

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Honorable Marvin H. Dukes, III, Master in Equity

Case No. 2009-CP-07-05088

**RECEIVED**

SEP 25 2014

**SC Court of Appeals**

CitiMortgage, Inc.,

Respondent,

v.

Daniel Junk a/k/a Daniel L. Junk and Christine H.  
Junk and Oldfield Community Association,

Defendants,

Of Whom Daniel L. Junk and Christine H. Junk are,

Appellants,

-and-

Daniel L. Junk and Christine H. Junk,

Counterclaim Appellants,

v.

CitiMortgage, Inc.

Counterclaim Respondent.

-and-

Daniel L. Junk and Christine H. Junk,

Third-party Appellants,

v.

Riley Pope & Laney, LLC, Heidi Carey, Esq.,  
Roy Laney, Esq., T. Lowndes Pope, Esq.,  
Bayview Loan Servicing, LLC, MERSCORP, Inc.,  
Mortgage Electronic Registration Systems, Inc.,  
Citi Master Servicing, Citigroup Global Markets  
Realty Corp., Citigroup Mortgage Loan Trust, Inc.,  
John Does 1-5,000, Jennifer Oakes, Robert G.  
Hall, Security Connections, Inc., Krystal Hall,  
Danielle Sterling, ABC Appraisal Group, Inc.,  
Mark A. Ruplinger, Linda Heller, Harry Jones,  
Colonial Coast Title Agency, Inc., Lawyers Title

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PROPOSED SUBSTITUTE APPELLANT'S, COUNTERCLAIM APPELLANT'S AND THIRD-PARTY APPELLANT'S REPLY TO CMI'S RETURN TO MOTION FOR LEAVE TO FILE MOTION IN THE CIRCUIT COURT UNDER RULE 60(b)(2),(3),(4), SCRCF

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Pursuant to Rule 240(f), SCACR, and savings clause, SCRCF, proposed Appellants, proposed Counterclaim Appellants and proposed Third-party Appellants (Collectively "Debtors-in-Possession" or "DIP") through proposed substitute counsel for DIP, Daniel L. Junk as DIP appearing *pro se*, respectfully submits this Reply to CitiMortgage, Inc.'s ("CMI") Return to Proposed Substitute Appellant's, Counterclaim Appellant's and Third-party Appellant's Motion for Leave to File Motion in the Circuit Court Under Rule 60(b)(2),(3),(4), SCRCF. CMI's Return does not deny that it is not the real party in interest, nor does CMI deny that, through counsel, it has been intentionally misleading this Court, the Circuit Court, the South Carolina Supreme Court, the Bankruptcy Court, the Junks and now DIP, from the inception of this litigation that began over 5 years ago.

On June 27, 2013, there was a transfer of interest in the underlying action subject this appeal as a matter of law as a result of the Junks filing their bankruptcy petition. On August 9, 2013, this Court issued an order of stay of the instant appeal. On July 2, 2014, the Hon. John E Hoffman, Jr., in the United States Bankruptcy Court for the Southern District of Ohio, Eastern Division issued an order (the "Relief Order") granting CMI limited relief from the automatic stay under 11 U.S.C. § 362(d) to pursue its claim against the bankruptcy estate to enforce a claimed specific lien against the Oldfield Property and to reform its claimed lien on the Oldfield Property, so long as doing so would not be inconsistent with DIP's position as a hypothetical judicial lien

creditor and bona fide purchaser as of June 27, 2013. On July 3, 2014, CMI filed notice of the Relief Order in this Court with a copy of the Relief Order attached, requesting this Court lift its stay of the appeal issued in its August 9, 2013 Order. On July 17, 2014, DIP filed a Rule 25(c) Motion to substitute proposed parties and proposed counsel as permitted by the Relief Order. On August 29, 2014, DIP received new evidence from CMI's counsel admitting that CMI has never been the owner of the refinance debt obligation secured by the note and mortgage at any time relevant herein. On September 10, 2014, DIP filed the instant motion with its specific request for relief under Rule 60, SCRCF. To the best of DIP's knowledge and belief, this Court has not lifted the stay of this appeal issued in its August 9, 2013 Order. Nor is DIP aware that this court has ordered a date for DIP to serve and file the perfected record on appeal in this matter.

DIP did not request to lift the appellate stay under Rule 241, SCACR, in the instant motion. CMI's alternative pleading on DIP's behalf is without authority and is nothing but a red herring. Red herrings are all CMI offers in its Return Brief because it has no argument under the law now that it admits it is not the real party in interest. CMI continues to raise its claim of fraudulent satisfaction of mortgage despite the Relief Order precluding CMI from pursuing that claim against the Junks' bankruptcy estate. All of CMI's arguments fall outside its pleadings or the relief granted to CMI in the Relief Order.

CMI also raises the red herring of claiming to be the servicer of the debt obligation and cites *Draper*, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013) as applicable to its foreclosure complaint. CMI ignores the fact its complaint does not sue on the note expressly waiving any right to a judgment at law and general lien under the terms of the note and it further ignores the fact that it did not sue in the capacity of servicer. The foreclosure complaint does not allege CMI is the servicer nor has CMI been found to be a servicer of the mortgage in the record below, nor

has DIP or the Junks ever admitted that CMI is the servicer – there are no admissions in this case – discovery has not occurred and there is yet to be any depositions or live testimony taken in this case in over 5 years. Moreover, CMI ignores the fact that it would have to disclose any agency capacity for its right to bring this action as servicer which it doesn't.

CMI's citation of *Draper* is inapposite to the facts of this action – CMI sued upon the terms of the mortgage only as owner to enforce a specific lien at equity and waived any right to a personal or deficiency judgment and general lien at law – CMI did not bring this action in the capacity as servicer and CMI did not sue upon the terms of the note as a person entitled to enforce the note. Finally, CMI argues that DIP can't represent anyone but himself and then asks the Court to require Mr. Junk proceed in his personal prepetition capacity ignoring the arguments made in its relief motion before the Bankruptcy Court in Ohio and the fact that Mr. Junk is no longer a party to this action in his personal prepetition capacity. CMI's counsel knows or should know that any judgment in equity is void unless all necessary parties are before the court.

**1. This Court has the authority and power to grant the relief requested.**

CMI admits it is not and never has been the real party in interest in this action despite its multiple sworn-to pleadings stating CMI is the owner of the refinance debt obligation note and mortgage when it knew it wasn't. "Lack of subject matter jurisdiction can and should be taken notice of by the Court *ex mero motu*." *Hunter v Boyd*, 203 S.C. 518, 28 S.E.2d 412 (S.C. 1943). Lack of jurisdiction of the subject-matter of an action cannot be waived even by consent. *Id. Cf Williamson v Richards*, 158 S.C. 534, 155 S.E. 890 (S.C. 1930). "The jurisdiction of a Court over the subject-matter of an action depends upon the authority granted to it by the Constitution and laws of the State, and is fundamental. Objection to such jurisdiction may be made at any time during the progress of the action, and cannot be waived or conferred by consent."

*McCullough v McCullough*, 242 S.C. 108, 130 S.E.2d 77 (S.C. 1963) citing *Senn v Spartanburg County*, 192 S.C. 489, 7 S.E.2d 454; *Ladshaw v Hoskins*, 204 S.C. 346, 29 S.E.2d 480; *Rosamond v Lucas-Kidd Motor Co.*, 182 S.C. 331, 189 S.E. 641.

“As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation.” *Ex parte Morris*, 367 S.C. 56, 624 S.E.2d 649, 652 (S.C. 2006). “One must be a real party in interest, *i e* , a party who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.” *Id* There is a difference between the concepts of “standing,” “capacity to sue,” and “real party in interest.” *See* Wright, Miller and Kane, Federal Practice and Procedure, § 1542 at pp. 328-329 (1990). “[P]laintiff must both be the real party in interest and have standing.” *Id* “To have standing, a party must have both a personal stake in the subject matter of a lawsuit and be the “real party in interest” *Queen's Grant Villas v Daniel Int'l Corp.*, 286 S.C. 555, 335 S.E.2d 365 (S.C. 1985). (Emphasis added). CMI’s newly discovered evidence admits CMI is not the real party in interest and lacks standing. A court’s authority to issue a judgment of foreclosure against the Oldfield Property to CMI as owner of the mortgage is an impossibility under the law.

## **2. CMI offers no defense to the claim of fraud upon this Court.**

While there has not been a final judgment in this foreclosure action, “[t]he subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud. Contrary to perjury by a witness or a party’s failure to disclose requested materials, conduct which constitutes intrinsic fraud, where an attorney - an officer of the court - suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court. These actions by an attorney

constitute extrinsic fraud.” (footnotes omitted). *Chewning v Ford Motor Company*, 354 S.C. 72, 82-83, 579 S.E.2d 605, 610-611 (S.C. 2003) *cf* *Kupferman v. Consol Research & Mfg Corp*, 459 F.2d 1072 (2d Cir.1972) (institution of action by attorney who knew that there was complete defense to action might be fraud upon the court); *Great Coastal Express, Inc, v Int'l Brotherhood of Teamsters*, 675 F.2d 1349, 1357 (4th Cir. 1982) (“[I]nvolvement of an attorney, as an officer of the court, in a scheme to suborn perjury would certainly be considered fraud on the court.”); *Cleveland Demolition Co v Azcon Scrap Corp*, 827 F.2d 984, 986 (4th Cir.1987) (“A verdict may be set aside for fraud on the court if an attorney and a witness have conspired to present perjured testimony.”); *Rozier v Ford Motor Co*, 573 F.2d 1332 (5th Cir.1978) (fabrication of evidence where attorney is implicated is fraud upon the court); *H.K Porter Co. v Goodyear Tire & Rubber*, 536 F.2d 1115, 1119 (6th Cir.1976) (“Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court.”); *Dixon v Comm'n of Internal Revenue*, 2003 WL 1216290 (9th Cir.2003) (fraud on the court occurred where attorneys entered into secret settlement agreements with taxpayers in exchange for false testimony); *Synanon Found, Inc., v Bernstein*, 503 A.2d 1254 (D.C.1986) (attorney subornation of perjury and false statements to trial court constitute fraud upon the court); *Porcelli v Joseph Schlitz Brewing Co.*, 78 F.R.D. 499 (E.D.Wis.1978) (noting distinction between perjury involving officers of the court and witness or party); *see* 12 James Wm. Moore et al., *Moore's Federal Practice* ¶ 60-21[4][b] (3d ed.2002). *Id.*

“Attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice. Accordingly, where an attorney embarks on a scheme to either suborn perjury or intentionally conceal documents, extrinsic fraud constituting a fraud upon the court occurs.” *Id.* “[B]ecause fraud upon the court is an affront to the

administration of justice, a litigant who has been defrauded need not establish prejudice. *Hazel-Atlas Glass Co. v Hartford-Empire Co*, *supra*; *Dixon v. Comm'n of Internal Revenue*, 2003 WL 1216290 (9th Cir.2003) ('... the perpetrator of the fraud [upon the court] should not be allowed to dispute the effectiveness of the fraud after the fact.')." *Id.* at FN7.

The foreclosure complaint was filed as verified under oath by an attorney at Riley Pope & Laney on personal knowledge that Bayview was the owner of the debt obligation refinance note and mortgage. Counsel – both Riley Pope & Laney and Nelson Mullins – next brought the joint motion under Rule 25(c), SCRCP, to substitute counsel and CMI as plaintiff for Bayview supported by sworn testimony from CMI that Bayview sold the refinance debt obligation note and mortgage to CMI and indorsed the note to CMI. CMI and Bayview counsel Brian Crotty, Esq. subsequently supplemented (not corrected) CMI's sworn testimony with a new affidavit stating the original affidavit in support of the Rule 25 motion was incorrect and that CMI has always been the owner of the refinance debt obligation note and mortgage and that Bayview did not sell the refinance debt obligation note and mortgage to CMI and that Bayview did not indorse the refinance debt obligation note and mortgage to CMI; rather, American Home Mortgage and Danielle Sterling indorsed the refinance debt obligation note and mortgage to CMI and that CMI took possession of the note with the specific indorsement to CMI already on the note.

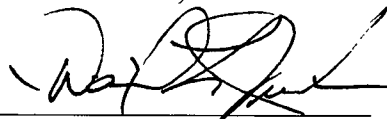
CMI's recent admission now shows that Bayview's counsel's sworn statement as to ownership was false; that, CMI's subsequent sworn statement submitted by counsel to correct Riley Pope & Laney's knowingly false statement was false; and that, CMI's testimony subsequently submitted by its counsel, Mr. Crotty, to correct the first two knowingly false statements was also knowingly false. Finally, Mr. Crotty is on record before the court stating that the refinance debt obligation is found on CMI's books and that it has never been sold.

The Circuit Court relied upon these knowingly false statements suborned and made by counsel in the April 11, 2011 order wherein the court substituted CMI as plaintiff for Bayview as the real party in interest in the foreclosure action. The Bankruptcy Court subsequently relied upon the April 11, 2011 order from the Circuit Court in finding that CMI had standing to request the relief granted in the Relief Order allowing CMI to litigate its claim outside the bankruptcy court back in this Court and the Circuit Court. As a result of the newly discovered admission that CMI has never been the owner of the refinance debt obligation note and mortgage at any time relevant herein, the foreclosure action should be dismissed *ex mero motu* for lack of subject matter jurisdiction based on the inability of a court to issue a judgment of foreclosure to CMI. The real party in interest has never been before the courts of the state of South Carolina and substitution of the real party in interest is no longer available to any other party as a result of the Junk's' bankruptcy and the Relief Order.

In conclusion, for the foregoing reasons, this action for foreclosure and reformation of the mortgage should be dismissed with prejudice and this court should award whatever sanctions it deems appropriate, including but not limited to attorney's fees.

Respectfully submitted,

DANIEL L. JUNK, DEBTOR-IN-  
POSSESSION, *PRO SE*



Daniel L. Junk, Debtor-in-possession  
*Proposed Substitute Pro Se*  
*Appellant, Counterclaim Appellant*  
*and Third-party Appellant*  
35 North Fourth Street  
Columbus, OH 43221  
(614) 648-5062

Columbus, Ohio  
September 24, 2014

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Honorable Marvin H. Dukes, III, Master in Equity

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Case No. 2009-CP-07-04301

Case No. 2009-CP-07-05088

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Daniel L. Junk and Christine H. Junk, Appellants,

v.

Mortgage Electronic Registration Systems, Inc., and John Does 1-5,000, Respondents.

---

CitiMortgage, Inc., Respondent,

v.

Daniel Junk a/k/a Daniel L. Junk and Christine H. Junk and Oldfield Community Association, Defendants,

Of Whom Daniel L. Junk and Christine H. Junk are, Appellants,

---

Daniel L. Junk and Christine H. Junk, Counterclaim Appellants,

v.

CitiMortgage, Inc. Counterclaim Respondent.

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Daniel L. Junk and Christine H. Junk, Third-party Appellants,

v.

Riley Pope & Laney, LLC , Heidi Carey, Esq.,  
Roy Laney, Esq., T. Lowndes Pope, Esq.,

Bayview Loan Servicing, LLC, MERSCORP, Inc.,  
Mortgage Electronic Registration Systems, Inc.,  
Citi Master Servicing, Citigroup Global Markets  
Realty Corp., Citigroup Mortgage Loan Trust, Inc.,  
John Does 1-5,000, Jennifer Oakes, Robert G.  
Hall, Security Connections, Inc., Krystal Hall,  
Danielle Sterling, ABC Appraisal Group, Inc.,  
Mark A. Ruplinger, Linda Heller, Harry Jones,  
Colonial Coast Title Agency, Inc., Lawyers Title  
Insurance Corporation, Corelogic, Inc. and American  
Home Mortgage Holdings, Inc.

Third-party Respondents.

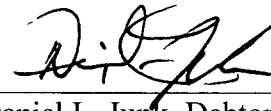
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I certify that I have served **PROPPOSED SUBSTITUTE APPELLANT'S, COUNTERCLAIM APPELLANT'S AND THIRD-PARTY APPELLANT'S REPLY TO CMP'S RETURN TO MOTION FOR LEAVE TO FILE MOTION IN THE CIRCUIT COURT UNDER RULE 60(b)(2),(3),(4), SCRCP** dated September 24, 2014, on counsel listed below by depositing a copy of it in the United States Mail, postage prepaid, on September 24, 2014.

DANIEL L. JUNK, DEBTOR-IN-  
POSSESSION, *PRO SE*



---

Daniel L. Junk, Debtor-in-possession  
*Proposed Substitute Pro Se  
Appellant, Counterclaim Appellant  
and Third-party Appellant*  
35 North Fourth Street  
Columbus, OH 43221  
(614) 648-5062

Columbus, Ohio  
September 24, 2014

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**Document(s) Served: PROPOSED SUBSTITUTE APPELLANT'S, COUNTERCLAIM APPELLANT'S AND THIRD-PARTY APPELLANT'S REPLY TO CMI'S RETURN TO MOTION FOR LEAVE TO FILE MOTION IN THE CIRCUIT COURT UNDER RULE 60(b)(2),(3),(4), SCRCP.**

**Persons Served:**

Brian Patrick Crotty, Esquire  
Nelson Mullins Riley & Scarborough, LLP  
P.O. Box 11070  
Columbia, SC 29211

James G. Long, III  
Nexsen Pruet, LLC  
P.O. Box 2426  
Columbia, SC 29202

Sean Michael Bolchoz, Esquire  
Bolchoz Law Firm, PA  
P.O. Box 828  
Bluffton, SC 29910

John Thomas Lay, Esquire  
Childs Cantey Thrasher, Esquire  
Gallivan White & Boyd P A  
PO Box 7368  
Columbia, SC 29202

Demetri K. Koutrakos, Esquire  
Callison Tighe & Robinson, LLC  
P.O. Box 1390  
Columbia, SC 29202-1390

Susan Taylor Wall, Esquire  
Amanda C. Williams, Esquire  
McNair Law Firm, P.A.  
PO Box 1431  
Charleston, SC 29402

Elizabeth Van Doren Gray, Esquire  
Tina M. Cundari, Esquire  
Sowell Gray Stepp & Laffitte, LLC  
PO Box 11449  
Columbia, SC 29211

O. Hamlin O'Kelley, III, Esquire  
Maria E. Kiehling, Esquire  
Buist, Byars & Taylor, LLC  
652 Coleman Blvd., Ste. 200  
Mt. Pleasant, SC 29464

Hamilton Osborne, Jr.  
HAYNSWORTH SINKLER BOYD, P.A.  
1201 Main Street, 22nd Floor  
Columbia, SC 29201-3226

DANIEL L. JUNK

*Debtor-in-Possession*

September 24, 2014

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, South Carolina 29201

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SEP 25 2014


**SC Court of Appeals**

Re: *CitiMortgage, Inc. v Junk and Junk v CitiMortgage, Inc., et al.*  
Consolidated Case Tracking No. 2012-210910.

Dear Ms. Kitchings,

Enclosed please find an original and 7 copies of **PROPOSED SUBSTITUTE APPELLANT'S, COUNTERCLAIM APPELLANT'S AND THIRD-PARTY APPELLANT'S REPLY TO CMI'S RETURN TO MOTION FOR LEAVE TO FILE MOTION IN THE CIRCUIT COURT UNDER RULE 60(b)(2),(3),(4), SCRPC**. Kindly file the original and return one copy to me in the postage-paid self-addressed return envelope. Should you have any questions or need anything further, please contact me.

Sincerely,



Daniel L. Junk,  
*Proposed Substitute Appellant, Counterclaim  
Appellant and Third-party Appellant.*

cc: A. Parker Barnes, Jr., Esq.  
Michael J. Anzelmo, Esq.  
John T. Lay, Esq.  
Sean Michael Bolchoz, Esq.  
Susan Taylor Wall, Esq.  
James Y. Becker, Esq.  
Demitri "Jim" Koutrakos, Esq.  
Elizabeth Van Doren Gray, Esq.  
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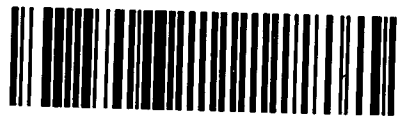
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