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May 13, 2014

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

RE: James C. Kincannon, James J. Kincannon, and Carolyn R. Kincannon v. U. S.  
Bank National Association, et al.  
Case No.: 2013-CP-15-1023

Dear Madame Clerk:

Our firm represents the Defendant U.S. Bank National Association (“U.S. Bank”) in the above-referenced case. On March 28, 2014, Plaintiffs James C. Kincannon, James J. Kincannon, and Carolyn R. Kincannon (collectively, the “Plaintiffs”) filed a Notice of Appeal to appeal an Order Granting Defendant’s Motion to Dismiss, In Part, and, Denying Defendant’s Motion to Dismiss in Part. For your convenience, a copy of the Notice of Appeal is enclosed herewith.

To our knowledge, Plaintiffs have not requested a transcript of the hearing in accordance with Rule 207, SCACR. In addition, Plaintiffs have not served our firm with one copy of Plaintiffs’ initial brief. South Carolina Appellate Court Rule 208(1)(a) states, in part, that “if no transcript is ordered, within thirty (30) days after serving the notice of appeal, appellant shall serve one copy of his brief on all parties to the appeal. . .” Over thirty (30) days has elapsed since the filing of the Notice of Appeal and Plaintiffs have not served our firm with their initial brief. Accordingly, the appeal is time-barred, and therefore, we respectfully request that the Court dismiss the above-referenced appeal.

Thank you for your kind assistance.


**RECEIVED**

MAY 15 2014

**SC Court of Appeals**

Very truly yours,

WOMBLE CARLYLE SANDRIDGE & RICE LLP



John C. Hawk, IV

JCH/cxc

Enclosure

cc: Todd Kincannon, Esquire

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM COLLETON COUNTY  
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No. 2013-CP-15-1023

RECEIVED

MAY 15 2014

SC Court of Appeals

James C. Kincannon, James J. Kincannon,  
and Carolyn R. Kincannon ..... Appellants,

v.

U.S. Bank National Association, U.S. Bank  
National Association ND, Palmetto Property  
Conservation, and Mark Brown ..... Defendants,

of whom

U.S. Bank National Association and U.S.  
Bank National Association ND are ..... Respondents

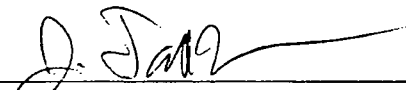
NOTICE OF APPEAL

Appellants appeal the attached Order Granting Defendants' Motion to Dismiss in Part and Denying Defendants' Motion to Dismiss in Part. Appellants received written notice of entry on January 13, 2014. Appellants timely filed a motion for reconsideration on January 21, 2014. Appellants received written notice of the entry of the attached Order Denying Plaintiffs' Motion to Reconsider Order of Dismissal on February 26, 2014.

March 28, 2014

Other Counsel of Record:

JOHN C. HAWK IV & JANA B. BAKER  
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Phone: 843.720.4626  
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Attorneys for Respondents

  
\_\_\_\_\_  
J. TODD KINCANNON  
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Attorney for Appellants

COPY

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

MAY 15 2014

**SC Court of Appeals**

APPEAL FROM COLLETON COUNTY  
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No. 2013-CP-15-1023

James C. Kincannon, James J. Kincannon,  
and Carolyn R. Kincannon ..... Appellants,

v.

U.S. Bank National Association, U.S. Bank  
National Association ND, Palmetto Property  
Conservation, and Mark Brown.....Defendants,

of whom

U.S. Bank National Association and U.S.  
Bank National Association ND are..... Respondents

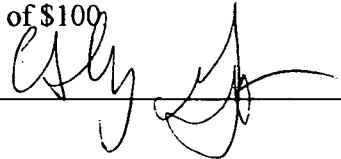
**CERTIFICATE OF FILING AND SERVICE**

I, the undersigned employee of The Kincannon Firm, certify that I have on the date below indicated served all respondents in this matter with the foregoing Notice of Appeal together with this proof of service and copies of the orders challenged on appeal by first class mail by and through their counsel of record with a courtesy copy by email as follows:

JOHN C. HAWK IV & JANA B. BAKER  
WOMBLE CARLYLE SANDRIDGE & RICE LLC  
Post Office Box 999  
Charleston, South Carolina 29401  
Email: JHawk@wcsr.com

I further certify that I have on the date below indicated mailed the foregoing to the Colleton County Clerk of Court and hand-delivered it to the Clerk of the South Carolina Court of Appeals together with the appropriate filing fee of \$100

March 28, 2014

  
\_\_\_\_\_

**COPY**

## **Exhibit A**

**Order Granting Defendants' Motion to  
Dismiss in Part and Denying  
Defendants' Motion to Dismiss in Part**

**COPY**

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF COLLETON )  
 )  
 James C. Kincannon, James J. Kincannon, and )  
 Carolyn R. Kincannon, )  
 )  
 Plaintiffs )  
 )  
 v. )  
 )  
 U.S. Bank National Association, U.S. Bank National )  
 Association ND, Palmetto Property Conversation, )  
 and Mark Brown, )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS

Civil Action No. 2013-CP-15-1023

**ORDER GRANTING DEFENDANTS'  
 MOTION TO DISMISS IN PART AND  
 DENYING DEFENDANTS' MOTION TO  
 DISMISS IN PART**

This matter came before the Court upon Defendants U.S. Bank National Association's ("U.S. Bank") Motion to Dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. A hearing on this motion was held on December 5, 2013 in Colleton County. Present at that hearing was Jana Baker on behalf of the Defendants and J. Todd Kincannon on behalf of the Plaintiffs ("Kincannons"). After considering the arguments of counsel, the applicable law, and legal memoranda submitted by the parties, the Court hereby GRANTS DEFENDANTS' MOTION IN PART and DENIES DEFENDANTS' MOTION IN PART.

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**FACTUAL FINDINGS**

Kincannons' Complaint sets forth the following facts: Kincannons own a house (the "Property") on Edisto Island. Complaint, ¶ 12. On February 10, 2010, two of the Kincannons executed a promissory Note (the "Note") promising to repay \$300,000.00, plus interest, over a period of thirty years. Complaint, ¶ 12. The Note is secured by a Mortgage on the Property dated February 2, 2010 (the "Mortgage"). Complaint, ¶ 12.

COPY

On November 9, 2012, U.S. Bank brought a foreclosure action against Kincannons, styled *U.S. Bank v. Kincannon*, 2012-CP-15-885. After the parties entered into a Loan Modification Agreement, U.S. Bank dismissed that action without prejudice on July 18, 2013. Complaint, ¶ 14 and ¶ 16.

On April 30, 2013, Kincannons unilaterally repudiated the Note and Mortgage and refused to make the payment due on May 1, 2013. Complaint, ¶ 25. Kincannons have made no payments since that time. *Id.* Kincannons' counsel confirmed at the hearing that no payments have been made since the repudiation.

After the foreclosure action was dismissed, on or about July 19, 2013, Kincannons brought an action against U.S. Bank, styled *Kincannon v. U.S. Bank*, 2013-CP-15-708 ("First Kincannon Lawsuit"). In this action, Kincannons sought money damages and a declaration that the Note and Mortgage were unenforceable. Complaint, ¶ 17. The parties dismissed this action with prejudice on October 22, 2013 by signing a Stipulation of Dismissal with Prejudice. Complaint, ¶ 20.

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On October 23, 2013, one day after the Stipulation of Dismissal with Prejudice was entered by the Court, Kincannons brought the instant action ("Second Kincannon Lawsuit"). The Second Kincannon Lawsuit includes four causes of action: (1) declaratory judgment; (2) statutory failure to release mortgage; (3) contractual failure to release mortgage; and (4) permanent injunction. The Second Kincannon Lawsuit bases all four of these causes of action on the premise that "the Note and Mortgage are therefore unenforceable because U.S. Bank can no longer maintain an action of any type against Plaintiffs for breach of the terms of the Note and Mortgage." Complaint, ¶ 31. "An action for the accelerated balance has been dismissed with prejudice and an action in foreclosure has likewise been dismissed with prejudice." Complaint, ¶ 31.

#### **LEGAL STANDARD**

In ruling on a motion to dismiss a cause of action under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure for failure to state facts sufficient to constitute a cause of action, the Court must look only to the allegations of the Plaintiff's Complaint. State Board of Medical Examiners v. Fenwick

Hall, Inc., 300 S.C. 274, 387 S.E.2d 458 (1990). The Court must view the facts and all reasonable inferences therefrom in the light most favorable to the Plaintiff. Woodell v. Marion School District One, 307 S.C. 297, 414 S.E.2d 794 (Ct. App. 1992). The Court must deny the motion if the facts and inferences, when viewed in the light most favorable to Plaintiff, show that Plaintiff could prevail under any theory. Murrow Crane Co. v. T.R. Tucker Constr. Co., 296 S.C. 427, 373 S.E.2d 701 (Ct. App. 1988). "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." Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). The motion must be granted if the facts and the inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case. Gray v. State Farm Auto Ins. Co., 327 S.C. 646, 651, 491 S.E.2d 272, 275 (Ct. App. 1997).

### DISCUSSION

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Kincannons' first three causes of action – (1) declaratory judgment; (2) statutory failure to release mortgage; and contractual failure to release mortgage – are premised on the flawed belief that because U.S. Bank agreed to dismiss the First Kincannon Lawsuit with prejudice, U.S. Bank is forever barred from bringing a foreclosure action for a future breach of the Note and Mortgage. Consequently, Kincannons argue, the Note and Mortgage are therefore "released, satisfied, discharged, or extinguished."

Kincannons' position is succinctly summarized in paragraph 31 of the Complaint: The Note and Mortgage are therefore unenforceable because U.S. Bank can no longer maintain an action of any type against Plaintiffs for breach of the terms of the Note and Mortgage. An action for the accelerated balance has been dismissed with prejudice and an action in foreclosure has likewise been dismissed with prejudice. U.S. Bank's Note and Mortgage are now worthless because they are unenforceable due to U.S. Bank's Stipulation of Dismissal with Prejudice. Complaint, ¶ 31.

The Court finds that Kincannons' position is incorrect. A dismissal with prejudice of a foreclosure action does not have the legal effect of a discharge, satisfaction, or renunciation of a mortgage. The Florida Supreme Court has held that the doctrine of res judicata does not necessarily bar

successive foreclosure suits, regardless of whether the mortgagee sought to accelerate payments on the note in a previous suit. Singleton v. Greymar Assocs., 882 So. 2d 1004, 1008 (Fla. 2004). A subsequent and separate alleged default creates a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action. Id. (see also Afolabi v. Atl. Mortgage & Inv. Corp., 849 N.E.2d 1170 (Ind. Ct. App. 2006)(holding that the subsequent and separate alleged defaults under the note created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action)). The Florida Supreme Court in Singleton correctly reasoned that, "If res judicata prevented a mortgagee from acting on a subsequent default ... the mortgagor would have no incentive to make future timely payments on the note." Id. at 1007.

Applying this logic to the instant case, the Court finds that U.S. Bank's Note and Mortgage are not worthless. The Court finds that the Note and Mortgage remain enforceable. Even if all facts pled in Kincannons' Complaint are presumed true, Kincannons still fail to state a claim upon which relief may be granted. Therefore, Kincannons' claims for (1) declaratory judgment, (2) statutory failure to release mortgage, and (3) contractual failure to release mortgage fail as a matter of law.

Kincannons' fourth and final cause of action for permanent injunction seeks to enjoin U.S. Bank from performing "invasive" inspections on the Property outside the presence of one of the Kincannons or their agent. Complaint, ¶ 59. This cause of action does not appear to be legally deficient at this time, and is therefore not dismissed.

### CONCLUSION

The Court finds that Kincannons' position that U.S. Bank's Note and Mortgage are worthless as a result of the dismissal with prejudice is incorrect. Because the facts and inferences reasonably deducible therefrom show that Kincannons could not prevail on their first three causes of action, the Court finds that U.S. Bank's motion must be granted as to Kincannons' causes of action for (1) declaratory judgment; (2) statutory failure to release mortgage; and (3) contractual failure to release mortgage.

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The Court further finds that Kincannons' fourth cause of action for permanent injunction is not dismissed because the facts and inferences reasonably deducible therefrom show that Kincannons could prevail on this cause of action.

IT IS THEREFORE ORDERED that U.S. Bank's Motion to Dismiss is hereby GRANTED IN PART and DENIED IN PART.

AND IT IS SO ORDERED.



\_\_\_\_\_  
Perry M. Buckner  
Presiding Judge, Fourteenth Judicial Circuit.

Walters, South Carolina

Dec. 18, 2013

COPY

**Exhibit B**

Order Denying Plaintiffs' Motion to  
Reconsider Order of Dismissal

COPY

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF COLLETON )  
 )  
 James C. Kincannon, James J. Kincannon, and )  
 Carolyn R. Kincannon )  
 )  
 Plaintiffs )  
 )  
 v. )  
 )  
 U.S. Bank National Association, U.S. Bank )  
 National Association ND, Palmetto Property )  
 Conversation, and Mark Brown )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 Civil Action No. 2013-CP-15-1023

**ORDER DENYING PLAINTIFFS'  
 MOTION TO RECONSIDER ORDER  
 OF DISMISSAL**

2014 FEB 26 AM 9:00  
 PATRICIA L. GRANT  
 COLLETON COUNTY  
 COMMON PLEAS

This matter came before the Court upon Plaintiffs' Motion for Reconsideration of the Court's Order of December 18, 2013. The Order dismissed Plaintiffs' causes of action for (1) declaratory judgment, (2) statutory failure to release mortgage, and (3) and contractual failure to release mortgage. The Order did not dismiss Plaintiffs' cause of action for permanent injunction. Plaintiffs' now move pursuant to Rules 59(e) and 60(b) of the South Carolina Rules of Civil Procedure for the Court to reconsider its Order of Dismissal.

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Plaintiffs' Motion to Reconsider sets out twenty-three (23) enumerated grounds for relief. While the Court has carefully considered each ground, Plaintiffs' Motion to Reconsider contains no valid legal basis for reversal of the Court's Order. Therefore, the Court hereby DENIES PLAINTIFFS' MOTION TO RECONSIDER.

Rule 59(e) permits a court to alter or amend a judgment. Rule 59(e), South Carolina Rules of Civil Procedure. The rule permits a court to amend a judgment for three reasons: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. *E.E.O.C. v.*

COPY

*Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir. 1997). Motions under Rule 59 are limited in scope, as they are not intended to rehash the same arguments and facts previously presented. *Dockins v. Benchmark Commc'ns*, 180 F.R.D. 294, 295 (D. S.C. 1998). Similarly, a party cannot use Rule 59(e) to present to the court an issue the party could have previously raised prior to judgment but did not. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990).

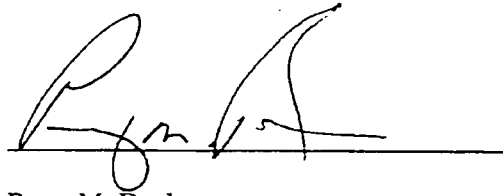
#2  
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Rule 60(b) permits relief from a final order only upon a particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party. *Tobias v. Rice*, n. 3, 386 S.C. 310, 688 S.E.2d 552, 553 (2010) (citing *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009)). A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief. *Lanier v. Lanier*, 364 S.C. 211, 215, 612 S.E.2d 456, 458 (Ct. App. 2005).

Plaintiffs' Motion to Reconsider does not set forth any intervening change in controlling law, it does not claim any new evidence not previously available, and it does not attempt to correct a clear error of law or prevent manifest injustice. Likewise, Plaintiffs' Motion to Reconsider does not attempt to demonstrate "a particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party." As a result, Plaintiffs' Motion does not identify any valid ground for the Court to alter or amend its' Order. Therefore, Plaintiffs' Motion does not meet the applicable legal standards.

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Reconsider is hereby DENIED.

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Perry M. Buckner", is written over a solid horizontal line.

Perry M. Buckner  
Presiding Judge, Fourteenth Judicial Circuit

Walterboro, South Carolina

February 24, 2014