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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis, Circuit Court Judge

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

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

v.

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

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

AND

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

v.

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

RECORD ON APPEAL

Volume III

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Americas, as Trustee &
Nationstar Mortgage, LLC

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
)
Deutsche Bank Trust Company Americas,)
as Trustee for Residential Accredit Loans,)
Inc., Pass-Through Certificates 2007-QH2,)
)
Plaintiff,)
)
Vs.)
)
Ashley Johnson Beshara as Trustee of the)
Revocable Trust Agreement for 2235)
Shoreline Drive originally dated the 3rd day)
of March, 2010; Shoreline Farms)
Community Association, Inc.; Wells Fargo)
Bank, N.A.; and Cadle Rock Joint Ventruure,)
L.P., and Ohio limited partnership,)
)
Defendants.)
)
Ashley Johnson Beshara as Trustee of the)
Revocable Trust Agreement for 2235)
Shoreline Drive originally dated the 3rd day)
of March, 2010;)
)
Third-Party Plaintiff,)
Vs.)
)
Nationstar Mortgage, LLC)
)
Third-Party Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
IN CASE NO.: 2019-CP-10-4503

DEFENDANT ASHLEY JOHNSON
BESHARA AS TRUSTEE'S NOTICE OF
MOTION AND MOTION TO
RECONSIDER THE ORDER FILED
JULY 10, 2023, AND SUPPORTING
MEMORANDUM

TO: THE HONORABLE KRISTI F. CURTIS; RICH MCPHERSON AND JASON
RICHARDSON OF MCGUIRE WOODS LLP, ATTORNEYS FOR DEUTSCHE BANK TRUST
COMPANY AND NATIONSTAR MORTGAGE LLC:

PLEASE TAKE NOTICE that Ashley Johnson Beshara as Trustee of the Revocable Trust
Agreement for 2235 Shoreline Drive originally dated the 3rd day of March, 2010 (hereinafter
“Defendant”), by and through her undersigned counsel, moves before the Honorable Kristi F.

Curtis, at Chambers, Charleston County Courthouse, Charleston, South Carolina, or at such other place and time as the court may appoint to reconsider, that certain Order filed on July 10, 2023 (hereinafter “the Order”). Defendant makes the motion pursuant all applicable Rules of Civil Procedures including but not limited to Rules, 52, 59, and 60, for the purposes of preserving all issues for appeal.

As a preliminary matter and statement Defendant adopts and incorporates herein, by reference thereto, all arguments and issues raised made by Curtis and Julie Rogers in their Motion for Reconsideration of the Order filed in this matter on July 20, 2023.

Respectfully, the Court committed the following errors in its Order, in the following ways:

- 1) The Court erred in dismissing Nationstar Mortgage, LLC ("Nationstar") as a party to this action, because there was no motion before the Court requesting such relief on the part of Nationstar. *Loftis v. Loftis*, 286 S.C. 12, 13-14, 331 S.E.2d 372 (1985) ("The appellate courts of this state have said many times that ordinarily a party may not receive relief not contemplated in his pleadings... this rule cannot be stretched so as to permit the judge to award relief not contemplated by the pleadings. Due process requires that a litigant be placed on notice of the issues which the court is to consider.")
- 2) The Court erred in granting summary judgment in favor of Deutsche as to all of the counterclaims and cross claims of the Defendants as being time barred. “Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003).

The question of when a statute of limitations runs is generally one left to the jury. *Dunbar v. Carlson*, 341 S.C. 261, 269, 533 S.E.2d 913, 917 (Ct. App. 2000) ("[G]enerally, statute of

limitations issues are for the jury, rather than the court, to resolve."). Specifically, the question of when a plaintiff discovered, or should have discovered the alleged harm is for the jury to decide because it is an objective question. *Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (stating in a medical malpractice action that when there is conflicting testimony regarding time of discovery of facts giving notice, the date on which discovery should have been made becomes an issue for the jury to decide); and *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) ("The burden of establishing the bar of the statute of limitations rests upon the one interposing it...and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide."). "According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. We have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist." *Dean v. Ruscon Corp.* 321, S.C. 360, 363, 468 S.E.2d 645, 647 (1996). "A defendant will be estopped from asserting a statute of limitations defense "when the delay that otherwise would give operation to the statute has been induced by the defendant's conduct. This conduct may be either an express representation that the claim will be settled without litigation or actions suggesting a lawsuit is unnecessary." *Harvey v. South Carolina Department of Corrections*, 338 S.C. 500, 509, 527 S.E.2d 765 (Ct. App. 2000).

First, Defendant took title to the property in 2010 and through the long history of these foreclosure proceedings , Nationstar as agent of Plaintiff never sought to name Defendant in Actions 2 or 3. Defendant believed pursuant Rule 41, SCRPC, Dismissal 2 and 3 constituted an

adjudication of the merits of Nationstar and/or Plaintiff's right to seek foreclosure upon the Property. After Dismissal 3, Nationstar and/or Plaintiff did not take any further action for over three years. By 2019 Defendant reasonably believed that Nationstar and/or Plaintiff would not take the improper action of continuing this never-ending attempt to foreclose upon the Property, until Plaintiff served Defendant in this matter in September of 2019. Defendant would assert the statute of limitations did not begin to run on her causes of action until September of 2019.

Second, Defendant would assert that Plaintiff and Nationstar should have been estopped from asserting the statute of limitations as a defense to Defendant's causes of action. Here the delay that gave rise to the alleged operation of the statute is a result of Plaintiff and/or Nationstar's, actions, inactions and delay. Nationstar as agent of Plaintiff's actions from the time of Dismissal 2 in June of 2014 until the filing of this Action in August of 2019, equates to more than a five-year delay attributable to Nationstar and Plaintiff. That delay constituted inaction which Defendant could reasonably rely upon as basis for believing that it did not need to bring an action against Nationstar and/or Plaintiff to protect Defendant's right in the Property. Further defendant took title the Property more than nine years before the commencement of this action and held title during Action 1, 2, and 3. Defendant could reasonably believe Plaintiff and Nationstar would not commit the improper acts of continuing the foreclosure matter a fourth time and naming Defendant.

Fourth, Defendant would assert that the facts and circumstances in this matter are appropriate for the Court to have applied equitable tolling of the statute. "Tolling" refers to suspending or stopping the running of a statute of limitations; it is analogous to a clock stopping, then restarting. Tolling may either temporarily suspend the running of the limitations period or delay the start of the limitations period. South Carolina law provides for tolling of the applicable limitations period by statute in certain circumstances . . . in order to serve the ends of justice where

technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations. Equitable tolling is a nonstatutory tolling theory which suspends a limitations period. Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period "to ensure fundamental practicality and fairness. The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use. . . . The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." Here, Defendant would assert that given the actions and inactions of Nationstar and/or Plaintiff asserted herein, to deny equitable tolling in this case, causes Defendant to suffer a gross wrong at the hands of Nationstar and Plaintiff.

Fifth as to declaratory judgment "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Sloan v. Greenville County*, 356 S.C. 531, 544, 590 S.E.2d 338 (Ct. App. 2003). Generally statutes of limitation do not bar the equitable relief. See *Richland County v. Kaiser*, 351 S.C. 89, 567 S.E. 2d 260 (S.C. App. 2002), *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 543 S.E.2d 563 (Ct.App.2001). In this case Plaintiff, brought this action to foreclose in equity, and Defendant's declaratory relief sought is for determinations as to Plaintiff and Defendants rights in regard to Plaintiff's ability to enforce the mortgage in the foreclosure action and Plaintiff's legal right to institute this action. Therefore, Defendant would assert that its declaratory judgment action sounds in equity and is not subject to a statute of limitations.

Sixth, the Court's conclusion that the claims "arise largely from events that transpired in the litigation of this matter between 2009 and 2016..." (Order, p. 8) inherently conflicts with the ruling. The "largely" events referenced by the court are not delineated. The use of the term "largely" clearly excludes certain events that are not specified and fall outside the reference. Thus, the Court leaves open whether the exclude events fall with a statute of limitations for a jury to determine.

Additionally, the finding that the claims transpired in "this matter" make it impossible for events to be outside a statute of limitations. If the events occurred in "this matter" which was not commenced until 2019 then the counterclaims that were asserted in 2020 certainly were within a statute of limitations. Further, Plaintiff and Nationstar's concession in their motion that not all of the Defendant's claims are outside the relevant statute of limitations is counter intuitive to the granting of summary judgment on a time barred basis. Defendant set forth specific facts she describe as bad acts of Plaintiff and Nationstar and certainly agree that her claims expand beyond the limitations asserted by Plaintiff and Nationstar. The Court erred in its ruling.

3) The Court erred in finding that Defendant lacked standing to assert her causes of action. It is fundamental right for named defendant to be able to challenge a plaintiff's ability to bring and prove the causes of action asserted in a complaint.

The party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt. *U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009). Plaintiff specifically named Defendant as a defendant to the foreclosure action. Thus, as a name defendant Defendant has the right to assert defenses and attack the ability

of Plaintiff to meet its burden of proof. It is implausible to think that one can bring in a defendant to an action and then say you cannot challenge my right to sue you.

A number of courts throughout the country have rejected the “standing” challenges lenders have raised against borrowers and owners attempting to keep them from being able to defend against foreclosure.¹ An owner of property clearly has standing to question the validity of the

¹ *Slorp v. Lerner, Sampson & Rothfuss*, 587 Fed. Appx. 249, 253–254 (6th Cir. 2014) (pursuing judicial foreclosure without assignments that would give authority to foreclose caused injury to borrower in having to defend suit; borrower had standing to bring debt collection claims); *Howard v. Chase Home Fin., L.L.C.*, 555 Fed. Appx. 567 (6th Cir. 2014) (under Michigan law, borrowers have standing to challenge assignments related to authority to foreclose, but after expiration of post-sale redemption period must assert strong claim of fraud or irregularity); *Reinagel v. Deutsche Bank Nat’l Trust Co.*, 735 F.3d 220, 225 (5th Cir. 2013) (Texas courts follow “the majority rule” that obligors may bring challenges based on any ground that renders assignment of deed of trust void); *Culhane v. Aurora Loan Serv. of Neb.*, 708 F.3d 282 (1st Cir. 2013) (applying Massachusetts law, borrowers may challenge assignments alleged to be invalid, ineffective, or void); *Juarez v. Select Portfolio Serv., Inc.*, 708 F.3d 269 (1st Cir. 2013) (same); *Metcalf v. Deutsche Bank Nat’l Trust Co.*, 2012 WL 2399369 (N.D. Tex. June 26, 2012) (borrower has standing to challenge whether foreclosing party has authority to enforce deed of trust); *Drouin v. Am. Home Mortg. Lending Serv., Inc.*, 2012 WL 1850967, at *4 (D.N.H. May 18, 2012) (borrower has standing to challenge whether assignor had rights to mortgage at time of alleged assignment); *Minnifield v. Johnson & Freedman II, L.L.C.*, 2012 WL 5463878, at *4 (N.D. Ga. Nov. 7, 2012), *aff’d on other grounds* 522 Fed. Appx. 782 (11th Cir. 2013) (if borrowers did not have standing to challenge mortgage assignments, they would be in the “perilous position” of being unable to oppose foreclosure by anyone claiming to be an assignee); *Fuller v. Lerner, Sampson, Rothfuss, L.P.A.*, 2012 WL 4361454, at *9–10 (N.D. Ohio May 14, 2012), objections to magistrate’s report and recommendations denied, 2012 WL 4361448 (N.D. Ohio Sept. 21, 2012) (borrowers have standing to bring claim that entity other than foreclosing party has right to enforce loan documents); *Talton v. BAC Home Loans Servicing, L.P.*, 839 F. Supp. 2d 896 (E.D. Mich. 2012) (borrowers may challenge mortgage assignments or authority to conduct non-judicial foreclosure under Michigan’s sale by advertisement statute); *U.S. Bank v. George*, 50 N.E. 3d 1049 (Ohio Ct. App. 2015) (maker of a promissory note or mortgage has standing to challenge their transfers and assignments, even if not in privity to the transfer or assignment challenged, declining to follow *Livonia Properties*); *Mruk v. Mortg. Elec. Registration Sys., Inc.*, 82 A.3d 527 (R.I. 2013); *EverBank v. Seederger Ventures, Inc.*, 499 S.W.3d 534, 541 (Tex. App. 2016) (borrowers have standing to challenge void assignments); *Brezzell v. Bank of Am.*, 2011 WL 2682973, at *4 n.3 (E.D. Mich. July 11, 2011) (“standing” argument raised by many lenders to dismiss challenge to foreclosures based on invalid assignments is a “bit of a red herring”; borrowers’ claim to possession and ownership of property puts them well within the zone of interests required for standing), *quoting Langley v. Chase Home Fin., L.L.C.*, 2011 WL 130926, at *2 n.2 (W.D. Mich. Mar. 28, 2011).

transfers of loan documents that a party alleges give it the right to sell the owner and/or borrower's home. A foreclosure terminates an owner's interest in the property and subjects the owner to physical eviction. Since South Carolina is a lien theory state, a foreclosure sale extinguishes the owner's title to the property. To the extent that the owner seeks to protect these existing rights in the property, the owner has standing to take legal action to do so. In addition, to the property title claims, an unauthorized eviction poses a very concrete injury to the owner, an injury that the owner has standing to prevent.

Here it is undisputed that Defendant holds title to the Property which Plaintiff and Nationstar seek to foreclose upon. A foreclosure will terminate Defendant's title interest in the Property, and a defective foreclosure sale would impair the significant property rights of Defendant. Defendant in asserting her causes of action is seeking to protect her interest in the Property and has the standing to do so. Defendant is not seeking to enforce the endorsement and/or assignment contracts, Defendant refers to the contracts as evidence that Plaintiff lacks authority to enforce the Note and/or Mortgage. Defendant has alleged that Dismissal 2 and 3 and the continuation of this action, accompanied by Nationstar's improper actions in executing endorsements and assignment after the initiation of litigation have clouded title to Defendant's Property and diminished its value. Further Nationstar and Plaintiff's improper tactical maneuver of naming Defendant as a party to this action, in an attempt to avoid res judicata issues has caused Defendant to incur attorney's fees in defending this action. Defendant has more than adequately asserted genuine issues of material fact for this Court to find she has standing to seek redress for the improper actions of Plaintiff and/or Nationstar as Plaintiff's agent as set forth in the pleadings. It was error for the court to preclude a named Defendant from protecting her rights and interest in the real property.

4) The Court erred in granting summary judgment on Defendant's cause of action for abuse of process cause of action. The tort of abuse of process embraces the full range of activities and procedures attendant to litigation.” *Food Lion Inc. v. United Food & Commercial Workers International Union*, 351 S.C. 65, 70, 567 S.E.2d 251 (Ct. App. 2002). “The two essential elements of an abuse of process claim are (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the conduct of the proceeding. The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure. *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 550, 730 S.E.2d 340 (Ct. App. 2012). “To cause process to issue without justification is an essential element of malicious prosecution, but not of abuse of process. In the latter, the issuance of the process may be justified in itself, it is the malicious misuse or perversion of the process for an end not lawfully warranted by it that constitutes the tort known as abuse of process.” *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693 (1967). “Abuse of process has been defined as the employment of legal process for some purpose other than that for which it was intended by the law to effect—the improper use of a regularly issued process. The elements of abuse of process are an ulterior purpose and a willful act in the use of the process not proper in the regular course of the proceeding. Furthermore, the improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself.” *Whitfield Const. v. Bank of Tokyo Trust*, 338 S.C. 207, 525 S.E.2d 888 (Ct. App. 1999)

First Defendant plead and there is evidence in the record Nationstar as Plaintiff's agent, not Plaintiff, is one who initiated this action on behalf of Plaintiff. There is evidence before the Court that Nationstar was the named Plaintiff in the foreclosure Actions 2 and 3, and after

Dismissal 3 Nationstar maintained communications with Roger's counsel about Nationstar reinstating the foreclosure action. Defendant plead that Nationstar retained Plaintiff's counsel to file this action and that Nationstar is the principle contact for Plaintiff's counsel. The only affidavit before this court in support of Plaintiff and Nationstar's motion for summary judgment is an affidavit of a Nationstar employee.² The cause of action does not require Nationstar be the plaintiff in this action only that Defendant assert Nationstar and Plaintiff misused the legal process through willful acts and coercion to obtain a collateral advantage. There is evidence before the court creating issues of fact regarding these allegations.

Defendant plead and there is evidence before this court that the Roger's moved to vacate the order naming Nationstar as plaintiff in Action 2 because there was no endorsement of the Note or assignment of the Mortgage to either Nationstar or its alleged predecessor ALS. Defendant plead and there is evidence before the court to support the allegation that four years into the foreclosure in Action 2, and days before the Roger's motion to vacate, was to be heard, Nationstar for the first time produced Note Copy 3 with a new endorsement to attempt alleviate the standing issues. The new endorsement was executed by Nationstar as attorney in fact for Deutsche Bank Trust Company Americas as Trustee (for an unidentified trust) endorsed the Note in blank, which would allow Nationstar to allege it had the right to enforce the Note. There is evidence in the record that thereafter Nationstar admitted that it had not produced Note Copy 3 in responses to requests for production in July of 3013; that the Note did not contain an endorsement to Nationstar

² Comparing the statement made by Alan Blunt in the Affidavit to the statements made by Nationstar in the discovery responses attached to Defendants' Response to Plaintiff and Nationstar's Motion for Summary Judgment which Defendant's filed on February 9, 2023, the exhibits attached to the Rogers' Motion for Summary Judgment filed on September 8, 2023, and the exhibits attached to Defendant's Reply to Plaintiff's Return to the Motion to Dismiss filed by Defendant on June 12, 2020; all create conflicting issues of fact as to whether Plaintiff and/or Nationstar willfully undertook improper acts for ulterior purposes by executing endorsements, filing and executing assignments and bring this action in the manner and time period chosen.

or ALS, and no assignment existed assigning the Mortgage to to Residential Funding, Deutsche Bank Trust Company Americas as Trustee, Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2, or Nationstar. Thereafter, the Rogers filed a Motion for Summary Judgment based on standing. Defendant alleged and there is evidence before this court that Nationstar undertook further improper acts to fix the standing issues by executing and filing an Assignment 2 dated April 1, 2014, wherein Nationstar as alleged attorney in fact for ALS assigned the Mortgage to Plaintiff, which was recorded by Nationstar's attorney for Action 2 on April 14, 2014. Therefore just prior to the Roger's Motion for Summary Judgment being heard, Nationstar made another improper tactical maneuver by moving for and being granted Dismissal 2. At that time Nationstar and Plaintiff either knew or should have known that Dismissal 2 was denied Nationstar relief by an adjudication on the merits. However, Nationstar moved to reinstate Action 3 and then Nationstar did nothing in furtherance of prosecuting Action 3. The matter was called for trial and Nationstar again made an improper tactical maneuver by moving for and being granted Dismissal 3. Nationstar and Plaintiff thereafter knew that the Roger's claimed that Dismissal 2 and Dismissal 3 constituted an adjudication on the merits under Rule 41. Therefore, instead of attempting to reinstate Action 3 with Nationstar as plaintiff, Nationstar sat and waited for over three years.³ Finally, Nationstar as agent for Plaintiff retained counsel to bring this action. However, in order to fix the previous standing and res judicata issues, in addition to Nationstar's previous improper acts of executing an endorsement of the Note and an assignment of Mortgage to fix those issues years after the litigation had commenced, Nationstar elected bring this new action in the name of Plaintiff and name Defendant as the defending party instead naming Nationstar and the Rogers as the Parties.

³ Coincidentally, the exact amount of time that Plaintiff and Nationstar now claim bar all of Defendant's and the Roger's causes of action asserted against Plaintiff and Nationstar under the Statute of Limitations.

There is evidence in the record which creates a genuine issue of fact that this Action was brought for the ulterior purpose of trying to mitigate or improperly rectify issues of standing and res judicata. Nationstar as Plaintiff's agent committed willful acts by in or around November of 2013, executing an alleged endorsement of the Note and in April of 2014, executing an alleged assignment of the mortgage and doing so in both cases as an alleged attorney in fact for distinct entities. Then with knowledge in late 2018, the Rogers were of the position that the dismissal of Action 3 constituted a dismissal upon the merits. Plaintiff and Nationstar commenced this action in 2019 naming Plaintiff and Defendant as the parties to the action as a willful ulterior purpose of mitigating previous discrepancies and issues.

There is evidence in the record creating an issue of fact as to whether Nationstar as Plaintiff's agent committed the willful act of creating documentation (potentially bogus) in an effort to try align the documentation with their efforts to justify and continue the prosecution of a foreclosure matter ten years, and three dismissals after it had begun, by bringing this action in the manner and time chosen. Sufficient evidence was presented to withstand Plaintiff and Nationstar's motion for summary judgment as to Defendant's causes of action for abuse of process.

5) The Court erred by basing its determination to grant summary judgment as to Defendant's cause of action for malicious prosecution on the faulty determination there was no adjudication on the merits.

"Our Supreme Court has recognized that an action will lie for the malicious prosecution of any ordinary civil action. To recover in an action for malicious prosecution, the plaintiff must show (1) the institution or continuation of original judicial proceedings, either civil or criminal (2) by, or at the instance of, the defendant (3) termination of such proceedings in plaintiff's favor (4) malice in instituting such proceedings (5) want of probable cause and (6) resulting injury or

damage. The mere fact that the defendant was unsuccessful in the prior action has no bearing on the issue of probable cause.” *Garr v. N. Myrtle Beach Realty Co. Inc.*, 287 S.C. 525, 528, 339 S.E.2d 887 (Ct. App. 1986). In this cause of action, malice is "the deliberate intentional doing of a wrongful act without just cause or excuse. It does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition. Malice also may proceed from an ill-regulated mind which is not sufficiently cautious before causing injury to another person. Moreover, malice may be implied where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person. Malice also may be implied in the doing of an illegal act for one's own gratification or purpose without regard to the rights of others or the injury which may be inflicted on another person. In an action for malicious prosecution, malice may be inferred from a lack of probable cause to institute the prosecution. Based on the foregoing, one need not show actual malice in order to successfully maintain an action for malicious prosecution.” *McBride v. School Dist. of Greenville*, 389 S.C. 546, 565-66, 698 S.E.2d 845 (Ct. App. 2020) “A party must show the opponent lacked probable cause as to each cause of action asserted to prevail on a claim of malicious prosecution; thus, the existence of probable cause as to any one is sufficient to defeat a malicious prosecution claim. Whether probable cause exists is ordinarily a jury question, but it may be decided as a matter of law when the evidence yields only one conclusion.” *Pallares v. Seinar*, 407 S.C. 359, 367, 765 S.E.2d 128 (2014)

Twice in the last five years our Court of Appeals has stated striking a case from the active roster pursuant to Rule 40(j), SCRCPP, is equivalent to dismissing a case. See. *Goodwin v. Landquest Development, LLC*, 414 S.C.623, 779 S.E.2d 826 (Ct. App. 2015) (A case involving a foreclosure of a mortgage where motion to restore was denied because striking a case pursuant to

Rule 40(J) is equivalent to a dismissal.). See. *Personal Care, Inv. v. Theos*, 426 S.C. 78, 825 S.E.2d 281 (Ct. App. 2019) (where the Court declined to restore a case to the active roster stating because striking a case under Rule 40(j) is the equivalent of dismissing the case and stating “Nevertheless, we believe this argument ignores the procedural posture of the case as dismissed.”)

“The terms of a contractual agreement are not conclusive in determining the association between two parties where there is evidence outside the contract establishing an agency relationship. If there are any facts tending to prove an agency relationship, the question is one for the jury. *Gamble v. Stevenson*, 305 S.C. 104, 108, 406 S.E.2d 350 (1991) “Generally agency may be implied or inferred and may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal. The doctrine of apparent authority provides that the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption.” *Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424 (1982)

Defendant plead that in the end 2018, Nationstar’s counsel on behalf of Nationstar contacted the Roger’s counsel stating that Nationstar wished to reinstated Action 3, and Roger’s counsel put Nationstar on notice that it was the Roger’s contention under Rule 41, the matter had been adjudicated on the merits and Nationstar was barred from reinstating a cause of action for foreclosure of the Mortgage. Plaintiff plead thereafter on August 27, 2019, Nationstar, predecessor, servicer, and agent of Plaintiff, retained Plaintiff’s counsel to bring this action, but that Nationstar concerned about issues of standing and res judicata determined that instead of bringing this action with Nationstar as the plaintiff and the Rogers as the defendants, determined it would name

Plaintiff and the Defendant trust as the parties instead. Defendant plead that Nationstar and Plaintiff are collaterally estopped from maintaining this Action 4, which is based upon the same facts and allegations as Actions 1, 2, and 3, seeking to foreclose on the same Mortgage secured by the same Note.

Therefore, there is evidence that Nationstar is Plaintiff's agent and servicer. Defendant plead that Action 2 was adjudicated on the merits in Defendant's favor. Thereafter Nationstar instituted Action 3 which was also adjudicated on the merits in the Defendant's favor.⁴ Thereafter Nationstar as servicer for Plaintiff initiated Action 4 continuing its attempts to foreclose upon the Mortgage for a fourth time ten years later. But in Action 4 instead, Nationstar elected to insert Plaintiff standing in Nationstar's past prosecutorial shoes in contrast to Action 2 and 3. By Nationstar as Plaintiff's agent instituting Action 4, Plaintiff and Nationstar instituted an illegal act for their own gratuitous benefit without regard to the rights of Defendant or the injury which may be inflicted on Defendant. Plaintiff and/or Nationstar lacked the probable cause to initiate Action 3 and continue to seek foreclosure of the Mortgage through Action 4 when they were on notice that they lacked probable cause to initiate both actions because the right to foreclose upon the Mortgage had been adjudicated upon the merits without a ruling in their favor. As a result of Plaintiff and Nationstar's decade long attempt to foreclose upon the Mortgage and continuation of attempting to do so by Nationstar initiating Action 4 on behalf of Plaintiff, Defendant has suffered the damages of incurring attorney's fees to defend this matter when Plaintiff, Nationstar, and/or

⁴ Defendant is the legal title holder to the Property sought to be foreclosed upon in this matter, a foreclosure would extinguish Defendant's title to the property causing Defendant harm. Defendant has standing to protect its rights in the Property. Defendant plead that Plaintiff and Nationstar were collaterally estopped from instituting this Foreclosure action and had knowledge of such but brought the action anyway. The case law and elements for malicious prosecution do not require that Defendant was a party to the former action, only that those proceedings ended in Defendant's favor which they did because Action 2 and Action 3 were an adjudication as to the merits against Plaintiff and Nationstar's right to foreclose upon Defendant's Property.

their alleged predecessor in interest never though it necessary to name Defendant a party to Action 1, 2, or 3. Defendant is also injured by the threat of a defective foreclosure sale extinguishing Defendant's title interest in the Property.

For the forgoing reasons the Court erred in granting summary judgment as to Defendant's cause of action of malicious prosecution.

6) The Court erred in granting summary judgment as to Defendant's cause of action for SCUTPA. SCUTPA establishes: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. Code Ann. § 39-5-20(a) (1985). "An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006).

Here, Defendant has presented evidence she has been injured by Plaintiff and Nationstar bringing this action in 2019 which has clouded Defendants title and diminished the value of the Property and Defendant requested attorney's fees as damages for having to appear and Defendant this matter due Nationstar and/or Plaintiff's tactical maneuver of naming the Defendant in this action instead of naming the Rogers to avoid res judicata issues. Defendant cited another South Carolina foreclosure case where Plaintiff's continued delays in failing to prosecute that foreclosure action caused that defendant damage, which establishes repetition. (Answer ¶ 114). The Court mistakenly concludes that Defendant's claims are the same as the Rogers' claims. They are not.

7) The Court erred in granting summary judgment as to Defendant's cause of action for declaratory judgment. The Court erred concluding the Declaratory Judgment is duplicative and

“unnecessary” because the issues of standing and the authority to enforce the debt will be decided in Plaintiff’s case. (Order, p. 21).

This lack of rationale does not support the preclusion of a cause of action for declaratory judgment. A cause of action under the Declaratory Judgment Act is established by showing the existence of a justiciable controversy, defined as "a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018), and *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970).

The Defendant has alleged a real and substantial controversy concerning the very contracts Plaintiff and Nationstar have sued upon. In part, the Defendant seeks a determination of the subject contracts are enforceable. Additionally, Defendant seeks a determination as to the impact of the initiation of the within suit in light of the prior three suites that were dismissed is precluded under the law of this state and the Rules of Civil Procedure. The Defendant's claims are therefore the very type of controversy the Declaratory Judgment Act contemplates, as it invites a party affected by a contract and law to ask a court to define how the contract and law impacts the party's rights. *See Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018).

The conclusion further lacks rationale because on the one hand the Court says the issues will be decided in Plaintiff’s case, and then two lines below improperly concludes Plaintiff has standing because it is in constructive possession of the note with all proper endorsements. (Order, p. 21).⁵ How the Court could conclude the endorsements were proper is incomprehensible. The Court did not have the necessary evidence before it to make this finding and/or conclusion. The

⁵ There is no admissible evidence in the record of this matter to establish that there is no genuine issue of fact whether or not Plaintiff is in constructive possession of the Note. There is no affidavit testimony to support this statement nor any other alleged evidence.

Court did not sit in this instance as a fact finder. Moreover, it is this very issue the Court says will be determined in Plaintiff's case. The Court erred as a matter of law.

8) The Court erred in failing to view the facts in the light most favorable to the Defendant's cause of action for negligent misrepresentation. The Court completely overlooked the fact that the Defendant claims the monthly statements that have been sent to her agent acting on her behalf, on a continuing basis, in part, are a basis for the claim of misrepresentation. Additionally, Defendant asserted Plaintiff misrepresented that it had the legal right to bring this action against Defendant.

9) The Court erred as a matter of law by concluding an "accounting" is not an affirmative cause of action. (Order, p. 20). Contrary to this Court's conclusion a number of Courts have recognized an accounting as a cause of action. In *Morris v. Tidewater Land & Timber, Inc.*, 388 S.C. 317, 696 S.E. 2d 599 (Ct. App. 2010) the Court holds "an action for an accounting sound in equity." The Supreme Court stated in *Verenes v. Alvanos*, No. 26780 (S.C. March 1, 2010) "the third cause of action is a classic cause of action for an accounting." So, while an accounting action may sound in equity, that does not mean it is not an affirmative cause of action, and this Court erred as a matter of law in so concluding.

10) The Court erred in failing to exclude from consideration the Affidavit by Deutsche and Nationstar. The Affidavit failed to meet the requirements of Rule 56, SCRCP.

The moving party has the initial burden of demonstrating no issue of material fact exists. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115-117, 410 S.E.2d 537, 545 (1991). "The rule governing summary judgment provides that '[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and

shall show affirmatively that the affiant is competent to testify to the matters stated therein.” *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (S.C. 2003), *citing* Rule 56(e), SCRCF. The Affidavit submitted by Plaintiff and Nationstar of a Nationstar employee is insufficient.

A genuine issue of fact “can be created only by evidence which would be admissible at trial.” *Hansen v. DHL Laboratories*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994). In order for a Court to consider materials and affidavits in support or opposition to summary judgment, they must be admissible and “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993); *See* Rule 11(c), SCRCF; Rule 56(e); SCRCF; *Montgomery v. CSX Transport, Inc.*, 376 S.C. 37, 656, S.E.2d 20 (2008) (applying the personal knowledge requirement of Rule 56(e)); and *Saro v. Ocean Holiday Partnership*, 314 S.C. 116, 441 S.E.2d 385 (Ct. App. 1994)(“facts stated in affidavits must be admissible evidence.”). Generally, affidavits are to be made on personal knowledge setting forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated. *See Baughman v. American Telephone & Telegraph Co*, 306 S.C. 101, 410 S.E. 2d 537 (1991).

Plaintiff and Nationstar submitted the Affidavit of Alan Blunt and employee of Nationstar with fails to state that Blunt has any affiliation with Plaintiff. Paragraph 9 of the Affidavit references a Revocable Trust Agreement of the Rogers of which he cannot authenticate and has no personal knowledge of nor asserts any. Paragraph 10 makes a completely unsupported statement as to the alleged status of the account which constitutes hearsay. Paragraph 11 makes a completely unsupported statement. Lastly Paragraph 12, makes reference to a document which is unsigned and in which Deutsche and Nationstar objected to producing through the course of

discovery. (Rogers Mot. Compel p. 16 (10 of 13)). Thus, each of these paragraphs is inappropriate and the testimony/evidence inadmissible.

CONCLUSION

For the foregoing reason, with the support of the arguments, oral and written, which Defendant has made before this court and supported by all pleadings, motions, and memorandums which Defendant and/or the Rogers have made and/or presented to this Court, Defendant respectfully requests that her Motion to Reconsider should be granted.

RESPECTUFLLY SUBMITTED,

THE LAW OFFICE OF
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s/ D. Conor Keys

D. Conor Keys

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Attorney for Defendant

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

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

Plaintiff,)

v.)

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

Defendants,)

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

Third-Party Plaintiff,)

v.)

Nationstar Mortgage LLC,)

Third-Party Defendant.)

MEMORANDUM IN OPPOSITION TO MOTIONS TO RECONSIDER

Pursuant to Rule 40(i) of the South Carolina Rules of Civil Procedure, Plaintiff Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2's ("Plaintiff") and Third-Party Defendant Nationstar Mortgage LLC's ("Nationstar") by and through its undersigned counsel, object to the Motions to Reconsider and

Supporting Memorandum (“Motions”) filed by Ashley Beshera, Curtis Rogers and Julie Rogers (“Movants”). Because this Court, the South Carolina Court of Appeals, and the South Carolina Supreme Court have rejected the arguments presented in the Motions on multiple occasions, it must be denied.

BACKGROUND

Pursuant to an order entered by this Court on July 10, 2023 (hereby “the Order”), Plaintiff’s and Nationstar’s Motion for Summary Judgment as to the counterclaims, cross-claims and third-party claims for accounting, negligent misrepresentation, abuse of process, malicious prosecution, declaratory judgment and SCUTPA was granted. Nationstar, which had been added as a third-party defendant, was dismissed from this action. The Rogers’ Motion to Compel and for Sanctions was granted in part and denied in part. Counsel for the parties received notification of the entry of the Judgment on July 10, 2023. Ten days later, on July 20, 2023, Movants filed these Motions. On Tuesday, October 3, 2023 a hearing on the Motion will be conducted before Judge Kristi F. Curtis.

ARGUMENT

1. Movants Have Not Asserted Any Basis for Reconsideration.

Movants fail to cite any legitimate reason for the Court to reconsider the Order under Rule 59(e), or any other Rule. Under South Carolina law, there are “two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004)

Movants have not asserted that this Court failed to rule on the motions before it. And, it is manifest that the Court carefully reviewed the matter, producing a memorandum setting forth the Court's basis for its decisions. Thus, the Motions are completely unnecessary. Nor can it be credibly asserted that this Court misunderstood or failed to consider the merits of these motions. Rather, the Motions attempt to pull at the threads of this Court's Order and seek a different ruling, which unnecessarily prolongs the administration of justice.

2. Movants' Arguments for Application of the "Two-Dismissal Rule" to Orders Striking a Case under Rule 40(j) Remain Completely Wrong.

The principal basis for the Motion, and for denying Movants' Motion for Summary Judgment and granting Plaintiff's and Nationstar's Motion for Summary Judgment, in part, is stated clearly and correctly by the Court. "Thus, Rule 40(j) does not contain language on preclusion, a case struck under Rule 40(j) is not terminated insofar as any party can move to restore it; it is not a unilateral act by the Plaintiff as contemplated in Rule 41's notice of dismissal provision. This Court holds successive Rule 40(j) Orders do not operate as a decision on the merits and denies the Rogers' Motion for Summary Judgment." Order, July 10, 2023, p 7.

Movans do not, and cannot, dispute any aspect of this conclusion. Moreover, Movants cannot cite to a single case enforcing the Two-Dismissal Rule against multiple Rule 40(j) dismissals. There is nothing to reconsider with respect to this issue, and it applies with equal force against any claim raised by the Rogers wherein it was raised as a legal basis.

3. Movants' Claims Remain Time-Barred.

In its Order, this Court succinctly stated, that the Movants' claims were first asserted in July 2020 and "[t]herefore, Beshera's and Rogers' claims for declaratory judgment, negligent misrepresentation, abuse of process, malicious prosecution, and violation of the SCUPTA are all

based on facts and circumstances that arose more than three years before they filed their claims and are time barred.” Order, July 10, 2023, p 8. The Motions do not, and cannot, assert this Court failed to comprehend their arguments, which were made at length during the hearing on the underlying motions. Moreover, despite its prolixity, the Motions fail to cogently describe any claim not barred by the limitations period.

Movants do argue that a claim for declaratory judgment is not subject to a statute of limitations because it is equitable. Movants however, cite no authority for the proposition that they can effectively bring a claim for declaratory judgment a decade after discovering a purported dispute. Additionally, this Court held “A request for declaratory relief for any issue, including standing to foreclose or challenges to Plaintiff’s authority to enforce the debt, will be decided in the Plaintiff’s case and a competing action for declaratory relief is unnecessary and duplicative.” Order, July 10, 2023, p 21. Movants do not, and cannot, dispute this holding.

Moreover, they adduced no authority whatsoever supporting the existence of the ‘anti-foreclosure’ claim they seek to bring. Foreclosures in South Carolina have proceeded for decades without ‘anti-foreclosure’ declarations and this Court correctly used its discretion not to recognize one here. “The decision to grant a declaratory judgment is a matter which rests in the sound discretion of the trial court and will not be disturbed absent a clear showing of abuse. Declaratory relief will ordinarily be refused where another remedy will be more effective or appropriate under the circumstances.” *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 319 S.C. 388, 390, 461 S.E.2d 819, 820–21 (1995). In *Garris*, the Court expressly approved rejection of a request for declaratory relief because it would interfere with an administrative process. Similarly, there is no justification for allowing a claim for declaratory relief that simply raises defenses to an existing foreclosure action.

Consequently, there is nothing to reconsider.¹

4. Movants' Negligent Misrepresentation Claims Remain Unsupported.

Movants assert this Court “overlooked” their argument that monthly statements from, presumably, Nationstar, support their claim for negligent misrepresentation. This is completely false — as this Court specifically examined and rejected this issue at the hearing. As explained then, Movants adduced no evidence these statements were false, which is also set forth in the Court’s Order. Order, July 10, 2023, pp 21-22. And there is no evidence the Rogers even believed these representations because they have been disputing Plaintiff and its servicers’ right to enforce the loan for over a decade. More fundamentally, it is undisputed that Movants did not rely on any alleged representation because they do not assert they made payments, let alone payments within the limitations period. There is nothing to reconsider.

5. Movants Fail to Understand the Tort of Abuse of Process.

In the Motions, Movants contend that abuse of process can be shown through evidence that Plaintiff brought an action with the ulterior purpose of attempting to “mitigate” or “rectify” issues of standing or res judicata/collateral estoppel. This contention is nonsense. As this Court has held, the tort of abuse of process involves the “malicious misuse or perversion of the process, *after its issuance*, for an end not lawfully warranted by it.” *Johnson*, 279 S.C. at 391, 307 S.E.2d at 860 (emphasis added). Asking a court to determine issues and enter a judgment of foreclosure is a lawfully warranted end and the antithesis of a perversion of the process. Movants’ contention that tort can be shown by the commencement of an action in which a defendant claims to have a valid defense would convert every single lawsuit filed into an abuse of process action. What is more,

¹ The Court also properly rejected the Rogers’ unconscionability arguments.

this Court has already rejected Movants' contention that any claim or issue preclusion applies. There is nothing to reconsider.

6. Movants' Malicious Prosecution Claims Remain Completely Unsubstantiated. under South Carolina Law.

Although the Court listed several reasons for granting Plaintiff's and Nationstar's Motion for Summary Judgment as to malicious prosecution, the Movants attack only one – a favorable termination on the merits.² And, even with respect to that challenge, the Movants make no argument and cite no cases in support. Generally, the question of favorable termination is decided by this Court's rejection of the Movants' attempt to apply Rule 41 to Rule 40(j) dismissals. There is nothing to reconsider.

7. Movants' SCUTPA Claims Remain Invalid.

As they did in their SCUPTA allegations, the Movants make frenzied claims about the Court's decision with respect to their SCUPTA claims. However, the Movants do not even argue that Plaintiff or Nationstar engaged in any specific unfair or deceptive acts, within the limitations period, affecting the public interest, which caused them a pecuniary loss. The Rogers must show all of these elements within the time frame allowed. They were unable to do so at the hearing and make no attempt to do so in the Motion. Moreover, Movants' SCUPTA claim is based on the erroneous proposition that Plaintiff is precluded from seeking foreclosure through the Court, which is not even an act in trade or commerce. Therefore, there is nothing to reconsider.

8. Beshera Adduces No Basis to Reconsider the Court's Order as to a Claim for Accounting.

² The Motions fail to even acknowledge that (1) this is the first action in which Beshera has been named as a defendant and it is, therefore, impossible that any prior action was terminated against her or (2) the Rogers were not even named in this action.

This Court held that Beshera is not entitled to an accounting. Beshera cites no authority holding that she is entitled to an accounting as the owner by trust of a property in foreclosure. Foreclosure judgments are entered every day in South Carolina courts without recognition of any right to an accounting. Beshera is not even the borrower under the loan and does not claim to have made any payments. There is nothing to reconsider.

9. Movants State No Other Basis for Reconsideration.

Although the Motion is replete with additional arguments, none of those arguments merit reconsideration. Movants attack Nationstar's affidavit, but that affidavit comports with South Carolina law in every respect as it is based on records produced and Mr. Blunt's review of Nationstar's business records. The Rogers raise numerous arguments about equitable principles. These are irrelevant. The Rogers claim the Court's decision was premature, but failed to raise this argument at the hearing and are, therefore, unable to make that argument now. "An issue may not be raised for the first time in a motion to reconsider." *Repko v. Cnty. of Georgetown*, 424 S.C. 494, 502, 818 S.E.2d 743, 748 (2018).

CONCLUSION

The Motions must be denied for all of the foregoing reasons.

This the 29th day of September 2023.

Respectfully submitted,

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Inc., Pass-Through Certificates 2007-QH2 and
Third-Party Defendant Nationstar Mortgage LLC*

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

}

COURT OF COMMON PLEAS
CASE No. 2019 CP 10 4503

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

PLAINTIFF,

V.

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

DEFENDANTS.

**MOTION TO INTERVENE BY
MORTGAGORS CURTIS ROGERS
AND JULIE J. ROGERS**

TO: THE ABOVE NAMED PARTIES:

Curtis Rogers and Julie J. Rogers, (“Intervenors”) hereby move this court, at such time and place as the court may appoint, for an Order allowing them to intervene in the above styled action pursuant to Rule 24, SCRPC, the terms of the subject note and mortgage and other applicable law.

The motion is supported by the allegations of the Complaint and the three prior actions filed by Plaintiff and/or its alleged predecessors in interest relating to the same Note and Mortgage which are the subject of this action. The basis for the motion is as follows:

1. The Plaintiff initiated the present action, its fourth action relating to a certain note and mortgage on August 27, 2019.

2. The Plaintiff references in its Complaint Intervenor in paragraphs 6, 7 and 17(a) and (b).

3. Plaintiff seeks in this action to foreclose on the note and mortgage referenced in paragraphs 6 and 7 which it alleges were executed by Intervenor.

4. The same note and mortgage referenced by Plaintiff herein are the same note and mortgage involved in prior actions initiated by Plaintiff or its alleged predecessor under the following civil action numbers: 2009CP1005840; 2011CP1001805; and 2015CP1001971. (hereinafter "Prior Actions") The records for each of these listed Prior Actions are adopted herein.

5. Intervenor was named defendant in each of the Prior Actions.

6. The Prior Actions spanned over a time period of at least seven (7) years. It is now eleven (11) years since the first of the Prior Actions was commenced.

7. Discovery was conducted in the Prior Actions.

8. Each of the three Prior Actions was dismissed voluntarily by Plaintiff or its predecessor in interest.

9. Plaintiff filed the within action without specifically naming the Intervenor as defendant but referencing them in the allegations of Complaint. Plaintiff did this to avoid the consequences of their actions in the Prior Actions under Rules 40 and 41, SCRCP and the principles of res judicata, collateral estoppel and judicial estoppel.

10. Intervenor has an interest in the real property. They owned the property at the time the subject note and mortgage were executed. They have a beneficial and equitable interest in the property. They continue to possess and occupy the property.

11. Plaintiff's failure to name the Intervenor is an effort by Plaintiff to avoid the arguments made by Intervenor in the prior actions involving the same note and mortgage and an inappropriate attempt to avoid the law and authority that Plaintiff is on notice of through its prior counsel.

12. Plaintiff has alleged the Intervenor are parties to the instruments they have brought suit upon for the fourth time and therefore Intervenor are proper if not necessary parties

and should be allowed to intervene in the matter and file pleadings including but not limited to the attached Answer attached hereto as Exhibit A. Additionally, intervention should be allowed in order to preclude Plaintiff from its attempt to circumvent the law.

PLEASE BE PRESENT TO DEFEND IF SO MINDED.

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MT. PLEASANT, SC 29464
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SAMMIE@MARYARNOLDLAW.COM
ATTORNEY FOR INTERVENORS

June 11, 2020

EXHIBIT A

**STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON**

}

**COURT OF COMMON PLEAS
CASE No. 2019 CP 10 4503**

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

PLAINTIFF,

V.

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

DEFENDANTS.

**ANSWER OF MORTGAGORS
CURTIS ROGERS AND JULIE J.
ROGERS**

TO: THE ABOVE NAMED PLAINTIFF:

Defendants Curtis Rogers and Julie J. Rogers (hereinafter "Defendants") by and through their undersigned counsel hereby answer the Complaint filed by Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2, (hereinafter "Plaintiff") and further as follows:

As to the Complaint, each and every allegation not specifically admitted or explained herein is denied.

1. As to paragraph 1 of the Complaint, Defendants assert the allegations constitute conclusions of law which they are required to neither admit nor deny. To the extent they are not conclusions of law they are denied.
2. As to paragraph 2 of the Complaint, Defendants deny that Plaintiff has the right to bring this action.
3. As to paragraphs 3, 4 and 5 of the Complaint, Defendants assert the allegations constitute conclusions of law which they are required to neither admit nor deny. To the extent they are not conclusions of law they are denied.
4. As to paragraph 6 of the Complaint, Defendants admit so much as alleges that Curt Rogers executed a note in favor of Homecomings Financial. Defendants assert however that no note is attached to Complaint therefore they can neither admit or deny the document Plaintiff references is a note signed by Curt Rogers. Defendants further state that Plaintiff bears the burden of proof of establishing a valid and enforceable obligation.
5. As to paragraph 7 of the Complaint, Defendants admit so much as alleges that they executed a mortgage. Defendants assert however that no mortgage is attached to Complaint therefore they can neither admit or deny the document Plaintiff references is a mortgage signed by them. Defendants further state that Plaintiff bears the burden of proof of establishing a valid and enforceable security interest.
6. As to paragraph 8 of the Complaint, Defendants and crave reference to the public records of Charleston County and deny any allegations inconsistent with records therein.
7. As to paragraph 9 of the Complaint, Defendants assert the allegations constitute conclusions of law which they are required to neither admit nor deny.
8. As to paragraphs 10 and 11 of the Complaint, Defendants and crave reference to the public records of Charleston County and deny any allegations inconsistent with records therein.
9. As to paragraph 12 of the Complaint, Defendants assert the allegations constitute conclusions of law which they are required to neither admit nor deny.
10. As to paragraph 13 of the Complaint, Defendants crave reference to the document referenced therein and deny any allegations inconsistent with said document.

11. As to paragraph 14 of the Complaint, Defendants deny said allegations.

12. As to paragraphs 15, 16 and 17 of the Complaint, Defendants assert the allegations constitute conclusions of law which they are required to neither admit nor deny. If said allegations are not deemed conclusions of law they are denied.

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

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

FOR AND AS A THIRD DEFENSE
(Waiver/Release/Estoppel)

14. Further answering said Complaint and for a further defense thereto Defendants allege that Plaintiff's Complaint is barred by the doctrines of waiver, release and estoppel.

FOR AND AS A FOURTH DEFENSE
(Standing/Real Party)

15. Further answering the Complaint and as and for a further defense thereto, the Defendants allege certain Plaintiff is not the real party in interest and lacks standing and therefore Plaintiff is precluded from maintaining this action.

FOR AND AS A FIFTH DEFENSE
(Failure to Mitigate)

16. Further answering the Complaint and as and for a further defense thereto, the Defendants allege the Plaintiff has failed to mitigate damages, therefore, Plaintiff's Complaint should be dismissed.

FOR AND AS A SIXTH DEFENSE
(Res Judicata/Collateral Estoppel/Judicial Estoppel)

18. Further answering the Complaint and as and for a further defense thereto, the Defendants allege the Plaintiff's, claims if any, are barred by the doctrine of res judicata, collateral estoppel and judicial estoppel.

**FOR AND AS A SEVENTH DEFENSE
(Unclean Hands)**

19. Further answering the Complaint and as and for a further defense thereto, the Defendants allege Plaintiff comes to this action with unclean hands and is therefore precluded from maintaining this action.

**FOR AND AS A EIGHTH DEFENSE
(Unconscionability)**

20. Further answering the Complaint and as and for a further defense thereto, the Defendants allege Plaintiff seeks relief under unconscionable terms which are against public policy and is therefore precluded from maintaining this action.

**FOR AND AS A NINTH DEFENSE
(Laches)**

21. Further answering the Complaint and for a further defense thereto, Defendants assert Plaintiff's action is barred by the principle of laches.

**FOR AND AS A TENTH DEFENSE
(Rule 41, SCRCP)**

22. Further answering the Complaint and for a further defense thereto, Defendants assert Plaintiff and brought the same action under the subject note and mortgage in three prior civil court actions and is therefore precluded under Rule 41, SCRCP from bringing the within action.

**FOR AND AS AN ELEVENTH DEFENSE
(Affirmative Defenses)**

23. Further answer said Complaint and for a further defense thereto Defendants specifically plead as an affirmative defense to the allegations of the Complaint, accord and satisfaction, comparative negligence, negligence, duress, statute of frauds, fraud, illegality, laches, misrepresentation, mistake, payment, release, waiver, standing, lack of consideration, failure to mitigate, or any other matter constituting avoidance or affirmative defense which may arise and develop as discovery in this action progresses.

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

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

MARY LEIGH ARNOLD, PA
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ATTORNEY FOR INTERVENORS

June 11, 2020

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
)
Deutsche Bank Trust Company Americas,)
as Trustee for Residential Accredit Loans,)
Inc., Pass-Through Certificates 2007-QH2,)
)
Plaintiff,)
)
Vs.)
)
Ashley Johnson Beshara as Trustee of the)
Revocable Trust Agreement for 2235)
Shoreline Drive originally dated the 3rd day)
of March, 2010; Shoreline Farms)
Community Association, Inc.; Wells Fargo)
Bank, N.A.; and Cadle Rock Joint Ventrure,)
L.P., and Ohio limited partnership,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
IN CASE NO.: 2019-CP-10-4503

DEFENDANT’S MOTION TO
RECONSIDER THE ORDER DENYING
DEFENDANT’S MOTION TO DISMISS
FILED ON 6-23-20

TO: THE ABOVE NAMED PARTIES:

PLEASE TAKE NOTICE that the Defendant, Ashley Johnson Beshara as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated the 3rd day of March, 2010 (hereinafter “Defendant”), by and through her undersigned counsel, will move before this Court on the 10th day after service, or at such other time and place as is convenient to the Court, for an order amending the Order filed on June 23, 2020, denying Defendant’s Motion to Dismiss, pursuant to Rules 59, SCRPC.

This motion will be based on the pleadings of record, the recorded records of Charleston County, applicable statutory and common law. The grounds for the motion are as follows:

1. Defendant filed a Motion to Dismiss (hereinafter “Motion”) based upon the doctrine of collateral estoppel, Rule 12(b)(7) and Rule 19, SCRPC.

2. On June 23, 2019, this Court filed a form four Order denying Defendant's Motion stating: "The Defendant's Motion to Dismiss is denied."

3. In *Woodson v. DLI Properties, LLC*, our Supreme Court stated: "We agree it is better practice—and in most cases common practice—as well as beneficial to the judicial process for a trial judge to articulate relevant findings and conclusions of law in an order. . ." 406 S.C. 517, 527, 753 S.E.2d 428 (2024) (stating it is the better practice to articulate relevant findings and conclusions of law in an order, but noting the Rule 52, SCRCF, does not require an order ruling on a motion to dismiss to provide findings of fact and conclusions of law.)

4. "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528 (2000).

5. Rule 41(a)(1)(B), SCRCF states: "an action may be dismissed by the plaintiff without order of court. . . (B) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless, otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that *a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.*"

6. Twice in the last five years our Court of Appeals has stated that striking a case from the active roster pursuant to Rule 40(j), SCRCF, is equivalent to dismissing a case. *See. Goodwin v. Landquest Development, LLC*, 414 S.C.623, 779 S.E.2d 826 (Ct. App. 2015) (A case involving a foreclosure of a mortgage where a motion to restore was denied stating striking a case pursuant to Rule 40(J) is equivalent to a dismissal.). *See. Personal Care, Inv. v. Theos*, 426 S.C. 78, 825 S.E.2d 281 (Ct. App. 2019) (where the Court declined to restore a case to the active roster, ruling

that striking a case under Rule 40(j) is equivalent to dismissing a case and stating “Nevertheless, we believe this argument ignores the procedural posture of the case as dismissed.”).

7. Plaintiff and/or its alleged predecessors interest have brought this foreclosure action for the fourth time to foreclose on the same mortgage alleging the same default date, and three times have previously have dismissed the foreclosure action pursuant Rule 40(j), SCRCF (See civil action numbers 2009-CP-10-5840, 2011-CP-10-1805 and 2015-CP-10-1971.)

8. “Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues . . . in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim. . .” *Carrigg v. Cannon*, 347.S.C.75, 79-81, 552 S.E.2d 767 (Ct. App. 2001) (citations omitted). “In our view, a fair rule regarding the application of issue preclusion in subsequent litigation with different parties is the rule recently formulated by the American Law Institute. See RESTATEMENT (SECOND) of JUDGMENTS § 29 at 291-92 (1982). . . [W]e adopt it as the rule by which to determine whether a party in South Carolina is precluded from relitigating an issue with a nonparty. The rule provides: . . . A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue.” *Beal v. Doe*, 281 S.C. 363, 367-372, 315 S.E.2d 186 (Ct. App. 1984) (citations omitted).

8. Because Rule 41 states “*a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim*” and Plaintiff and/or its alleged predecessor’s in interest had a decade prior to filing this action to litigate this foreclosure in the three previous

foreclosure action but previously dismissed those actions, identified above, then pursuant to the Rule 41, SCRCPP, the second and third dismissals in civil actions 2011-CP-10-1805 and 2015-CP-10-1971 constituted adjudications upon the merits. Therefore pursuant to the case law of this state and the South Carolina Rules of Civil Procedure Plaintiff's prosecution of this fourth foreclosure action against Defendant is precluded by the doctrine of collateral estoppel and it was an abuse of discretion for this Court to deny Defendant's motion to dismiss this action based upon the doctrine of collateral estoppel.

9. Moreover, Defendant also assert in its Motion that this matter should be dismissed pursuant to Rule 12(b)(7) and Rule 19, SCRCPP. Plaintiff failed to name Curt and Julie Rogers as necessary parties to this action. Plaintiff by its own pleadings alleges that Curt Rogers is the borrower on the subject loan and Curt and Julie Rogers are the mortgagors of the subject mortgage Plaintiff is seeking to foreclose. Further Plaintiff named judgment creditors of Curt Rogers based on awards of judgment awarded against Curt Rogers but which have not attached to the Subject Property because the judgments were awarded after Defendant took title to the Subject Property. Plaintiff's own pleadings make clear that Curt and Julie Rogers are necessary parties to this action, Plaintiff's failure to name them as Defendants in this action is grounds to have dismissed this action under Rule 12(b)(7) and Rule 19, SCRCPP. Therefore, it was an abuse of discretion for this Court not to dismiss this action based upon Defendant's Motion pursuant to Rule 12(b)(7) and Rule 19, SCRCPP.

CONCLUSION

For the forgoing reasons set forth above Defendant would respectfully request that this Court issue an order amending its order filed June 23, 2202, and dismiss this action based upon

the doctrine of collateral estoppel and pursuant to Rules 12(b)(7) and Rule 19 of the South Carolina Rules of Civil Procedure.

RESPECTUFLY SUBMITTED,

THE LAW OFFICE OF
DAVID CONOR KEYS, LLC

s/ D. Conor Keys

D. Conor Keys

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Attorney for Defendant

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

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

Plaintiff,)

v.)

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

Defendants,)

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

Third-Party Plaintiff,)

v.)

Nationstar Mortgage LLC,)

Third-Party Defendant.)

**PLAINTIFF AND THIRD-PARTY DEFENDANT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Plaintiff Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2's ("Plaintiff") and Third-Party Defendant Nationstar Mortgage LLC's ("Nationstar" or "Third-Party Defendant") Motion for Summary Judgment as to Counterclaims,

Crossclaims of Defendant/Third-Party Claims of Third-Party Plaintiffs Ashley Johnson Beshera as Trustee, Curt Rogers and Julie Rogers. The basis of this Motion is that there is no genuine issue of material fact, and movants are entitled to judgment as a matter of law.

Briefly, and as movants will set forth in detail in their brief, Defendants/Third-Party Plaintiffs raise untimely claims under South Carolina law. Additionally, Defendant Beshera has no connection to any of the alleged claims and Defendants/Third-Party Plaintiffs Curt and Julie Rogers cannot substantiate any element of any claim. Finally, Defendants/Third-Party Plaintiffs may not obtain a declaratory judgment construing orders issues in prior proceedings.

This Motion is based upon pleadings, affidavits, the South Carolina Rules of Civil Procedure, statutes, applicable law, and such evidence as may be accepted by the Court.

DATED this 7th day of October, 2022.

Respectfully submitted,

McGUIREWOODS LLP

/s/ T. Richmond McPherson, III

T. Richmond McPherson, III (SC #80432)

McGuireWoods LLP

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*Attorney for Third-Party Defendant Nationstar
Mortgage LLC*

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

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

Plaintiff,)

v.)

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

Defendants,)

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

Third-Party Plaintiff,)

v.)

Nationstar Mortgage LLC,)

Third-Party Defendant.)

**PLAINTIFF AND THIRD-PARTY DEFENDANT'S
AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Plaintiff Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2's ("Plaintiff") and Third-Party Defendant Nationstar Mortgage LLC's ("Nationstar" or "Third-Party Defendant") Motion for Summary Judgment as to Counterclaims,

Crossclaims and Third-Party Claims of Ashley Johnson Beshara as Trustee, Curt Rogers and Julie Rogers. The basis of this Motion is that there is no genuine issue of material fact, and movants are entitled to judgment as a matter of law.

Briefly, and as movants will set forth in detail in their brief, Defendants/Third-Party Plaintiffs raise untimely claims under South Carolina law. Additionally, Defendant Beshara has no connection to any of the alleged claims and Defendants/Third-Party Plaintiffs Curt and Julie Rogers cannot substantiate any element of any claim. Finally, Defendants/Third-Party Plaintiffs may not obtain a declaratory judgment construing orders issues in prior proceedings.

This Motion is based upon pleadings, affidavits, the South Carolina Rules of Civil Procedure, statutes, applicable law, and such evidence as may be accepted by the Court.

DATED this 10th day of October, 2022.

Respectfully submitted,

McGUIREWOODS LLP

/s/ T. Richmond McPherson, III

T. Richmond McPherson, III (SC #80432)

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

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

PLAINTIFF,

vs.

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

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

C/A NO: 2019-CP-10-04503

**PLAINTIFF'S RETURN TO DEFENDANT'S
MOTION TO DISMISS**

Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2 ("Plaintiff"), by and through its undersigned attorneys, hereby responds to the Motion to Dismiss filed by Ashley Johnson Beshara as Trustee of Revocable Trust Agreement for 2235 Shoreline Drive originally dated the 3rd day of March, 2010 ("Defendant Trustee"). As is further set forth herein, Plaintiff has sufficiently stated a claim for foreclosure against all necessary parties and complied with the provisions of the 2011-05-02-01 Administrative Order ("Administrative Order"). Any breach of Defendant Trustee's fiduciary duties to her beneficiaries has no bearing upon the merits of Plaintiff's foreclosure action or its obligations under the Administrative Order. Finally, there has been no final judgment on the merits in an action to foreclose the subject mortgage and the doctrine of collateral estoppel is accordingly inapplicable. As such, the Motion to Dismiss should be denied.

BACKGROUND

On January 12, 2007, Curt Rogers ("Borrower") executed and delivered a promissory note in the amount of \$1,500,000.00 in favor of Homecomings Financial, LLC (F/K/A Homecomings Financial Network, Inc.). (Compl. ¶ 6). To secure the payment of said note, Borrower and Julie J. Rogers (together, "Mortgagors") executed a mortgage against real property described as 2235 Shoreline Drive, Johns Island,

Charleston County, South Carolina 29455 (the “Property”) to Mortgage Electronic Registration Systems, Inc. as nominee for Homecomings Financial, LLC (F/K/A Homecomings Financial Network, Inc.). (Compl. ¶ 7). The mortgage was recorded January 24, 2007 in the Charleston County Register of Deeds Office in Book B613 at Page 844. (Compl. ¶ 8). On September 8, 2009, Mortgage Electronic Registration Systems, Inc. as nominee for Homecomings Financial, LLC (F/K/A Homecomings Financial Network, Inc.) assigned the subject mortgage to Aurora Loan Services LLC (“Plaintiff”), by virtue of an assignment of mortgage recorded September 15, 2009 in Book 0081 at Page 058. (Compl. ¶ 10(a)). Thereafter, the mortgage was assigned from Aurora Loan Services LLC to Plaintiff by assignment dated March 31, 2014 and recorded April 14, 2014 in Book 0398 at Page 768. (Compl. ¶ 10(b)).

After a series of conveyances from the Mortgagors beginning on July 18, 2007, the subject property was ultimately transferred from 2235 Shoreline Drive, LLC to Ashley Johnson Beshara as Trustee of Revocable Trust Agreement for 2235 Shoreline Drive originally dated the 3rd day of March, 2010, by deed dated March 3, 2010 and recorded August 9, 2010 in Book 0137 at Page 344. (Compl. ¶ 11(a)-(f)).

After Mortgagors defaulted on their payment obligations, Plaintiff provided Defendants with the required notices and declared the entire balance due and payable with the filing of the instant foreclosure action. As of September 1, 2009, there is an unpaid principal balance of \$1,608,085.44, together with interest from August, 1, 2009, escrow advances, late fees, the costs and disbursements of this action, and attorneys’ fees due and owing under the note and mortgage. (Compl. ¶ 14). Plaintiff did not demand a deficiency judgment in the event the sale of the subject property does not yield a sum sufficient to satisfy the debt due under the note and mortgage. (Compl. ¶ 16).

Defendant Trustee was personally served with the Summons, Complaint, and Notice of Foreclosure Intervention on September 21, 2019 and filed the instant Motion to Dismiss on October 18, 2019. Plaintiff filed a Certification of Non-Compliance with the Administrative Order on January 21, 2020.

STANDARD

“In considering a motion pursuant to Rule 12(b)(6), SCRCp, the trial court must base its ruling solely on allegations set forth in the complaint.” *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874

(2006). “If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper.” *Id.* “At the Rule 12 stage, therefore, the first decision for the trial court is to decide only whether the pleading states a claim.” *Skydive Myrtle Beach, Inc. vs. Horry Cty.*, 426 S.C. 175, 180, 826 S.E.2d 585, 588 (2019).

ARGUMENT

A. Plaintiff has named all necessary parties.

“It shall not be necessary to make a mortgagor who has conveyed to another the mortgaged premises a party to any action for foreclosure when no judgment for a deficiency is demanded.” S.C. Code Ann. § 29-3-620. Rule 19, SCRPC further provides that a person shall be joined as a party in an action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. *See* Rule 19(a), SCRPC.

Plaintiff has not named the Mortgagors as party defendants because it is not seeking a deficiency judgment and they no longer hold title to the subject property. Complete relief can be accorded in the absence of the Mortgagors as party defendants because they no longer have any interest in the subject property. Plaintiff’s foreclosure action is *in rem*, and Defendant’s argument that the Mortgagors are necessary parties under the applicable South Carolina statutes and Rules of Procedure is patently without merit. Plaintiff has named all necessary parties to this foreclosure, therefore the Motion should be denied.

B. Plaintiff has sufficiently stated a claim for foreclosure.

“A mortgage and a note are separate securities for the same debt, and a mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action.” *U.S. Bank Trust. Nat. Ass’n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009). “Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the

mortgagor's default on that debt." *Id.*, 385 S.C. at 374-75, 684 S.E.2d at 205. "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." *Id.*

Plaintiff has alleged the execution of the subject note and mortgage, the existence of a debt under the note and mortgage, and the Mortgagors' default on that debt. Plaintiff has clearly set forth a claim upon which relief can be granted. In the light most favorable to Plaintiff and construing only the allegations of the Complaint as required under Rule 12(b)(6), Defendant's Motion must be denied as a matter of law.

C. Plaintiff has complied with the Administrative Order.

The Administrative Order provides that "[i]n all foreclosure actions filed after May 9, 2011, the Mortgagee's attorney shall serve on the mortgagor, ***along with the summons and complaint***, a notice of the Mortgagor's right to foreclosure intervention." Administrative Order of the Supreme Court of South Carolina, *Re: Mortgage Foreclosure Actions, No. 2011-05-02-01 (May 2, 2011)* (emphasis added).

Here, the property is held by a trust and the trustee was personally served with the Summons, Complaint, and Notice of Foreclosure Intervention. As a trustee, she owes a fiduciary duty to her beneficiaries, *i.e.* the Mortgagors, to apprise them of legal action concerning the property. The South Carolina Trust Code describes the duties of trustees and mandates that a trustee "shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries" S.C. Code Ann. § 62-7-801 (Supp. 2018). The Code also imposes a duty of loyalty on the Trustee. S.C. Code Ann. § 62-7-802(a) (Supp. 2018) ("A trustee shall administer the trust solely in the interests of the beneficiaries."). Where, as here, a trust has two or more beneficiaries, the duty of loyalty includes a duty to "act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests." S.C. Code Ann. § 62-7-803 (Supp. 2018). The Code also incorporates the common law of trusts and principles of equity to the extent they supplement its provisions. S.C. Code Ann. § 62-7-106 (Supp. 2018).

Whether or not Defendant Trustee provided the Mortgagors with copies of the documents served on her or notified them of same is not known. However, it is clear that no one responded to the Notice of

Foreclosure Intervention and as such, the Plaintiff complied with the Administrative Order by filing a Certification of Non-Compliance. The Administrative Order cannot abrogate the statutory framework or Rules of Civil Procedure, and presumably had the Supreme Court intended for the inclusion of non-necessary parties to foreclosure actions for purposes of the Order, it would have so specified. Furthermore, while it is germane to the Court's analysis under Rule (12)(b)(6), as a matter of equity it warrants noting that the Mortgagors have been and continue to be free to pursue loss mitigation efforts with the Plaintiff at any time. But rather than avail themselves of those options to retain their home, they attempt to use the Administrative Order as vehicle to dismiss a proper foreclosure action. This contravenes the very purpose and spirit of the Administrative Order, and certainly is not valid grounds for dismissal of a complaint that clearly sets forth a cause of action. For these reasons, the Plaintiff has complied with Administrative Order and the Motion should be denied.

D. Collateral Estoppel is inapplicable.

“Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim.” *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986). “A party may assert nonmutual collateral estoppel to preclude relitigation of a previously litigated issue unless the party sought to be precluded did not have a full and fair opportunity to litigate the issue in the first proceeding, or unless other circumstances justify providing the party an opportunity to relitigate the issue.” *Wade v. Berkeley County*, 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct. App. 1998).

Defendant's Motion plainly admits that there has not been a final judgment on the merits in any action to foreclose the subject mortgage, but instead contends that because there was a prior action that was stricken from the active docket twice this somehow is tantamount to a final judgment. There is absolutely no authority to support such a position. “It is fundamental that a voluntary dismissal or nonsuit brings about the same situation or result as if no suit had been brought.” *Allen v. Southern Ry. Co.*, 218 S.C. 291, 298, 62 S.E.2d 507, 511 (1950). The voluntary dismissal of the only prior foreclosure action is simply not a

final judgment on the merits, no matter how tortured an argument Defendant attempts to cobble together using an analysis of Rule 40(j), which permits a party to strike a claim from the active docket as Plaintiff's predecessor did during loss mitigation efforts.

Before the adoption of the Rules of Civil Procedure, the circuit court had the power to dismiss an action without prejudice if it was called for trial and the parties were not ready to proceed. *See Small v. Mungo*, 254 S.C. 438, 441, 443, 175 S.E.2d 802, 803, 804 (1970). While there is a basis to consider a case stricken pursuant to Rule 40(j), SCRPC as the equivalent of being dismissed, such a dismissal would necessarily be without prejudice. *See Goodwin v. Landquest Development, LLC*, 414 S.C. 623, 779 S.E.2d 826 (Ct. App. 2015) (finding a case stricken under 40(j) due to bankruptcy is not a dismissal and does not trigger the tolling provision of the rule). Defendant's reliance on Rule 40(j) to obtain a dismissal of an action to foreclose a mortgage is entirely misplaced and unsupported by both the Rules of Procedure and case law. The Motion should be denied because this argument is simply untenable.

CONCLUSION

Defendant Trustee has failed to show any deficiencies in Plaintiff's Complaint, and as such her Motion to Dismiss should be denied.

Respectfully submitted,

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Attorneys for Plaintiff

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Deutsche Bank Trust Company Americas,)
 as Trustee for Residential Accredit Loans,)
 Inc., Pass-Through Certificates 2007-QH2,)
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 Ashley Johnson Beshara as Trustee of the)
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 of March, 2010; Shoreline Farms)
 Community Association, Inc.; Wells Fargo)
 Bank, N.A.; and Cadle Rock Joint Ventrure,)
 L.P., and Ohio limited partnership,)
)
 Defendants.)
)

IN THE COURT OF COMMON PLEAS
 FOR THE NINTH JUDICIAL CIRCUIT
 IN CASE NO.: 2019-CP-10-4503

DEFENDANT’S REPLY TO
 PLAINTIFF’S RETURN TO THE
 MOTION TO DISMISS

TO: THE ABOVE NAMED PARTIES:

Defendant, Ashley Johnson Beshara as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated the 3rd day of March 2010 (hereinafter “Defendant”) submits this reply pursuant to the Honorable Bentley Price’s request that the parties brief him on the pending Motion. Defendant’s Motion itself provides much greater detail for its basis for the relief sought and Defendant would direct the Court to the Motion itself as the principle basis for granting the relief requested. This memorandum is a reply to Plaintiff’s Return.

DEFENDANT’S ASSERTION THAT COLLATERAL ESTOPPEL APPLIES IN THIS CASE
IS BASED UPON THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE AND OUR
STATE’S RELEVANT CASE LAW.

Plaintiff in its return states: “There is absolutely no authority to support such a position. . . The voluntary dismissal of the only prior foreclosure action¹ is simply not a final judgment on the merits, no matter how tortured an argument Defendant attempts to cobble together. . .”

Plaintiff’s assertions are disingenuous at best. Twice in the last five years our Court of Appeals has stated that striking a case from the active roster pursuant to Rule 40(j), SCRPC, is equivalent to dismissing a case. *See. Goodwin v. Landquest Development, LLC*, 414 S.C.623, 779 S.E.2d 826 (Ct. App. 2015) (A case involving a foreclosure of a mortgage where a motion to restore was denied stating striking a case pursuant to Rule 40(J) is equivalent to a dismissal.). *See. Personal Care, Inv. v. Theos*, 426 S.C. 78, 825 S.E.2d 281 (Ct. App. 2019) (where the Court declined to restore a case to the active roster, ruling that striking a case under Rule 40(j) is equivalent to dismissing a case and stating “Nevertheless, we believe this argument ignores the procedural posture of the case as dismissed.”). Plaintiff in its return even concedes this point. Further the point is supported by the Form 4 Orders dismissing the actions under Case number 2011-CP-10-1805 filed June 20, 2014, and under case number 2015-CP-10-1971 filed May 16, 2016, wherein both occasions the Court check the box stating this order *ends* the case.

However, Plaintiff in an attempt to distract this Court, focuses its analysis on Rule 40, SCRPC and dismissals without prejudice. But, the applicable rule is actually Rule 41, SCRPC, which states in relevant part “an action may be dismissed by the plaintiff without order of court. .

¹ There were three prior actions in the prosecution of this same foreclosure, not one, and Plaintiff dismissed all three. More importantly the last dismissal did not occur as a result of the parties pursuing loss mitigation efforts as Plaintiff’s counsel asserts in her return. It occurred because the matter came up on the trial roster and Plaintiff had failed to take necessary steps to prosecute the matter such as having an active counsel actually representing Plaintiff in the matter at the time. See Exhibit A to the Affidavit of Mary Leigh Arnold attached hereto as Exhibit 1.

.(B) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless, otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, *except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.*” Rule 41(a)(1)(B),SCRCP. The rule does not make a distinction between whether an action is dismissed with prejudice or without prejudice, it unequivocally states that where an action is previously dismissed, a second dismissal of the action constitutes an adjudication on the merits. Plaintiff concedes this action was previously dismissed, though it disingenuously asserts that occurred only once. However, the public record is clear. Plaintiff and/or its predecessors, standing in its shoes, have three times dismissed the same foreclosure action under three different case numbers when each time the foreclose sought to foreclose on the same mortgage for the same default date. By the plain unmistakable language of Rule 41, SCRCP, Plaintiff’s rights to bring this action for foreclose has been adjudicated on the merits to Plaintiff’s detriment as a result of its own failure to prosecute its own actions.

Upon information and belief, Plaintiff knew before filing this action these dismissals and Rule 41, SCRCP’s would negatively impact any attempt to file this foreclosure action for a fourth time. Defense counsel previously addressed this issue to Plaintiff’s counsel after Plaintiff previously had to 40(j) this matter when it was called for trial. Plaintiff at the time did not have an active counsel on the case, leaving Plaintiff incapable of trying the case at the time (See Exhibit “1” attached hereto and incorporated herein by reference.) Moreover an examination of the public records for this foreclosure evidence that in case number 2011-CP-10-1805 Plaintiff’s last substantive filing, in furtherance of prosecuting this foreclosure, was a motion to compel discovery filed on September 27, 2013 (defense counsel Mary Leigh Arnold, filed a motion for summary

judgement on March 3, 2014), and thereafter Plaintiff failed to file any substantive filings in furtherance of prosecuting this foreclosure until August 27, 2019, when it through new counsel it filed the summons in complaint under this case number (Defendant asks the Court to take judicial notice of the public records for these cases).

This is not first time Plaintiff has been deleterious in prosecuting a foreclosure action in this state. Plaintiff brought another foreclosure action in Colleton county under case number 2012-CP-15-166 filing a summons and complaint on March 6, 2012, which the defendants answered on September 25, 2012. The only thing filed in the matter from 2012 to January of 2015 was a consent order of reference. The Honorable Perry M. Buckner dismissed the action pursuant to Rule 41, SCRPC for failure to prosecute on October 1, 2015. Thereafter in April of 2016, Plaintiff, under different counsel filed a new summons and complaint in case number 2016-CP-15-414 alleging the exact same claims as were alleged in the action bearing case number 2012-CP-15-166. The defendants filed a motion to dismiss based on Judge Buckner's October 1, 2015 order. The Honorable Carmen T. Mullen heard the motion to dismiss on August 10, 2016, and referred the matter to Judge Buckner because it called for interpretation of his October 1, 2015 Order dismissing the matter for want of prosecution. On September 29, 2016, a year after Judge Buckner's October 2015, Plaintiff filed a motion seeking to clarify the October 2015 Order and/or for relief under Rule 60. Judge Buckner filed an order denying the motion on December 16, 2016 in case number 2012-CP-15-166 (a copy of which is attached hereto as Exhibit "2" and incorporated herein by reference) states:

"plaintiff has not given a valid reason for delay. It was represented, but not shown by affidavit or other evidence, that one of plaintiff's counsel of record had decided to cease doing business in South Carolina, insinuating that it had been abandoned. Generally an attorney's negligence is imputed to the client for purposes of Rule 60 relief. . .

Second, without further factual support, it is possible that the plaintiff, a sophisticated lender, was informed of the order and elected to do nothing at the time. Third, there was no information or representation provided to the Court that the plaintiff itself was ignorant of the dismissal. . . Even if one of the Plaintiff's lawyers had ceased representation, the plaintiff was still obligated to monitor its case, given the amount of notice it had and the length of time the case had been proceeding. A party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney. The action proceeded for three years with little to no action by plaintiff and the current situation is a result of its own inaction. For these reasons, the plaintiff's motion is denied. (citations omitted).²

In this case Plaintiff had the opportunity to prosecute this foreclosure action for a decade (the default date it alleges in the complaint under this case number is September 1, 2009). However, the public record for these actions shows that, prior to filing the summons and complaint in this case number on August 27, 2019, the last time Plaintiff filed a document of substance in furtherance of prosecuting the foreclosure was September 27, 2013. Plaintiff due to its own deleterious actions caused this foreclosure to be dismissed three times. The rules are clear, two dismissals of the same cause of action constitutes an adjudication on the merits. For that reason this Court should grant Defendant's motion to dismiss plaintiff's complaint based on Rule 41, SCRCP and the doctrine of collateral estoppel.

CONCLUSION

For the forgoing reasons set forth above as well as within Defendant's Motion to Dismiss, Defendant would respectfully request that this Court issue an order dismiss this action with prejudice based upon Rule 41, SCRCP and the doctrine of collateral estoppel. In the event the Court denies such remedy, then in the alternative that this Court dismiss this action pursuant to Rules 12(b)(7) and Rule 19 of the South Carolina Rules of Civil Procedure.

² Thereafter, Plaintiff dismissed case number 2016-CP-15-414 pursuant to Rule 40(J), SCRCP, and appealed the Judge Buckner's December 2016 Order. However, the parties mutually agreed to a stipulation of dismissal of the appeal prior to an adjudication of the appeal on the merits.

RESPECTUFLLY SUBMITTED,

THE LAW OFFICE OF
DAVID CONOR KEYS, LLC

s/ D. Conor Keys

D. Conor Keys

P.O. Box 14225

Charleston, SC 29422

Phone: 843-906-3998

conor@dconorkeyslaw.com

Attorney for Defendant

EXHIBIT 1

ELECTRONICALLY FILED - 2020 Jun 12 3:47 PM - CHARLESTON - COMMON PLEAS - CASE#2019CP1004503

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	IN CASE NO.: 2019-CP-10-4503
	)	
Deutsche Bank Trust Company Americas,	)	
as Trustee for Residential Accredit Loans,	)	
Inc., Pass-Through Certificates 2007-QH2,	)	AFFIDAVIT OF MARY LEIGH ARNOLD
	)	
Plaintiff,	)	
	)	
Vs.	)	
	)	
Ashley Johnson Beshara as Trustee of the	)	
Revocable Trust Agreement for 2235	)	
Shoreline Drive originally dated the 3 rd day	)	
of March, 2010; Shoreline Farms	)	
Community Association, Inc.; Wells Fargo	)	
Bank, N.A.; and Cadle Rock Joint Venture,	)	
L.P., and Ohio limited partnership,	)	
	)	
Defendants.	)	
	)	

PERSONALLY APPEARED before me, Mary Leigh Arnold, who being duly sworn, deposes and says as follows:

1. I am twenty-one years of age or older, legally competent to testify as to the matters contained within this Affidavit and have personal knowledge of the facts set forth within this Affidavit.
2. I am a licensed to practice law in the State of South Carolina and I represented Curtis Rogers and Julie J. Rogers in this ongoing foreclosure action involving their primary residence filed under the following case numbers 2009CP1005840; 2011CP1001805; and 2015CP1001971. I have also filed a Motion to Intervene on the Rogers' behalf in the matter as it is currently captioned herein above.
3. This action was initially filed in 2009. Plaintiff voluntarily dismissed the foreclosure action three separate times pursuant to Rule 40(j), SCRCPP. The first time the foreclosure action was filed it was given the Civil Action No. 2009CP1005840. Plaintiff voluntarily dismissed the action under Rule 40(j). When Plaintiff restored the matter on March 10, 2011 it received the new Civil Action 2011CP1001805. Again Plaintiff voluntarily dismissed the action on June 24, 2014. After the third dismissal the action when restored was give Civil Action No. 2015CP1001971. The last dismissal of the case occurred by order filed on May 16, 2016.
4. On May 12, 2016, the matter under Civil Action No. 2015CP1001971 appeared on the trial roster for the following week. Local counsel of record for Plaintiff, John Kelchner was

EXHIBIT 1

notified of the trial roster. Mr. Kelchner contacted me about dismissing the matter again pursuant to Rule 40(j). He made the comment this would be the second time the matter would be dismissed and I made him aware of the fact it would not be the second time but the third time the matter will have been dismissed. Mr. Kelchner emailed the Court stating that he had handled the matter when he worked for the Korn Law Firm, but that he had left the Korn Law Firm in 2014, and the firm who had retained the file and/or its successor firm ceased doing business in May of 2015. He stated that he had been in contact with the Plaintiff and it was aware of the matter being on the trial roster. The Court attached all of the emails to the Order of Dismissal filed May 16, 2016. See Exhibit "A" attached hereto and incorporated herein by reference.

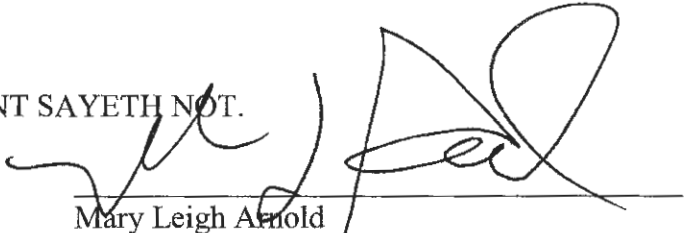
5. Several years later I was contacted by Trent M. Grissom of McGuire Woods LLP, on behalf of Plaintiff regarding this matter and was told his firm would be representing Plaintiff.

6. Mr. Grissom informed me that Plaintiff wished to restore the matter to active roster. I advised Mr. Grissom if such happened I would challenge the motion to restore and/or file a motion to dismiss because I believed such an action was precluded by Rule 41, SCRPC.

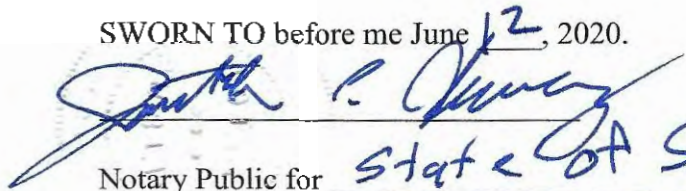
7. One of my email communications with Mr. Grissom regarding this matter is dated December 13, 2018 and attached hereto as Exhibit "B" and incorporated herein by reference.

8. The Finkel Law Firm, not McGuire Woods, LLP filed the within Summons and Complaint on behalf of Plaintiff in this above captioned fourth iteration of this same foreclosure action which initially began in 2009.

AND FURTHER THE AFFIANT SAYETH NOT.


Mary Leigh Arnold

SWORN TO before me June 12, 2020.


Notary Public for

My Commission Expires:

State of S.C.
2-3-2026

EXHIBIT A
FORM 4STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-1971

Aurora Loan Services

Curtis Rogers

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

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

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

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

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

Circuit Court Judge

2134

Judge Code

Date

5/13/16

EXHIBIT A

To: Don Michel; 'John B. Kelchner'

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

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

MARY LEIGH ARNOLD, P.A.

749 Johnnie Dodds Blvd, Suite B

Mt. Pleasant, S.C. 29464

(843) 971-6053

email: sammie@maryarnoldlaw.com

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

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

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

To: 'John B. Kelchner'

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

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

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

Don

Don Michel

Court Management Supervisor

Charleston County Clerk of Court

Direct: 843-958-5013

<http://clerkofcourt.charlestoncounty.org>

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

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

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

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

EXHIBIT A

To: Don Michel

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

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

Don,

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

Thanks, John

Hutchens Law Firm

John B. Kelchner | Associate Attorney

<mailto:John.Kelchner@hutchenslawfirm.com>

240 Stoneridge Drive, Suite 400 | Columbia, SC 29210 P.O. Box 8237 | Columbia, SC 29202

T: 803-726-2700 Ext:2704 | F: 803-726-2832

<http://HutchensLawFirm.com>

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

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

Sent: Thursday, May 12, 2016 12:38 PM

To: John B. Kelchner

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

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

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

Don Michel

Court Management Supervisor

Charleston County Clerk of Court

Direct: 843-958-5013

https://mailgate.hutchenslawfirm.com/enduser/classify_url.html?url=7lnlwZWRWBbaOooyWlwOk46hM1MlkEQVMzgZDRiiubsC/OWZ/rFNWZ6wXDPxNw/2

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

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

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

Sent: Thursday, May 12, 2016 12:37 PM

EXHIBIT A

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

Don,

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

Thanks, John

Hutchens Law Firm

John B. Kelchner | Associate Attorney

mailto:John.Kelchner@hutchenslawfirm.com

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

<http://HutchensLawFirm.com>

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

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

John,

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

Don

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

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

EXHIBIT A

ELECTRONICALLY FILED - 2020 Jun 12 3:47 PM - CHARLESTON - COMMON PLEAS - CASE#2019CP1004503

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

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

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

To: Don Michel

Cc: 'Sammie Arnold'; 'Dean Hayes'

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

Importance: High

Don,

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

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

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

John

Hutchens Law Firm

John B. Kelchner | Associate Attorney

mailto:John.Kelchner@hutchenslawfirm.com

240 Stoneridge Drive, Suite 400 | Columbia, SC 29210 P.O. Box 8237 | Columbia, SC 29202

T: 803-726-2700 Ext:2704 | F: 803-726-2832

<http://HutchensLawFirm.com>

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

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

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

To: John B. Kelchner

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

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

EXHIBIT A

QUESTIONS SHOULD BE DIRECTED TO DON MICHEL AT: DMICHEL@CHARLESTONCOUNTY.ORG. OR (843) 958-5013

ELECTRONICALLY FILED - 2020 Jun 12 3:47 PM - CHARLESTON - COMMON PLEAS - CASE#2019CP1004503

[Insert your disclaimer here]

[Insert your disclaimer here]

[Insert your disclaimer here]

EXHIBIT B

From: [Grissom, Trent M.](#)
To: sammie.marvarnoldlaw.com
Subject: (SC) Curtis Rogers - [REDACTED]
Date: Thursday, December 13, 2018 3:41:35 PM

Sammie,

NS wants to move this case forward. Would your clients be willing to [REDACTED]
[REDACTED]

Trent M. Grissom

Attorney

McGuireWoods LLP

201 North Tryon Street

Suite 3000

Charlotte, NC 28202-2146

T: +1 704 343 2162

M: +1 919 696 4831

tgrissom@mcguirewoods.com

[Bio](#) | [VCard](#) | [LinkedIn](#) | www.mcguirewoods.com



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EXHIBIT 2

ELECTRONICALLY FILED - 2020 Jun 12 3:47 PM - CHARLESTON - COMMON PLEAS - CASE#2019CP1004503

STATE OF SOUTH CAROLINA)
COUNTY OF COLLETON)
IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2012-CP-15-00166

Deutsche Bank National Trust Company, as)
Trustee of IndyMac Residential Mortgage-)
Backed Trust Series 2006-L2, Residential)
Mortgage-Backed Securities, Series 2006-12)

Plaintiff(s)

vs.
Adriana P. Lesemann and Charles S.
Lesemann, et al.,

Defendant(s).

ORDER DENYING MOTION TO
CLARIFY ORDER AND/OR
FOR RULE 60 RELIEF

2016 DEC 16 PM 3:06
COMMON PLEAS
COLLETON COUNTY
CHARLESTON

#1
PMB
THIS MATTER was before the Court on plaintiff Deutsche Bank National Trust Company's Motion to Clarify and/or for Rule 60 Relief filed September 29, 2016. The Court conducted a hearing on this Motion on November 28th, 2016 in Walterboro, South Carolina. Vance Brabham, III appeared for the plaintiff, and David Haller appeared for the defendants. The motion seeks to clarify that the order of this Court dated October 1, 2015 dismissing this action for failure to prosecute was without prejudice. Alternatively, Deutsche Bank seeks relief from the judgment under Rule 60 to change the dismissal to without prejudice. For the reasons set forth herein, the motion is denied.¹

FACTUAL BACKGROUND

This is a foreclosure action brought by plaintiff Deutsche Bank on a vacant lot in Colleton County. It filed its complaint on March 6, 2012. Defendants Adriana P. Lesemann and Charles S. Lesemann answered the complaint on September 25, 2012. Counsel for the plaintiff filed its

¹ Plaintiff attempted to argue that the Order could be amended pursuant to Rule 60(a); however, it failed to state this as a grounds for the motion it filed on September 29, 2016 and the issue is not before me.

EXHIBIT 2

ELECTRONICALLY FILED - 2020 Jun 12 3:47 PM - CHARLESTON - COMMON PLEAS - CASE#2019CP1004503

Certificate of Compliance with Foreclosure Intervention on August 25, 2012. Thereafter, the parties exchanged discovery. The last filing in the case was a consent order to refer the case for trial to a special referee in January 12, 2015. In the almost three years the case was pending, there were no filings beyond the complaint, answer, and reference.

This action was dismissed on October 1, 2015. Prior to entering the Order, this Court twice warned the plaintiff in writing that failure to take some action to end the case would lead to dismissal. The order of dismissal finds and hold as follows:

Case dismissed for want of prosecution and failure to appear. A letter was sent by Judge Buckner giving the parties 90 days to file a final Order in the case in April 2015. Another letter was sent in September 2015 setting a Rule to Show Cause hearing for 10am October 1, 2015. No one appeared when the case was called.

#2
PAB The form order indicates that the Clerk of Court mailed the order to two lawyers for the plaintiff in two separate offices, one in Greenville and one in Atlanta. It is not disputed that these lawyers received the order dismissing the case and that both were counsel of record, neither having moved or been relieved as counsel.² Despite having six months notice of the need to act and having received the order of dismissal, plaintiff took no steps to reopen the case, clarify the position of it, notify the Court of the case's posture, file an appeal, or otherwise protect its rights.

In April of 2016, the plaintiff, through different counsel, filed a complaint alleging the exact same claims as were alleged in this action. See Case No. 2016-CP-15-00414. Defendants moved to dismiss the 2016 action on the basis of the October 1, 2015, order. Judge Mullen heard that motion on August 10, 2016 and referred it to me as it involved an interpretation of my order.

² Plaintiff argued through counsel at the hearing that its counsel of record at the time (who remains counsel of record as of this order), was seeking to withdraw as counsel. The plaintiff failed to produce any record to support this contention.

EXHIBIT 2

Still, plaintiff waited until September 29, 2016, nearly a year after the case was dismissed to file this motion.

The plaintiff did not support the motion with an affidavit or any other record. At the hearing, plaintiff's current counsel indicated that one of the plaintiff's lawyer's law firms determined to stop doing business in South Carolina. It was unclear what the second lawyer, who is based in South Carolina, was doing. Neither lawyer has been relieved as counsel as of this motion.

LAW/ANALYSIS

Dismissals of an action for failure to prosecute is governed by Rule 41(b), SCRCP. It provides:

#3
P3B
(b) Involuntary Dismissal: Non-suit; Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). **Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for failure to join a party under Rule 19, operates as an adjudication upon the merits.**

Plaintiff requests the court clarify the October 1, 2015 order to state that the dismissal was not an adjudication. For the following reasons, the motion is denied.

The plaintiff asks for relief from the judgment dismissing the action pursuant to Rule 60(b), SCRCP. However, Rule 60 relief is not available to the plaintiff because it could have appealed the October 1, 2015 order and did not do so. *Tench v. Dept. of Education*, 347 S.C. 117, 553

EXHIBIT 2

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S.E.2d 451 (2001). In *Tench*, the parties stipulated to resolve a legal question by the trial court's resolution of a motion to dismiss, which the trial court treated as one for summary judgment. The Department of Education lost the motion and appealed. The Court of Appeals dismissed the appeal, finding it interlocutory because it was an appeal of a motion to dismiss. The Department then filed a motion under Rule 60, which was granted. *Tench* appealed. The Supreme Court vacated the order granting Rule 60 relief. "A party may not invoke this rule where it could have pursued the issue on appeal. See *Smith Companies of Greenville v. Hayes*, 311 S.C. 358, 428 S.E.2d 900 (Ct.App.1993) (finding relief from judgment is not a substitute for appeal from final judgment, particularly when it is clear party seeking relief could have litigated at trial and on appeal claims he now makes by motion)." *Tench v. Dept. of Education*, 347 S.C. 117, 553 S.E.2d at 453 (2001). Here, plaintiff acknowledges that its counsel of record at the time received the order of dismissal. At that time, plaintiff had the option of moving to alter or amend the October 1, 2015 order or then appealing it. It failed to do either. Rule 60 is not available to it to amend the order.

#4
R26
Even if Rule 60 were available to it, I would deny the motion. "In determining whether to grant a motion under Rule 60(b), the trial judge should consider: (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other party." *Micronics v. S.C. Dept. of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001). While in *Micronics* the plaintiff made an error in a hearing date and immediately sought relief, the Plaintiff here waited almost a year to bring the motion. *Id.* at 226. Plaintiff acknowledged both of its lawyers of record received the order of dismissal. As in *Micronics*, the moment of receipt would have been the most prompt time to seek relief as any order dismissing an action should be taken seriously, especially one adjudicating the case. Six months later, it filed a second action based on the same set of facts. Plaintiff still failed to act when

EXHIBIT 2

a motion to dismiss was brought in that case and even after it was heard by Judge Mullen in August of 2016. When a motion for relief from judgment under Rule 60(b) is brought within a year, whether it has been brought in a reasonable amount of time is within the discretion of the trial court. *Coleman v. Dunlap*, 306 S.C. 491, 413 S.E.2d 15 (1992). In my view, a year delay in this situation is too long, especially in light of similar cases of similar situations.

Further, the plaintiff has not given a valid reason for delay. It was represented, but not shown by affidavit or other evidence, that one of plaintiff's counsel of record had decided to cease doing business in South Carolina, insinuating that it had been abandoned.³ Generally, an attorney's negligence is imputed to the client for purposes of Rule 60 relief. *Sterns Bank, NA v. Glenwood Falls, LP*, 373 S.C. 331, 644 S.E.2d 793 (Ct. App. 2007).

Second, without further factual support, it is possible that the plaintiff, a sophisticated lender, was informed of the order and elected to do nothing at the time. Third, there was no information or representation provided to the Court that the plaintiff itself was ignorant of the dismissal.

Plaintiff relied on three cases to support its position that the order should be amended to state that the dismissal was without prejudice. In all three cases, however, the effected party moved immediately to protect its rights. *Small v. Mungo*, 254 S.C. 438, 175 S.E.2d 802 (1970) ("... plaintiff moved during the term of court, to vacate the order of dismissal upon the ground that his failure to appear for trial was not due to unreasonable neglect by him or his counsel..."); *Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (1978) (motion made 13 days after hearing missed

³ Notably, "abandonment by counsel" was not a stated ground for the motion in the plaintiff's filing and, accordingly, that issue is not properly before me. Instead, it alleged the defendants were undergoing foreclosure intervention efforts. However, plaintiff filed a Certificate of Compliance in August of 2012 prior to the Rule to Show Cause having been issued.

EXHIBIT 2

by former lawyer); *McComas v. Ross*, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006)(plaintiff filed a motion within 10 days of the order dismissing the case pursuant to Rule 59). In *Small* and *McComas*, the actions were dismissed when they were called for trial and the defendant could not appear at the moment it was called. In *Graham*, the supreme court granted Rule 60 relief where the lawyer for the Town of Loris quit the day before a hearing without prior notice. *Id.* at 452, 599. This Court notified the plaintiff in April of 2015 it needed to bring the case to a conclusion, then in September of 2015 issued a Rule to Show Cause to the plaintiff why the case should not be dismissed, hence it knew for six months of the need for action. The case was dismissed and the order mailed to two separate lawyers in two separate offices and the plaintiff did nothing. No record has been provided as to the timing of the Atlanta based lawyer's claimed withdrawal and the South Carolina counsel remained active in South Carolina.

#6
PMB
Even if one of the plaintiff's lawyers had ceased representation, the plaintiff was still obligated to monitor its case, given the amount of notice it had and the length of time the case had been proceeding. "[A] party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney." *Goodson v. American Bankers Ins. Co. of Florida*, 295 S.C. 400, 368 S.E.2d 687 (Ct. App. 1988). The action proceeded for three years with little to no action by the plaintiff and the current situation is a result of its own inaction.

For these reasons, the plaintiff's motion is DENIED.

AND IT IS SO ORDERED!


Perry M. Buckner, III
Presiding Judge

This 8th day of December, 2016
Walterboro, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	IN CASE NO.: 2019-CP-10-4503
	)	
Deutsche Bank Trust Company Americas,	)	
as Trustee for Residential Accredited Loans,	)	
Inc., Pass-Through Certificates 2007-QH2,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	OBJECTION TO THE CERTIFICATION
	)	OF NON-COMPLIANCE WITH THE
Ashley Johnson Beshara as Trustee of the	)	ADMINISTRATIVE ORDER 2011-05-02-01
Revocable Trust Agreement for 2235	)	FILED BY PLAINTIFF ON 1-21-2020
Shoreline Drive originally dated the 3 rd day	)	
of March, 2010; Shoreline Farms	)	
Community Association, Inc.; Wells Fargo	)	
Bank, N.A.; and Cadle Rock Joint Venture,	)	
L.P., and Ohio limited partnership,	)	
	)	
Defendants.	)	
	)	

TO: THE ABOVE NAMED PARTIES:

PLEASE TAKE NOTICE that the Defendant, Ashley Johnson Beshara as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated the 3rd day of March, 2010 (hereinafter "Defendant"), by and through her undersigned counsel, would state in response to Plaintiff's Certification of Non-Compliance with Administrative Order 2011-05-02-01 (hereinafter "Certification") filed by Plaintiff's counsel Magalie A. Creech on January 21, 2020, the following:

1) The South Carolina Supreme Court Administrative Order 2011-05-02-01 (hereinafter "Admin Order") states: "In all mortgage foreclosure actions filed after May 9, 2011, the Mortgagee's attorney shall serve on the Mortgagor, along with the summons and complaint, a notice of the Mortgagor's right to foreclosure intervention. No foreclosure hearing may be held in the foreclosure action until the Mortgagee's attorney certifies that the Mortgagee has complied

with the requirements of paragraphs B (1) (a) through (e) above. If within thirty days after having been served with notice of the Mortgagor's rights, the Mortgagor has failed, refused, or voluntarily elected not to participate in any foreclosure intervention process, the Mortgagee, through its attorney, shall certify that fact to the Court, and the foreclosure action may proceed."

2) Curtis L. Rogers III and Julie J. Rogers are Mortgagor(s) as defined by Admin Order.

3). Plaintiff's Certification states that Defendant has not filed a response to the Notice of Foreclosure Intervention served upon Defendant on September 21, 2019, but importantly, Plaintiff's Certification does not state that Plaintiff has served Curtis L. Rogers III and Julie J. Rogers with the Notice of Foreclosure Intervention in this matter.

4) Therefore, Defendant would reassert as it did in its Motion to Dismiss filed on October 18, 2019 in this matter, that Plaintiff and/or Plaintiff's counsel has not met the condition precedent required by the Admin Order to remove the judicial stay in this matter.

CONCLUSION

For the forgoing reasons set forth above Defendant would respectfully request that this Court maintain the judicial stay in this matter until such time that Plaintiff and/or Plaintiff's counsel certifies in compliance with the Admin Order that it has served Curtis L. Rogers III and Julie J. Rogers with the Notice of Foreclosure Intervention in this matter.

RESPECTUFLY SUBMITTED,

THE LAW OFFICE OF
DAVID CONOR KEYS, LLC
s/D. Conor Keys
D. Conor Keys
P.O. Box 14225
Charleston, SC 29422
Phone: 843-906-3998
conor@dconorkeyslaw.com
Attorney for Defendant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL DISTRICT
	)	
Deutsche Bank Trust Company	)	Civil Action No. 2019-CP-10-04503
Americas, as Trustee for Residential	)	
Accredit Loans, Inc., Pass-Through	)	
Certificates 2007-QH2,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Ashley Johnson Beshera as Trustee of the	)	
Revocable Trust Agreement for 2235	)	
Shoreline Drive originally dated 3 rd day	)	
of March 2010; et al.,	)	
	)	
Defendants.	)	
	)	
	)	

PLAINTIFF'S REPLY TO INTERVENERS' COUNTERCLAIMS

Plaintiff Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2 ("Plaintiff") hereby replies to the Counterclaims alleged by Interveners Curtis Rogers and Julie Rogers ("Interveners"), denies any and all allegations in the Counterclaims that are not expressly admitted herein, and states as follows:

FOR A FIRST DEFENSE

25. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 25 of the Counterclaims, and therefore, Plaintiff denies the allegations.

26. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 26 of the Counterclaims, and therefore, Plaintiff denies the allegations.

27. In response to the allegations in Paragraph 27 of the Counterclaims, Plaintiff refers to the express provisions of its Complaint. Plaintiff denies all allegations in Paragraph 27 that are not expressly stated in its Complaint.

28. In response to the allegations in Paragraph 28 of the Counterclaims, Plaintiff refers to the express provisions of its Complaint. Plaintiff denies all allegations in Paragraph 28 that are not expressly stated in its Complaint.

29. In response to the allegations in Paragraph 29 of the Counterclaims, Plaintiff refers to the express provisions of its Complaint. Plaintiff denies all allegations in Paragraph 29 that are not expressly stated in its Complaint.

30. In response to the allegations in Paragraph 30 of the Counterclaims, Plaintiff refers to the express provisions of its Complaint and the complaint at issue in the civil actions identified in Paragraph 30. Plaintiff denies all allegations in Paragraph 30 that are not expressly stated in its Complaint or the complaint associated with the other civil actions identified in Paragraph 30.

31. In response to the allegations in Paragraph 31 of the Counterclaims, Plaintiff refers to the express provisions of its Complaint and the complaint at issue in the civil actions identified in Paragraph 30. Plaintiff denies all allegations in Paragraph 31 that are not expressly stated in its Complaint or the complaint associated with the other civil actions identified in Paragraph 31.

32. In response to the allegations in Paragraph 32 of the Counterclaims, Plaintiff refers to the express provisions of the note and mortgage identified in its Complaint and the note and mortgage identified in the complaint at issue in the civil actions identified in Paragraph 30 along with the Rule 40(j) Orders entered in the civil actions identified in the Paragraph 32. Plaintiff denies all allegations in Paragraph 32 that are not expressly stated in note and mortgage identified

in its Complaint, the note and mortgage identified complaint associated with the other civil actions identified in Paragraph 32, or the Rule 40(j) Orders that are also identified in Paragraph 32.

33. The allegations in Paragraph 33 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 33.

34. The allegations in Paragraph 34 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 34.

35. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 35 of the Counterclaims regarding any communications between Defendants' counsel and any prior counsel of Plaintiff, and therefore, Plaintiff denies those allegations. Furthermore, Plaintiff denies all of the other remaining allegation in Paragraph 35.

36. Plaintiff denies the allegations in Paragraph 36 of the Counterclaims.

37. Plaintiff denies the allegations in Paragraph 37 of the Counterclaims.

38. In response to the allegations in Paragraph 38 of the Counterclaims, Plaintiff admits only that loss mitigation negotiations with the Interveners were undertaken. Plaintiff lacks sufficient information to know the truth of the remaining allegations in Paragraph 38 of the Counterclaims, and therefore, Plaintiff denies those allegations.

39. In response to the allegations in Paragraph 39 of the Counterclaims, Plaintiff refers to the express provisions of the complaint filed in the civil action and assignment of mortgage, which are both identified in Paragraph 39. Plaintiff denies all allegations in Paragraph 39 that are not expressly stated in the complaint filed for the civil action and assignment of mortgage that are identified in Paragraph 39.

40. The allegations in Paragraph 40 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 40.

41. The allegations in Paragraph 41 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 41.

42. The allegations in Paragraph 42 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 42.

43. Plaintiff denies the allegations in Paragraph 43 of the Counterclaims.

44. In response to the allegations in Paragraph 44 of the Counterclaims, Plaintiff refers to the express provisions of the Rule 40(j) Order dated March 9, 2010, and identified in Paragraph 44. Plaintiff denies all allegations in Paragraph 44 that are not expressly stated in the Rule 40(j) Order identified in Paragraph 44.

45. In response to the allegations in Paragraph 45 of the Counterclaims, Plaintiff refers to the express provisions of the Order to Restore dated March 10, 2011, and identified in Paragraph 45. Plaintiff denies all allegations in Paragraph 40 that are not expressly stated in the Order to Restore identified in Paragraph 45.

46. In response to the allegations in Paragraph 46 of the Counterclaims, Plaintiff refers to the express provisions of the motion and proposed order identified in Paragraph 46. Plaintiff denies all allegations in Paragraph 46 that are not expressly stated in the motion and proposed order that are identified in Paragraph 46.

47. The allegations in Paragraph 47 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 47.

48. The allegations in Paragraph 48 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 48.

49. Plaintiff denies the allegations in Paragraph 49 of the Counterclaims.

50. In response to the allegations in Paragraph 50 of the Counterclaims, Plaintiff refers to the express provisions of the written discovery responses identified in Paragraph 50. Plaintiff denies all allegations in Paragraph 50 that are not expressly stated in the written discovery responses identified in Paragraph 50.

51. The allegations in Paragraph 51 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 51.

52. The allegations in Paragraph 52 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 52.

53. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 53 of the Counterclaims, and therefore, Plaintiff denies the allegations.

54. The allegations in Paragraph 54 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 54.

55. In response to the allegations in Paragraph 55 of the Counterclaims, Plaintiff refers to the express provisions of the answer of Curt Rogers and Julie Rogers, which is identified in Paragraph 55. Plaintiff denies all allegations in Paragraph 55 that are not expressly stated in the pleading identified in Paragraph 55.

56. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 56 of the Counterclaims, and therefore, Plaintiff denies the allegations.

57. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 57 of the Counterclaims, and therefore, Plaintiff denies the allegations.

58. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 58 of the Counterclaims, and therefore, Plaintiff denies the allegations.

59. In response to the allegations in Paragraph 59 of the Counterclaims, Plaintiff refers to the express provisions of the amended answer identified in Paragraph 59. Plaintiff denies all allegations in Paragraph 59 that are not expressly stated in the amended answer identified in Paragraph 59.

60. In response to the allegations in Paragraph 60 of the Counterclaims, Plaintiff refers to the express provisions of the motion and proposed order identified in Paragraph 60. Plaintiff denies all allegations in Paragraph 60 that are not expressly stated in the motion and proposed order that are identified in Paragraph 60.

61. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 61 of the Counterclaims, and therefore, Plaintiff denies the allegations.

62. In response to the allegations in Paragraph 62 of the Counterclaims, Plaintiff refers to the express provisions of the motion identified in Paragraph 62. Plaintiff denies all allegations in Paragraph 62 that are not expressly stated in the motion identified in Paragraph 62.

63. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 63 of the Counterclaims, and therefore, Plaintiff denies the allegations.

64. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 64 of the Counterclaims, and therefore, Plaintiff denies the allegations.

65. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 65 of the Counterclaims, and therefore, Plaintiff denies the allegations.

66. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 66 of the Counterclaims, and therefore, Plaintiff denies the allegations.

67. In response to the allegations in Paragraph 67 of the Counterclaims, Plaintiff refers to the express provisions of the written discovery responses identified in Paragraph 67. Plaintiff denies all allegations in Paragraph 63 that are not expressly stated in the discovery responses identified in Paragraph 67.

68. In response to the allegations in Paragraph 68 of the Counterclaims, Plaintiff refers to the express provisions of the written discovery responses identified in Paragraph 68. Plaintiff denies all allegations in Paragraph 68 that are not expressly stated in the discovery responses identified in Paragraph 68.

69. In response to the allegations in Paragraph 69 of the Counterclaims, Plaintiff refers to the express provisions of the motion identified in Paragraph 69. Plaintiff denies all allegations in Paragraph 69 that are not expressly stated motion identified in Paragraph 69.

70. In response to the allegations in Paragraph 70 of the Counterclaims, Plaintiff refers to the express provisions of the assignment of mortgage identified in Paragraph 70. Plaintiff denies all allegations in Paragraph 70 that are not expressly stated in the assignment of mortgage identified in Paragraph 70.

71. In response to the allegations in Paragraph 71 of the Counterclaims, Plaintiff refers to the express provisions of the Rule 40(j) Order identified in Paragraph 71. Plaintiff denies all allegations in Paragraph 71 that are not expressly stated in the Rule 40(j) Order identified in Paragraph 71.

72. In response to the allegations in Paragraph 72 of the Counterclaims, Plaintiff refers to the express provisions of the motion to restore identified in Paragraph 72. Plaintiff denies all allegations in Paragraph 72 that are not expressly stated in the motion to restore identified in Paragraph 72.

73. In response to the allegations in Paragraph 73 of the Counterclaims, Plaintiff refers to the express provisions of the court's docket for the civil action identified in Paragraph 73. Plaintiff denies all allegations in Paragraph 73 that are not expressly stated in the docket for the civil action identified in Paragraph 73.

74. In response to the allegations in Paragraph 74 of the Counterclaims, Plaintiff refers to the express provisions of the Rule 40(j) motion and order identified in Paragraph 74. Plaintiff denies all allegations in Paragraph 74 that are not expressly stated in the Rule 40(j) motion and order identified in Paragraph 74.

75. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 75 of the Counterclaims, and therefore, Plaintiff denies the allegations.

76. In response to the allegations in Paragraph 76, Plaintiff admits only that it filed this foreclosure action on August 27, 2019. Plaintiff denies all remaining allegations in Paragraph 76.

77. In response to the allegations in Paragraph 77, Plaintiff admits only that Nationstar is the principle contact for Plaintiff's counsel in this matter. Plaintiff denies the remaining allegations in Paragraph 77 of the Counterclaims.

78. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 78 of the Counterclaims, and therefore, Plaintiff denies the allegations.

FIRST COUNTERCLAIM
(Declaratory Judgment)

79. The allegations in Paragraph 79 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 79.

80. Plaintiff denies the allegations in Paragraph 80 of the Counterclaims.

81. Plaintiff denies the allegations in Paragraph 81 of the Counterclaims.

SECOND COUNTERCLAIM
(Negligent Misrepresentation)

82. In response to the allegations in Paragraph 82 of the Counterclaims, Plaintiff re-states and incorporates by reference here its prior responses to Paragraphs 25 through 81 of the Counterclaims.

83. Plaintiff denies the allegations in Paragraph 83 of the Counterclaims.

84. Plaintiff denies the allegations in Paragraph 84 of the Counterclaims.

85. Plaintiff denies the allegations in Paragraph 85 of the Counterclaims.

86. Plaintiff denies the allegations in Paragraph 86 of the Counterclaims.

87. Plaintiff denies the allegations in Paragraph 87 of the Counterclaims.

88. Plaintiff denies the allegations in Paragraph 88 of the Counterclaims.

THIRD COUNTERCLAIM
(Abuse of Process)

89. In response to the allegations in Paragraph 89 of the Counterclaims, Plaintiff re-states and incorporates by reference here its prior responses to Paragraphs 25 through 88 of the Counterclaims.

90. Plaintiff denies the allegations in Paragraph 90 of the Counterclaims.

91. Plaintiff denies the allegations in Paragraph 91 of the Counterclaims.

92. Plaintiff denies the allegations in Paragraph 92 of the Counterclaims.

93. Plaintiff denies the allegations in Paragraph 93 of the Counterclaims.

94. Plaintiff denies the allegations in Paragraph 94 of the Counterclaims.

95. Plaintiff denies the allegations in Paragraph 95 of the Counterclaims.

96. Plaintiff denies the allegations in Paragraph 96 of the Counterclaims.

97. Plaintiff denies the allegations in Paragraph 97 of the Counterclaims.

FOURTH COUNTERCLAIM
(Malicious Prosecution)

98. In response to the allegations in Paragraph 98 of the Counterclaims, Plaintiff re-states and incorporates by reference here its prior responses to Paragraphs 25 through 97 of the Counterclaims.

99. Plaintiff denies the allegations in Paragraph 99 of the Counterclaims.

100. Plaintiff denies the allegations in Paragraph 100 of the Counterclaims.

101. The allegations in Paragraph 101 of the Counterclaims states a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 101.

102. In response to the allegations in Paragraph 102 of the Counterclaims, Plaintiff refers to the text of S.C.R.C.P. 41. Plaintiff denies all allegations in Paragraph 102 that are not expressly stated in the provisions of S.C.R.C.P. 41.

103. In response to the allegations in Paragraph 103 of the Counterclaims, Plaintiff refers to the complaint associated with the civil actions identified in Paragraph 103. Plaintiff denies all

allegations in Paragraph 103 that are not expressly stated in the complaint associated with the civil actions identified in Paragraph 103.

104. Plaintiff denies the allegations in Paragraph 104 of the Counterclaims.

105. Plaintiff denies the allegations in Paragraph 105 of the Counterclaims.

106. Plaintiff denies the allegations in Paragraph 106 of the Counterclaims.

107. Plaintiff denies the allegations in Paragraph 107 of the Counterclaims.

108. Plaintiff denies the allegations in Paragraph 108 of the Counterclaims.

109. Plaintiff denies the allegations in Paragraph 109 of the Counterclaims.

110. Plaintiff denies the allegations in Paragraph 110 of the Counterclaims.

111. Plaintiff denies the allegations in Paragraph 111 of the Counterclaims.

112. Plaintiff denies the allegations in Paragraph 112 of the Counterclaims.

FIFTH COUNTERCLAIM
(Unfair Trade Practices)

113. In response to the allegations in Paragraph 113 of the Counterclaims, Plaintiff re-states and incorporates by reference here its prior responses to Paragraphs 25 through 112 of the Counterclaims.

114. Plaintiff denies the allegations in Paragraph 114 of the Counterclaims.

115. The allegations in Paragraph 115 state legal conclusions that do not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 115.

116. Plaintiff denies the allegations in Paragraph 116 of the Counterclaims.

117. Plaintiff denies the allegations in Paragraph 117 of the Counterclaims.

118. Plaintiff denies the allegations in Paragraph 118 of the Counterclaims.

119. Plaintiff denies the allegations in Paragraph 119 of the Counterclaims.

120. Plaintiff denies the allegations in Paragraph 120 of the Counterclaims.

121. Plaintiff denies the allegations in Paragraph 121 of the Counterclaims.

FOR A SECOND DEFENSE

122. Interveners' Counterclaims fail to state facts sufficient to constitute a cause of action against Plaintiff, and therefore, all of the Interveners' Counterclaims should be dismissed with prejudice pursuant to Rule 12(b)(6), S.C.R.C.P.

FOR A THIRD DEFENSE

123. Plaintiff would show that all counterclaims alleged are time barred under applicable statutes of limitation.

FOR A FOURTH DEFENSE

124. Plaintiff pleads the terms of the note and mortgage at issue in this action as complete bar to Interveners' Counterclaims.

FOR A FIFTH DEFENSE

125. Plaintiff would show that any purported action undertaken by it concerning the mortgage loan that is the subject to this action are expressly authorized by the terms of the mortgage loan documents at issue, and therefore, Interveners is precluded from alleging a claim under the South Carolina Unfair Trade Practices Act ("SCUTPA") for Interveners' alleged private dispute.

FOR A SIXTH DEFENSE

126. Plaintiff would show that it operates in a regulated industry and that any purported action undertaken by Plaintiff were taken in good faith, in reasonable manner, and that any such action or procedures were authorized by law, statute, or regulation, and therefore, Interveners are precluded from recovering from Plaintiff under the SCUTPA.

FOR A SEVENTH DEFENSE

127. Plaintiff would show that it is owed a sum of money that Intervener Curt Rogers promised to repay with interest under the mortgage loan documents at issue in this case, and therefore, Plaintiff is entitled to setoff or recoup any damages, which Plaintiff denies, against the outstanding balance that is owed to Plaintiff.

FOR AN EIGHTH DEFENSE

128. The American Rule bars Interveners' demand for attorney's fees and costs for any common law theories of liability alleged.

FOR A NINTH DEFENSE

129. The doctrines of estoppel, laches, and waiver bar all of Interveners' Counterclaims.

FOR A TENTH DEFENSE

130. Plaintiff would show that some or all of the Counterclaims alleged are barred by the statute of frauds.

FOR AN ELEVENTH DEFENSE

131. Plaintiff would show that Interveners' damages, which Plaintiff expressly denies, are the result of acts or omissions by third-parties over whom Plaintiff lacked authority to direct or control.

FOR A TWELFH DEFENSE

132. Plaintiff would show that Interveners' demand for damages is limited by applicable statutory caps.

RESERVATION OF DEFENSES

133. In addition to the affirmative defenses enumerated above, Plaintiff reserves the right to assert any additional defenses as may be warranted or as may be revealed by additional information received in discovery and/or to amend its Answer.

WHEREFORE, having fully answered or otherwise responded to the allegations set forth in Interveners' Counterclaims, Plaintiff respectfully requests:

- (1) Interveners' Counterclaims be dismissed in their entirety and with prejudice, with all costs taxed against Interveners; and
- (2) Plaintiff recover such other and additional relief as the Court deems just and appropriate.

DATED this 25th day of January, 2021.

Respectfully submitted,

McGUIREWOODS LLP

/s/ Brian A. Calub

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

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

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

Plaintiff,)

v.)

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

Defendants,)

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

Third-Party Plaintiff,)

v.)

Nationstar Mortgage LLC,)

Third-Party Defendant.)

CROSS-CLAIM DEFENDANT
NATIONSTAR MORTGAGE LLC'S ANSWER TO INTERVENERS' CROSS-CLAIMS

Nationstar Mortgage LLC ("Nationstar") hereby answers to the Cross-Claims alleged by Interveners Curtis Rogers and Julie Rogers ("Interveners"), denies any and all allegations in the Cross-Claims that are not expressly admitted herein, and states as follows:

FOR A FIRST DEFENSE

25. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 25 of the Cross-Claims, and therefore, Nationstar denies the allegations.

26. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 26 of the Cross-Claims, and therefore, Nationstar denies the allegations.

27. In response to the allegations in Paragraph 27 of the Cross-Claims, Nationstar refers to the express provisions of its Complaint. Nationstar denies all allegations in Paragraph 27 that are not expressly stated in its Complaint.

28. In response to the allegations in Paragraph 28 of the Cross-Claims, Nationstar refers to the express provisions of its Complaint. Nationstar denies all allegations in Paragraph 28 that are not expressly stated in its Complaint.

29. In response to the allegations in Paragraph 29 of the Cross-Claims, Nationstar refers to the express provisions of its Complaint. Nationstar denies all allegations in Paragraph 29 that are not expressly stated in its Complaint.

30. In response to the allegations in Paragraph 30 of the Cross-Claims, Nationstar refers to the express provisions of its Complaint and the complaint at issue in the civil actions identified in Paragraph 30. Nationstar denies all allegations in Paragraph 30 that are not expressly stated in its Complaint or the complaint associated with the other civil actions identified in Paragraph 30.

31. In response to the allegations in Paragraph 31 of the Cross-Claims, Nationstar refers to the express provisions of its Complaint and the complaint at issue in the civil actions identified in Paragraph 30. Nationstar denies all allegations in Paragraph 31 that are not expressly stated in its Complaint or the complaint associated with the other civil actions identified in Paragraph 31.

32. In response to the allegations in Paragraph 32 of the Cross-Claims, Nationstar refers to the express provisions of the note and mortgage identified in its Complaint and the note and mortgage identified in the complaint at issue in the civil actions identified in Paragraph 30 along with the Rule 40(j) Orders entered in the civil actions identified in the Paragraph 32. Nationstar denies all allegations in Paragraph 32 that are not expressly stated in note and mortgage identified in its Complaint, the note and mortgage identified complaint associated with the other civil actions identified in Paragraph 32, or the Rule 40(j) Orders that are also identified in Paragraph 32.

33. The allegations in Paragraph 33 of the Cross-Claims state a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 33.

34. The allegations in Paragraph 34 of the Cross-Claims state a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 34.

35. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 35 of the Cross-Claims regarding any communications between Defendants' counsel and any prior counsel of Nationstar, and therefore, Nationstar denies those allegations. Furthermore, Nationstar denies all of the other remaining allegation in Paragraph 35.

36. Nationstar denies the allegations in Paragraph 36 of the Cross-Claims.

37. Nationstar denies the allegations in Paragraph 37 of the Cross-Claims.

38. In response to the allegations in Paragraph 38 of the Cross-Claims, Nationstar admits only that loss mitigation negotiations with the Interveners were undertaken. Nationstar lacks sufficient information to know the truth of the remaining allegations in Paragraph 38 of the Cross-Claims, and therefore, Nationstar denies those allegations.

39. In response to the allegations in Paragraph 39 of the Cross-Claims, Nationstar refers to the express provisions of the complaint filed in the civil action and assignment of mortgage, which are both identified in Paragraph 39. Nationstar denies all allegations in Paragraph 39 that are not expressly stated in the complaint filed for the civil action and assignment of mortgage that are identified in Paragraph 39.

40. The allegations in Paragraph 40 of the Cross-Claims state a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 40.

41. The allegations in Paragraph 41 of the Cross-Claims state a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 41.

42. The allegations in Paragraph 42 of the Cross-Claims state a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 42.

43. Nationstar denies the allegations in Paragraph 43 of the Cross-Claims.

44. In response to the allegations in Paragraph 44 of the Cross-Claims, Nationstar refers to the express provisions of the Rule 40(j) Order dated March 9, 2010, and identified in Paragraph 44. Nationstar denies all allegations in Paragraph 44 that are not expressly stated in the Rule 40(j) Order identified in Paragraph 44.

45. In response to the allegations in Paragraph 45 of the Cross-Claims, Nationstar refers to the express provisions of the Order to Restore dated March 10, 2011, and identified in Paragraph 45. Nationstar denies all allegations in Paragraph 40 that are not expressly stated in the Order to Restore identified in Paragraph 45.

46. In response to the allegations in Paragraph 46 of the Cross-Claims, Nationstar refers to the express provisions of the motion and proposed order identified in Paragraph 46. Nationstar denies all allegations in Paragraph 46 that are not expressly stated in the motion and proposed order that are identified in Paragraph 46.

47. The allegations in Paragraph 47 of the Cross-Claims state a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 47.

48. The allegations in Paragraph 48 of the Cross-Claims state a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 48.

49. Nationstar denies the allegations in Paragraph 49 of the Cross-Claims.

50. In response to the allegations in Paragraph 50 of the Cross-Claims, Nationstar refers to the express provisions of the written discovery responses identified in Paragraph 50. Nationstar denies all allegations in Paragraph 50 that are not expressly stated in the written discovery responses identified in Paragraph 50.

51. The allegations in Paragraph 51 of the Cross-Claims state a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 51.

52. The allegations in Paragraph 52 of the Cross-Claims state a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 52.

53. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 53 of the Cross-Claims, and therefore, Nationstar denies the allegations.

54. The allegations in Paragraph 54 of the Cross-Claims state a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 54.

55. In response to the allegations in Paragraph 55 of the Cross-Claims, Nationstar refers to the express provisions of the answer of Curt Rogers and Julie Rogers, which is identified in Paragraph 55. Nationstar denies all allegations in Paragraph 55 that are not expressly stated in the pleading identified in Paragraph 55.

56. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 56 of the Cross-Claims, and therefore, Nationstar denies the allegations.

57. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 57 of the Cross-Claims, and therefore, Nationstar denies the allegations.

58. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 58 of the Cross-Claims, and therefore, Nationstar denies the allegations.

59. In response to the allegations in Paragraph 59 of the Cross-Claims, Nationstar refers to the express provisions of the amended answer identified in Paragraph 59. Nationstar denies all allegations in Paragraph 59 that are not expressly stated in the amended answer identified in Paragraph 59.

60. In response to the allegations in Paragraph 60 of the Cross-Claims, Nationstar refers to the express provisions of the motion and proposed order identified in Paragraph 60. Nationstar denies all allegations in Paragraph 60 that are not expressly stated in the motion and proposed order that are identified in Paragraph 60.

61. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 61 of the Cross-Claims, and therefore, Nationstar denies the allegations.

62. In response to the allegations in Paragraph 62 of the Cross-Claims, Nationstar refers to the express provisions of the motion identified in Paragraph 62. Nationstar denies all allegations in Paragraph 62 that are not expressly stated in the motion identified in Paragraph 62.

63. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 63 of the Cross-Claims, and therefore, Nationstar denies the allegations.

64. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 64 of the Cross-Claims, and therefore, Nationstar denies the allegations.

65. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 65 of the Cross-Claims, and therefore, Nationstar denies the allegations.

66. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 66 of the Cross-Claims, and therefore, Nationstar denies the allegations.

67. In response to the allegations in Paragraph 67 of the Cross-Claims, Nationstar refers to the express provisions of the written discovery responses identified in Paragraph 67. Nationstar denies all allegations in Paragraph 67 that are not expressly stated in the discovery responses identified in Paragraph 67.

68. In response to the allegations in Paragraph 68 of the Cross-Claims, Nationstar refers to the express provisions of the written discovery responses identified in Paragraph 68. Nationstar denies all allegations in Paragraph 68 that are not expressly stated in the discovery responses identified in Paragraph 68.

69. In response to the allegations in Paragraph 69 of the Cross-Claims, Nationstar refers to the express provisions of the motion identified in Paragraph 69. Nationstar denies all allegations in Paragraph 69 that are not expressly stated motion identified in Paragraph 69.

70. In response to the allegations in Paragraph 70 of the Cross-Claims, Nationstar refers to the express provisions of the assignment of mortgage identified in Paragraph 70. Nationstar denies all allegations in Paragraph 70 that are not expressly stated in the assignment of mortgage identified in Paragraph 70.

71. In response to the allegations in Paragraph 71 of the Cross-Claims, Nationstar refers to the express provisions of the Rule 40(j) Order identified in Paragraph 71. Nationstar denies all allegations in Paragraph 71 that are not expressly stated in the Rule 40(j) Order identified in Paragraph 71.

72. In response to the allegations in Paragraph 72 of the Cross-Claims, Nationstar refers to the express provisions of the motion to restore identified in Paragraph 72. Nationstar denies all allegations in Paragraph 72 that are not expressly stated in the motion to restore identified in Paragraph 72.

73. In response to the allegations in Paragraph 73 of the Cross-Claims, Nationstar refers to the express provisions of the court's docket for the civil action identified in Paragraph 73. Nationstar denies all allegations in Paragraph 73 that are not expressly stated in the docket for the civil action identified in Paragraph 73.

74. In response to the allegations in Paragraph 74 of the Cross-Claims, Nationstar refers to the express provisions of the Rule 40(j) motion and order identified in Paragraph 74. Nationstar denies all allegations in Paragraph 74 that are not expressly stated in the Rule 40(j) motion and order identified in Paragraph 74.

75. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 75 of the Cross-Claims, and therefore, Nationstar denies the allegations.

76. In response to the allegations in Paragraph 76, Nationstar admits only that Plaintiff's foreclosure action was filed on August 27, 2019. Nationstar denies all remaining allegations in Paragraph 76.

77. In response to the allegations in Paragraph 77, Nationstar admits only that Nationstar is the principle contact for Nationstar's counsel in this matter. Nationstar denies the remaining allegations in Paragraph 77 of the Cross-Claims.

78. In response to the allegations in Paragraph 78 of the Cross-Claims, Nationstar admits only that it is incorporated in Delaware, maintains a principal place of business in Texas, and transacts business in South Carolina via the servicing of loans. Nationstar denies all remaining allegations in Paragraph 78.

FIRST CROSS-CLAIM
(Declaratory Judgment)

79. The allegations in Paragraph 79 of the Cross-Claims states a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 79.

80. Nationstar denies the allegations in Paragraph 80 of the Cross-Claims.

81. Nationstar denies the allegations in Paragraph 81 of the Cross-Claims.

SECOND CROSS-CLAIM
(Negligent Misrepresentation)

82. In response to the allegations in Paragraph 82 of the Cross-Claims, Nationstar re-states and incorporates by reference here its prior responses to Paragraphs 25 through 81 of the Cross-Claims.

83. Nationstar denies the allegations in Paragraph 83 of the Cross-Claims.

84. Nationstar denies the allegations in Paragraph 84 of the Cross-Claims.

- 85. Nationstar denies the allegations in Paragraph 85 of the Cross-Claims.
- 86. Nationstar denies the allegations in Paragraph 86 of the Cross-Claims.
- 87. Nationstar denies the allegations in Paragraph 87 of the Cross-Claims.
- 88. Nationstar denies the allegations in Paragraph 88 of the Cross-Claims.

THIRD CROSS-CLAIM
(Abuse of Process)

89. In response to the allegations in Paragraph 89 of the Cross-Claims, Nationstar re-states and incorporates by reference here its prior responses to Paragraphs 25 through 88 of the Cross-Claims.

- 90. Nationstar denies the allegations in Paragraph 90 of the Cross-Claims.
- 91. Nationstar denies the allegations in Paragraph 91 of the Cross-Claims.
- 92. Nationstar denies the allegations in Paragraph 92 of the Cross-Claims.
- 93. Nationstar denies the allegations in Paragraph 93 of the Cross-Claims.
- 94. Nationstar denies the allegations in Paragraph 94 of the Cross-Claims.
- 95. Nationstar denies the allegations in Paragraph 95 of the Cross-Claims.
- 96. Nationstar denies the allegations in Paragraph 96 of the Cross-Claims.
- 97. Nationstar denies the allegations in Paragraph 97 of the Cross-Claims.

FOURTH CROSS-CLAIM
(Malicious Prosecution)

98. In response to the allegations in Paragraph 98 of the Cross-Claims, Nationstar re-states and incorporates by reference here its prior responses to Paragraphs 25 through 97 of the Cross-Claims.

- 99. Nationstar denies the allegations in Paragraph 99 of the Cross-Claims.
- 100. Nationstar denies the allegations in Paragraph 100 of the Cross-Claims.

101. The allegations in Paragraph 101 of the Cross-Claims states a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 101.

102. In response to the allegations in Paragraph 102 of the Cross-Claims, Nationstar refers to the text of S.C.R.C.P. 41. Nationstar denies all allegations in Paragraph 102 that are not expressly stated in the provisions of S.C.R.C.P. 41.

103. In response to the allegations in Paragraph 103 of the Cross-Claims, Nationstar refers to the complaint associated with the civil actions identified in Paragraph 103. Nationstar denies all allegations in Paragraph 103 that are not expressly stated in the complaint associated with the civil actions identified in Paragraph 103.

104. Nationstar denies the allegations in Paragraph 104 of the Cross-Claims.

105. Nationstar denies the allegations in Paragraph 105 of the Cross-Claims.

106. Nationstar denies the allegations in Paragraph 106 of the Cross-Claims.

107. Nationstar denies the allegations in Paragraph 107 of the Cross-Claims.

108. Nationstar denies the allegations in Paragraph 108 of the Cross-Claims.

109. Nationstar denies the allegations in Paragraph 109 of the Cross-Claims.

110. Nationstar denies the allegations in Paragraph 110 of the Cross-Claims.

111. Nationstar denies the allegations in Paragraph 111 of the Cross-Claims.

112. Nationstar denies the allegations in Paragraph 112 of the Cross-Claims.

FIFTH CROSS-CLAIM
(Unfair Trade Practices)

113. In response to the allegations in Paragraph 113 of the Cross-Claims, Nationstar re-states and incorporates by reference here its prior responses to Paragraphs 25 through 112 of the Cross-Claims.

114. Nationstar denies the allegations in Paragraph 114 of the Cross-Claims.

115. The allegations in Paragraph 115 state legal conclusions that do not require a response. If a response is required, Nationstar denies the allegations in Paragraph 115.

116. Nationstar denies the allegations in Paragraph 116 of the Cross-Claims.

117. Nationstar denies the allegations in Paragraph 117 of the Cross-Claims.

118. Nationstar denies the allegations in Paragraph 118 of the Cross-Claims.

119. Nationstar denies the allegations in Paragraph 119 of the Cross-Claims.

120. Nationstar denies the allegations in Paragraph 120 of the Cross-Claims.

121. Nationstar denies the allegations in Paragraph 121 of the Cross-Claims.

FOR A SECOND DEFENSE

122. Inteveners' Cross-Claims fail to state facts sufficient to constitute a cause of action against Nationstar, and therefore, all of the Interveners' Cross-Claims should be dismissed with prejudice pursuant to Rule 12(b)(6), S.C.R.C.P.

FOR A THIRD DEFENSE

123. Nationstar would show that all Cross-Claims alleged are time barred under applicable statutes of limitation.

FOR A FOURTH DEFENSE

124. Nationstar pleads the terms of the note and mortgage at issue in this action as a complete bar to Interveners' Cross-Claims.

FOR A FIFTH DEFENSE

125. Nationstar would show that any purported action undertaken by it concerning the mortgage loan that is the subject to this action are expressly authorized by the terms of the mortgage loan documents at issue, and therefore, Interveners' are precluded from alleging a claim

under the South Carolina Unfair Trade Practices Act (“SCUTPA”) for Interveners’ alleged private dispute.

FOR A SIXTH DEFENSE

126. Nationstar would show that it operates in a regulated industry and that any purported action undertaken by Nationstar were taken in good faith, in reasonable manner, and that any such action or procedures were authorized by law, statute, or regulation, and therefore, Interveners’ are precluded from recovering from Nationstar under the SCUTPA.

FOR A SEVENTH DEFENSE

127. Nationstar would show that it is owed a sum of money that Intervener Curt Rogers promised to repay with interest under the mortgage loan documents at issue in this case, and therefore, Nationstar is entitled to setoff or recoup any damages, which Nationstar denies, against the outstanding balance that is owed to Nationstar.

FOR AN EIGHTH DEFENSE

128. The American Rule bars Interveners’ demand for attorney’s fees and costs for any common law theories of liability alleged.

FOR A NINTH DEFENSE

129. The doctrines of estoppel, laches, and waiver bar all of Interveners’ Cross-Claims.

FOR A TENTH DEFENSE

130. Nationstar would show that some or all of the Cross-Claims alleged are barred by the statute of frauds.

FOR AN ELEVENTH DEFENSE

131. Nationstar would show that Interveners' damages, which Nationstar expressly denies, are the result of acts or omissions by third-parties over whom Nationstar lacked authority to direct or control.

FOR A TWELFH DEFENSE

132. Nationstar would show that Interveners' demand for damages is limited by applicable statutory caps.

RESERVATION OF DEFENSES

133. In addition to the affirmative defenses enumerated above, Nationstar reserves the right to assert any additional defenses as may be warranted or as may be revealed by additional information received in discovery and/or to amend its Answer.

WHEREFORE, having fully answered or otherwise responded to the allegations set forth in Interveners' Cross-Claims, Nationstar respectfully requests:

- (1) Interveners' Cross-Claims be dismissed in their entirety and with prejudice, with all costs taxed against Interveners; and
- (2) Nationstar recover such other and additional relief as the Court deems just and appropriate.

DATED this 25th day of January, 2021.

Respectfully submitted,

McGUIREWOODS LLP

/s/ Brian A. Calub

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*Attorney for Cross-Claim Defendant
Nationstar Mortgage LLC*

CERTIFICATE OF SERVICE

I certify that on January 25, 2021, I electronically filed the foregoing pleading with the Clerk of the Court using the CM/ECF system, which will serve all counsel of record.

/s/ Brian A. Calub

Brian A. Calub

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL DISTRICT
	)	
Deutsche Bank Trust Company	)	Civil Action No. 2019-CP-10-04503
Americas, as Trustee for Residential	)	
Accredit Loans, Inc., Pass-Through	)	
Certificates 2007-QH2,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Ashley Johnson Beshera as Trustee of the	)	
Revocable Trust Agreement for 2235	)	
Shoreline Drive originally dated 3 rd day	)	
of March 2010; et al.,	)	
	)	
Defendants.	)	
	)	
	)	

**PLAINTIFF'S REPLY TO
DEFENDANT BESHARA'S COUNTERCLAIMS**

Plaintiff Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2 ("Plaintiff") hereby replies to the Counterclaims alleged by Defendant Ashley Johnson Beshera as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd day of March 2010 ("Defendant"), denies any and all allegations in the Counterclaims that are not expressly admitted herein, and states as follows:

FOR A FIRST DEFENSE

29. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 29 of the Counterclaims, and therefore, Plaintiff denies the allegations.

30. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 30 of the Counterclaims, and therefore, Plaintiff denies the allegations.

31. Plaintiff denies the allegations in Paragraph 31 of the Counterclaims.

32. In response to the allegations in Paragraph 32 of the Counterclaims, Plaintiff refers to the express provisions of its Complaint. Plaintiff denies all allegations in Paragraph 32 that are not expressly stated in its Complaint.

33. Plaintiff denies the allegations in Paragraph 33 of the Counterclaims.

34. In response to the allegations in Paragraph 34 of the Counterclaims, Plaintiff admits only that loss mitigation negotiations with mortgagors, Curt Rogers and Julie Rogers, were undertaken. Plaintiff lacks sufficient information to know the truth of the remaining allegations in Paragraph 34 of the Counterclaims, and therefore, Plaintiff denies those allegations.

35. In response to the allegations in Paragraph 35 of the Counterclaims, Plaintiff refers to the express provisions of the complaint filed in civil action 2009-CP-10-5480 with the Charleston County Circuit Court. Plaintiff denies all allegations in Paragraph 35 that are not expressly stated in the complaint filed with the Court for civil action no. 2009-CP-10-5480.

36. The allegations in Paragraph 36 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 36.

37. The allegations in Paragraph 37 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 37.

38. The allegations in Paragraph 38 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 38.

39. Plaintiff denies the allegations in Paragraph 39 of the Counterclaims.

40. In response to the allegations in Paragraph 40 of the Counterclaims, Plaintiff refers to the express provisions of the Rule 40(j) Order dated March 9, 2010, and identified in Paragraph 40. Plaintiff denies all allegations in Paragraph 40 that are not expressly stated in the Rule 40(j) Order identified in Paragraph 40.

41. In response to the allegations in Paragraph 41 of the Counterclaims, Plaintiff refers to the express provisions of the Order to Restore dated March 10, 2011, and identified in Paragraph 41. Plaintiff denies all allegations in Paragraph 40 that are not expressly stated in the Order to Restore identified in Paragraph 41.

42. In response to the allegations in Paragraph 42 of the Counterclaims, Plaintiff refers to the express provisions of the motion and proposed order identified in Paragraph 42. Plaintiff denies all allegations in Paragraph 42 that are not expressly stated in the motion and proposed order identified in Paragraph 42.

43. The allegations in Paragraph 43 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 43.

44. The allegations in Paragraph 44 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 44.

45. Plaintiff denies the allegations in Paragraph 45 of the Counterclaims.

46. In response to the allegations in Paragraph 46 of the Counterclaims, Plaintiff refers to the express provisions of the written discovery responses identified in Paragraph 46. Plaintiff denies all allegations in Paragraph 46 that are not expressly stated in the written discovery responses identified in Paragraph 46.

47. The allegations in Paragraph 47 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 47.

48. The allegations in Paragraph 48 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 48.

49. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 49 of the Counterclaims, and therefore, Plaintiff denies the allegations.

50. The allegations in Paragraph 50 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 50.

51. In response to the allegations in Paragraph 51 of the Counterclaims, Plaintiff refers to the express provisions of the answer of Curt Rogers and Julie Rogers, which is identified in Paragraph 51. Plaintiff denies all allegations in Paragraph 51 that are not expressly stated in the answer identified in Paragraph 51.

52. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 52 of the Counterclaims, and therefore, Plaintiff denies the allegations.

53. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 53 of the Counterclaims, and therefore, Plaintiff denies the allegations.

54. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 54 of the Counterclaims, and therefore, Plaintiff denies the allegations.

55. In response to the allegations in Paragraph 55 of the Counterclaims, Plaintiff refers to the express provisions of the amended answer identified in Paragraph 55. Plaintiff denies all

allegations in Paragraph 55 that are not expressly stated in the amended answer identified in Paragraph 55.

56. In response to the allegations in Paragraph 56 of the Counterclaims, Plaintiff refers to the express provisions of the motion and proposed order identified in Paragraph 56. Plaintiff denies all allegations in Paragraph 56 that are not expressly stated in the motion and proposed order identified in Paragraph 56.

57. The allegations in Paragraph 57 of the Counterclaims state a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 57.

58. In response to the allegations in Paragraph 58 of the Counterclaims, Plaintiff refers to the express provisions of the motion identified in Paragraph 58. Plaintiff denies all allegations in Paragraph 58 that are not expressly stated in the motion identified in Paragraph 58.

59. In response to the allegations in Paragraph 59 of the Counterclaims, Plaintiff refers to the express provisions of the written discovery responses and production identified in Paragraph 59. Plaintiff denies all allegations in Paragraph 59 that are not expressly stated in the discovery responses or production identified in Paragraph 59.

60. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 60 of the Counterclaims, and therefore, Plaintiff denies the allegations.

61. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 61 of the Counterclaims, and therefore, Plaintiff denies the allegations.

62. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 62 of the Counterclaims, and therefore, Plaintiff denies the allegations.

63. In response to the allegations in Paragraph 63 of the Counterclaims, Plaintiff refers to the express provisions of the written discovery responses identified in Paragraph 63. Plaintiff denies all allegations in Paragraph 63 that are not expressly stated in the discovery responses identified in Paragraph 63.

64. In response to the allegations in Paragraph 64 of the Counterclaims, Plaintiff refers to the express provisions of the written discovery responses identified in Paragraph 64. Plaintiff denies all allegations in Paragraph 64 that are not expressly stated in the discovery responses identified in Paragraph 64.

65. In response to the allegations in Paragraph 65 of the Counterclaims, Plaintiff refers to the express provisions of the motion identified in Paragraph 65. Plaintiff denies all allegations in Paragraph 65 that are not expressly stated motion identified in Paragraph 65.

66. In response to the allegations in Paragraph 66 of the Counterclaims, Plaintiff refers to the express provisions of the assignment of mortgage identified in Paragraph 66. Plaintiff denies all allegations in Paragraph 66 that are not expressly stated in the assignment of mortgage identified in Paragraph 66.

67. In response to the allegations in Paragraph 67 of the Counterclaims, Plaintiff refers to the express provisions of the Rule 40(j) Order identified in Paragraph 67. Plaintiff denies all allegations in Paragraph 67 that are not expressly stated in the Rule 40(j) Order identified in Paragraph 67.

68. In response to the allegations in Paragraph 68 of the Counterclaims, Plaintiff refers to the express provisions of the motion to restore identified in Paragraph 68. Plaintiff denies all allegations in Paragraph 68 that are not expressly stated in the motion to restore identified in Paragraph 68.

69. In response to the allegations in Paragraph 69 of the Counterclaims, Plaintiff refers to the express provisions of the court's docket for the civil action identified in Paragraph 69. Plaintiff denies all allegations in Paragraph 69 that are not expressly stated in the docket for the civil action identified in Paragraph 69.

70. In response to the allegations in Paragraph 70 of the Counterclaims, Plaintiff refers to the express provisions of the Rule 40(j) motion and order identified in Paragraph 70. Plaintiff denies all allegations in Paragraph 70 that are not expressly stated in the Rule 40(j) motion and order identified in Paragraph 70.

71. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 71 of the Counterclaims, and therefore, Plaintiff denies the allegations.

72. In response to the allegations in Paragraph 72, Plaintiff admits only that it filed this foreclosure action against Defendant on August 27, 2019. Plaintiff denies all remaining allegations in Paragraph 72.

73. Plaintiff denies the allegations in Paragraph 73 of the Counterclaims.

74. In response to the allegations in Paragraph 74, Plaintiff admits only that Nationstar is the principle contact for Plaintiff's counsel in this matter. Plaintiff denies the remaining allegations in Paragraph 74 of the Counterclaims.

75. Plaintiff lacks sufficient information to know the truth of the allegations in Paragraph 75 of the Counterclaims, and therefore, Plaintiff denies the allegations.

FIRST COUNTERCLAIM
(Accounting)

76. In response to the allegations in Paragraph 76 of the Counterclaims, Plaintiff re-states and incorporates by reference here its prior responses to Paragraphs 29 through 75 of the Counterclaims.

77. Plaintiff denies the allegations in Paragraph 77 of the Counterclaims.

SECOND COUNTERCLAIM
(Negligent Misrepresentation)

78. In response to the allegations in Paragraph 78 of the Counterclaims, Plaintiff re-states and incorporates by reference here its prior responses to Paragraphs 29 through 77 of the Counterclaims.

79. Plaintiff denies the allegations in Paragraph 79 of the Counterclaims.

80. Plaintiff denies the allegations in Paragraph 80 of the Counterclaims.

81. Plaintiff denies the allegations in Paragraph 81 of the Counterclaims.

82. Plaintiff denies the allegations in Paragraph 82 of the Counterclaims.

83. Plaintiff denies the allegations in Paragraph 83 of the Counterclaims.

84. Plaintiff denies the allegations in Paragraph 84 of the Counterclaims.

THIRD COUNTERCLAIM
(Abuse of Process)

85. In response to the allegations in Paragraph 85 of the Counterclaims, Plaintiff re-states and incorporates by reference here its prior responses to Paragraphs 29 through 84 of the Counterclaims.

86. Plaintiff denies the allegations in Paragraph 86 of the Counterclaims.

87. Plaintiff denies the allegations in Paragraph 87 of the Counterclaims.

88. Plaintiff denies the allegations in Paragraph 88 of the Counterclaims.

89. Plaintiff denies the allegations in Paragraph 89 of the Counterclaims.

90. Plaintiff denies the allegations in Paragraph 90 of the Counterclaims.

91. Plaintiff denies the allegations in Paragraph 91 of the Counterclaims.

92. Plaintiff denies the allegations in Paragraph 92 of the Counterclaims.

93. Plaintiff denies the allegations in Paragraph 93 of the Counterclaims.

FOURTH COUNTERCLAIM
(Malicious Prosecution)

94. In response to the allegations in Paragraph 94 of the Counterclaims, Plaintiff re-states and incorporates by reference here its prior responses to Paragraphs 29 through 93 of the Counterclaims.

95. Plaintiff denies the allegations in Paragraph 95 of the Counterclaims.

96. Plaintiff denies the allegations in Paragraph 96 of the Counterclaims.

97. The allegations in Paragraph 97 of the Counterclaims states a legal conclusion that does not require a response. If a response is required, Plaintiff denies the allegations.

98. In response to the allegations in Paragraph 98 of the Counterclaims, Plaintiff refers to the text of S.C.R.C.P. 41. Plaintiff denies all allegations in Paragraph 98 that are not expressly stated in the provisions of S.C.R.C.P. 41.

99. In response to the allegations in Paragraph 99 of the Counterclaims, Plaintiff refers to the complaint associated with the civil actions identified in Paragraph 99. Plaintiff denies all allegations in Paragraph 99 that are not expressly stated in the complaints associated with the civil actions identified in Paragraph 99.

100. Plaintiff denies the allegations in Paragraph 100 of the Counterclaims.

101. Plaintiff denies the allegations in Paragraph 101 of the Counterclaims.

102. Plaintiff denies the allegations in Paragraph 102 of the Counterclaims.

103. Plaintiff denies the allegations in Paragraph 103 of the Counterclaims.

104. Plaintiff denies the allegations in Paragraph 104 of the Counterclaims.

105. Plaintiff denies the allegations in Paragraph 105 of the Counterclaims.

106. Plaintiff denies the allegations in Paragraph 106 of the Counterclaims.

107. Plaintiff denies the allegations in Paragraph 107 of the Counterclaims.

108. Plaintiff denies the allegations in Paragraph 108 of the Counterclaims.

FIFTH COUNTERCLAIM
(Unfair Trade Practices)

109. In response to the allegations in Paragraph 109 of the Counterclaims, Plaintiff re-states and incorporates by reference here its prior responses to Paragraphs 29 through 108 of the Counterclaims.

110. Plaintiff denies the allegations in Paragraph 110 of the Counterclaims.

111. The allegations in Paragraph 111 state legal conclusions that do not require a response. If a response is required, Plaintiff denies the allegations in Paragraph 111 of the Counterclaims.

112. Plaintiff denies the allegations in Paragraph 112 of the Counterclaims.

113. Plaintiff denies the allegations in Paragraph 113 of the Counterclaims.

114. Plaintiff denies the allegations in Paragraph 114 of the Counterclaims.

115. Plaintiff denies the allegations in Paragraph 115 of the Counterclaims.

116. Plaintiff denies the allegations in Paragraph 116 of the Counterclaims.

117. Plaintiff denies the allegations in Paragraph 117 of the Counterclaims.

SIXTH COUNTERCLAIM
(Declaratory Injunctive Relief)

118. In response to the allegations in Paragraph 118 of the Counterclaims, Plaintiff re-states and incorporates by reference here its prior responses to Paragraphs 29 through 117 of the Counterclaims.

119. Plaintiff denies the allegations in Paragraph 119 of the Counterclaims.

120. Plaintiff denies the allegations in Paragraph 120 of the Counterclaims.

121. In response to the unnumbered Paragraph in the Counterclaims beginning with “WHEREFORE,” Plaintiff denies that Defendant is entitled to any of the relief alleged therein.

FOR A SECOND DEFENSE

122. Defendant’s counterclaims fail to state facts sufficient to constitute a cause of action against Plaintiff, and therefore, all of the Defendant’s counterclaims should be dismissed with prejudice pursuant to Rule 12(b)(6), S.C.R.C.P.

FOR A THIRD DEFENSE

123. Plaintiff would show that all counterclaims alleged are time barred under applicable statutes of limitation.

FOR A FOURTH DEFENSE

124. Plaintiff pleads the terms of the note and mortgage at issue in this action as complete bar to Defendant’s Counterclaims.

FOR A FIFTH DEFENSE

125. Plaintiff would show that any purported action undertaken by it concerning the mortgage loan that is the subject to this action are expressly authorized by the terms of the mortgage loan documents at issue, and therefore, Defendant is precluded from alleging a claim under the South Carolina Unfair Trade Practices Act (“SCUTPA”) for Defendant’s alleged private dispute.

FOR A SIXTH DEFENSE

126. Plaintiff would show that it operates in a regulated industry and that any purported action undertaken by Plaintiff were taken in good faith, in reasonable manner, and that any such action or procedures were authorized by law, statute, or regulation, and therefore, Defendant is precluded from recovering from Plaintiff under the SCUTPA.

FOR A SEVENTH DEFENSE

127. Plaintiff would show that it is owed a sum of money that Intervenor Curt Rogers promised to repay with interest under the mortgage loan documents at issue in this case, and therefore, Plaintiff is entitled to setoff or recoup any damages, which Plaintiff denies, against the outstanding balance that is owed to Plaintiff.

FOR AN EIGHTH DEFENSE

128. The American Rule bars Defendant's demand for attorney's fees and costs for any common law theories of liability alleged.

FOR A NINTH DEFENSE

129. The doctrines of estoppel, laches, and waiver bar all of Defendant's counterclaims.

FOR A TENTH DEFENSE

130. Plaintiff would show that some or all of the Counterclaims alleged are barred by the statute of frauds.

FOR AN ELEVENTH DEFENSE

131. Plaintiff would show that Defendant's damages, which Plaintiff expressly denies, are the result of acts or omissions by third-parties over whom Plaintiff lacked authority to direct or control.

FOR A TWELFH DEFENSE

132. Plaintiff would show that Defendant's demand for damages is limited by applicable statutory caps.

RESERVATION OF DEFENSES

133. In addition to the affirmative defenses enumerated above, Plaintiff reserves the right to assert any additional defenses as may be warranted or as may be revealed by additional information received in discovery and/or to amend its Answer.

WHEREFORE, having fully answered or otherwise responded to the allegations set forth in Defendant's Counterclaims, Plaintiff respectfully requests:

- (1) Defendant's Counterclaims be dismissed in their entirety and with prejudice, with all costs taxed against Defendant; and
- (2) Plaintiff recover such other and additional relief as the Court deems just and appropriate.

DATED this 25th day of January, 2021.

Respectfully submitted,

McGUIREWOODS LLP

/s/ Brian A. Calub

Brian A. Calub (S.C. Bar No. 72009)
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*Attorney for Plaintiff Deutsche Bank Trust Company
Americas, as Trustee for Residential Accredit
Loans, Inc., Pass-Through Certificates 2007-QH2*

CERTIFICATE OF SERVICE

I certify that on January 25, 2021, I electronically filed the foregoing pleading with the Clerk of the Court using the CM/ECF system, which will serve all counsel of record.

/s/ Brian A. Calub

Brian A. Calub

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

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

Plaintiff,)

v.)

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

Defendants,)

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

Third-Party Plaintiff,)

v.)

Nationstar Mortgage LLC,)

Third-Party Defendant.)

**THIRD-PARTY DEFENDANT NATIONSTAR MORTGAGE LLC'S
ANSWER TO THIRD-PARTY PLAINTIFF' S THIRD-PARTY COMPLAINT**

Third-Party Defendant Nationstar Mortgage LLC ("Nationstar") hereby answers the Third-Party Complaint filed by Third-Party Plaintiff Ashley Johnson Beshera as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd day of March 2010 ("Third-Party

Plaintiff”), denies any and all allegations in the Third-Party Complaint that are not expressly admitted herein, and states as follows:

FOR A FIRST DEFENSE

29. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 29 of the Third-Party Complaint, and therefore, Nationstar denies the allegations.

30. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 30 of the Third-Party Complaint, and therefore, Nationstar denies the allegations.

31. Nationstar denies the allegations in Paragraph 31 of the Third-Party Complaint.

32. In response to the allegations in Paragraph 32 of the Third-Party Complaint, Nationstar refers to the express provisions of its Complaint. Nationstar denies all allegations in Paragraph 32 that are not expressly stated in its Complaint.

33. Nationstar denies the allegations in Paragraph 33 of the Third-Party Complaint.

34. In response to the allegations in Paragraph 34 of the Third-Party Complaint, Nationstar admits only that loss mitigation negotiations with mortgagors, Curt Rogers and Julie Rogers, were undertaken. Nationstar lacks sufficient information to know the truth of the remaining allegations in Paragraph 34 of the Third-Party Complaint, and therefore, Nationstar denies those allegations.

35. In response to the allegations in Paragraph 35 of the Third-Party Complaint, Nationstar refers to the express provisions of the complaint filed in civil action 2009-CP-10-5480 with the Charleston County Circuit Court. Nationstar denies all allegations in Paragraph 35 that are not expressly stated in the complaint filed with the Court for civil action no. 2009-CP-10-5480.

36. The allegations in Paragraph 36 of the Third-Party Complaint state a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 36.

37. The allegations in Paragraph 37 of the Third-Party Complaint state a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 37.

38. The allegations in Paragraph 38 of the Third-Party Complaint state a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 38.

39. Nationstar denies the allegations in Paragraph 39 of the Third-Party Complaint.

40. In response to the allegations in Paragraph 40 of the Third-Party Complaint, Nationstar refers to the express provisions of the Rule 40(j) Order dated March 9, 2010, and identified in Paragraph 40. Nationstar denies all allegations in Paragraph 40 that are not expressly stated in the Rule 40(j) Order identified in Paragraph 40.

41. In response to the allegations in Paragraph 41 of the Third-Party Complaint, Nationstar refers to the express provisions of the Order to Restore dated March 10, 2011, and identified in Paragraph 41. Nationstar denies all allegations in Paragraph 40 that are not expressly stated in the Order to Restore identified in Paragraph 41.

42. In response to the allegations in Paragraph 42 of the Third-Party Complaint, Nationstar refers to the express provisions of the motion and proposed order identified in Paragraph 42. Nationstar denies all allegations in Paragraph 42 that are not expressly stated in the motion and proposed order identified in Paragraph 42.

43. The allegations in Paragraph 43 of the Third-Party Complaint state a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 43.

44. The allegations in Paragraph 44 of the Third-Party Complaint state a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 44.

45. Nationstar denies the allegations in Paragraph 45 of the Third-Party Complaint.

46. In response to the allegations in Paragraph 46 of the Third-Party Complaint, Nationstar refers to the express provisions of the written discovery responses identified in Paragraph 46. Nationstar denies all allegations in Paragraph 46 that are not expressly stated in the written discovery responses identified in Paragraph 46.

47. The allegations in Paragraph 47 of the Third-Party Complaint state a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 47.

48. The allegations in Paragraph 48 of the Third-Party Complaint state a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 48.

49. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 49 of the Third-Party Complaint, and therefore, Nationstar denies the allegations.

50. The allegations in Paragraph 50 of the Third-Party Complaint state a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 50.

51. In response to the allegations in Paragraph 51 of the Third-Party Complaint, Nationstar refers to the express provisions of the answer of Curt Rogers and Julie Rogers, which is identified in Paragraph 51. Nationstar denies all allegations in Paragraph 51 that are not expressly stated in the answer identified in Paragraph 51.

52. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 52 of the Third-Party Complaint, and therefore, Nationstar denies the allegations.

53. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 53 of the Third-Party Complaint, and therefore, Nationstar denies the allegations.

54. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 54 of the Third-Party Complaint, and therefore, Nationstar denies the allegations.

55. In response to the allegations in Paragraph 55 of the Third-Party Complaint, Nationstar refers to the express provisions of the amended answer identified in Paragraph 55. Nationstar denies all allegations in Paragraph 55 that are not expressly stated in the amended answer identified in Paragraph 55.

56. In response to the allegations in Paragraph 56 of the Third-Party Complaint, Nationstar refers to the express provisions of the motion and proposed order identified in Paragraph 56. Nationstar denies all allegations in Paragraph 56 that are not expressly stated in the motion and proposed order identified in Paragraph 56.

57. The allegations in Paragraph 57 of the Third-Party Complaint state a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations in Paragraph 57.

58. In response to the allegations in Paragraph 58 of the Third-Party Complaint, Nationstar refers to the express provisions of the motion identified in Paragraph 58. Nationstar

denies all allegations in Paragraph 58 that are not expressly stated in the motion identified in Paragraph 58.

59. In response to the allegations in Paragraph 59 of the Third-Party Complaint, Nationstar refers to the express provisions of the written discovery responses and production identified in Paragraph 59. Nationstar denies all allegations in Paragraph 59 that are not expressly stated in the discovery responses or production identified in Paragraph 59.

60. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 60 of the Third-Party Complaint, and therefore, Nationstar denies the allegations.

61. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 61 of the Third-Party Complaint, and therefore, Nationstar denies the allegations.

62. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 62 of the Third-Party Complaint, and therefore, Nationstar denies the allegations.

63. In response to the allegations in Paragraph 63 of the Third-Party Complaint, Nationstar refers to the express provisions of the written discovery responses identified in Paragraph 63. Nationstar denies all allegations in Paragraph 63 that are not expressly stated in the discovery responses identified in Paragraph 63.

64. In response to the allegations in Paragraph 64 of the Third-Party Complaint, Nationstar refers to the express provisions of the written discovery responses identified in Paragraph 64. Nationstar denies all allegations in Paragraph 64 that are not expressly stated in the discovery responses identified in Paragraph 64.

65. In response to the allegations in Paragraph 65 of the Third-Party Complaint, Nationstar refers to the express provisions of the motion identified in Paragraph 65. Nationstar

denies all allegations in Paragraph 65 that are not expressly stated motion identified in Paragraph 65.

66. In response to the allegations in Paragraph 66 of the Third-Party Complaint, Nationstar refers to the express provisions of the assignment of mortgage identified in Paragraph 66. Nationstar denies all allegations in Paragraph 66 that are not expressly stated in the assignment of mortgage identified in Paragraph 66.

67. In response to the allegations in Paragraph 67 of the Third-Party Complaint, Nationstar refers to the express provisions of the Rule 40(j) Order identified in Paragraph 67. Nationstar denies all allegations in Paragraph 67 that are not expressly stated in the Rule 40(j) Order identified in Paragraph 67.

68. In response to the allegations in Paragraph 68 of the Third-Party Complaint, Nationstar refers to the express provisions of the motion to restore identified in Paragraph 68. Nationstar denies all allegations in Paragraph 68 that are not expressly stated in the motion to restore identified in Paragraph 68.

69. In response to the allegations in Paragraph 69 of the Third-Party Complaint, Nationstar refers to the express provisions of the court's docket for the civil action identified in Paragraph 69. Nationstar denies all allegations in Paragraph 69 that are not expressly stated in the docket for the civil action identified in Paragraph 69.

70. In response to the allegations in Paragraph 70 of the Third-Party Complaint, Nationstar refers to the express provisions of the Rule 40(j) motion and order identified in Paragraph 70. Nationstar denies all allegations in Paragraph 70 that are not expressly stated in the Rule 40(j) motion and order identified in Paragraph 70.

71. Nationstar lacks sufficient information to know the truth of the allegations in Paragraph 71 of the Third-Party Complaint, and therefore, Nationstar denies the allegations.

72. In response to the allegations in Paragraph 72, Nationstar admits only that it filed this foreclosure action against Third-Party Plaintiff on August 27, 2019. Nationstar denies all remaining allegations in Paragraph 72.

73. Nationstar denies the allegations in Paragraph 73 of the Third-Party Complaint.

74. In response to the allegations in Paragraph 74, Nationstar admits only that Nationstar is the principle contact for Plaintiff's counsel in this matter. Nationstar denies the remaining allegations in Paragraph 74 of the Third-Party Complaint.

75. In response to the allegations in Paragraph 75 of the Third-Party Complaint, Nationstar admits only that it is incorporated in Delaware, maintains a principal place of business in Texas, and transacts business in South Carolina via the servicing of loans. Nationstar denies all remaining allegations in Paragraph 75.

FIRST COUNT IN THIRD-PARTY COMPLAINT
(Accounting)

76. In response to the allegations in Paragraph 76 of the Third-Party Complaint, Nationstar re-states and incorporates by reference here its prior responses to Paragraphs 29 through 75 of the Third-Party Complaint.

77. Nationstar denies the allegations in Paragraph 77 of the Third-Party Complaint.

SECOND COUNT IN THIRD-PARTY COMPLAINT
(Negligent Misrepresentation)

78. In response to the allegations in Paragraph 78 of the Third-Party Complaint, Nationstar re-states and incorporates by reference here its prior responses to Paragraphs 29 through 77 of the Third-Party Complaint.

79. Nationstar denies the allegations in Paragraph 79 of the Third-Party Complaint.

80. Nationstar denies the allegations in Paragraph 80 of the Third-Party Complaint.

81. Nationstar denies the allegations in Paragraph 81 of the Third-Party Complaint.

82. Nationstar denies the allegations in Paragraph 82 of the Third-Party Complaint.

83. Nationstar denies the allegations in Paragraph 83 of the Third-Party Complaint.

84. Nationstar denies the allegations in Paragraph 84 of the Third-Party Complaint.

THIRD COUNT IN THIRD-PARTY COMPLAINT
(Abuse of Process)

85. In response to the allegations in Paragraph 85 of the Third-Party Complaint, Nationstar re-states and incorporates by reference here its prior responses to Paragraphs 29 through 84 of the Third-Party Complaint.

86. Nationstar denies the allegations in Paragraph 86 of the Third-Party Complaint.

87. Nationstar denies the allegations in Paragraph 87 of the Third-Party Complaint.

88. Nationstar denies the allegations in Paragraph 88 of the Third-Party Complaint.

89. Nationstar denies the allegations in Paragraph 89 of the Third-Party Complaint.

90. Nationstar denies the allegations in Paragraph 90 of the Third-Party Complaint.

91. Nationstar denies the allegations in Paragraph 91 of the Third-Party Complaint.

92. Nationstar denies the allegations in Paragraph 92 of the Third-Party Complaint.

93. Nationstar denies the allegations in Paragraph 93 of the Third-Party Complaint.

FOURTH COUNT IN THIRD-PARTY COUNTERCLAIM
(Malicious Prosecution)

94. In response to the allegations in Paragraph 94 of the Third-Party Complaint, Nationstar re-states and incorporates by reference here its prior responses to Paragraphs 29 through 93 of the Third-Party Complaint.

95. Nationstar denies the allegations in Paragraph 95 of the Third-Party Complaint.

96. Nationstar denies the allegations in Paragraph 96 of the Third-Party Complaint.

97. The allegations in Paragraph 97 of the Third-Party Complaint states a legal conclusion that does not require a response. If a response is required, Nationstar denies the allegations.

98. In response to the allegations in Paragraph 98 of the Third-Party Complaint, Nationstar refers to the text of S.C.R.C.P. 41. Nationstar denies all allegations in Paragraph 98 that are not expressly stated in the provisions of S.C.R.C.P. 41.

99. In response to the allegations in Paragraph 99 of the Third-Party Complaint, Nationstar refers to the complaint associated with the civil actions identified in Paragraph 99. Nationstar denies all allegations in Paragraph 99 that are not expressly stated in the complaints associated with the civil actions identified in Paragraph 99.

100. Nationstar denies the allegations in Paragraph 100 of the Third-Party Complaint.

101. Nationstar denies the allegations in Paragraph 101 of the Third-Party Complaint.

102. Nationstar denies the allegations in Paragraph 102 of the Third-Party Complaint.

103. Nationstar denies the allegations in Paragraph 103 of the Third-Party Complaint.

104. Nationstar denies the allegations in Paragraph 104 of the Third-Party Complaint.

105. Nationstar denies the allegations in Paragraph 105 of the Third-Party Complaint.

106. Nationstar denies the allegations in Paragraph 106 of the Third-Party Complaint.

107. Nationstar denies the allegations in Paragraph 107 of the Third-Party Complaint.

108. Nationstar denies the allegations in Paragraph 108 of the Third-Party Complaint.

FIFTH COUNT IN THIRD-PARTY COMPLAINT
(Unfair Trade Practices)

109. In response to the allegations in Paragraph 109 of the Third-Party Complaint, Nationstar re-states and incorporates by reference here its prior responses to Paragraphs 29 through 108 of the Third-Party Complaint.

110. Nationstar denies the allegations in Paragraph 110 of the Third-Party Complaint.

111. The allegations in Paragraph 111 state legal conclusions that do not require a response. If a response is required, Nationstar denies the allegations in Paragraph 111 of the Third-Party Complaint.

112. Nationstar denies the allegations in Paragraph 112 of the Third-Party Complaint.

113. Nationstar denies the allegations in Paragraph 113 of the Third-Party Complaint.

114. Nationstar denies the allegations in Paragraph 114 of the Third-Party Complaint.

115. Nationstar denies the allegations in Paragraph 115 of the Third-Party Complaint.

116. Nationstar denies the allegations in Paragraph 116 of the Third-Party Complaint.

117. Nationstar denies the allegations in Paragraph 117 of the Third-Party Complaint.

SIXTH COUNT IN THIRD-PARTY COMPLAINT
(Declaratory Injunctive Relief)

118. In response to the allegations in Paragraph 118 of the Third-Party Complaint, Nationstar re-states and incorporates by reference here its prior responses to Paragraphs 29 through 117 of the Third-Party Complaint.

119. Nationstar denies the allegations in Paragraph 119 of the Third-Party Complaint.

120. Nationstar denies the allegations in Paragraph 120 of the Third-Party Complaint.

121. In response to the unnumbered Paragraph in the Third-Party Complaint beginning with “WHEREFORE,” Nationstar denies that Third-Party Plaintiff is entitled to any of the relief alleged therein.

FOR A SECOND DEFENSE

122. Third-Party Plaintiff’s Complaint fails to state facts sufficient to constitute a cause of action against Nationstar, and therefore, Third-Party Plaintiff’s Complaint should be dismissed with prejudice pursuant to Rule 12(b)(6), S.C.R.C.P.

FOR A THIRD DEFENSE

123. Nationstar would show that all claims alleged in the Third-Party Complaint are time barred by applicable statutes of limitation.

FOR A FOURTH DEFENSE

124. Nationstar pleads the terms of the note and mortgage at issue in this action as a complete bar to the claims alleged in Third-Party Plaintiff’s Complaint.

FOR A FIFTH DEFENSE

125. Nationstar would show that any purported action undertaken by it concerning the mortgage loan that is the subject to this action are expressly authorized by the terms of the mortgage loan documents at issue, and therefore, Third-Party Plaintiff is precluded from alleging a claim under the South Carolina Unfair Trade Practices Act (“SCUTPA”) for Third-Party Plaintiff’s alleged private dispute.

FOR A SIXTH DEFENSE

126. Nationstar would show that it operates in a regulated industry and that any purported action undertaken by Nationstar were taken in good faith, in reasonable manner, and

that any such action or procedures were authorized by law, statute, or regulation, and therefore, Third-Party Plaintiff is precluded from recovering from Nationstar under the SCUTPA.

FOR A SEVENTH DEFENSE

127. The American Rule bars Third-Party Plaintiff's demand for attorney's fees and costs for any common law theories of liability alleged.

FOR AN EIGHTH DEFENSE

128. The doctrines of estoppel, laches, and waiver bar all of Third-Party Plaintiff's Third-Party Complaint.

FOR A NINTH DEFENSE

129. Nationstar would show that some or all of the Third-Party Complaint alleged are barred by the statute of frauds.

FOR A TENTH DEFENSE

130. Nationstar would show that Third-Party Plaintiff's claims, which Nationstar expressly denies, arise from the purported acts or omissions by third-parties over whom Nationstar lacked authority to direct or control.

FOR AN ELEVENTH DEFENSE

131. Nationstar would show that Third-Party Plaintiff's demand for damages is limited by applicable statutory caps.

RESERVATION OF DEFENSES

132. In addition to the affirmative defenses enumerated above, Nationstar reserves the right to assert any additional defenses as may be warranted or as may be revealed by additional information received in discovery and/or to amend its Answer.

WHEREFORE, having fully answered or otherwise responded to the allegations set forth in Third-Party Plaintiff's Complaint, Nationstar respectfully requests:

- (1) That Third-Party Plaintiff's Complaint be dismissed in its entirety and with prejudice, with all costs taxed against Third-Party Plaintiff; and
- (2) That Nationstar recover such other and additional relief as the Court deems just and appropriate.

DATED this 25th day of January, 2021.

Respectfully submitted,

McGUIREWOODS LLP

/s/ Brian A. Calub

Brian A. Calub (S.C. Bar No. 72009)

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*Attorney for Third-Party Defendant Nationstar
Mortgage LLC*

CERTIFICATE OF SERVICE

I certify that on January 25, 2021, I electronically filed the foregoing pleading with the Clerk of the Court using the CM/ECF system, which will serve all counsel of record.

/s/ Brian A. Calub

Brian A. Calub

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL DISTRICT
	)	
Deutsche Bank Trust Company	)	Civil Action No. 2019-CP-10-04503
Americas, as Trustee for Residential	)	
Accredit Loans, Inc., Pass-Through	)	
Certificates 2007-QH2,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Ashley Johnson Beshera as Trustee of the	)	
Revocable Trust Agreement for 2235	)	
Shoreline Drive originally dated 3 rd day	)	
of March 2010; et al.,	)	
	)	
Defendants,	)	
	)	
Ashley Johnson Beshera as Trustee of the	)	
Revocable Trust Agreement for 2235	)	
Shoreline Drive originally dated 3 rd day	)	
of March 2010,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
Nationstar Mortgage LLC,	)	
	)	
Third-Party Defendant.	)	
	)	

**PLAINTIFF AND THIRD-PARTY DEFENDANT'S
MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS
COUNTERCLAIMS, CROSS-CLAIMS, AND THIRD-PARTY COMPLAINT**

In support of their motions to dismiss, Plaintiff Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2 (“Deutsche Bank”) and Third-Party Defendant Nationstar Mortgage LLC (“Nationstar”), by their undersigned counsel, submit this memorandum in support of their motions to dismiss the counterclaims, third-

party complaint, and cross-claims alleged by Defendant Ashley Johnson Beshera as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd day of March 2010 (“Beshara”) and Intervenor Curtis and Julie Rogers (“Mortgagors”). Because all claims alleged by Beshara and the Mortgagors are either time barred, precluded by applicable law, or defectively pleaded, the counterclaims, cross-claims, and the third-party complaint should be dismissed with prejudice for the following reasons:

BACKGROUND

Loan Origination

This case involves the foreclosure of a first-priority mortgage encumbering real property at 2235 Shoreline Drive, Johns Island, South Carolina 29455 (“Property”). The first-priority mortgage being foreclosed in this current action was originated by the Mortgagors when Borrower Curt Rogers executed and delivered a promissory note (“Note”) in the amount of \$1,500,000.00 in favor of Homecomings Financial, LLC—f/k/a Homecomings Financial Network, Inc.— (“Lender”) on January 12, 2007. (Compl. ¶ 6.) To secure payment on the Note, the Mortgagors signed a mortgage (“Mortgage” and together with the Note, the “Mortgage Loan”) that encumbers the Property. (*Id.* ¶ 7.) The Mortgage was recorded with the Charleston County Register of Deeds Office (“ROD Office”) in Book B613 at Page 844 on January 24, 2007. (*Id.* ¶ 8.)

Mortgagors’ Default and Transfer of the Mortgage Loan and Property

During the repayment term for the Mortgage Loan, the Mortgagors defaulted on their repayment obligations under the Mortgage Loan by failing to remit timely payments coming due on September 1, 2009 and thereafter. (*Id.* ¶ 14.) Since September 1, 2009, there is an unpaid principal balance of \$1,608,085.44, together with interest from August 1, 2009, escrow advances, late fees, and accrued attorney’s fees and costs. (*Id.*)

Procedural History for the Prior Foreclosure Action

On September 8, 2009, Mortgage Electronic Registration Systems, Inc. as nominee for Lender assigned the Mortgage to Aurora Loan Servicing LLC (“Aurora”) pursuant to an assignment of mortgage that was recorded with the ROD Office in Book 0081 at Page 058 on September 15, 2009. (*Id.* ¶ 10(a).)

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

The Foreclosure Action was reinstated to the court’s active trial roster under case no. 2011-CP-10-01805 pursuant to an order entered on March 3, 2010.

After a series of conveyances and pursuant to a deed recorded in the ROD Office on August 9, 2010, in Book 0137 at Page 344, the Property was conveyed to Beshara. (*Id.* ¶ 11(a)-(f).)

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

- Breach of contract and good faith and fair dealing for an alleged breach of a purported work-out agreement,
- Declaratory judgment to address alleged unconscionable loan terms,
- Unjust enrichment,
- Negligent misrepresentation regarding loss mitigation negotiations and purported workout agreements,
- Demand for accounting,
- Promissory estoppel,

- Violations of the South Carolina Unfair Trade Practices Act (“SCUTPA”), and
- Violation of the Truth in Lending Act.

Aurora served a timely reply to the counterclaims, and the court entered an order substituting Nationstar for Aurora as the plaintiff in the Foreclosure Action on June 14, 2013. For a second time, the action was removed from the court’s active trial roster pursuant to a consent Rule 40(j) order entered by the court on June 24, 2014. (Mortgagors’ Ans., Ex. B.)

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

Deutsche Bank’s Foreclosure

Neither the Mortgagors nor Nationstar reinstated the Foreclosure Action to the court’s active trial roster. Thus, because the Mortgage Loan was transferred to Deutsche Bank and Deutsche Bank has become the holder of the Mortgage Loan, Deutsche Bank filed this current foreclosure proceeding. (Compl. *passim*.) In its foreclosure complaint, Deutsche Bank pled that it “does not demand a deficiency judgment in the event the sale of the real estate herein does not yield a sum sufficient to satisfy all indebtedness due unto” Deutsche Bank, “including costs and Attorney’s fees.” (*Id.* ¶ 16.) In response to Deutsche Bank’s foreclosure complaint, Defendant Beshara filed a motion to dismiss to argue that the prior entry of three 40(j) Orders in the Foreclosure Action precluded Deutsche Bank’s current action under Rule 41, S.C.R.C.P., and the doctrine of collateral estoppel. (Def. Beshara’s Mot. to Dismiss. & Beshara’s Reply to Pl. Resp. to Def. Beshara’s Mot. To Dismiss.) Beshara further argued that Deutsche Bank’s action should also be dismissed because the Mortgagors were not joined as necessary parties to the action in

Deutsche Bank's foreclosure complaint. (*Id.*) The court considered these arguments and denied Beshara's motion to dismiss by a Form 4 Order entered on June 23, 2020.

Counterclaims, Cross-Claims, and Third-Party Complaint

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

- Demand for Accounting;
- Negligent Misrepresentation;
- Abuse of Process;
- Malicious Prosecution;
- Violation of the SCUTPA; and
- Declaratory Judgment.

Critically, the demand for accounting claim, SCUTPA claim, negligent misrepresentation claim, and declaratory judgment claim alleged in this action mirror the counterclaims that the Mortgagors raised in the amended answer that they served in the prior Foreclosure Action on February 2, 2012.¹

STANDARD FOR DECISION

"Under Rule 12(b)(6), S.C.R.C.P., a defendant may make a motion to dismiss based on a failure to state facts sufficient to constitute a cause of action." *Baird v. Charleston County*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999); *see also, Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006) (finding that dismissal of a claim is proper when the pleading fails to state facts sufficient to constitute a cause of action). "[T]he [claimant] must plead facts which are sufficient to establish

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

the statutory elements of the cause of action.” *Justice v. Pantry*, 335 S.C. 572, 577, 518 S.E.2d 40, 43 (1999) (citing *Trumbo v. Finley*, 18 S.C. 305 (1882)). ““The question for the court is whether in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state any valid claim for relief.”” *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 617, 698 S.E.2d 879, 882 (Ct. App. 2010) (quoting *Sloan Constr. v. Southco Grassing, Inc.*, 377 S.C. 108, 112-13, 659 S.E.2d 158, 161 (2008)).

“[S]tatutes of limitation were developed to prevent injustices, not to further them.” *Moriarty v. Garden Sanctuary Church of God*, 334 S.C. 150, 163, 511 S.E.2d 699 (Ct. App. 1999), *aff’d*, 341 S.C. 320, 534 S.E.2d 672, 706 (2000). “Statutes of limitation evolved over time with definite purposes in mind. They protect people from being forced to defend themselves against stale claims.” *Id.* ““One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a [claimant] has slept on his rights.”” *Logan*, 389 S.C. at 618, 698 S.E.2d at 883 (quoting *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996)). ““Another purpose of the statute of limitations is to protect potential defendants from protracted fear of litigation.”” *Id.*

ARGUMENT

1. All of the theories of liability alleged in Beshara and the Mortgagors’ counterclaims, cross-claims, and third-party complaint are time barred.

The following claims alleged against Deutsche Bank and Nationstar are all time barred:

- Demand for Accounting;²
- Negligent Misrepresentation;
- Abuse of Process;
- Malicious Prosecution;
- Violation of the SCUTPA; and

² As further detailed in part 8 of this memorandum, the “Demand for Accounting” claim is not a viable cause of action under South Carolina law.

- Declaratory Judgment.

(Beshara Ans. *passim* & Borrower-Defs.' Ans. *passim*.)

Under South Carolina law, each of these claims are subject to a three-year statute of limitation. *See* S.C. Code Ann. §§ 15-3-530(1), (5) & (7) (setting three-year statute of limitation for actions concerning “injury to the person or rights of another not arising in contract and not enumerated by law” and “relief on ground of fraud”); S.C. Code Ann. § 15-3-535 (applying discovery rule to statute of limitation provided by § 15-3-530(5)); S.C. Code Ann. § 39-5-150 (“No action may be brought under this article more than three years after discovery of the unlawful conduct which is the subject of the suit.”).

According to the allegations in Beshara and the Mortgagors’ pleadings, all of their claims are based the following events that occurred before or during the prior Foreclosure Action:

- Settlement of the Mortgage Loan at loan origination with unconscionable terms;
- The collection of payments before the prior Foreclosure Action was filed;
- Standing to collect payments and foreclose, and
- Loss migration negotiations involving the Mortgage Loan.

(Beshara Ans. *passim* & Borrower-Defs. Ans. *passim*.) In the answer and counterclaims filed in the Foreclosure Action on February 2, 2012, the Mortgagors initially alleged all of these circumstances to plead counterclaims against Nationstar in the Foreclosure Action.

But the Mortgagors never restored the claims that they alleged in the Foreclosure Action under Rule 40(j) within a year of the last 40(j) Order entered on May 16, 2016. “Rule 40(j) provides that, if the claim is restored within one year after it is stricken, *the statute of limitations is tolled for that period.*” *Maxwell v. Genez*, 356 S.C. 617, 620-21, 591 S.E.2d 26, 28 (2003) (emphasis added). “A party can move to restore a case to the docket more than one year after the claim was stricken without running afoul of Rule 40(j); the party simply cannot take advantage of the one year tolling period provided by the rule.” *Id.* at 621, 591 S.E.2d at 28. “Rule 40(j)

require[s] motions to restore be made within one year of the case being stricken *to take advantage of the tolling of the statute of limitations.*” *Graham v. Dorchester County Sch. Dist.*, 339 S.C. 121, 125, 528 S.E.2d 80, 82 (Ct. App. 2000) (emphasis added). “There is an historical basis for considering a case stricken pursuant to Rule 40(j) as the equivalent of dismissed.” *Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 631, 779 S.E.2d 826, 831 (Ct. App. 2015). “Moreover, the tolling period would not be necessary if striking the case pursuant to Rule 40(j) were not the equivalent of a dismissal.” *Id.*

The Mortgagors first alleged the circumstances giving rise to the claims alleged in Deutsche Bank’s foreclosure proceeding by serving an amended answer with counterclaims in the Foreclosure Action on February 12, 2012. Given the procedural history for the Foreclosure Action, the counterclaims alleged by the Mortgagors expired before entry of last 40(j) Order for the Foreclosure action on May 16, 2016. Neither Nationstar nor the Mortgagors restored the Foreclosure Action to the active trial roster by May 16, 2017. Accordingly, the statute of limitations for the Mortgagors’ counterclaims in the Foreclosure Action—which mirror the claims that Beshara and the Mortgagors are alleging in this foreclosure proceeding—expired after the Foreclosure Action remained stricken for 1 year and had not been restored. Accordingly, Beshara and the Mortgagors’ re-pleading of the accounting, negligent misrepresentation, SCUTPA, and declaratory judgment claims in this foreclosure proceeding does not prevent these claims from being time barred. And to the extent the abuse of process and malicious prosecution claims are at all related to any allegations concerning the Mortgagors’ dealings with Aurora or Nationstar before or during the Foreclosure Action, then these additional claims are time barred and must be dismissed with prejudice as well.

2. Multiple dismissals of the Foreclosure Action under Rule 40(j) do not bar Deutsche Bank's foreclosure action under Rule 41 of the South Carolina Rules of Civil Procedure, and therefore, the abuse of process and malicious prosecution claims fail as a matter of law.

For the following reasons, the claim that Rule 41 precludes Deutsche Bank's foreclosure proceeding fails as a matter of law for the following reasons:

First, the dismissal and reinstatement of Aurora's Foreclosure Action under Rule 40(j) with the consent of Mortgagors on multiple occasions during the Foreclosure Action does not trigger application of the two-strike rule under Rule 41, S.C.R.C.P., or any liability for abuse of process or malicious prosecution claims. Critically, the language of Rule 41(a)(1) does not address or mention multiple dismissals of a prior action with leave to reinstate as provided by Rule 40(j) by stating as follows:

Subject to the provisions of Rule 23(c), of Rule 66(a), and of any statute, an action may be dismissed by the plaintiff without order of court (A) by filing and serving a notice of dismissal at any time before service by the adverse party of an answer or motion for summary judgment, whichever first occurs, or (B) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

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

Under the unambiguous terms of Rule 41(a)(1), the two-strike provision is only triggered when an action is dismissed *by a notice of dismissal* after an action involving the same claims is previously dismissed. Here, multiple dismissals of the prior Foreclosure Action under Rule 40(j) do not trigger the adjudication provisions of Rule 41(a)(1). *See id.* at 41(a)(1)(A). Simply put, Beshara and the Mortgagors' failure to plead any facts showing the dismissal of the prior Foreclosure Action by any *notice of dismissal* served and filed by Aurora or Nationstar during the Foreclosure Action precludes application of Rule 41(a)(1)(A)'s two strike rule. (Beshara's Ans.

passim & Mortgagors' Ans. *passim*.)

Unlike Rule 41(a)(1), which only permits the filing and service of a notice of dismissal *before* a defendant appears in an action, Rule 40(j) requires all adverse parties to a plaintiff's claims—including defendants—to consent to entry of a Rule 40(j) order. *See* S.C. R. Civ. P. 40(j). Indeed, there is no controlling case law authority issued by the South Carolina Supreme Court or South Carolina Court of Appeals establishing that entry of multiple 40(j) orders in an action trigger the merits-adjudication provision of Rule 41(a)(1), S.C.R.C.P. Further, numerous cases interpreting Rule 41 of the Federal Rules of Civil Procedure³ and similar state court iterations of Rule 41, S.C.R.C.P., have recognized that subsequent dismissals of a previously dismissed action by anything other than a notice of dismissal does not constitute a merits determination. *See Manning v. S.C. Dept. of Highway and Public Transp.*, 914 F.2d 44, 47 n.3 (4th Cir. 1990) (recognizing that two dismissals of an action involving the same claims stated in a previously dismissed action only happens when the second dismissal is by notice, but not when the defendant is dismissed by motion or by stipulation); 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2368, (4th Ed. Oct. 2020 Update) (“By its own clear terms, the ‘two dismissal’ rule applies only when the second dismissal is by notice under Rule 41(a)(1)(A)(i). It does not apply to a dismissal by stipulation, nor to an involuntary dismissal, nor to a dismissal by a court order under Rule 41(a)(2). The rule does not apply if the second dismissal is in some way irregular.”); *see also Estate of Livesay ex rel, Morley v. Livesay*, 723 S.E.2d 772, 776-77 (N.C. Ct. App. 2012) (holding that two dismissal rule did not apply because the two prior dismissals of action were involuntary and by court order); *Crawford v. Kingston*, 728 S.E.2d 904, 906 (Ga. Ct.

³ *See Unisun v. Hawkins*, 342 S.C. 537, 542, 537 S.E.2d 559, 561-62 (Ct. App. 2000) (recognizing that in the absence of prior state law on a procedural issue, federal cases interpreting similar federal rules of procedure are persuasive).

App. 2012) (recognizing that under Georgia law, only voluntary notice of dismissals filed by a plaintiff are to be counted for purposes of Georgia's version of Rule 41).

Here, the abuse of process and malicious prosecution claims predicated on the filing of Deutsche Bank's foreclosure proceeding after entry of the 40(j) order in the prior Foreclosure Action must be dismissed with prejudice for failure to state a claim.

3. The abuse of process and malicious prosecution claims are not properly pleaded, and therefore, they must be dismissed.

Because Deutsche Bank's foreclosure action is not precluded by Rule 41(a)(1), the abuse of process and malicious prosecution claims must be dismissed because they are not properly pleaded.

The abuse of process claim is subject to dismissal with prejudice because Beshara and the Mortgagors fail to allege how the prosecution of this foreclosure action is aimed at some improper collateral purpose that this foreclosure proceeding is not designed to achieve. *See, e.g., Food Lion, Inc. v. United Food Commercial Works Intern. Union*, 351 S.C. 65, 567 S.E.2d 251 (Ct. App. 2002) (affirming dismissal of abuse of process claim where plaintiff failed to allege how use of court process was designed to achieve improper collateral purposes that legal process was not designed to achieve). Here, the foreclosure of the Mortgage because of the Mortgagors' failure to remit timely payments under the Note is the natural result of Deutsche Bank's foreclosure proceeding and does not trigger liability for abuse of process.

The malicious prosecution claim is also subject to dismissal with prejudice because neither Beshara nor the Mortgagors pleaded or showed the termination of any prior litigation in their favor, lack of probable cause for instituting any alleged prior foreclosure action, malice, or any purported damages resulting therefrom. *See, e.g., Law v. South Carolina Dept. of Corrections*, 368 S.C. 424, 436-37, 629 S.E. 2d 642, 649 (Sup. Ct. 2006) (affirming trial court's award of summary judgment

to defendant where plaintiff failed to prove termination of prior litigation in plaintiff's favor, lack of probable cause for defendants' legal proceeding, and malice). Critically, Beshara was not a party to the prior Foreclosure Action, and Nationstar cannot be liable for the malicious prosecution of Deutsche Bank's current foreclosure because it is not the prosecuting plaintiff for this foreclosure proceeding.

4. Because Beshara and the Mortgagors lack standing to challenge any endorsements or transfer of the Mortgage Loan, their claims fail as a matter of law.

Beshara and the Mortgagors lack standing to challenge the terms of the mortgage loan and cannot assert any claims based on any endorsements on the Note or transfers or assignments of the Mortgage. Critically, neither Beshara nor the Mortgagors is a party or intended beneficiary of any assignments or agreements to transfer the Mortgage Loan. *See Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 445, 494 S.E. 2d 827, 833 (Ct. App. 1997) ("Generally, a third person not in privity of contract with the contracting parties has no right to enforce a contract. However, when the contract is made for the benefit of the third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person"); *see, e.g., Doherty v. PNC Mortg.*, C/A No. 0:14-cv-4013-TLW-SVH, 2015 WL 5012781, at *3 (D.S.C. July 16, 2015) *adopted in-part* by 2015 WL 5012823, at *1 (D.S.C. August 21, 2015); *Reese v. U.S. Bank Ass'n*, C/A No. 3:11-cv-2990-CMC-SVH, 2012 WL 1952819, at *3 (D.S.C. Apr. 30, 2012).

5. Beshara and the Mortgagors' negligent misrepresentation claim fails as a matter of law because neither Deutsche Bank nor Nationstar owed Beshara or the Mortgagors any legal duty in tort.

The negligent misrepresentation claim alleged by Beshara and the Mortgagors is fatally flawed and subject to dismissal with prejudice for the following reasons:

First, as a matter of law, neither Deutsche Bank nor Nationstar owed any duty to tort to Beshara or the Mortgagors. *See Regions Bank v. Schmauch*, 354 S.C. at 670, 582 S.E.2d at 444.

Further, Beshara cannot demonstrate that either Deutsche Bank or Nationstar made any representations directly to Beshara or that Beshara relied on any purported representations because Beshara affirmatively denies all allegations related to either Nationstar or Deutsche Bank's standing to secure a foreclosure remedy in this action. (Beshara Ans. at ¶¶ 3 & 16.)

Finally, the negligent misrepresentation claim alleged by Beshara and the Mortgagors cannot be based on any transfer or assignment of the mortgage loan being foreclosed. In the prior foreclosure action cited in Beshara's and the Mortgagors' pleadings, the Mortgagors conceded that the mortgage loan being foreclosed was properly transferred to Nationstar because the Mortgagors never prosecuted their motion to vacate the court's order substituting Nationstar as the foreclosing plaintiff during the prior Foreclosure Action.

6. The SCUTPA claim fails as a matter of law.

The SCUTPA claim must be dismissed for the following reasons:

First, the SCUTPA claim cannot be based on the terms of the Mortgage Loan because neither Deutsche Bank nor Nationstar originated the loan. As mere assignees of the mortgage loan, Deutsche Bank and Nationstar are *not* subject to any claims arising from origination of the loan. *See Rosemond v. Campbell*, 288 S.C. 516, 523, 343 S.E.2d 641, 645 (Ct. App. 1986).

Next, because Beshara and the Mortgagors lack standing to challenge any endorsements or assignments or transfers of the Mortgage Loan, they cannot maintain their SCUTPA claim based on any challenge to the transfers of the Mortgage Loan.

Further, the SCUTPA claim cannot be based on the procedural history of the prior Foreclosure Action because it was filed, dismissed and the reinstated with the Mortgagors' consent

and as permitted by the South Carolina Rules of Civil Procedure. Moreover, Beshara was not a party to the prior Foreclosure Action. Accordingly, the SCUTPA claim cannot be based on the events that transpired in the prior Foreclosure Action. *See* S.C. Code Ann. § 39-5-40(a); S.C. R. Civ. P. 40(j); S.C. R. Civ. 41(a)(1).

Finally, the SCUTPA claim fails because neither Beshara nor the Mortgagors have identified any pecuniary loss supporting the SCUTPA claim.

7. The declaratory judgment claim fails because none of the allegations for the claim states any viable claim for relief under South Carolina law.

The claim for declaratory judgment fails as a matter of law for the following reasons:

First, the application of Rule 40(j) during the prior foreclosure action does not preclude this current action under South Carolina law. *See* S.C. R. Civ. P. 40(j) & 41(a).

Next, as stated previously, Beshara and the Mortgagors' lack of standing to challenge any endorsements or assignments of the mortgage loan preclude them from basing their declaratory judgment action on any transfer of the mortgage loan. Indeed, under South Carolina law, Deutsche Bank's constructive possession⁴ of the original note, with all proper endorsements, provide Deutsche Bank with standing to prosecute this current action. *See* S.C. Code Ann. § 36-3-301; *Bank of America, N.A. v. Draper*, 405 S.C. 214, 223-24, 746 S.E.2d 478, 483 (Ct. App. 2013); *see also MidFirst Bank, SSB v. C.W. Haynes & Co., Inc.*, 893 F.Supp 1304, 1314 (D.S.C. 1994). Indeed, even if the note at issue in this foreclosure action was not in Deutsche Bank's constructive possession or if the note contained any defective endorsements, as alleged in the Mortgagors' pleadings, the declaratory judgment claim fails because under South Carolina, "[a] person may be entitled to enforce the instrument even though the person is not the owner of the instrument or is

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

in wrongful possession of the instrument.” S.C. Code Ann. § 36-3-301; *see also*, *Koola v. Ditech Financial LLC*, 611 B.R. 251, 258-60 (D.S.C. 2019) (holding that a servicer of mortgage loan could enforce instrument, even though the note was lost and holding that transferee of lost instrument also had standing to enforce mortgage loan).

Finally, the declaratory judgment fails because Article 3 of the South Carolina Commercial Code—not assignments of a mortgage—dictates whether a party is entitled to foreclose a mortgage that secures a note in the possession of the foreclosing plaintiff. *See Bank of America, N.A. v. Draper*, 405 S.C. at 223-24, 746 S.E.2d at 483.

8. The demand for account claim fails as a matter of law because it is not cognizable cause of action under South Carolina law.

An accounting between a debtor and creditor requires the creditor to establish the amount due, and then the debtor bears the burden of proving payments, discounts, and off-sets. *See Devereux v. McCrady*, 53 S.C. 387, 395 (1898). In South Carolina, however, an accounting is an **equitable remedy, rather than an affirmative cause of action**. *See Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 144 (1989) (citing *Cox v. Lunsford*, 272 S.C. 527 (1979)) (emphasis added). Thus, an accounting may be awarded as an equitable remedy to support a claim such as unjust enrichment or breach of a fiduciary duty. *Id.* (citing *Smith v. Union Central Life Ins. Co.*, 112 S.C. 356 (1919)). Likewise, an equitable accounting may be awarded in an action with affirmative claims “involving long and complicated accounts where it would not be practicable for a jury to comprehend the issues and correctly make adjustments” *Id.* (citing *Jefferies v. Harvey*, 206 S.C. 245 (1945)).

Here, neither Beshara nor the Mortgagors can assert a claim for an accounting and are not entitled to the equitable remedy of accounting under any other claim. Indeed, Beshara and the Mortgagors have not pled or established a fiduciary duty owed to them by BANA or made a claim

for unjust enrichment in this foreclosure proceeding. Further, the accounting claim involves an individual, residential promissory note and mortgage. Accordingly, the loan involved is not so complicated that the trier of fact would not be able to comprehend the issues involved, and Beshara and the Mortgagors do not allege otherwise. Simply put, an accounting is not an affirmative cause of action, and Beshara and the Mortgagors have not alleged any facts that would entitle them to the equitable remedy of accounting based on their other claims. As a result, the “accounting counterclaim” fails to state a claim upon which relief can be granted, making dismissal appropriate as a matter of law.

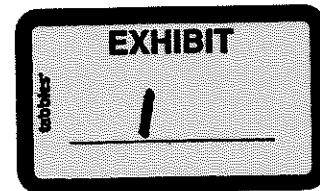
CONCLUSION

For all the reasons stated herein, the Court should grant Deutsche Bank’s and Nationstar’s motions to dismiss the counterclaims, cross-claims and third-party complaint alleged by Beshara and the Mortgagors with prejudice, award Deutsche Bank and Nationstar the fees and costs incurred for defense of the claims alleged, and award such further relief to Deutsche Bank and Nationstar that is just and warranted.

Respectfully submitted on this 21st day of October 2020.

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



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

IN THE COURT OF COMMON PLEAS

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

**AMENDED ANSWER and COUNTERCLAIM
 OF DEFENDANTS
 CURTIS ROGERS and JULIE J. ROGERS**

(Jury Trial Demanded)

2012 FEB 13 PM 3:35
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY _____

FILED

TO: DEAN HAYES, ATTORNEY FOR PLAINTIFF:

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

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

specific terms of said documents.

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

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

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

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

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

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

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

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

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

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

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

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

FOR AND AS A FOURTH DEFENSE
(Work Out Agreement)

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

FOR AND AS A FIFTH DEFENSE
(Novation)

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

FOR AND AS A SIXTH DEFENSE

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

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

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

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

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

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

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

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

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

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

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

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

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

simultaneously therewith the required payment.

27. Defendants made the required payments.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

same herein by reference as if stated verbatim.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§226.17. General disclosure requirements.

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

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

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

JURY TRIAL DEMANDED

PRAYER FOR RELIEF

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

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

MARY LEIGH ARNOLD, P.A.



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ATTORNEY FOR DEFENDANTS
CURTIS ROGERS AND JULIE ROGERS

Mt. Pleasant, SC
Dated: February 2, 2012

CERTIFICATE OF SERVICE

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

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



Mary Leigh Arnold

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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COURT OF COMMON PLEAS
CASE No. 2019 CP 10 4503

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

PLAINTIFF,

V.

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

DEFENDANTS,

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

THIRD-PARTY PLAINTIFF,

V.

NATIONSTAR MORTGAGE LLC,

THIRD-PARTY DEFENDANT

DEFENDANTS CURTIS AND JULIE
ROGERS
MEMORANDUM IN OPPOSITION
TO MOTION
TO DISMISS COUNTERCLAIM

Defendants Curtis Rogers and Julie Rogers, (hereinafter “Rogers”), by and through their undersigned counsel submit this memorandum in opposition to Plaintiff and Nationstar’s Motion to Dismiss Counterclaims and Cross-Claims filed on September 9, 2020.

NATURE OF CASE AND SUMMARY OF ARGUMENT

This case arises because it is the claimed mortgage holder’s fourth attempt to bring an action on the same note and mortgage that has been the subject of three prior suits all voluntarily dismissed by Plaintiff, its agent or predecessor. Plaintiff and Nationstar (hereinafter “Movants”) bring the present motion to dismiss essentially ignoring the necessary elements of a motion to dismiss, make unsupported statements and present disingenuous arguments that in some instances appear to boarder on violating Rule 11, SCRPC.

PROCEDURAL HISTORY

Plaintiff filed a Complaint on August 27, 2019 containing a single cause of action for mortgage foreclosure. The allegations of the Complaint specifically referenced the Rogers in paragraphs 6, 7 and 17(a) and (b) as the obligors under the note and the mortgagors under the mortgage but failed to include them as parties to the action.

On June 11, 2020, Rogers filed a Motion to Intervene arguing they were necessary parties to the action, should be granted the opportunity to assert numerous defenses to the action and should be allowed to challenge the Plaintiff’s failure to name them as parties as an intentional act to avoid the fact and consequences of its’ and its predecessors three prior suits under Civil Actions 2009-CP-10-5840, 2011-CP-10-1805, and 2015-CP-10-1971 on the same note and mortgage and the dismissal of all three actions. The Rogers motion to intervene was granted on July 28, 2020.

On August 13, 2020 the Rogers filed an Answer, Counterclaim and Cross Claim. (Hereinafter “Answer”) The Answer consists of 121 numbered paragraphs, eleven separate defenses and five counter and cross claims. The Counterclaims are for declaratory judgment, negligent misrepresentation, and abuse of process, malicious prosecution and unfair trade practices.

On September 9, 2020 Plaintiff and Nationstar (hereinafter "Movants") filed the within Motion to Dismiss.¹

STANDARD

Under Rule 12(b) (6), SCRPC, a [party] may move to dismiss based on a failure to state facts sufficient to constitute a cause of action." *Fleteau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003) "Generally, in considering a 12(b)(6) motion, the [circuit] court must base its ruling solely upon allegations set forth on the face of the complaint." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "[W]hen ruling on a motion to dismiss a counterclaim, the question is whether, in the light most favorable to the complainant, and with every doubt resolved in his behalf, the counterclaim states any valid claim for relief." *Slack v. James*, 364 S.C. 609, 614 S.E.2d 636 (2005). "The counterclaim should not be dismissed merely because the court doubts the complainant will prevail in the action." *Id.*

ARGUMENT

1. Rogers' claims are not time barred.

Movants' blanket argument that all of Rogers' claims are barred by a three year statute of limitations found at S.C. Code is patently wrong and Movants should know this.

A. Certain claims arose immediately prior to and with the filing of the within fourth foreclosure complaint.

Some of Rogers claims did not arise until immediately before and with the filing of the within foreclosure complaint. Thus, the claims are well within any applicable statute of limitations.

¹ Movants also have pending a Motion to Dismiss against Defendant Ashley Johnson Beshara which is very similar to the subject motion.

B. The declaratory judgment claim is not subject to a three year statute of limitations.

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue.' *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)." *City of Hartsville v. S.C. Mun. Ins. & Risk Financing Fund*, 382 S.C. 535, 677 S.E.2d 574 (2009). A declaratory judgment action is like a chameleon. Its color is determined by its background, i.e., the underlying action. *See Jacobs v. Service Merchandise Co.*, 297 S.C. 123, 375 S.E.2d 1 (Ct.App.1988) (the character of a declaratory judgment action is determined by the main purpose of the complaint).

Here, the underlying action for mortgage foreclosure sounds in equity. *See Carolina First Bank v. Badd, L.L.C.*, 414 S.C. 289, 778 S.E.2d 106 (2015). Generally statutes of limitation do not bar the equitable relief. *See Richland County v. Kaiser*, 351 S.C. 89, 567 S.E. 2d 260 (Ct. App. 2002), *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 543 S.E.2d 563 (Ct. App.2001). The declaratory judgment claim is not subject to a three year statute of limitations.

C. Rogers' claims are subject to equitable tolling.

Under South Carolina law, "a defendant may be estopped from claiming the statute of limitations as a defense if 'the delay that otherwise would give operation to the statute had been induced by the defendant's conduct.' " *Wiggins v. Edwards*, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994)(quoting *Dillon County School Dist. Number Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555 (Ct. App.1985), cert. dismissed, 288 S.C. 468, 343 S.E.2d 613 (1986), overruled on other grounds by *Atlas Food Sys. & Servs. v. Crane Nat'l Vendors*, 319 S.C. 556, 462 S.E.2d 858 (1995)). Whether a defendant is estopped from claiming the statute of limitations is ordinarily a question of fact. *See Black v. Lexington School Dist. No. 2*, 327 S.C. 55, 488 S.E.2d 327 (1997).

Here equitable tolling should apply. Rogers have set for facts invoking equitable tolling. For instance the Rogers have asserted facts showing that for over eleven years Plaintiff and its predecessors jumped in and out of court asserting the same claims against the same note and mortgage. There is no basis to dismiss.

2. Borrowers have the right to challenge a lenders authority to enforce loan documents.

Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt. *U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009). 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. *See Bandy v. Bandy*, 187 S.C. 410, 413, 197 S.E. 396, 397 (1938) (holding the burden was on defendant in mortgage foreclosure suit to establish her defense that mortgage and note secured thereby were without valuable consideration by preponderance of evidence).

A number of courts throughout the country have rejected the “standing” challenges lenders have raised against borrowers attempting to keep borrowers from being able to defend against foreclosure.² A borrower clearly has standing to question the validity of the transfers of

² *Slorp v. Lerner, Sampson & Rothfuss*, 587 Fed. Appx. 249, 253–254 (6th Cir. 2014) (pursuing judicial foreclosure without assignments that would give authority to foreclose caused injury to borrower in having to defend suit; borrower had standing to bring debt collection claims); *Howard v. Chase Home Fin., L.L.C.*, 555 Fed. Appx. 567 (6th Cir. 2014) (under Michigan law, borrowers have standing to challenge assignments related to authority to foreclose, but after expiration of post-sale redemption period must assert strong claim of fraud or irregularity); *Reinagel v. Deutsche Bank Nat'l Trust Co.*, 735 F.3d 220, 225 (5th Cir. 2013) (Texas courts follow “the majority rule” that obligors may bring challenges based on any ground that renders assignment of deed of trust void); *Culhane v. Aurora Loan Serv. of Neb.*, 708 F.3d 282 (1st Cir. 2013) (applying Massachusetts law, borrowers may challenge assignments alleged to be invalid, ineffective, or void); *Juarez v. Select Portfolio Serv., Inc.*, 708 F.3d 269 (1st Cir. 2013) (same); *Metcalf v. Deutsche Bank Nat'l Trust Co.*, 2012 WL 2399369 (N.D. Tex. June 26, 2012) (borrower has standing to challenge whether foreclosing party has authority to enforce deed of trust); *Drouin v. Am. Home Mortg. Lending Serv., Inc.*, 2012 WL 1850967, at *4 (D.N.H. May 18, 2012) (borrower has standing to challenge whether assignor had rights to mortgage at time of alleged assignment); *Minnifield v. Johnson & Freedman II, L.L.C.*, 2012 WL 5463878, at *4 (N.D. Ga. Nov. 7, 2012), *aff'd* on other grounds 522 Fed. Appx. 782 (11th Cir. 2013) (if borrowers did not have standing to challenge mortgage assignments, they would be in the “perilous position” of being unable to oppose foreclosure by anyone claiming to be an assignee); *Fuller v. Lerner, Sampson, Rothfuss, L.P.A.*, 2012 WL 4361454, at *9–10 (N.D. Ohio May 14, 2012), objections to magistrate’s report and recommendations denied, 2012 WL 4361448 (N.D. Ohio Sept. 21, 2012) (borrowers have standing to bring claim that entity other than foreclosing party has right to enforce loan documents); *Talton v. BAC Home Loans Servicing, L.P.*, 839 F. Supp. 2d 896 (E.D. Mich. 2012) (borrowers may challenge mortgage assignments or authority to conduct non-judicial foreclosure under Michigan’s sale by advertisement statute); *U.S. Bank v. George*, 50 N.E. 3d 1049 (Ohio Ct. App. 2015) (maker of a promissory note or mortgage has standing to challenge their transfers and assignments, even if not in privity to the transfer or assignment challenged, declining to follow *Livonia Properties*); *Mruk v. Mortg. Elec.*

loan documents that a party alleges give it the right to sell the borrower's home. A foreclosure terminates a borrower's interest in the property and subjects the borrower to physical eviction. Since South Carolina is a lien theory state, a foreclosure sale extinguishes the borrower's title to the property. To the extent that the borrower seeks to protect these existing rights in the property, the borrower has standing to take legal action to do so. In addition to the property title claims, an unauthorized eviction poses a very concrete injury to the borrower, an injury that the borrower has standing to prevent.

Additionally, contrary to Movants' characterizations, the Rogers do not seek to "enforce" contracts to which they were not parties, but instead, refer to these contracts as evidence that Movants lack authority to enforce the loan documents under law. No basis for dismissal has been asserted.

3. Creditors are liable for negligent misrepresentation.

Movants' do not argue Rogers insufficient plead a cause of action for negligent misrepresentation. Instead they argue as a creditor a tort claim cannot be asserted against them.

There are several cases however, where the appellate courts have addressed negligent misrepresentation claims against creditors. In the case of *AMA Management Corp. v. Strasburger*, 309 S.C. 213, 420 S.E. 2d 868 (Ct. App. 1992) the Court reviewed a lower court's decision to direct a verdict against a creditor for negligent misrepresentation. After setting forth the elements of negligent misrepresentation and addressing the issues, the Court of Appeals found the evidence fails as a matter of law for negligent misrepresentation.

In 1908 the South Carolina Supreme Court determined that a mortgagor could raise as a defense that the subject mortgage was void on the ground of fraud and misrepresentation. *Whittle v. Jones*, 79 S.C. 205, 60 S.E. 522 (1908). The existence of a creditor debtor relationship is not an automatic bar to a claim for negligent misrepresentation.

Registration Sys., Inc., 82 A.3d 527 (R.I. 2013); *EverBank v. Seedergy Ventures, Inc.*, 499 S.W.3d 534, 541 (Tex. App. 2016) (borrowers have standing to challenge void assignments); *Brezzell v. Bank of Am.*, 2011 WL 2682973, at *4 n.3 (E.D. Mich. July 11, 2011) ("standing" argument raised by many lenders to dismiss challenge to foreclosures based on invalid assignments is a "bit of a red herring"; borrowers' claim to possession and ownership of property puts them well within the zone of interests required for standing), quoting *Langley v. Chase Home Fin., L.L.C.*, 2011 WL 130926, at *2 n.2 (W.D. Mich. Mar. 28, 2011).

4. A viable claim for Abuse of Process has been asserted.

“Abuse of process has been defined as the employment of legal process for some purpose other than that for which it was intended by the law to effect—the improper use of a regularly issued process. The elements of abuse of process are an ulterior purpose and a willful act in the use of the process not proper in the regular course of the proceeding. Furthermore, the improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself.” *Whitfield Const. v. Bank of Tokyo Trust*, 338 S.C. 207, 525 S.E.2d 888 (Ct. App. 1999)

In this case Nationstar asserts that Rogers’ abuse of process claim against Nationstar must fail because Nationstar is not the Plaintiff in this action, and that an improper purpose of the foreclosure action was not asserted.

Rogers pled Nationstar as Plaintiff’s agent, not the Plaintiff, is the one who directed the initiation of this action on behalf of Plaintiff. Rogers plead Nationstar was the named Plaintiff in the foreclosure Actions 2 and 3, and after Dismissal 3 Nationstar maintained communications with Roger’s counsel about Nationstar reinstating the foreclosure action. It was alleged that Nationstar retained Plaintiff’s counsel to file this action and that Nationstar is the principle contact for Plaintiff’s counsel. The cause of action does not require Nationstar be the Plaintiff in this action only that the Rogers assert Nationstar misused the legal process through willful acts and coercion to obtain a collateral advantage. Therefore, this line of argument is without merit.

Movants’ argument that Rogers failed to plead how prosecution of this foreclosure action is aimed at some improper purpose is also without merit.

Rogers’ have plead Movants’ have engaged in improper purposes. Rogers plead that Movants’ engaged in improper acts by creating new assignments, altering assignments to defeat issues and create a right of enforcement and producing inconsistent documents that appear to improperly created, executing documents without proper authorization, claiming ownership when to instruments when ownership did not exist, claiming a right to enforce a mortgage when such right did not exist, initiating action when it was on notice any such action was barred, filing pleadings that were intended to mislead the court, and take action improper action to take ones real property. Rogers have set forth sufficient allegations to withstand Movants’ motion to dismiss its cause of action for abuse of process and this court should deny the motion.

5. There is not flaw in the Rogers malicious prosecution claim and Movants' motion is baseless.

“Our Supreme Court has recognized that an action will lie for the malicious prosecution of any ordinary civil action. To recover in an action for malicious prosecution, the plaintiff must show (1) the institution or continuation of original judicial proceedings, either civil or criminal (2) by, or at the instance of, the defendant (3) termination of such proceedings in plaintiff's favor (4) malice in instituting such proceedings (5) want of probable cause and (6) resulting injury or damage. The mere fact that the defendant was unsuccessful in the prior action has no bearing on the issue of probable cause.” *Garr v. N. Myrtle Beach Realty Co. Inc.*, 287 S.C. 525, 528, 339 S.E.2d 887 (Ct. App. 1986). In this cause of action, malice is "the deliberate intentional doing of a wrongful act without just cause or excuse. It does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition. Malice also may proceed from an ill-regulated mind which is not sufficiently cautious before causing injury to another person. Moreover, malice may be implied where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person. Malice also may be implied in the doing of an illegal act for one's own gratification or purpose without regard to the rights of others or the injury which may be inflicted on another person. In an action for malicious prosecution, malice may be inferred from a lack of probable cause to institute the prosecution. Based on the foregoing, one need not show actual malice in order to successfully maintain an action for malicious prosecution.” *McBride v. School Dist. of Greenville*, 389 S.C. 546, 565-66, 698 S.E.2d 845 (Ct. App. 2020) “A party must show the opponent lacked probable cause as to each cause of action asserted to prevail on a claim of malicious prosecution; thus, the existence of probable cause as to any one is sufficient to defeat a malicious prosecution claim. Whether probable cause exists is ordinarily a jury question, but it may be decided as a matter of law when the evidence yields only one conclusion.” *Pallares v. Seinar*, 407 S.C. 359, 367, 765 S.E.2d 128 (2014).

“The terms of a contractual agreement are not conclusive in determining the association between two parties where there is evidence outside the contract establishing an agency relationship. If there are any facts tending to prove an agency relationship, the question is one for the jury. *Gamble v. Stevenson*, 305 S.C. 104, 108, 406 S.E.2d 350 (1991). “Generally agency may be implied or inferred and may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal. The doctrine

of apparent authority provides that the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption.” *Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424 (1982).

Here Movants’ motion only references 3 of the 6 elements the cause of action, without applying the Rogers’ allegations to those elements or even asserting that the elements have not been met.

Here Movants brought and dismissed three prior foreclosure actions against the Rogers. The striking of a case under Rule 40j, SCRPC is the equivalent of dismissing a case. *Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 779 S.E.2d 826 (Ct. App. 2015). The voluntary dismissal by Movants on three separate occasions is a favorable determination for the Rogers.

Rogers pled the second dismissal under Rule 41, SCRPC precluded Movants from initiating any further action under the same Note and Mortgage. Rogers plead that Movants fourth action to foreclose lacked cause and was done with the intent of stripping the Rogers of their property for Movants’ personal gain. This shows implied malice where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person. Rogers are certainly injured by the threat of a defective foreclosure sale extinguishing their title interest in the property and eviction from the property.

For the forgoing reasons Rogers plead an adequate basis to withstand a motion and dismiss. Movants’ Motion to Dismiss Defendant’s cause of action of malicious prosecution must be denied.

6. Movants are not immunized from claims for violations of Unfair Trade Practice Act.

Movants do not argue the counterclaim lacks sufficient facts to set forth a cause of action. Rather they just make blanket incorrect statements.

Movants first attempt to argue a claim for violation of the South Carolina Unfair Trade Practice Act (“SCUTPA”) cannot be assert against them because they did not originate the loan. They state “[a]s mere assignees of the mortgage loan, Deutsche Bank and Nationstar are subject to any claims arising from origination of the loan.” They say nothing else as to this issue.

There are a number of problems with their argument. First, it would appear that they meant to include the word “not” before the word “subject” otherwise the statement is inapposite to their position. Second, they leave out a critical holding in the case of *Rosemond v. Campbell*³ which they cite to support their position. Immediately before the sentence quoted by movants, the *Rosemond* Court states the following: "Consequently, the assignee of a debt takes the obligation subject to all claims and defenses the obligor may have against the assignor." *Id.* at 645. Being an assignee and ones that have affirmatively sought to enforce the loan provides them with no shelter. No basis for dismissal has been argued.

Likewise, it is important to note that Movants do not claim to be holders in due course and Rogers have affirmatively alleged they are not. (Answer ¶ 115). Not being holders in due course they are subject to all claims.

Second the blanket remark is made that a SCUTPA claim cannot be maintain if based on challenges to transfers of the mortgage. No support for this remark is made. Likely that is because movants are aware the facts and allegations asserted in the counterclaims far exceed any allegations addressing the transfers of the note and mortgage. The Rogers allegations are based on the various principal agent relationships Plaintiff had not only with Nationstar but other servicers of the loan. Additionally, the Rogers set forth allegations involving the specific conduct or lack thereof of Movants. Although Movants fail to address any of the allegations of the counterclaims, the claims for unfair and deceptive practices range from imposing unconscionable interest amounts owed, servicer violations, and maintaining a lien on real property that is unenforceable. (Answer ¶ 116).

Again Movants’ third point lacks support and is meritless. If Movant is claiming it is entitled to an exemption under the Act, it has the burden of proving the exemption. S.C. Code Ann. § 39–5–40. It has made no effort to do so. In fact, the wealth of the law establishes that Movants actions are not permitted by law.

Movants three prior dismissals of the action brought under the identical note and mortgage precluded the filing of the within action under Rules 40j and 41, SCRCPP. (Answer ¶¶ 33 and 102 – 110) Twice in the last five years our Court of Appeals has stated striking a case

³ 288 S.C. 516, 343 S.E. 2d 641 (Ct. App. 1986)

from the active roster pursuant to Rule 40(j), SCRCF, is equivalent to dismissing a case. *See Goodwin v. Landquest Development, LLC*, 414 S.C.623, 779 S.E.2d 826 (Ct. App. 2015) (A case involving a foreclosure of a mortgage where motion to restore was denied because striking a case pursuant to Rule 40(J) is equivalent to a dismissal.). *See Personal Care, Inv. v. Theos*, 426 S.C. 78, 825 S.E.2d 281 (Ct. App. 2019) (where the Court declined to restore a case to the active roster stating because striking a case under Rule 40(j) is the equivalent of dismissing the case and stating "Nevertheless, we believe this argument ignores the procedural posture of the case as dismissed."). Movants actions fall within the Act.

SCUTPA establishes: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. Code Ann. § 39-5-20(a) (1985). "An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006).

Recently the South Carolina Court of Appeals upheld a lower court's grant of summary judgment in favor of a consumer on his counterclaim for violation of SCUTPA against a lender in a foreclosure action. *See Beneficial Financial I, Inc., v. Jon Windham*, Op. No. 5753 (Ct. App. August 5, 2020). The consumer/mortgagor asserted: Beneficial's conduct violated the SCUTPA by (1) "foreclosing on a tract of land which [Beneficial] knows, or should know, was not to be secured by any mortgage between [Beneficial] and [Windham]"⁴; (2) "force-placing insurance on [Windham's] property when [Windham] already had insurance, causing [Windham's] monthly payment to increase"; (3) "taking monthly payments from [Windham] and applying them all to alleged interest and fees"; (4) "unilaterally ceasing acceptance of payments from [Windham] on his loan"; and (5) "refusing to offer [Windham] a loan modification, even after stating it would do so."

The Court held Windham met his burden of proof on his counterclaim for a violation of SCUTPA. Beneficial's unfair practice of force-placing hazard insurance in violation of a mortgage contract has the potential for repetition. *See Crary*, 329 S.C. at 388, 496 S.E.2d at 23 (1998) (holding evidence indicating mortgage broker had other opportunities to enter into similar transactions was sufficient evidence to support a finding of a SCUTPA violation); *York v.*

Conway Ford, Inc., 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) (holding allegation of car dealership's alleged misrepresentation of a car's accident history was sufficient to survive directed verdict motion for SCUTPA violation because the dealership was in the business of selling cars; thus, "[c]ertainly the alleged acts or practices have the potential for repetition"). The lower court's grant of summary judgment to Windham on his counterclaim against Beneficial for a violation of the SCUTPA was affirmed. Like Windham, the Rogers have set forth a claim for violation of SCUTPA against their mortgagee and the claim should not be dismissed.

7. The Rogers claim is the precise type of controversy to be resolved by a declaratory judgment action.

A cause of action under the Declaratory Judgment Act is established by showing the existence of a justiciable controversy, defined as "a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018), and *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970).

The Rogers have alleged a real and substantial controversy concerning the very contract Plaintiffs has sued upon. In part, the Rogers seek a determination of the subject contracts are enforceable or whether they have any obligations under the contracts. Additionally they seek a determination as to the impact of the initiation of the within suit in light of the prior three suites that were dismissed is precluded under the law of this state and the Rules of Civil Procedure. The Rogers' counterclaim is therefore the very type of controversy the Declaratory Judgment Act contemplates, as it invites a party affected by a contract and law to ask a court to define how the contract and law impacts the party's rights. *See Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018).

Indeed the three points proffered by Movants illustrate a controversy exists. Movants contend Rule 40(j) and 41 do not preclude it bring the within action whereas the Rogers take the absolute opposition position and have so pled in their counterclaim. Movants claim the endorsements on the note are "all proper endorsements" (Movant's Motion to Dismiss, p. 6) whereas the Rogers have pled the opposite. (Answer ¶¶ 40, 41, 47, 48, 53, 54, 57, and 58).

Movants claim the declaratory judgment fails because South Carolina law under Article 3 of the Uniform Commercial Code not endorsements dictates whether a party is entitled to foreclosure a mortgage (Movant's Motion to Dismiss, p. 7), which further illustrates a justiciable controversy. *See Consignment Sales Llc v. Tucker Oil Co.*, 391 S.C. 266, 705 S.E.2d 73 (S.C. App. 2011), citing *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) ("A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party.' Id. Thus, '[a]ny person interested under a ... written contract ... may have determined any question of construction or validity arising under the ... contract ... and obtain a declaration of rights, status or other legal relations thereunder.' S.C. Code Ann. § 15-53-30 (2005)").

CONCLUSION

Movant's motion to dismiss the Rogers' counterclaims and cross-claims should be denied. Rogers have set forth valid claims for relief.

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October 23, 2020

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
IN CASE NO.: 2019-CP-10-4503

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

DEFENDANT’S MEMORANDUM IN
OPPOSITION TO PLAINTIFF AND
NATIONSTAR’S MOTION TO DISMISS

Vs.)

Ashley Johnson Beshara as Trustee of the)
Revocable Trust Agreement for 2235)
Shoreline Drive originally dated the 3rd day)
of March, 2010; Shoreline Farms)
Community Association, Inc.; Wells Fargo)
Bank, N.A.; and Cadle Rock Joint Ventrure,)
L.P., and Ohio limited partnership,)
Defendants.)

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

Third-Party Plaintiff,)

Vs.)

Nationstar Mortgage, LLC)

Third-Party Defendant.)

TO: THE ABOVE NAMED PARTIES:

Defendant, Ashley Johnson Beshara as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated the 3rd day of March 2010 (hereinafter “Defendant” or “Defendant Trust”) submits this memorandum in opposition to Plaintiff, Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans Inc., Pass-Through Certificates 2007-QH2 (hereinafter “Plaintiff” and Nationstar Mortgage, LLC’s (hereinafter “Nationstar”) Motion to

Dismiss the counterclaims and third-party claims of Defendant, pursuant to the Honorable William H. Seals, Jr., request that the parties brief him on the pending Motion.

CHARTS FOR THE BENEFIT OF REFERENCE OF THE COURT

Alleged Chain of Title of the Note and Mortgage

NOTE	MORTGAGE
1) <u>Homecomings</u> 1/12/07	1) MERS on behalf of Homecomings 1/12/07
2) Pay to the order of <u>Residential Funding</u> (this endorsement was originally in blank and subsequently altered to become an endorsement to Residential funding)	2) ALS 9/8/2009
3) Pay to the Order of <u>Deutsche Bank Trust Americas as Trustee</u> (the trust is unidentified)	3) Deutsche Bank Trust Americas as Trustee for Residential Accredit Loans, Inc. Pass-Through Certificates 2007-QH2; 4/1/2014 (executed by Nationstar as attorney in fact for ALS)
4) Pay to the Order en blank (executed by Nationstar as attorney in fact For Deutsche Bank Trust Company Americas as Trustee (the trust is unidentified)).	

History of the Civil Actions filed to foreclose upon the Mortgage

Action 1; filed 9/15/2009
Plaintiff: ALS
Defendants: Curt and Julie Rogers

Action1; dismissal order 3/9/2010
Rule 40(j), SCRCF

Action2, restored 3/10/2011
Plaintiff: ALS
Plaintiff Sub. 6/12/13: Nationstar
Defendants: Curt and Julie Rogers

Action 2, dismissal order 6/24/14

Action 3, restored 4/7/15
Plaintiff: Nationstar
Defendants: Curt and Julie Rogers

Action 3, dismissal order 5/16/2016

Action 4, filed 8/27/19
Plaintiff: Deutsche Bank Trust Americas as Trustee for Residential Accredit Loans, Inc.

Pass-Through Certificates 2007-QH2
Defendant: Ashley Johnson Beshara as Trustee of the Revocable Trust Agreement for
2235 Shoreline Drive originally dated the 3rd day of March 2010

STATEMENT OF THE PLEADINGS

Plaintiff alleges in its complaint Curt Rogers executed a Note and Mortgage to Homecomings Financial, LLC (hereinafter “Homecomings”) and Julie Rogers executed the Mortgage. (hereinafter “the Rogers”) on January 12, 2007 (hereinafter “Note” and “Mortgage”). The Mortgage was executed to MERS to hold on behalf of Homecomings. Defendant, plead Nationstar stated in discovery responses dated February 28, 2014, in Action 2, that on February 27, 2007, through an assignment and assumption agreement Residential Funding, Company, LLC (hereinafter “Residential Funding”) assigned the Note and Mortgage to Residential Accredited Loans, Ins. Mortgage Asset-Backed Pass-Through Certificates, Series 2007-QH2 Trust (hereinafter “Securitized Trust”).

September 15, 2009, Aurora Loan Services, LLC (hereinafter “ALS”) filed a summons and complaint against the Rogers seeking to foreclose upon the Mortgage in civil action number 2009-CP-10-5480 (hereinafter “Action 1”), alleging that ALS was the present lien holder of the subject Note and Mortgage and that MERS acting on behalf of Homecomings assigned the mortgage to ALS by an alleged assignment dated September 8, 2009, and recorded September 15, 2009 (Assignment 1). If Residential Funding owned and was the holder of the Note on February 27, 2007, then then MERS acting on behalf of Homecomings had no authority to assign the Mortgage ALS by Assignment 1, and ALS lacked the standing to seek to enforce both the Note and Mortgage in Action 1. By order filed March 9, 2010 (hereinafter “Dismissal 1”), Action 1 was dismissed pursuant to Rule 40(j), SCRPC. The action was restored by Order filed March 10, 2011, in civil action number 2011-CP-10-1805 (hereinafter “Action 2”).

On June 12, 2013, in Action 2, ALS filed a motion and proposed order alleging that the Note and Mortgage had been assigned to Nationstar Mortgage, LLC (hereinafter “Nationstar”) and that Nationstar was the present lien holder of the Note and Mortgage and therefore Nationstar should be substituted as Plaintiff for ALS. The Note does not bear an endorsement to Nationstar and there is no assignment of the Mortgage to Nationstar. If the Note was never endorsed to Nationstar and the Mortgage was never assigned to Nationstar, then Nationstar lacked standing and the legal right and authority to seek to foreclose upon the Mortgage in Action 2. By law the chain of title of a mortgage must follow and correspond to the chain of title of the note it secures.

Prior to the execution of Assignment 1, on or about July 16, 2009, ALS, sent Curt Rogers a correspondence with an alleged certified copy of the Note and Mortgage which are the subject of this action (hereinafter “Note Copy 1”). The note contained an undated endorsement in blank executed by Bakhtiar S. Akhunji as Assistant Secretary of Homecoming Financial, LLC (hereinafter “Endorsement 1”). The Note contained no other endorsements. On or about November 19, 2009, Counsel for ALS in response to a qualified written request sent by counsel for the Rogers, sent a copy of the Note which bears two endorsements (hereinafter “Note Copy 2”). Note Copy 2 bears an altered version of Endorsement 1 whereby Endorsement 1 which had originally been an endorsement in blank by Homecomings had been altered to be endorsed specifically to Residential Funding (hereinafter “Altered Endorsement 1”). The Note Copy 2 bears a second specific endorsement to Deutsche Bank Trust Company Americas as Trustee executed by Judy Faber as Vice President, Residential Funding Company, LLC (hereinafter “Endorsement 2”). Note Copy 2 does not bear any endorsements other than Altered Endorsement 1 and Endorsement 2.

June 28, 2013, the Rogers filed a Motion to Vacate the Order filed June 14, 2012, substituting Nationstar as Plaintiff for ALS in Action 2, citing as a basis for the motion standing. July 10, 2013, Nationstar in response to the Rogers discovery requests provided responses to request for production and produced a copy of the Note Copy 2. Therefore, the copy of the Note produced on July 10, 2013 did not contain an endorsement to Nationstar giving it the right to enforce the Note and therefore the right to enforce the Mortgage in Action 2. The Motion to Vacate was scheduled to be heard November 18, 2013. On or about November 16, 2013, Nationstar's counsel, provided for the first time, to Curt and Julie Roger's counsel a third copy of the Note (hereinafter "Note Copy 3") Note Copy 3 bears Altered Endorsement 1, Endorsement 2 and third endorsement in blank made by Nationstar as attorney in fact for Deutsche Bank Trust Company Americas as Trustee, however the trust is not identified.

February 28, 2014, Nationstar served the Rogers Responses Requests for Admissions (hereinafter "2/28/14 Admissions"), which were filed in Action 2 on March 3, 2014 attached as Exhibit "A" to Curt and Julie Rogers' Motion for Summary Judgment. In the 2/28/14 Admissions Nationstar Admits the following: a) Note Copy 3 was not produced in Nationstar's responses to requests for production dated July 10, 2013; b) the Note does not contain an endorsement to Nationstar or ALS; and c) as of 2/28/14 no assignment of the Mortgage had been executed assigning the Mortgage to Residential Funding, Deutsche Bank Trust Company Americas as Trustee, Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2, or Nationstar. On March 3, 2014, in Action 2, the Rogers filed a Motion for Summary Judgment based on standing and supported by Nationstar's 2/28/14 Admissions.

April 1, 2014, Nationstar as predecessor, servicer and agent of Plaintiff, was aware it had standing issues in Action 2, and tried to correct the problem prior to the Roger's Motion for Summary Judgment by executing an alleged assignment of the Mortgage whereby Nationstar as Attorney and Fact for ALS alleged to assign the Mortgage to Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2. Nationstar's counsel recorded the alleged assignment on April 14, 2014, in Book 0398 at Page 768 in the RMC Office for Charleston County (hereinafter "Assignment 2"). However, if Assignment 1 was void because Homecoming did not possess an interest in the Note at the time MERS executed Assignment 1 to ALS, then Assignment must also be void as Nationstar as attorney in fact for ALS could not execute Assignment 2 if ALS lacked the authority to assign the Mortgage. June 9, 2014, after receiving notice that the Rogers Motion for Summary Judgment had been scheduled to be heard by the Court but prior to the hearing, Nationstar moved before the court to have Action 2 dismissed pursuant to Rule 40(J), SCRCPP, which was granted by Order filed June 24, 2014 (hereinafter "Dismissal 2").

March 13, 2015, Nationstar, as predecessor, servicer and agent of Plaintiff moved to restore the action which was restored by order filed April 7, 2015, in civil action 2015-CP-10-1971 (hereinafter "Action 3"). Thereafter Nationstar made no further filings in the prosecution of the foreclosure of Mortgage in Action 3. Action 3 was called for trial on or about May 12, 2016, and on May 12, 2016, Nationstar moved to have Action 3 dismissed pursuant to Rule 40(J), SCRCPP, and was granted the motion by Order filed May 16, 2016 (Dismissal 3).

A couple of years later Nationstar as predecessor, servicer and agent of Plaintiff contacted the Roger's counsel stating Nationstar wanted to restore the action to active. The Roger's counsel informed Nationstar's counsel that she would contest the motion to restore and believed the Action

had been adjudicated on the merits pursuant to Rule 41, SCRPC. The Roger's counsel's last communication with Nationstar's counsel was December 18, 2018. Thereafter over three years after Dismissal 3 on August 27, 2019, this action (hereinafter "Action 4") was commenced for foreclosure on the Mortgage again, however this time instead of naming Nationstar as the plaintiff, Deutsche Bank Trust Company Americas as Trustee for Residential Accredited Loans, Inc., Pass-Through Certificates 2007-QH2 is the named Plaintiff, and further instead of naming the Rogers as defendants the Defendant Trust is named defendant.

STANDARD OF REVIEW

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRPC, the appellate court applies the same standard of review as the trial court. In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper. The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245 (2007) "A Rule 12(b)(6) motion should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved at trial in support of his claim. The function of a motion to dismiss is to test the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *In re Derivium Capital, LLC*, 380 B.R. 429, 435 (Bankr. Ct. D. S.C. 2006)

Malicious Prosecution

“Our Supreme Court has recognized that an action will lie for the malicious prosecution of any ordinary civil action. To recover in an action for malicious prosecution, the plaintiff must show (1) the institution or continuation of original judicial proceedings, either civil or criminal (2) by, or at the instance of, the defendant (3) termination of such proceedings in plaintiff's favor (4) malice in instituting such proceedings (5) want of probable cause and (6) resulting injury or damage. The mere fact that the defendant was unsuccessful in the prior action has no bearing on the issue of probable cause.” *Garr v. N. Myrtle Beach Realty Co. Inc.*, 287 S.C. 525, 528, 339 S.E.2d 887 (Ct. App. 1986). In this cause of action, malice is "the deliberate intentional doing of a wrongful act without just cause or excuse. It does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition. Malice also may proceed from an ill-regulated mind which is not sufficiently cautious before causing injury to another person. Moreover, malice may be implied where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person. Malice also may be implied in the doing of an illegal act for one's own gratification or purpose without regard to the rights of others or the injury which may be inflicted on another person. In an action for malicious prosecution, malice may be inferred from a lack of probable cause to institute the prosecution. Based on the foregoing, one need not show actual malice in order to successfully maintain an action for malicious prosecution.” *McBride v. School Dist. of Greenville*, 389 S.C. 546, 565-66, 698 S.E.2d 845 (Ct. App. 2020) “A party must show the opponent lacked probable cause as to each cause of action asserted to prevail on a claim of malicious prosecution; thus, the existence of probable cause as to any one is sufficient to defeat a malicious prosecution claim. Whether probable cause exists is ordinarily a jury question, but it may be decided as a matter of

law when the evidence yields only one conclusion.” *Pallares v. Seinar*, 407 S.C. 359, 367, 765 S.E.2d 128 (2014)

Twice in the last five years our Court of Appeals has stated striking a case from the active roster pursuant to Rule 40(j), SCRCP, is equivalent to dismissing a case. See. *Goodwin v. Landquest Development, LLC*, 414 S.C.623, 779 S.E.2d 826 (Ct. App. 2015) (A case involving a foreclosure of a mortgage where motion to restore was denied because striking a case pursuant to Rule 40(J) is equivalent to a dismissal.). See. *Personal Care, Inv. v. Theos*, 426 S.C. 78, 825 S.E.2d 281 (Ct. App. 2019) (where the Court declined to restore a case to the active roster stating because striking a case under Rule 40(j) is the equivalent of dismissing the case and stating “Nevertheless, we believe this argument ignores the procedural posture of the case as dismissed.”)

“The terms of a contractual agreement are not conclusive in determining the association between two parties where there is evidence outside the contract establishing an agency relationship. If there are any facts tending to prove an agency relationship, the question is one for the jury. *Gamble v. Stevenson*, 305 S.C. 104, 108, 406 S.E.2d 350 (1991) “Generally agency may be implied or inferred and may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal. The doctrine of apparent authority provides that the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption.” *Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424 (1982)

In this Case Plaintiff and Nationstar merely makes reference to elements 3-6 of the cause of action, without applying Defendant’s allegations to those elements or even asserting that the

elements have not been met. Nationstar also asserts Defendant cannot recovery under cause for malicious prosecution against Nationstar because Nationstar is not the named plaintiff in this action.

Here Defendant plead ALS initiated Action 1 in 2009 to foreclose upon the Mortgage securing the Note. Defendant alleged that there is not an endorsement endorsing the Note to ALS which would entitle ALS to enforce the Note or Mortgage. Defendant alleged the Roger's asserted the defense of standing and that thereafter Action 1 was dismissed pursuant to Dismissal 1. Defendant alleged shortly after Action 2 was reinstated in 2013 Nationstar and/or ALS moved before the court alleging the Note and Mortgage had been assigned to Nationstar and that Nationstar should be substituted as plaintiff in Action 2, without notice or hearing of the motion to the Rogers. Defendant plead the Note does not bear an endorsement to Nationstar and there is no assignment of record of the Mortgage being assigned to Nationstar. Defendant plead that the Rogers moved to vacate the order substituting Nationstar as Plaintiff in action 2, but the motion was never heard. Defendant plead Nationstar on July 10, 2013, produced Note Copy 2 with a first endorsement from Homecomings Financial, LLC to Residential Funding and a Second Endorsement from Residential Funding Company, LLC to Deutsche Bank Trust Company Americas as Trustee (for an unidentified trust). Defendant Plead the Motion to Vacate was scheduled to be heard November 18, 2013, though it was never heard, and that November 16, 2013, Nationstar's counsel in Action 2 produced for the first time Note Copy 3 which a third endorsement whereby Nationstar as attorney in Fact for Deutsche Bank Trust Company Americas as Trustee (for an unidentified trust) endorse the note in blank. Nationstar on February 28, 2014, in response to requests for admission in Action 2 admitted the note it produced in July of 2013 in response to discovery Action 2, could only be enforced by Residential Funding, and not Nationstar

or ALS; and as of 2/28/14 no assignment of the Mortgage had been executed to Residential Funding, Deutsche Bank Trust Company Americas as Trustee, Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2, or Nationstar. March 3, 2014, the Rogers's filed a motion for summary judgment in Action 2, based upon Nationstar's lack of standing and attaching Nationstar's responses to the requests for admissions as a filed exhibit to the motion. Defendant alleged that Nationstar aware that its cause of action for foreclosure in Action 2 could likely be dismissed because Nationstar lacked standing, sought to retroactively try to fix the issue by having its counsel for Action 2 to file Assignment 2 of Mortgage dated April 1, 2014 wherein Nationstar as alleged attorney in fact for ALS assigned the Mortgage Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2, which was recorded by Nationstar's attorney in Action 2 on April 14, 2014, in Book 0398 at Page 768 in the RMC Office for Charleston County.¹ Defendant plead that after Nationstar received notice of the scheduling of the Roger's Motion for Summary Judgement in Action 2, that prior to the hearing Nationstar moved for and was granted Dismissal 2. Defendant plead that pursuant to Rule 41(b), SCRPC, Dismissal 2 constituted an adjudication of upon the merits of foreclosure action on the Mortgage. Defendant Plead despite Dismissal 2 barring Nationstar from reinstating the foreclosure action Nationstar move to restore Action 2 and Action 3 was initiated in April of 2015. Plaintiff plead that Nationstar thereafter took no acts in furtherance of prosecuting Action 3 and when it was called for trial, with the Roger's Motion for Summary Judgment still pending, Nationstar moved for and was granted Dismissal 3 on May 16, 2016. Defendant plead that pursuant to Rule 41(b), SCRPC, Dismissal 3 constituted

¹ It can also be inferred from the allegations that because Endorsement 3 of the Note was not on the copy of the Note produced in discovery in July of 2013, that Nationstar who executed Endorsement 3 did so after the Roger's had moved vacate Nationstar as plaintiff based upon standing.

an adjudication of upon the merits of foreclosure action on the Mortgage. Defendant plead that in the end 2018, Nationstar's counsel on behalf of Nationstar contacted the Roger's counsel stating that Nationstar wished to reinstated Action 3, and Roger's counsel put Nationstar on notice that it was the Roger's contention under Rule 41, the matter had been adjudicated on the merits and Nationstar was barred from reinstating a cause of action for foreclosure of the Mortgage. Plaintiff plead thereafter on August 27, 2019, Nationstar, predecessor, servicer, and agent of Plaintiff, retained Plaintiff's counsel to bring this action, but that Nationstar concerned about issues of standing and res judicata determined that instead of bringing this action with Nationstar as the plaintiff and the Rogers as the Defendant's, determined it would name Plaintiff and the Defendant trust as the parties instead. Defendant plead that Nationstar and Plaintiff are collaterally estopped from maintaining this Action 4, which is based upon the same facts and allegations as Actions 1, 2, and 3, seeking to foreclose on the same Mortgage secured by the same Note.

Therefore, There is evidence that Nationstar is Plaintiff's agent and servicer. Defendant plead that Action 2 was adjudicated on the merits in Defendant's favor. Thereafter Nationstar instituted Action 3 which was also adjudicated on the merits in the Defendant's favor.² Thereafter Nationstar as servicer for Plaintiff initiated Action 4 continuing its attempts to foreclose upon the Mortgage for a fourth time ten years later. But in Action 4 instead, Nationstar elected to insert Plaintiff standing in Nationstar's past prosecutorial shoes in contrast to Action 2 and 3.³ Nationstar

² Defendant is the legal title holder to the Property sought to be foreclosed upon in this matter, a foreclosure would extinguish Defendant's title to the property causing Defendant harm. Defendant has standing to protect its rights in the Property. Defendant plead that Plaintiff and Nationstar were collaterally estopped from instituting this Foreclosure action and had knowledge of such but brought the action anyway. The case law and elements for malicious prosecution do not require that Defendant was a party to the former action, only that those proceedings ended in Defendant's favor which they did because Action 2 and Action 3 were an adjudication as to the merits against Plaintiff and Nationstar's right to foreclose upon Defendant's Property.

³ Nationstar asserts that Defendant's cause of action for Malicious Prosecution against Nationstar must fail because Nationstar is not the plaintiff in this action. However, our case law for malicious prosecution makes clear that the institution or continuation of judicial proceedings by or at the instance of Nationstar is sufficient, whether or not they are the named Plaintiff in this action. Here, Defendant plead that Nationstar as servicer not Plaintiff, retained

as Plaintiff's agent and servicer chose a tactical maneuver to dismiss action 2 and Action 3 to avoid a ruling by summary judgment or trial that Nationstar was barred from the foreclosure relief sought. Then Nationstar as servicer for Plaintiff retained Plaintiff's to bring Action 4 more than three years later, naming the parties of Plaintiff and Defendant Trust instead of Nationstar and the Rogers to further attempt avoid res judicata and standing issues. This shows implied malice where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person. By Nationstar as Plaintiff's agent instituting Action 4, Plaintiff and Nationstar instituted an illegal act for their own gratuitous benefit without regard to the rights of Defendant or the injury which may be inflicted on Defendant. Plaintiff and/or Nationstar lacked the probable cause to initiate Action 3 and continue to seek foreclosure of the Mortgage through Action 4 when they were on notice that they lacked probable cause to initiate both actions because the right to foreclose upon the Mortgage had been adjudicated upon the merits without a ruling in their favor. As a result of Plaintiff and Nationstar's decade long attempt to foreclose upon the Mortgage and continuation of attempting to do so by Nationstar initiating Action 4 on behalf of Plaintiff, Defendant has suffered the damages of incurring attorney's fees to defend this matter when Plaintiff, Nationstar, and/or their alleged predecessor in interest never though it necessary to name Defendant a party to Action 1, 2, or 3. Defendant is also injured by the threat of a defective foreclosure sale extinguishing Defendant's title interest in the Property.

Plaintiff's counsel to initiate this action. It is no different then an instance where a defendant files a baseless police report against a plaintiff and the subsequent action is latter dismissed for lack of probable cause. In that instance like this case the aggrieved plaintiff has a cause of action for malicious prosecution against the defendant. Nationstar's argument is without merit.

For the forgoing reasons Defendant plead an adequate basis to withstand a motion and dismiss. Plaintiff and Nationstar's Motion to Dismiss Defendant's cause of action of malicious prosecution must be denied.

Abuse of Process

"To cause process to issue without justification is an essential element of malicious prosecution, but not of abuse of process. In the latter, the issuance of the process may be justified in itself, it is the malicious misuse or perversion of the process for an end not lawfully warranted by it that constitutes the tort known as abuse of process." *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693 (1967). "Abuse of process has been defined as the employment of legal process for some purpose other than that for which it was intended by the law to effect—the improper use of a regularly issued process. The elements of abuse of process are an ulterior purpose and a willful act in the use of the process not proper in the regular course of the proceeding. Furthermore, the improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself." *Whitfield Const. v. Bank of Tokyo Trust*, 338 S.C. 207, 525 S.E.2d 888 (Ct. App. 1999)

In this case Nationstar asserts that Defendant's abuse of process claim against Nationstar must fail because Nationstar is not the Plaintiff in this action, and that Defendant failed to plead an improper purpose of this foreclosure action.

First Defendant plead Nationstar as Plaintiff's agent, not Plaintiff, is one who initiated this action on behalf of Plaintiff. Defendant plead that Nationstar was the named Plaintiff in the foreclosure Actions 2 and 3, and after Dismissal 3 Nationstar maintained communications with Roger's counsel about Nationstar reinstating the foreclosure action. Defendant plead that Nationstar retained Plaintiff's counsel to file this action and that Nationstar is the principle contact

for Plaintiff's counsel. The cause of action does not require Nationstar be the Plaintiff in this action only that Defendant assert Nationstar misused the legal process through willful acts and coercion to obtain a collateral advantage. Therefore, this line of argument is without merit.

As to Plaintiff and Nationstar's argument that Defendant failed to plead how prosecution of this foreclosure action is aimed at some improper purpose, this argument is also without merit.

Plaintiff plead that the Roger's moved to vacate the order naming Nationstar as plaintiff in Action 2 because there was no endorsement of the Note or assignment of the Mortgage to either Nationstar or its alleged predecessor ALS. Defendant plead that four years into the foreclosure in Action 2, and Days before the Roger's motion to vacate, was to be heard, Nationstar for the first time produced Note Copy 3 with a new endorsement to attempt alleviate the standing issues. The new endorsement was executed by Nationstar as attorney in fact for Deutsche Bank Trust Company Americas as Trustee (for an unidentified trust) endorsed the Note in blank, which would allow Nationstar to allege it had the right to enforce the Note. Defendant alleges that thereafter Nationstar admitted that it had not produced Note Copy 3 in responses to requests for production in July of 3013; that the Note did not contain an endorsement to Nationstar or ALS, and no assignment existed assigning the Mortgage to to Residential Funding, Deutsche Bank Trust Company Americas as Trustee, Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2, or Nationstar. Thereafter the Rogers filed a Motion for Summary Judgment based on standing. Defendant alleged that Nationstar based on the record before the court had reason to believe the Roger's motion for summary judgment could be granted denying Nationstar and its principle (Plaintiff) foreclosure relief. Therefore Nationstar undertook further improper acts to fix the standing issues years by also executing and filing an Assignment 2 dated April 1, 2014, wherein Nationstar as alleged attorney

in fact for ALS assigned the Mortgage to Plaintiff, which was recorded by Nationstar's attorney for Action 2 on April 14, 2014. However, Defendant also plead Nationstar stated in response to discovery in Action 2 to alleged that on February 27, 2007, Residential Funding was the alleged owner and holder of the Note and Mortgage and , assigned the Note and Mortgage to the Securitized Trust (no reference to Deutsche as the Trustee was made). If Residential Funding was the owner and holder of the Note in February of 2007 and assigned it to the Securitized Trust who Deutsche as claims to be the trustee for, then the MERS assignment of the Mortgage in 2009 is void as a matter of law. Further if ALS never received authority to enforce the Mortgage in 2009 then Nationstar as attorney in fact for ALS had no authority to assign the Mortgage to Plaintiff in 2014. Nationstar and Plaintiff knew or should have known that Nationstars standing issues were legitimate. Therefore just prior to the Roger's Motion for Summary Judgment being heard, Nationstar made another improper tactical maneuver by moving for and being granted Dismissal 2. At that time Nationstar and Plaintiff either knew or should have known that Dismissal 2 was denied Nationstar relief by an adjudication on the merits. However, Nationstar moved to reinstate Action 3 and then Nationstar did nothing in furtherance of prosecuting Action 3. The matter was called for trial and Nationstar again made an improper tactical maneuver by moving for and being granted Dismissal 3. Nationstar and Plaintiff thereafter new that the Roger's claimed that Dismissal 2 and Dismissal 3 constituted an adjudication on the merits under Rule 41. Therefore instead of attempting to reinstate Action 3 with Nationstar as plaintiff, Nationstar sat and waited for over three years. Finally, Nationstar as agent for Plaintiff retained counsel to bring this action. However, in order to fix the previous standing and res judicata issues, in addition to Nationstar's previous improper acts of executing an endorsement of the Note and an assignment of Mortgage

to fix those issues years after the litigation had commenced, Nationstar elected bring this new action Plaintiff and the Defendant Trust as named parties instead of Nationstar and the Rogers.

Here, Defendant plead that Plaintiff and Nationstar as the agent and servicer of Plaintiff brought this Action for the ulterior purpose of trying to mitigate or improperly rectify its of issues of standing and res judicata which are laid out in the public record of Actions 2 and 3. Nationstar as Plaintiff's agent committed willful acts by in or around November of 2013, executing an alleged endorsement of the Note and in April of 2014, executing an alleged assignment of the mortgage and doing so in both case as an alleged attorney in fact for distinct entities. Defendant plead that Nationstar as Plaintiff's agent committed the willful act of trying to alleviate its standing issues by moving for and receiving Dismissal 2. Defendant plead that Nationstar as Plaintiff's agent committed the willful act of trying to continue the foreclosure process despite Dismissal 2 by reinstating Action 2 through Action 3. Defendant plead that Nationstar as Plaintiff's agent committed the willful act of trying to alleviate the standing and res judicata issues by moving for and receiving Dismissal 3. Defendant plead that Nationstar as Plaintiff's agent committed the willful act of trying to continue to prosecute the foreclosure matter ten years, and three dismissals after it had begun by bring this action, Action 4 in 2019 in the name Plaintiff for the first time.⁴in an attempt match the alleged 2013 endorsement of the Note and the void 2014 assignment of the Mortgage. Nationstar further sought to rectify the res judicata issues by not naming the Roger's as defendants but instead for the first time naming the Defendant Trust. Defendant would assert it

⁴ Again Defendant plead that Nationstar in response to discovery asserted that the Securitized Trust was assigned the Note and Mortgage in 2007, However, ALS brought Action 1 in its own name in 2009, despite the Note never being endorsed to ALS, and then Nationstar and/or ALS moved to substitute Nationstar as plaintiff in Action 2 alleging to the Court that the Note and Mortgage had been assigned to Nationstar despite the fact the Note and Mortgage were never endorsed or assigned to Nationstar. Nationstar remained the named Plaintiff in Acton 3 and not until this action was Plaintiff named a party.

plead sufficient allegations to withstand Plaintiff and Nationstar's motion to dismiss its cause of action for abuse of process and this court must deny the motion.

Declaratory Judgment

A cause of action under the Declaratory Judgment Act is established by showing the existence of a justiciable controversy, defined as "a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018), and *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970).

Defendant has alleged a real and substantial controversy concerning the very contract Plaintiff has sued upon. In part, the Defendant seeks a determination of the subject contracts are enforceable. Additionally, Defendant seeks a determination as to the impact of the initiation of the within suit in light of Dismissal 2 and 3, a determination of whether this action is precluded under the law of this state and the Rules of Civil Procedure. The Defendant's counterclaim is therefore the very type of controversy the Declaratory Judgment Act contemplates, as it invites a party affected by a contract and law to ask a court to define how the contract and law impacts the party's rights. See *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018).

Indeed, the three points proffered by Plaintiff illustrate a controversy exists. Plaintiff contends Rule 40(j) and 41 do not preclude it from bringing the within action whereas Defendant takes the absolute opposite position and has so pled in its counterclaim. Plaintiff claims the endorsements on the note are "all proper endorsements" (P & NS Motion to Dismiss, p. 7) whereas Defendant has pled the opposite. (Answer pgs. 7-11). Plaintiff claims the declaratory judgment fails because South Carolina law under Article 3 of the Uniform Commercial Code not endorsements dictates whether a party is entitled to foreclosure a mortgage (Movant's Motion to

Dismiss, p. 7), which further illustrates a justiciable controversy. See *Consignment Sales Llc v. Tucker Oil Co.*, 391 S.C. 266, 705 S.E.2d 73 (S.C. App. 2011), citing *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995)(“A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party.’ *Id.* “Any person interested under a deed, written contract or other writings . . . or whose rights, status, or other legal relations are affected by a statute . . . contract . . . may have determined any question of construction or validity arising under the ... contract ... and obtain a declaration of rights, status or other legal relations thereunder.’ S.C. Code Ann. § 15–53–30 (2005)”).

Here Defendant is the legal title holder to the Property, which Plaintiff seeks to foreclosed upon in this matter. A foreclosure would extinguish Defendant’s title to the property causing Defendant harm. Defendant has legal interest to protect and the right to determine whether the Mortgage is enforceable, and to determine whether laws of this state and the civil rules of procedure preclude Plaintiff’s ability to enforce the Mortgage in this action.

South Carolina Unfair Trade Practices Act

Plaintiff and Nationstar do not argue the counterclaim lacks sufficient facts to set forth a cause of action. Rather they just make blanket incorrect statements.

Plaintiff and Nationstar first attempt to argue a claim for violation of the South Carolina Unfair Trade Practice Act (“SCUTPA”) cannot be asserted against them because they did not originate the loan. They state “[a]s mere assignees of the mortgage loan, Deutsche Bank and Nationstar are [not] *sic* subject to any claims arising from origination of the loan.” They say nothing else as to this issue.

First they leave out a critical holding in the case of *Rosemond v. Campbell* which they cite to support their position. Immediately before the sentence quoted by Plaintiff and Nationstar, the *Rosemond* Court states: "At common law, an assignee's rights can be no greater than those of the assignor. Consequently, the assignee of a debt takes the obligation subject to all claims and defenses the obligor may have against the assignor." Id. at 645. Being an assignee and ones that have affirmatively sought to enforce the loan provides them with no shelter. No basis for dismissal has been argued.

Additionally, it is important to note that Plaintiff and Nationstar do not claim to be holders in due course and Defendant has affirmatively alleged they are not. (Answer ¶ 111). Not being holders in due course they are subject to all claims.

Second Defendant Plead that Plaintiff plead in its Return to the Roger's motion to intervene, filed July 9, 2020 that the Roger's no longer possess a legal interest in the Property and Defendant adequately represents the Roger's interest in this action through Defendant's fiduciary duties owed to the Rogers. (Answer ¶ 29-31) "When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." and must be judicially estopped from maintaining two inconsistent positions. *See. Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006). Here, Defendant's alleged SCUTPA allegations far exceed allegations addressing the transfers of the note and mortgage. Defendant's allegations are based on the various principal agent relationships Plaintiff had not only with Nationstar but other servicers of the loan. Additionally, Defendant set forth allegations involving the specific conduct or lack thereof of Plaintiff and Nationstar. Although Plaintiff and Nationstar fail to address any of the allegations of the counterclaim, the claims for unfair and deceptive practices range from imposing unconscionable interest amounts owed, servicer violations, maintaining a lien on real

property that is unenforceable; and the injury cause by continued neglect and delay in prosecuting Actions 1, 2, 3 and now this action for over 11 years clouding title to and diminishing the value of Defendant's Property. (Answer ¶ 112).

Plaintiff and Nationstar's third point lacks support and is meritless. If Plaintiff and Nationstar are claiming they are entitled to an exemption under the Act, it has the burden of proving the exemption. S.C. Code Ann. § 39–5–40. It has made no effort to do so. In fact, the wealth of the law establishes that Plaintiff and Nationstar's actions are not permitted by law.

Dismissal 2 precluded filing Action 3. Dismissal 2 and 3 precluded the filing of this action under Rules 40j and 41, SCRPC, as well as the doctrine of collateral estoppel. Twice in the last five years our Court of Appeals has stated striking a case from the active roster pursuant to Rule 40(j), SCRPC, is equivalent to dismissing a case. See. *Goodwin v. Landquest Development, LLC*, 414 S.C.623, 779 S.E.2d 826 (Ct. App. 2015) (A case involving a foreclosure of a mortgage where motion to restore was denied because striking a case pursuant to Rule 40(J) is equivalent to a dismissal.). See. *Personal Care, Inv. v. Theos*, 426 S.C. 78, 825 S.E.2d 281 (Ct. App. 2019) (where the Court declined to restore a case to the active roster stating because striking a case under Rule 40(j) is the equivalent of dismissing the case and stating "Nevertheless, we believe this argument ignores the procedural posture of the case as dismissed.")). Plaintiff and Nationstar's actions fall within the Act.

SCUTPA establishes: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. Code Ann. § 39-5-20(a) (1985). "An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006).

Recently the South Carolina Court of Appeals upheld a lower court's grant of summary judgment in favor of a consumer on his counterclaim for violation of SCUTPA against a lender in a foreclosure action. See *Beneficial Financial I, Inc., v. Jon Windham*, Op. No. 5753 (Ct. App. August 5, 2020). The consumer/mortgagor asserted: Beneficial's conduct violated the SCUTPA by (1) "foreclosing on a tract of land which [Beneficial] knows, or should know, was not to be secured by any mortgage between [Beneficial] and [Windham]"; (2) "force-placing insurance on [Windham's] property when [Windham] already had insurance, causing [Windham's] monthly payment to increase"; (3) "taking monthly payments from [Windham] and applying them all to alleged interest and fees"; (4) "unilaterally ceasing acceptance of payments from [Windham] on his loan"; and (5) "refusing to offer [Windham] a loan modification, even after stating it would do so." The Court held Windham met his burden of proof on his counterclaim for a violation of SCUTPA. Beneficial's unfair practice of force-placing hazard insurance in violation of a mortgage contract has the potential for repetition. See *Crary*, 329 S.C. at 388, 496 S.E.2d at 23 (1998) (holding evidence indicating mortgage broker had other opportunities to enter into similar transactions was sufficient evidence to support a finding of a SCUTPA violation); *York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) (holding allegation of car dealership's alleged misrepresentation of a car's accident history was sufficient to survive directed verdict motion for SCUTPA violation because the dealership was in the business of selling cars; thus, "[c]ertainly the alleged acts or practices have the potential for repetition"). The lower court's grant of summary judgment to Windham on his counterclaim against Beneficial for a violation of the SCUTPA was affirmed.

Here, Defendant has alleged it has been injured by unconscionable interest charges claimed owed, the continuous delay of prosecuting Actions 1, 2, 3, and now this action which has clouded Defendants title and diminished the value to its Property and Defendant requested attorney's fees as damages for having to appear and Defendant this matter due Nationstar and/or Plaintiff's tactical maneuver of naming the Defendant Trust in this action instead of naming the Rogers to avoid res judicata issues. Defendant cited to another South Carolina foreclosure case where Plaintiff's continued delays in failing to prosecute that foreclosure action caused that defendant damage, which establishes repetition. (Answer ¶ 114). Like Windham, Defendant has set forth a claim for violation of SCUTPA and its claim should not be dismissed.

Negligent Misrepresentation

"In South Carolina, one may bring an action sounding in tort for negligent misrepresentation. A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction. The recovery of damages may be predicted upon a negligently made false statement where a party suffers either injury or loss as a consequence of relying upon the misrepresentation." *Gilliland v. Elmwood Properties*, 301 S.C. 295, 301, 391 S.E.2d 577 (1990).

Here, Defendant alleged a number of misrepresentations were made by Plaintiff and/or Nationstar as Plaintiff's agent (Answer ¶ 79 , including that Nationstar moved to dismiss Action 2 and Action 3 with full knowledge that pursuant to Rule 41, SCRCF, such a motion would constitute a decision upon the merits precluding further prosecution of a foreclosure of the Mortgage upon Defendant's Property. It is clear Plaintiff and Nationstar had a pecuniary interest in the Mortgage transaction. Defendant reasonably relied in Nationstar as Plaintiff's agent's statements, filed in the public record, that Nationstar and Plaintiff desired to dismiss Action 2 and Action 3 subject to Rule

41, SCRCF. The misrepresentations caused Defendant an injury and loss when Plaintiff and Nationstar continued to cloud the title to Defendant's Property, diminishing its value and further causing Defendant to incur attorney's fees in defending this action. The Court should deny Plaintiff and Nationstar's Motion to Dismiss as to this cause of action.

Statute of Limitations

Plaintiff and Nationstar assert Defendant's counterclaims and third-party claims "are time barred in-whole or in part pursuant to the applicable statute of limitations" asserting a three-year statute of limitations applies.⁵

"According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. We have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist." *Dean v. Ruscon Corp.* 321, S.C. 360, 363, 468 S.E.2d 645, 647 (1996). "A defendant will be estopped from asserting a statute of limitations defense "when the delay that otherwise would give operation to the statute has been induced by the defendant's conduct. This conduct may be either an express representation that the claim will be settled without litigation or actions suggesting a lawsuit is unnecessary." *Harvey v. South Carolina Department of Corrections*, 338 S.C. 500, 509, 527 S.E.2d 765 (Ct. App. 2000).

⁵ Plaintiff and Nationstar do not assert that Defendant's equitable cause of action for accounting is barred by the statute of limitations, nor do they assert any other basis in their motion as to which Defendant's cause of action for accounting should be dismissed.

First, Defendant took title to the property in 2010 and through the long history of these foreclosure proceedings , Nationstar as agent of Plaintiff never sought to name Defendant in Actions 2 or 3. Defendant believed pursuant Rule 41, SCRPC, Dismissal 2 and 3 constituted an adjudication of the merits of Nationstar and/or Plaintiff's right to seek foreclosure upon the Property. After Dismissal 3, Nationstar and/or Plaintiff did take any further action for over three years. By 2019 Defendant reasonably believed that Nationstar and/or Plaintiff would not take the improper action of continuing this never-ending attempt to foreclose upon the Property, until Plaintiff serviced Defendant this matter in September of 2019. Defendant would assert the statute of limitations did not begin to run on its causes of action until September of 2019.

Second, though Defendant affirmatively asserts the statute of limitations has not run on its causes of action, if this Court were to find that the statute had run on any of its causes of action Defendant would assert that Plaintiff and Nationstar should be estopped from asserting the statute of limitations as a defense to Defendant's causes of action. Here the delay that gave rise to the alleged operation of the statute is a result of the of Plaintiff and/or Nationstar's, actions, inactions and delay. Nationstar as agent of Plaintiff's actions from the time of Dismissal 2 in June of 2014 until the filing of this Action in August of 2019, equates to more than a five-year delay attributable to Nationstar and Plaintiff. That delay constituted inaction which Defendant could reasonably rely upon as basis for believing that it did not need to bring an action against Nationstar and/or Plaintiff to protect Defendant's right in the Property. Further defendant took title the Property more than nine years before the commencement of this action and has held title during Action 1, 2, and 3. Defendant could reasonably believe Plaintiff and Nationstar would not commit the improper acts of continuing the foreclosure matter a fourth time and naming Defendant.

Fourth, though Defendant affirmatively asserts that the statute of limitations has not run on its causes of action, if this court were to find that the statute had run on any of its causes of action Defendant would assert that the facts and circumstances in this matter are appropriate for the Court to apply equitable tolling of the statute. "Tolling" refers to suspending or stopping the running of a statute of limitations; it is analogous to a clock stopping, then restarting. Tolling may either temporarily suspend the running of the limitations period or delay the start of the limitations period. South Carolina law provides for tolling of the applicable limitations period by statute in certain circumstances . . . in order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations. Equitable tolling is a nonstatutory tolling theory which suspends a limitations period. Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period `to ensure fundamental practicality and fairness. The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use. . . . The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." Here, Defendant would assert that given the actions and inactions of Nationstar and/or Plaintiff asserted herein, to deny equitable tolling in this case, to the extent the Court found the statute of limitations had run, would permit Defendant to suffer a gross wrong at the hands of Nationstar and Plaintiff.

Fifth as to declaratory judgment "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Sloan v. Greenville County*, 356 S.C. 531, 544, 590 S.E.2d 338 (Ct. App. 2003). Generally statutes of limitation do not bar the equitable relief. See *Richland County v. Kaiser*, 351 S.C. 89, 567 S.E. 2d 260 (S.C. App. 2002), *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 543 S.E.2d 563 (Ct.App.2001). In this case Plaintiff, brought this action to foreclose in equity, and Defendant's declaratory relief sought is for determinations as to Plaintiff and Defendants rights in regard to Plaintiff's ability to enforce the mortgage in the foreclosure action. Therefore, Defendant would assert that its declaratory judgment action sounds in equity and is not subject to a statute of limitations.

Standing

"[T]he United States Supreme Court enunciated a stringent standing test. Lujan set forth the "irreducible constitutional minimum of standing," which consists of the following three elements: First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... traceable to the challenged action of the defendant, and not ... the result of the independent action of some third party not before the court." Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Spaw v. SC Dept. of Nat. Resources*, 345 S.C. 594, 601, 550 S.E.2d 287 (2001). "Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the

constitutional requisites are met” *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80-81 (1978).

Here it is undisputed that Defendant holds title to the Property which Plaintiff and Nationstar seek to foreclose upon. A foreclosure will terminate Defendant’s title interest in the Property, and a defective foreclosure sale would impair the significant property rights of Defendant. Defendant in asserting its causes of action is seeking to protect its interest in the Property and has the standing to do so. Defendant is not seeking to enforce the endorsement and/or assignment contracts, Defendant refers to the contracts as evidence that Plaintiff lacks authority to enforce the Note and/or Mortgage. Defendant has alleged that Dismissal 2 and 3 and the continuation of this action, accompanied by Nationstar’s improper actions in executing endorsements and assignment after the initiation of litigation have clouded title to Defendant’s Property and diminished its value. Further Nationstar and Plaintiff’s improper tactical maneuver of naming Defendant as a party to this action, in an attempt to avoid res judicate issues has caused Defendant to incur attorney’s fees in defending this action. Defendant has more than adequately asserted allegations for this Court to find it has standing to seek redress for the improper actions of Plaintiff and/or Nationstar as Plaintiff’s agent as set forth in the pleadings.

CONCLUSION

For the foregoing reasons set forth herein above Defendant would request that this Court deny Plaintiff and Nationstar’s motion to dismiss.

RESPECTUFLY SUBMITTED,

THE LAW OFFICE OF
DAVID CONOR KEYS, LLC
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D. Conor Keys
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conor@dconorkeyslaw.com
Attorney for Defendant

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

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

Plaintiff,)

v.)

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

Defendants,)

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

Third-Party Plaintiff,)

v.)

Nationstar Mortgage LLC,)

Third-Party Defendant.)

AFFIDAVIT OF ALAN BLUNT

I, Alan Blunt, being duly sworn and deposed, state as follows:

1. I am over eighteen (18) years of age, am competent to make this statement, and have personal knowledge of the matters set forth in this Affidavit.
2. I am a duly authorized bank officer and/or custodian of the records of Nationstar Mortgage LLC ("Nationstar") with authority to execute this Affidavit and certify the authenticity and accuracy of the records produced.

3. Nationstar maintained records for the subject loan (the "Loan") in its capacity as servicer of the Loan. As part of my job responsibilities for Nationstar, I am familiar with Nationstar's record keeping practices and the type of records maintained by Nationstar in connection with the Loan.
4. The Records were kept in the ordinary course of regularly conducted business activity by Nationstar personnel or by persons acting under their control.
5. The Records were made and kept by the regularly conducted activity of Nationstar as a regular practice, on or about the time of the act, condition, or event recorded.
6. Homecomings Financial, LLC (F/K/A Homecomings Financial Network, Inc.) was the loan lender for the Mortgage and Note on or about January 12, 2007 for the Property located at 2235 Shoreline Drive, Johns Island, SC 29455 entered with the Charleston County South Carolina Register of Deeds in Book 613 Page 844. A true and accurate copy is attached herewith as **Exhibit A**.
7. Effective September 8, 2009 a Corporate Assignment of Mortgage was executed from Mortgage Electronic Registration Systems, Inc., as Nominee for Homecomings Financial, LLC F/K/A Homecomings Financial Network, Inc. It's Successors and Assigns to Aurora Loan Services LLC recorded on September 15, 2009 in Book 0081 and Page 058. A true and accurate copy is attached herewith as **Exhibit B**.
8. Effective April 14, 2014 a Corporate Assignment of Mortgage was executed from Aurora Loan Services LLC by Nationstar Mortgage LLC, Its Attorney-In-Fact to Deutsche Bank Trust Company As Nominee for Homecomings Financial, LLC (F/K/A Homecomings Financial Network, Inc.) recorded in Book 0398 and Page 768 investor and owner of the loan. A true and accurate copy is attached herewith as **Exhibit C**.
9. Curtis & Julie Rogers ("Rogers") are the beneficiaries of a Revocable Trust Agreement dated March 3, 2010 with Ashley Johnson Beshara as Trustee ("Trustee"). A true and accurate copy is attached herewith as **Exhibit D**.
10. The Rogers broke the conditions of the note and mortgage and were in default since May, 1, 2009.
11. Nationstar Mortgage LLC became the loan servicer on July 1, 2012. At that time, Nationstar took possession of the Note through its custodian.
12. Pursuant to the Standard Terms of the Pooling and Servicing Agreement, Nationstar was authorized to commence a judicial foreclosure in its name and as a person entitled to enforce the Note. A true and accurate copy is attached herewith as **Exhibit E**.

FURTHER AFFIANT SAYETH NOT.

Signature: _____

Print Name: **Alan Blunt**

Title: **Assistant Secretary and Assistant Vice President**

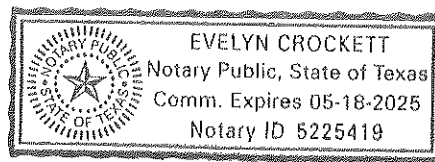
Date: **October 5, 2022**

STATE OF TEXAS

COUNTY OF DALLAS

SWORN TO and subscribed before me this 5th day of October, 2022.

Evelyn Crockett



My Commission expires: 5-18-2025

Exhibit A

BIB 613PG844

Return To:
 Homecomings Financial
 One Meridian Crossing, Sx. 100
 Minneapolis, MN 55423
 Loan Number: 047-197018-6

LAW OFFICES OF
 EDWARD C. BOGGS, PA
 1024 6WALL STREET, UNIT A-2
 MT PLEASANT, SC 29464
 DB-259C

Prepared By: Homecomings Financial
 2101 Rexford, Suite 250W
 Charlotte, NC 28211

[Space Above This Line For Recording Date]

MORTGAGE

MIN 1866

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated JANUARY 12TH, 2007 together with all Riders to this document.

(B) "Borrower" is

CURTIS ROGERS

a/k/a CURTIS L. ROGERS, III, and JULIE J. ROGERS

Borrower is the mortgagor under this Security Instrument.

(C) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. **MERS is the mortgagee under this Security Instrument.** MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS Form 3041 1/01
 MSC7770 (09/2006) / 047-197018-6

VMP-6A(SC) 041081.01

Page 1 of 11

Initials: *UR* *CR*

VMP Mortgage Solutions, Inc.



RECORD0691

in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender; (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, the following described property located in the COUNTY of CHARLESTON :

[Type of Recording Jurisdiction]

[Name of Recording Jurisdiction]

Legal description attached hereto and made a part hereof

Parcel ID Number: 315-C0-06-067

which currently has the address of

2235 SHORELINE DRIVE

[Street]

JOHNS ISLAND

[City] , South Carolina

29455

[Zip Code]

("Property Address"):

TO HAVE AND TO HOLD this property unto MERS (solely as nominee for Lender and Lender's successors and assigns,) and to the successors and assigns of MERS, forever, together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

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(D) "Lender" is HOMECOMINGS FINANCIAL, LLC (F/X/A HOMECOMINGS FINANCIAL NETWORK, INC.)

Lender is a LIMITED LIABILITY COMPANY organized and existing under the laws of DELAWARE. Lender's address is 2101 REXFORD, SUITE 250W CHARLOTTE, NC 28211.

(E) "Note" means the promissory note signed by Borrower and dated JANUARY 12TH, 2007. The Note states that Borrower owes Lender ONE MILLION FIVE HUNDRED THOUSAND AND NO/100 Dollars (U.S. \$1,500,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than FEBRUARY 1ST, 2037.

(F) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(G) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(H) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

☒ Adjustable Rate Rider	☐ Condominium Rider	☐ Second Home Rider
☐ Balloon Rider	☒ Planned Unit Development Rider	☐ 1-4 Family Rider
☐ VA Rider	☐ Biweekly Payment Rider	☐ Other(s) [specify]

(I) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(L) "Escrow Items" means those items that are described in Section 3.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(N) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(O) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used

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THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges.

Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be

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in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the

lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. **Property Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with

the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable

attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

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(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

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16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to Section 22 of this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA

requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

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NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence, all of which shall be additional sums secured by this Security Instrument.

23. Release. Upon Payment of all sums secured by this Security Instrument, this Security Instrument shall become null and void. Lender shall release this Security Instrument. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. Homestead Waiver. Borrower waives all rights of homestead exemption in the Property to the extent allowed by Applicable Law.

25. Waiver of Appraisal Rights. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within 30 days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. TO THE EXTENT PERMITTED BY LAW, THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY. This waiver shall not apply so long as the Property is used as a dwelling place as defined in Section 12-37-250 of the South Carolina Code of Laws.

26. Future Advances. The lien of this Security Instrument shall secure the existing indebtedness under the Note and any future advances made under this Security Instrument up to 150% of the original principal amount of the Note plus interest thereon, attorneys' fees and court costs.

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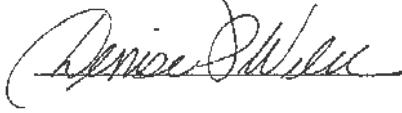
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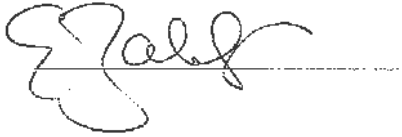
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BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Signed, sealed and delivered in the presence of:



 (Seal)
CURTIS ROGERS, A/K/A
CURTIS L. ROGERS, III -Borrower



 (Seal)
JULIE J. ROGERS -Borrower

____ (Seal)
-Borrower

____ (Seal)
-Borrower

____ (Seal)
-Borrower

____ (Seal)
-Borrower

____ (Seal)
-Borrower

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-Borrower

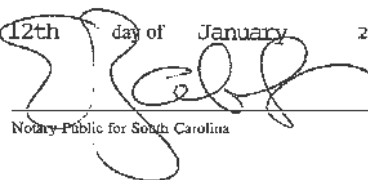
STATE OF SOUTH CAROLINA, CHARLESTON
I, ~~BARBARA K. BLOOM~~ Ellen Babo

County ss:
do hereby certify that

CURTIS ROGERS, a/k/a CURTIS L. ROGERS, III, and JULIE J. ROGERS

personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this 12th day of January 2007 .


Notary Public for South Carolina

My Commission Expires: ~~XXXXX~~ 9-25-13

EXHIBIT "A" ~ LEGAL DESCRIPTION

All that certain lot, piece or parcel of land, situate, lying and being on Johns Island, County of Charleston, State of South Carolina, and known and designated as Lot 8, Block F, Shore Line Farms Subdivision, on a lot of Shore Line Farms, made by Davis & Floyd, Engineers, Inc., dated June, 19078, and recorded in the RMC Office for Charleston County in Plat Book AL, at Page 73, on September 6, 1978, the said lot having such location, size, shape, dimensions, buttings and boundings as are shown and delineated on the aforesaid plat.

ALL of the Grantee's right, title and interest in and to an area immediately adjoining said lot to the east, composed of highland and marshland and butting and bounding generally as follows, to wit:

To the North on the prolongation of the boundary line between Lots 8 and 9, Block F;; to the South on a prolongation of the boundary line between Lots 7 and 8, Block F; to the West on Lot 8, Block F; and to the East on the now water mark of the Stono River, all as will more fully appear by reference to the aforesaid plat by Davis and Floyd Engineers, Inc., dated June, 1978, and recorded in the RMC Office for Charleston County in Plat Book AL, Page 73.

BEING the same property conveyed to Curtis L. Rogers, III by deed from Kathleen P. Evans, dated July 3, 2002, recorded July 3, 2002, in Book G-411, at Page 112, and re-recorded August 20, 2002, in Book O-415, at Page 836, in the ROD Office for Charleston County. Subsequent thereto, Curtis L. Rogers, III conveyed said property to Julie J. Rogers by deed dated December 14, 2005, and recorded January 10, 2006, in the aforesaid ROD Office in Book W-568, at Page 643, and to Curtis L. Rogers III by deed of Julie J. Rogers dated and recorded simultaneously herewith. TMS Nos. 315-00-00-067 and 315-00-00-008 (marsh)

File No. 06-259C

JR
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ADJUSTABLE RATE RIDER **5 Year Fixed Rate Payment Option**

THIS ADJUSTABLE RATE RIDER is made this 12TH day of JANUARY, 2007, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date given by the undersigned ("Borrower") to secure Borrower's Adjustable Rate Note (the "Note") to HOMECOMINGS FINANCIAL, LLC (P/K/A HOMECOMINGS FINANCIAL NETWORK, INC.)

("Lender") of the same date and covering the property described in the Security Instrument and located at:

2235 SHORELINE DRIVE
JOHNS ISLAND, SC 29455

[Property Address]

THE NOTE CONTAINS PROVISIONS THAT WILL CHANGE THE INTEREST RATE AND THE MONTHLY PAYMENT. THERE MAY BE A LIMIT ON THE AMOUNT THAT THE MONTHLY PAYMENT CAN INCREASE OR DECREASE. THE PRINCIPAL AMOUNT TO REPAY COULD BE GREATER THAN THE AMOUNT ORIGINALLY BORROWED, BUT NOT MORE THAN THE LIMIT STATED IN THE NOTE.

ADDITIONAL COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

Lender or anyone who takes the Note by transfer and who is entitled to receive payments under the Note is called the "Note Holder."

A. INTEREST RATE AND MONTHLY PAYMENT CHANGES

The Note provides for changes in the interest rate and the monthly payments, as follows:

2. INTEREST

(A) Interest Rate

Interest will be charged on unpaid Principal until the full amount of Principal has been paid. I will initially pay interest at a yearly rate of 7.3750 %. The interest rate I will pay may change.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 7(B) of the Note.

(B) Interest Rate Change Dates

The interest rate I will pay may change on the first day of FEBRUARY, 2012, and on that day every month thereafter. Each date on which my interest rate could change is

5 YEAR PAYMENT OPTION MULTISTATE ADJUSTABLE RATE RIDER 05/06

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VMP Mortgage Solutions, Inc.

Initials: 


called an "Interest Rate Change Date." The new rate of interest will become effective on each Interest Rate Change Date. Although the interest rate may change monthly, my monthly payment will be recalculated in accordance with Section 3.

(C) Interest Rate Limit

My interest rate will never be greater than 9.9500 %.

(D) Index

Beginning with the first Interest Rate Change Date, my adjustable interest rate will be based on an Index. The "Index" is the "Twelve-Month Average" of the annual yields on actively traded United States Treasury Securities adjusted to a constant maturity of one year as published by the Federal Reserve Board in the Federal Reserve Statistical Release entitled "Selected Interest Rates (h,15)" (the "Monthly Yields"). The Twelve Month Average is determined by adding together the Monthly Yields for the most recently available twelve months and dividing by 12. The most recent Index figure available as of the date 15 days before each Interest Rate Change Date is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

(E) Calculation of Interest Rate Changes

Before each Interest Rate Change Date, the Note Holder will calculate my new interest rate by adding TWO AND ONE FOURTH percentage point(s) (2.2500 %) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limit stated in Section 2(C) above, the result of this addition will be my new interest rate until the next Interest Rate Change Date.

3. PAYMENTS

(A) Time and Place of Payments

I will make a payment every month.

I will make my monthly payments on the first day of each month beginning on MARCH 1ST, 2007. Each of these dates is called a "Payment Due Date." I will make these payments every month until I have paid all the Principal and interest and any other charges that I may owe under the Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on FEBRUARY 1ST, 2037, I still owe amounts under the Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at 2101 REXFORD, SUITE 250W, CHARLOTTE, NC 28211 or at a different place if required by the Note Holder.

(B) Minimum Payment; Amount of My Initial Monthly Payments

My "Minimum Payment" is the minimum amount the Note Holder will accept for my monthly payment, which the Note Holder will determine in accordance with this Section 3(B), or Section 3(D), 3(F) or 3(G), below, as applicable.

Each of my initial Minimum Payments will be in the amount of U.S. \$ 5,926.81, until a new Minimum Payment is required as provided below. If my Minimum Payment is not sufficient to cover the interest due under the Note, the difference will be added to my Principal amount as provided in Section 3(E) below. My initial Minimum Payment may not be sufficient to cover the interest due.

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(C) Payment Change Dates

My Minimum Payment may change as required by Section 3(D) below beginning on the first day of MARCH, 2012, and on that day every 12th month thereafter through my 109th Payment Due Date. Beginning with my 121st Payment Due Date, my Minimum Payment may change monthly thereafter. Each of these dates is called a "Payment Change Date." My Minimum Payment also will change at any time Section 3(F) or 3(G) below requires me to pay a different amount.

I will pay at least the amount of my new Minimum Payment each month beginning on each Payment Change Date or as provided in Section 3(F) or 3(G) below.

(D) Calculation of Monthly Payment Changes

Before each Payment Change Date, the Note Holder will calculate the amount of the monthly payment that would be sufficient to repay the unpaid Principal that I am expected to owe at the Payment Change Date in full on the Maturity Date in substantially equal installments at the interest rate effective during the month preceding the Payment Change Date. The result of this calculation is called the "Full Payment." For the Payment Change Dates occurring on the 61st, 73rd, 85th, 97th, and 109th Payment Due Dates, the Note Holder also will multiply the amount of my last Minimum Payment due before the Payment Change Date by the number 1.075. The result of this calculation is called the "Limited Payment." Unless Section 3(F) below requires me to pay a different amount, the amount of my new Minimum Payment that will be effective on each of the 61st, 73rd, 85th, 97th, and 109th Payment Change Dates will be the lesser of the Full Payment or the Limited Payment. The amount of my new Minimum Payment that will be effective on each of the Payment Change Dates beginning with the 121st Payment Due Date and continuing monthly thereafter will be the Full Payment, as provided in Section 3(G) below.

The Minimum Payment applies only to the Principal and interest payment and does not apply to any escrow payments the Note Holder may require under the Security Instrument.

(E) Additions to My Unpaid Principal

My monthly payment could be less than or greater than the amount of the interest portion of the monthly payment that would be sufficient to repay the unpaid Principal I owe at the monthly payment date in full on the Maturity Date in substantially equal payments. For each month that my monthly payment is less than the interest portion, the Note Holder will subtract the amount of my monthly payment from the amount of the interest portion and will add the difference to my unpaid Principal. The Note Holder also will add interest on the amount of this difference to my unpaid Principal each month. The interest rate on the interest added to Principal will be the rate required by Section 2 above. For each month that my monthly payment is greater than the interest portion, the Note Holder will apply the payment as provided in Section 3(A).

(F) Limit on My Unpaid Principal; Increased Monthly Payment

My unpaid Principal may never exceed a maximum amount equal to 115% of the Principal amount I originally borrowed. Because of my paying only limited monthly payments, the addition of unpaid interest to my unpaid Principal under Section 3(E) above could cause my unpaid Principal to exceed that maximum amount. In that event and unless Section 3(G) requires me to pay a different amount, on the Payment Due Date that my paying my monthly payment would cause me to exceed that limit and continuing each monthly Payment Due Date thereafter through the 120th Payment Due Date, I will instead pay a new monthly payment in an amount not less than the amount that would pay the interest portion of the monthly payment at the interest rate effective during the month preceding the applicable Payment Due Date. This amount will be my new Minimum Payment. This means that my Minimum Payment may change monthly. This method of calculating my new Minimum Payment amount will remain in effect until the 121st Payment Due Date.

(G) Required Full Payment

Beginning on the Payment Change Date that occurs on the 121st Payment Due Date and continuing monthly thereafter, I will pay the Full Payment as my Minimum Payment until my monthly payment changes again.

(H) Payment Options

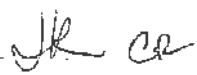
Each month the Note Holder may provide me with up to three additional payment options (in addition to the Minimum Payment) that are equal to or greater than the Minimum Payment, which are called "Payment Options." I may be given the following Payment Options:

- (i) **Interest Only Payment:** the amount that would pay the interest portion of the monthly payment at the current interest rate. The Principal balance will not be decreased by this Payment Option. This payment option will not be available beginning with the 121st Payment Due Date.
- (ii) **Fully Amortized Payment:** the amount necessary to pay the loan off (including all Principal and interest) on the Maturity Date in substantially equal installments at the interest rate effective during the preceding month. This Payment Option is calculated on the assumption that the current interest rate will remain in effect until the loan is paid in full, however, the current interest rate may in fact change in accordance with Section 2(B) above.
- (iii) **15 Year Amortized Payment:** the amount necessary to pay the loan off (including all Principal and interest) within a fifteen (15) year period from the first payment due date in substantially equal installments at the interest rate effective during the preceding month. This Payment Option is calculated on the assumption that the current rate will remain in effect until the loan is paid in full, however, the current interest rate may in fact change in accordance with Section 2(B) above.

Payment Options will only be available if they are equal to or greater than the Minimum Payment.

(I) Failure to Make Adjustments

If for any reason the Note Holder fails to make an adjustment to the interest rate or payment amount as described herein, regardless of any notice requirement, I agree the Note

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Holder may, upon discovery of such failure, then make the adjustment as if they had been made on time. I also agree not to hold the Note Holder responsible for any damages to me that may result from the Note Holder's failure to make the adjustment and to let the Note Holder, at its option, apply any excess monies that I may have paid to partial Prepayment of unpaid Principal.

4. NOTICE OF CHANGES

The Note Holder will deliver or mail to me a notice of any changes in the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

B. TRANSFER OF THE PROPERTY OR A BENEFICIAL INTEREST IN BORROWER

Uniform Covenant 18 of the Security Instrument is amended to read as follows:

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

Initials: JK CE

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Adjustable Rate Rider.


CURTIS ROGERS, a/k/a
CURTIS L. ROGERS, III

(Seal)
-Borrower


JULIE J. ROGERS

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

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-Borrower

(Seal)
-Borrower

PLANNED UNIT DEVELOPMENT RIDER

THIS PLANNED UNIT DEVELOPMENT RIDER is made this 12TH day of JANUARY, 2007, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date, given by the undersigned (the "Borrower") to secure Borrower's Note to HOMECOMINGS FINANCIAL, LLC (F/X/A HOMECOMINGS FINANCIAL NETWORK, INC.)

(the "Lender") of the same date and covering the Property described in the Security Instrument and located at:
2235 SHORELINE DRIVE
JOHNS ISLAND, SC 29455

[Properly Address]

The Property includes, but is not limited to, a parcel of land improved with a dwelling, together with other such parcels and certain common areas and facilities, as described in COVENANTS, CONDITIONS, AND RESTRICTIONS

(the "Declaration"). The Property is a part of a planned unit development known as SHORELINE FARMS

[Name of Planned Unit Development]

(the "PUD"). The Property also includes Borrower's interest in the homeowners association or equivalent entity owning or managing the common areas and facilities of the PUD (the "Owners Association") and the uses, benefits and proceeds of Borrower's interest.

PUD COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. PUD Obligations. Borrower shall perform all of Borrower's obligations under the PUD's Constituent Documents. The "Constituent Documents" are the (i) Declaration; (ii) articles of incorporation, trust instrument or any equivalent document which creates the Owners Association; and (iii) any by-laws or other rules or regulations of the Owners Association. Borrower shall promptly pay, when due, all dues and assessments imposed pursuant to the Constituent Documents.

MULTISTATE PUD RIDER - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT
Form 3150 1/01 MFC08033 (09/2006) / 047-197018-6
Wolters Kluwer Financial Services Page 1 of 3
VMP*-7R (0411).01

Initials: JK ER



B. Property Insurance. So long as the Owners Association maintains, with a generally accepted insurance carrier, a "master" or "blanket" policy insuring the Property which is satisfactory to Lender and which provides insurance coverage in the amounts (including deductible levels), for the periods, and against loss by fire, hazards included within the term "extended coverage," and any other hazards, including, but not limited to, earthquakes and floods, for which Lender requires insurance, then: (i) Lender waives the provision in Section 3 for the Periodic Payment to Lender of the yearly premium installments for property insurance on the Property; and (ii) Borrower's obligation under Section 5 to maintain property insurance coverage on the Property is deemed satisfied to the extent that the required coverage is provided by the Owners Association policy.

What Lender requires as a condition of this waiver can change during the term of the loan.

Borrower shall give Lender prompt notice of any lapse in required property insurance coverage provided by the master or blanket policy.

In the event of a distribution of property insurance proceeds in lieu of restoration or repair following a loss to the Property, or to common areas and facilities of the PUD, any proceeds payable to Borrower are hereby assigned and shall be paid to Lender. Lender shall apply the proceeds to the sums secured by the Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

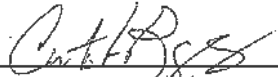
C. Public Liability Insurance. Borrower shall take such actions as may be reasonable to insure that the Owners Association maintains a public liability insurance policy acceptable in form, amount, and extent of coverage to Lender.

D. Condemnation. The proceeds of any award or claim for damages, direct or consequential, payable to Borrower in connection with any condemnation or other taking of all or any part of the Property or the common areas and facilities of the PUD, or for any conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender. Such proceeds shall be applied by Lender to the sums secured by the Security Instrument as provided in Section 11.

E. Lender's Prior Consent. Borrower shall not, except after notice to Lender and with Lender's prior written consent, either partition or subdivide the Property or consent to: (i) the abandonment or termination of the PUD, except for abandonment or termination required by law in the case of substantial destruction by fire or other casualty or in the case of a taking by condemnation or eminent domain; (ii) any amendment to any provision of the "Constituent Documents" if the provision is for the express benefit of Lender; (iii) termination of professional management and assumption of self-management of the Owners Association; or (iv) any action which would have the effect of rendering the public liability insurance coverage maintained by the Owners Association unacceptable to Lender.

F. Remedies. If Borrower does not pay PUD dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph F shall become additional debt of Borrower secured by the Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this PUD Rider.

 (Seal)
 CURTIS ROGERS, a/k/a -Borrower
 CURTIS L. ROGERS, III

 (Seal)
 JULIE J. ROGERS -Borrower

____ (Seal)
 -Borrower

____ (Seal)
 -Borrower

____ (Seal)
 -Borrower

____ (Seal)
 -Borrower

____ (Seal)
 -Borrower

____ (Seal)
 -Borrower

BK B 613PG869

RECORDER'S PAGE

NOTE: This page MUST remain
with the original document



Filed By:

Edward C Boggs

1024 eWall St

Unit A-2

Mt. Pleasant

SC 29464

FILED

January 24, 2007

10:45:41 AM

BK B 613PG844

Charlie Lybrand, Register
Charleston County, SC

DESCRIPTION	AMOUNT
	\$ 31.00
Postage	
TOTAL	\$ 31.00

DESCRIPTION	AMOUNT
	\$ 31.00
Postage	

TOTAL	\$ 31.00
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DRAWER:

A - bmm

DO NOT STAMP BELOW THIS LINE

ADJUSTABLE RATE NOTE

5 Year Fixed Rate Payment Option

THIS NOTE CONTAINS PROVISIONS THAT WILL CHANGE THE INTEREST RATE AND THE MONTHLY PAYMENT. THERE MAY BE A LIMIT ON THE AMOUNT THAT THE MONTHLY PAYMENT CAN INCREASE OR DECREASE. THE PRINCIPAL AMOUNT TO REPAY COULD BE GREATER THAN THE AMOUNT ORIGINALLY BORROWED, BUT NOT MORE THAN THE LIMIT STATED IN THIS NOTE.

JANUARY 12TH, 2017
[Date]

Mt. Pleasant
[City]

SOUTH CAROLINA
[State]

2235 SEASHORE DRIVE, JOHNS ISLAND, SC 29455
[Property Address]

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$ 1,500,000.00 (this amount, including any increase to this amount under the terms of this Note, is called "Principal"), plus interest, to the order of Lender. The Principal amount may increase as provided in this Note, but can never exceed the maximum amount specified in Section 3(F) of this Note. Lender is HOMECOMINGS FINANCIAL, LLC (F/K/A HOMECOMINGS FINANCIAL NETWORK, INC.)

I will make all payments under this Note in the form of cash, check or money order

I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

(A) Interest Rate

Interest will be charged on unpaid Principal until the full amount of Principal has been paid. I will initially pay interest at a yearly rate of 7.3750 %. The interest rate I will pay may change.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 7(B) of this Note.

(B) Interest Rate Change Dates

The interest rate I will pay may change on the first day of FEBRUARY, 2012, and on that day every month thereafter. Each date on which my interest rate could change is called an "Interest Rate Change Date." The new rate of interest will become effective on each Interest Rate Change Date. Although the interest rate may change monthly, my monthly payment will be recalculated in accordance with Section 3.

(C) Interest Rate Limit

My interest rate will never be greater than 9.9500 %.

5 YEAR FIXED RATE PAYMENT OPTION MULTISTATE ADJUSTABLE RATE NOTE 05/06

MFCD6283 (10/2006) / 047-197018-6

7754168 (0006)

Page 1 of 6

VMP Mortgage Solutions, Inc.

Initials: 

(D) Index

Beginning with the first Interest Rate Change Date, my adjustable interest rate will be based on an Index. The "Index" is the "Twelve-Month Average" of the annual yields on actively traded United States Treasury Securities adjusted to a constant maturity of one year as published by the Federal Reserve Board in the Federal Reserve Statistical Release entitled "Selected Interest Rates (h.15)" (the "Monthly Yields"). The Twelve Month Average is determined by adding together the Monthly Yields for the most recently available twelve months and dividing by 12. The most recent Index figure available as of the date 15 days before each Interest Rate Change Date is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

(E) Calculation of Interest Rate Changes

Before each Interest Rate Change Date, the Note Holder will calculate my new interest rate by adding ^{TWO AND ONE FOURTH} percentage point(s) (2.2500 %) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limit stated in Section 2(C) above, the result of this addition will be my new interest rate until the next Interest Rate Change Date.

3. PAYMENTS**(A) Time and Place of Payments**

I will make a payment every month.

I will make my monthly payments on the first day of each month beginning on MARCH 1ST, 2007. Each of these dates is called a "Payment Due Date." I will make these payments every month until I have paid all the Principal and interest and any other charges that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on FEBRUARY 1ST, 2037, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at 2101 REXFORD, SUITE 250W, CHARLOTTE, NC 28211 or at a different place if required by the Note Holder.

(B) Minimum Payment; Amount of My Initial Monthly Payments

My "Minimum Payment" is the minimum amount the Note Holder will accept for my monthly payment, which the Note Holder will determine in accordance with this Section 3(B), or Section 3(D), 3(F) or 3(G), below, as applicable.

Each of my initial Minimum Payments will be in the amount of U.S. \$ 5,926.81, until a new Minimum Payment is required as provided below. If my Minimum Payment is not sufficient to cover the interest due under this Note, the difference will be added to my Principal amount as provided in Section 3(E) below. My initial Minimum Payment may not be sufficient to cover the interest due.

(C) Payment Change Dates

My Minimum Payment may change as required by Section 3(D) below beginning on the first day of MARCH, 2012, and on that day every 12th month thereafter through my 109th Payment Due Date. Beginning with my 121st Payment Due Date, my Minimum Payment may change monthly thereafter. Each of these dates is called a "Payment Change Date." My Minimum Payment also will change at any time Section 3(F) below requires me to pay a different amount.

I will pay at least the amount of my new Minimum Payment each month beginning on each Payment Change Date or as provided in Section 3(F) or 3(G) below.

(D) Calculation of Monthly Payment Changes

Before each Payment Change Date, the Note Holder will calculate the amount of the monthly payment that would be sufficient to repay the unpaid Principal that I am expected to owe at the Payment Change Date in full on the Maturity Date in substantially equal installments at the interest rate effective during the month preceding the Payment Change Date. The result of this calculation is called the "Full Payment." For the Payment Change Dates occurring on the 61st, 73rd, 85th, 97th, and 109th Payment Due Dates, the Note Holder also will multiply the amount of my last Minimum Payment due before the Payment Change Date by the number 1.075. The result of this calculation is called the "Limited Payment." Unless Section 3(F) below requires me to pay a different amount, the amount of my new Minimum Payment that will be effective on each of the 61st, 73rd, 85th, 97th, and 109th Payment Change Dates will be the lesser of the Full Payment or the Limited Payment. The amount of my new Minimum Payment that will be effective on each of the Payment Change Dates beginning with the 121st Payment Due Date and continuing monthly thereafter will be the Full Payment, as provided in Section 3(G) below.

The Minimum Payment applies only to the Principal and interest payment and does not apply to any escrow payments the Note Holder may require under the Security Instrument (as defined in Section 11 of this Note, below).

(E) Additions to My Unpaid Principal

My monthly payment could be less than or greater than the amount of the interest portion of the monthly payment that would be sufficient to repay the unpaid Principal I owe at the monthly payment date in full on the Maturity Date in substantially equal payments. For each month that my monthly payment is less than the interest portion, the Note Holder will subtract the amount of my monthly payment from the amount of the interest portion and will add the difference to my unpaid Principal. The Note Holder also will add interest on the amount of this difference to my unpaid Principal each month. The interest rate on the interest added to Principal will be the rate required by Section 2 above. For each month that my monthly payment is greater than the interest portion, the Note Holder will apply the payment as provided in Section 3(A).

(F) Limit on My Unpaid Principal; Increased Monthly Payment

My unpaid Principal can never exceed a maximum amount equal to 115% of the Principal amount I originally borrowed. Because of my paying only limited monthly payments, the addition of unpaid interest to my unpaid Principal under Section 3(E) above could cause my unpaid Principal to exceed that maximum amount. In that event and unless Section 3(G) requires me to pay a different amount, on the Payment Due Date that my paying my monthly payment would cause me to exceed that limit and continuing each monthly Payment Due Date thereafter through the 120th Payment Due Date, I will instead pay a new monthly payment in an amount not less than the amount that would pay the interest portion of the monthly payment at the interest rate effective during the month preceding the applicable Payment Due Date. This amount will be my new Minimum Payment. This means that my Minimum Payment may change monthly. This method of calculating my new Minimum Payment amount will remain in effect until the 121st Payment Due Date.

(G) Required Full Payment

Beginning on the Payment Change Date that occurs on the 121st Payment Due Date and continuing monthly thereafter, I will pay the Full Payment as my Minimum Payment until my payment changes again.

(H) Payment Options

Each month the Note Holder may provide me with up to three additional payment options (in addition to the Minimum Payment) that are equal to or greater than the Minimum Payment, which are called "Payment Options." I may be given the following Payment Options:

- (i) **Interest Only Payment:** the amount that would pay the interest portion of the monthly payment at the current interest rate. The Principal balance will not be decreased by this Payment Option. This payment option will not be available beginning with the 121st Payment Due Date.

- (ii) **Fully Amortized Payment:** the amount necessary to pay the loan off (including all Principal and interest) on the Maturity Date in substantially equal installments at the interest rate effective during the preceding month. This Payment Option is calculated on the assumption that the current interest rate will remain in effect until the loan is paid in full, however, the current interest rate may in fact change in accordance with Section 2(B) above.
- (iii) **15 Year Amortized Payment:** the amount necessary to pay the loan off (including all Principal and interest) within a fifteen (15) year period from the first payment due date in substantially equal installments at the interest rate effective during the preceding month. This Payment Option is calculated on the assumption that the current rate will remain in effect until the loan is paid in full, however, the current interest rate may in fact change in accordance with Section 2(B) above.

Payment Options will only be available if they are equal to or greater than the Minimum Payment.

(I) Failure to Make Adjustments

If for any reason the Note Holder fails to make an adjustment to the interest rate or payment amount as described in this Note, regardless of any notice requirement, I agree the Note Holder may, upon discovery of such failure, then make the adjustment as if they had been made on time. I also agree not to hold the Note Holder responsible for any damages to me that may result from the Note Holder's failure to make the adjustment and to let the Note Holder, at its option, apply any excess monies that I may have paid to partial Prepayment of unpaid Principal.

4. NOTICE OF CHANGES

The Note Holder will deliver or mail to me a notice of any changes in the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

5. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under this Note.

I may make a full Prepayment or partial Prepayments without paying any Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount before applying my Prepayment to reduce the Principal amount of this Note. If I make a partial Prepayment, there will be no changes in the due dates of my monthly payments unless the Note Holder agrees in writing to those changes. My partial Prepayment may reduce the amount of my monthly payments after the first Payment Change Date following my partial Prepayment. However, any reduction due to my partial Prepayment may be offset by an interest rate increase.

6. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me that exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

7. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charges for Overdue Payments

If the Note Holder has not received at least the full amount of any Minimum Payment by the end of 15 calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.0000 % of my overdue Minimum Payment. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay at least the full amount of each Minimum Payment on the date it is due, I will be in default.

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Initials: CR

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal that has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. These expenses include, for example, reasonable attorneys' fees.

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Unless the Note Holder requires a different method, any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety, or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety, or endorser of this Note, is also obligated to keep all the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all the amounts owed under this Note.

10. WAIVERS

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

11. SECURED NOTE

In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of these conditions read as follows:

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

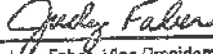
If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

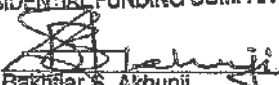
WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

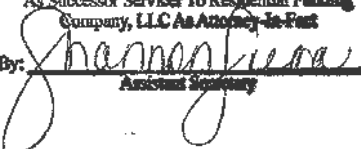
 (Seal) (Seal)
-Borrower -Borrower
CURT ROGERS

(Seal) (Seal)
-Borrower -Borrower

PAY TO THE ORDER OF (Seal) (Seal)
Deutsche Bank Trust Company Americas as Trustee -Borrower -Borrower
WITHOUT RECOURSE
Residential Funding Company, LLC

BY  (Seal) (Seal)
Judy Faber, Vice President -Borrower -Borrower

Without Recourse
Pay to the Order of
RESIDENTIAL FUNDING COMPANY, LLC

Bakhtiar S. Akhunj
Assistant Secretary
Homecomings Financial, LLC
A Delaware Corporation

[Sign Original Only]
Pay to the Order of
Without Recourse
Deutsche Bank Trust Company Americas
As Trustee, By Nationstar Mortgage LLC
As Successor Servicer To Aurora Loan Services LLC,
As Successor Servicer To Residential Funding
Company, LLC As Attorney-In-Fact
By: 
Shannon Sierra
Assistant Secretary

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MFCD5288 (10/2006) / 047-197018-6

Page 6 of 6

Shannon Sierra

Exhibit B

RECORD AND RETURN TO:
KORN LAW FIRM
P. O. BOX 11264
COLUMBIA, SC 29211

Recording Requested By:
AURORA LOAN SERVICES

When Recorded Return To:

ASSIGNMENT PREP
AURORA LOAN SERVICES
P.O. Box 1706
Scottsbluff, NE 69363-1706



BP0081058

F29.04814

SC

CORPORATE ASSIGNMENT OF MORTGAGE

Charleston, South Carolina
SELLER'S SERVICING #:0021897988 "ROGERS"

MERS #: 100062604719701866 VRU #: 1-888-679-6377

Date of Assignment: September 8th, 2009

Assignor: MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR HOMECOMINGS FINANCIAL, LLC F/K/A HOMECOMINGS FINANCIAL NETWORK, INC. IT'S SUCCESSORS AND ASSIGNS at 3300 S.W. 34TH AVENUE, SUITE 101, OCALA, FL 34474

Assignee: AURORA LOAN SERVICES LLC at 2617 COLLEGE PARK, SCOTTSBLUFF, NE 69361

Executed By: CURT ROGERS A/K/A CURTIS L. ROGERS, III, AND JULIE J. ROGERS To: MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC AS NOMINEE FOR HOMECOMINGS FINANCIAL, LLC F/K/A HOMECOMINGS FINANCIAL NETWORK, INC.

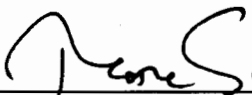
Date of Mortgage: 01/12/2007 Recorded: 01/24/2007 in Book/Reel/Liber: B613 Page/Folio: 844 In Charleston, South Carolina

Property Address: 2235 SHORELINE DRIVE, JOHNS ISLAND, SC 29455

KNOW ALL MEN BY THESE PRESENTS that in consideration of the sum of TEN and NO/100ths DOLLARS and other good and valuable consideration, paid to the above named Assignor, the receipt and sufficiency of which is hereby acknowledged, the said Assignor hereby assigns unto the above-named Assignee, the said Mortgage together with the Note or other evidence of indebtedness (the "Note"), said Note having an original principal sum of \$1,500,000.00 with interest, secured thereby, together with all moneys now owing or that may hereafter become due or owing in respect thereof, and the full benefit of all the powers and of all the covenants and provisos therein contained, and the said Assignor hereby grants and conveys unto the said Assignee, the Assignor's beneficial interest under the Mortgage.

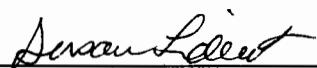
TO HAVE AND TO HOLD the said Mortgage and Note, and also the said property unto the said Assignee forever, subject to the terms contained in said Mortgage and Note.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR HOMECOMINGS FINANCIAL, LLC F/K/A HOMECOMINGS FINANCIAL NETWORK, INC. IT'S SUCCESSORS AND ASSIGNS
On September 8th, 2009

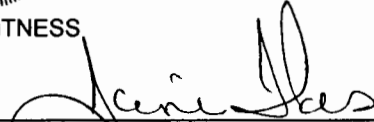
By: 
THEODORE SCHULTZ, Vice-President



WITNESS


SUSAN LINDHORST

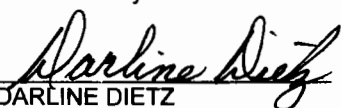
WITNESS


JANIE FLORES

STATE OF Nebraska
COUNTY OF Scotts Bluff

ON September 8th, 2009, before me, DARLINE DIETZ, a Notary Public in and for the County of Scotts Bluff County, State of Nebraska, personally appeared THEODORE SCHULTZ, Vice-President, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity, and that by his/her/their signature on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal,


DARLINE DIETZ
Notary Expires: 03/22/2010



(This area for notarial seal)

RECORDER'S PAGE

NOTE: This page MUST remain
with the original document



Filed By:

KORN LAW FIRM

PO BOX 12369
COLUMBIA SC 29211-2369

RECORDED

Date: September 15, 2009

Time: 9:47:43 AM

Book

Page

DocType

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058

Asgt

Charlie Lybrand, Register
Charleston County, SC

MAKER:

MERS

RECIPIENT:

AURORA LOAN SERVS LLC

of Pages: 2

of Sats:

of References:

Note:

Recording Fee \$ 6.00

Extra Reference Cost \$ -

Extra Pages \$ -

Postage \$ -

Chattel \$ -

TOTAL \$ 6.00

DRAWER Drawer 4

CLERK LRR

Original Book:

B613

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Exhibit C

Recording Requested By:
Nationstar Mortgage

When Recorded Return To:

DOCUMENT ADMINISTRATION
Nationstar Mortgage
2617 COLLEGE PARK
SCOTTSBLUFF, NE 69361



BP0398768

PGS:

2

CORPORATE ASSIGNMENT OF MORTGAGE

Charleston, South Carolina
SELLER'S SERVICING #: "ROGERS"

Date of Assignment: March 31st, 2014

Assignor: AURORA LOAN SERVICES LLC BY NATIONSTAR MORTGAGE LLC, ITS ATTORNEY-IN-FACT at 350 HIGHLAND DRIVE, LEWISVILLE, TX 75067

Assignee: DEUTSCHE BANK TRUST COMPANY AMERICAS AS TRUSTEE FOR RESIDENTIAL ACCREDIT LOANS, INC PASS THROUGH CERTIFICATES 2007-QH2 at 1761 EAST ST ANDREW PLACE, SANTA ANA, CA 92705

Executed By: CURTIS ROGERS A/K/A CURTIS L. ROGERS, III, AND JULIE J. ROGERS To: MORTGAGE ELECTRONIC REGISTRATION SYTEMS, INC. AS NOMINEE FOR HOMECOMINGS FINANCIAL, LLC (F/K/A HOMECOMINGS FINANCIAL NETWORK, INC.)

Date of Mortgage: 01/12/2007 Recorded: 01/24/2007 in Book/Reel/Liber: B 613 Page/Folio: 844 In the County of Charleston, State of South Carolina.

Property Address: 2235 SHORELINE DRIVE, JOHNS ISLAND, SC 29455

KNOW ALL MEN BY THESE PRESENTS, that for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the said Assignor hereby assigns unto the above-named Assignee, the said Mortgage having an original principal sum of \$1,500,000.00 with interest, secured thereby, with all moneys now owing or that may hereafter become due or owing in respect thereof, and the full benefit of all the powers and of all the covenants and provisos therein contained, and the said Assignor hereby grants and conveys unto the said Assignee, the Assignor's interest under the Mortgage.

TO HAVE AND TO HOLD the said Mortgage, and the said property unto the said Assignee forever, subject to the terms contained in said Mortgage.

AURORA LOAN SERVICES LLC BY NATIONSTAR MORTGAGE LLC, ITS ATTORNEY-IN-FACT
On 4-1-2014

By: Susan Lindhorst
Susan Lindhorst, Assistant
Secretary

WITNESS
Jill L. Starke
Jill L. Starke

WITNESS
Angel Bolton
Angel Bolton

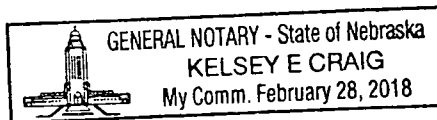
STATE OF Nebraska
COUNTY OF Scotts Bluff

On 4-1-2014, before me, Kelsey Craig, a Notary Public in and for Scotts Bluff in the State of Nebraska, personally appeared Susan Lindhorst, Assistant Secretary, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity, and that by his/her/their signature on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal,

Kelsey E. Craig
Kelsey Craig

Notary Expires: 2/28/2018



(This area for notarial seal)

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NOTE: This page MUST remain
with the original document

**Filed By:**

KORN LAW FIRM

PO BOX 12369

COLUMBIA SC 29211-2369

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Date: April 14, 2014

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Page

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768

Asgt

Charlie Lybrand, Register
Charleston County, SC

MAKER:

AURORA LN SERVICES ETC

RECIPIENT:

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Exhibit D

**REVOCABLE TRUST AGREEMENT
FOR
2235 SHORELINE DRIVE**

TAYLOR & ASSOCIATES, PA
Attorneys & Counselors at Law
171 Church Street – Suite 330
Charleston, South Carolina 29401
Telephone 843.723.2000