

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Joseph W. Hudgens, Special Referee

Common Pleas Case No.: 2012-CP-36-103
Appellate Case No. 2013-002181

RECEIVED

SEP 29 2014

SC Court of Appeals

EverBank,.....Respondent,

v.

Lenora Scurry, Patrick Scurry, The South Carolina
Department of Revenue, Defendants,

Of Whom Lenora Scurry and Patrick Scurry are.....Appellants.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)

COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS
DOCKET NO. 2010-CP-36-0103

EverBank)

Plaintiff,)

vs.)

Lenora Scurry, Patrick Scurry, The
South Carolina Department of
Revenue,)

Defendants)

RECEIVED

OCT 11 2013

Office of Appeals

ORDER

FILED
NEWBERRY COUNTY
OCT 11 2013
JACQUE S. GORDON
CLERK OF COURT

This matter arises out of an action for the foreclosure of a mortgage which previously resulted in a decree of foreclosure and sale in favor of the plaintiff EverBank on March 11, 2013. A sale was held on sales day April 1, 2013. The plaintiff was the successful bidder. Before the sale was confirmed and deed delivered the defendants Scurry filed a motion to set aside the judgment and sale. The motion was made pursuant to Rule 60 (b) (1), (3), (4), and/or (5). The defendants also submitted an answer and counterclaim setting forth their contention that they have meritorious defenses. Although under the Rule the motion "does not affect the finality of a judgment or suspend its operation" the final operation of the judgment and delivery of the deed to the plaintiff was held in abeyance until determination of the motion.

The defendant South Carolina Department of Revenue answered the complaint alleging it has a tax lien against the defendants Scurry and has not responded to their motion which does not affect its position.

On February 12, 2010 the defendants Scurry, husband and wife, executed and delivered a promissory note in the amount of \$152,192.00 to Primary Capital Advisors LC in the amount of \$152,192.00 plus interest payable in installments payable to Primary Capital Advisors LC, identified as "Lender" in the note, or its order, in consideration and payment of a loan to the defendants Scurry by the lender. The note provided that it is secured by a mortgage dated on the same day, February 12, 2010. The was made to "Mortgage Electronic Registration Systems, Inc. ('MERS') (solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns), as mortgagee." Primary Capital Advisors LC is identified as "Lender", and the mortgage further states that it "secures to Lender" payment of the debt. The mortgage again states

that MERS holds "solely as nominee for Lender and Lender's successors and assigns," and also "to the successors and assigns of MERS."

On February 28, 2012 MERS executed a written assignment "as nominee for Primary Capital Advisors LC, and its successors and/or assigns" purporting to assign the "mortgage and note thereby secured" to EverBank c/o EverHome Mortgage Company. It was recorded on March 6, 2012 in Book 1610, page 178 by the plaintiff's law firm.

The foreclosure action was commenced by EverBank against the defendants Scurry and the South Carolina Department of Revenue (which is not participating in this proceeding relating to the motion of the defendants Scurry and any reference herein to "defendants" without and specific identification refers only to the Scurry defendants). The pleadings were filed on February 27, 2012, and, on the same day the defendants Scurry were served with the summons, complaint, lis pendens and notice of foreclosure intervention evidenced by affidavits of service dated February 27, 2012, filed on February 28, 2012 amended by affidavits of service dated on March 5, 2012, filed on March 6, 2012 but stating the same time of service as the February 27 affidavits. (The amendments clarified the person actually served, and there is no dispute or issue by the Scurrys as to effective service):

On March 30, 2012 the plaintiff filed an affidavit of default as to the defendants Scurry and on February 11, 2013 filed certification of compliance with Administrative Order 2011-05-02-01 and that the defendants Scurry "failed, refused, or voluntarily elected not to participate in any foreclosure intervention process." The defendant South Carolina Department of Revenue has answered alleging its lien for unpaid taxes.

On March 30, 2012 by order of the Clerk of Court the undersigned was appointed special referee to make appropriate findings of fact and conclusions of law with authority to enter final judgment. After notice to all parties a hearing on the foreclosure action was held on March 8, 2013. (The delay in scheduling a hearing was due to bankruptcy proceedings filed by the defendants Scurry). The defendants Scurry did not appear at the hearing. On March 11, 2013 an Order and Judgment of Foreclosure and Sale was filed. After due advertisement a sale was held on sales day, April 1, 2013. The plaintiff was successful bidder. Before the sale was confirmed and a deed to the plaintiff issued the defendants Scurry on April 26, 2013 filed their Motion to Vacate the Judgment and Sale.

The defendants Scurry in their motion assert that they did not answer the complaint of the plaintiff due to mistake, inadvertence, surprise, or excusable neglect, Rule 60(b) (1); and that they did not attend the scheduled hearing of the foreclosure reference after notice of the time and place of the hearing because of misrepresentations by the plaintiff bank that the hearing was not going to be held. Rule 60(b) (3) and perhaps because of the vices of 60(b) (1). The motion was also based on the assertion that the judgment was void, Rule (60) (b) (4) and contrary to Rule 60(b) (5), specifically that "it is no longer equitable that the judgment should have prospective application."

A hearing on the motion was held by me after scheduling with counsel for the defendants

Scurry and counsel for the plaintiff attended by both counsel and the defendants Scurry. No testimony was taken. memoranda were filed and arguments made by both counsel.

The factual basis for relief pursuant to Rule 60 (b) (1) and (3) from the failure to answer the complaint or attend the foreclosure reference was presented by affidavits of Mr. and Ms. Scurry. Defendants Exhibits A and B. The asserted reasons for relief by virtue of Rule 60 (b) (3) and (5) were legal arguments.

As to the failure to answer the complaint and attend the foreclosure reference:

Failure to answer:

In their affidavits the Scurrys contended that the process server made statements to them which led them to believe that they did not have to take the summons and complaint seriously and misled them to think that they did not need seek legal advice or file a response to the summons and complaint. The affidavit of Ms. Lenora Scurry, Exhibit A, set out her recollection of the events of service of the foreclosure papers and her communications with the plaintiff bank. The affidavit of her husband, Mr. Patrick Scurry, Exhibit B, added no factual averments and that her statements were "true and correct to the best of my knowledge."

In paragraph 3 of her affidavit Ms. Scurry stated:

The man who served us the papers to begin this foreclosure case met with us inside our home and sat at our dining room table with my husband and me. I asked him what the documents were, and he said they were nothing to worry about. I noticed the name 'EverBank' on the documents, and I told him that we were trying to get a modification. The man told us that Obama was coming out with a program to help homeowners, and he made conversation with us and generally acted like these papers were nothing for us to worry about.

Because of what the man told me, I did not worry about the papers, examine them, or take them to a lawyer.

Plaintiff's counsel filed an affidavit of the process server by which he denied any conversations with the Scurrys and denied any entry to their home.

There is no evidence, or even indication, that the process server, identified by Ms. Scurry in her affidavit as "the man who served the papers," had any authority to speak on behalf of the plaintiff bank, or its attorneys, or that anything occurred in the conversation as related by Ms. Scurry that would indicate to her or her husband that he knew what he was talking about or that the Scurrys would be justified in relying on what he may have said with respect to the significance of the papers being served upon them at a time when they were discussing a loan modification with the plaintiff bank as the result of a default in payments from the September 01, 2011 payment due date as indicated in Defendant's Exhibit A-1. Nothing in the items supporting the defendant's motion indicates that the process server was any thing more than that. The

defendant's counsel states in the motion, paragraph 6, that the process server was a "person acting on the plaintiff's behalf," but furnishes nothing to leap to a conclusion that he could speak "on the plaintiff's behalf" as to the significance of the foreclosure action.

I find no credible evidence or argument that the failure to answer or otherwise respond to the Summons and Complaint based upon the requirements of Rule 60(b) (1) or (3) sufficient to set aside and vacate the judgment of foreclosure and sale pursuant to that judgment.

Failure to attend the foreclosure reference hearing.

The defendants Scurry also contend that the judgment of foreclosure and sale should be vacated and set aside because of "the Defendants' failure to attend the hearing in this case [i.e. the foreclosure reference hearing]. The Defendants believed the hearing was cancelled because of the actions and representations of persons acting on behalf of the Plaintiff." Defendants' motion paragraph 7. The basis for this contention is presented by the Scurry's affidavits, Exhibits A and B and Exhibits A-1 - A-7. Exhibits A-1 - A-7 are letters or notices from the plaintiff bank relating to the efforts of the Scurrys to obtain a modification of their loan. Although the Scurrys did not participate in foreclosure intervention (see supra certification of compliance with Administrative Order 2011-05-02-01) they were attempting to obtain a modification of the loan with the plaintiff bank at the time of the commencement of the foreclosure action. Affidavit of Lenora Scurry, Exhibit A, paragraphs 3 and 4.

Ms. Scurry in her affidavit stated that she received a notice of the foreclosure hearing but thought the plaintiff bank, "[b]ased on what Everhome's employees were telling me about the modification process, I believed Everhome would instruct the law firm not to go forward with the hearing. As I thought the hearing was cancelled, we did not attend it." What Everhome employees were "telling" Ms. Scurry can only be found in Exhibits A-1 - A-7. A reading of those exhibits does not support or justify her belief that the hearing was going to be cancelled or that the foreclosure action was not proceeding. Ms. Scurry stated in her affidavit that she telephoned the Weston Adams law firm, plaintiff's foreclosure counsel, and asked an unidentified employee if the hearing was going to be cancelled in view of the modification process and was told only that it would be cancelled "if their client told them to." Exhibit A, paragraph 9. There is no claim by the Scurrys of a follow up inquiry to the Adams law firm of a communication to it from the plaintiff bank of a cancellation of the hearing. The Scurry's effort to have the loan modified was unsuccessful, and Ms. Scurry was so notified by the plaintiff bank for lack submission of necessary documentation. Exhibit A, paragraph 13, Exhibit A-7.

I find nothing in Exhibits A-1 - A-7 suggesting intentional or even unintentional misrepresentation of a cancellation of the foreclosure reference hearing.

I find that the defendants are not entitled to have the judgement and sale vacated under Rule 60(b) (1) or (3).

Rule 60(b) (4) and (5)

Subsection (4) of Rule 60(b) applies to a judgment that is void; subsection (5) applies to a judgment when "it is no longer equitable that the judgment should have prospective application".

The defendants argue that the judgment of foreclosure and sale should be set aside and vacated because of the amount of the award of attorney's fees and the provision of the decree that

the amount of the judgment shall be subject to increase to permit the Plaintiff to recover additional costs, commissions and expenses not included in the judgment figures set forth [in the decree]. It may also increase to include supplemental compensation for attorney's services not contemplated by the initial fee awarded. Jurisdiction over the fee award and total debt is reserved to facilitate the assessment and payment of any such costs and/or supplemental compensation. Such additional costs, commissions and expenses may be established by affidavit and shall be adjudicated by the Court without further hearing.

The attorney's fees awarded by the decree were "for services performed and anticipated to be performed until final adjudication of the within action under the terms of the note and mortgage."

Attorney's fees and costs are authorized by the note and mortgage. The defendants argue that the purpose of an action of the nature of the present one is to determine debt not to create debt. That may be true, but the note and mortgage authorize collection of fees and costs in actions to collect money because of default in payment of the initial debt. If such fees and costs are incurred in actions to collect a debt and are authorized by the agreed upon documents creating the debt they are not unauthorized additions to debt. Moreover, in the present case, since a personal deficiency judgment against the defendants is waived, the plaintiff's remedy was recovery of the real property subject to the mortgage which has occurred by its successful nominal bid and acknowledgment that it has paid all fees and costs without any recourse against the defendants personally. Consequently, the defendants are not prejudiced thereabout and have no legal or equitable claim justifying the Court to vacate the judgment and sale under Rule 60(b) (4) and (5).

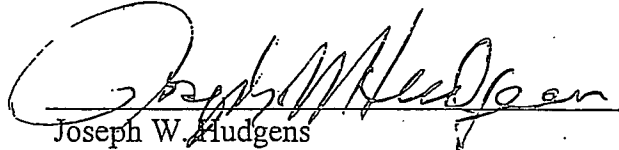
Meritorious defense

The defendants have submitted in support of their motion an answer and counterclaim. In order to obtain relief from a default judgment the defendants as moving parties in addition to meeting the burden of establishing entitlement to relief under Rule 60 (b) (1), (3), (4) and (5) must also show a meritorious defense. The defenses and counterclaims alleged by the defendants are based upon the evidence presented in support of their motion. That evidence as presented

does not meet the burden of showing that they are entitled to relief. They the same insufficient showing which fails to show that they are entitled to relief on the basis of their claim under Rule 60(b) cannot be turned into defenses to the foreclosure action.

IT IS THEREFORE ORDERED that the motion of the defendants is denied.

Newberry, S. C.
September 6, 2013


Joseph W. Hudgens
Special Referee

STATE OF SOUTH CAROLINA)
)
)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-36-103

EverBank,)
)
Plaintiff,)
)
vs.)
)
)
Lenora Scurry, Patrick Scurry,)
The South Carolina Department)
of Revenue,)
Defendants.)

ORDER

FILED
NEWBERRY COUNTY
JACKIE S. BOWERS
CLERK OF COURT
2013 OCT 4 PM 3 20

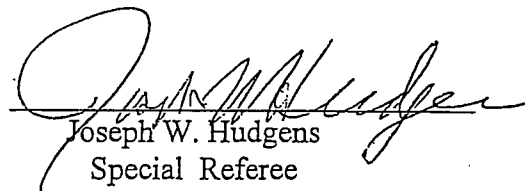
The Defendants Scurry have filed a motion to reconsider and/or alter or amend the Order filed September 6, 2013 in the above case.

Having reviewed the Defendants' memorandum, its exhibits supporting the motion and review of the order filed September 6, 2013 and consideration thereof I find no basis to alter or amend the prior order.

IT IS THEREFORE ORDERED that the motion of the Defendants Scurry is denied.

IT IS SO ORDERED.

NEWBERRY S. C.
October 4, 2013


Joseph W. Hudgens
Special Referee

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

EverBank,

Plaintiff,

vs.

Lenora Scurry, Patrick Scurry, The South
Carolina Department of Revenue,

Defendants.

IN THE COURT OF COMMON PLEAS
DOCKET NO. 2012-CP-36-0103

SPECIAL REFEREE'S
ORDER AND JUDGMENT OF
FORECLOSURE AND SALE

(NO DEFICIENCY REQUESTED)

FILED
NEWBERRY COUNTY
2013 MAR 11 AM 11 49
JACKIE S. BOWERS
CLERK OF COURT

TO:

Weston Adams Law Firm
Attorneys for Plaintiff

Milton G. Kimpson
Attorney for Defendant The South Carolina Department of Revenue

Pursuant to Rule 53, SCRPC, the above-entitled matter was referred to the undersigned to make appropriate findings of fact and conclusions of law with authority to enter a final judgment in the cause, and any appeal therefrom shall be directed to the South Carolina Court of Appeals.

Pursuant to the said Order of Reference, a hearing was held, attended by the attorneys of record, the testimony was taken, which is reported herein, and from the testimony and evidence, I find and conclude as follows:

FINDINGS OF FACT

1. The Lis Pendens was filed on February 27, 2012.
2. The Summons and Complaint were filed on February 27, 2012.

3. Service was made upon the Defendants named in this Order as is shown by the proof of service filed herewith.

4. The Defendants, with the exception of The South Carolina Department of Revenue, are in default as shown by the affidavit filed herein.

5. The Defendants and all attorneys of record were notified of the time, date and place of the hearing in this matter.

6. According to the affidavit filed herein, no Defendant in default is in the military service of the United States of America as contemplated under the Soldiers' and Sailors' Civil Relief Act of 1940, and any amendments thereto.

7. For value received, Lenora Scurry and Patrick Scurry made, executed and delivered a note dated the 12th day February, 2010, promising thereby to pay to the order of Primary Capital Advisors LC the sum of \$152,192.00, with interest at five and no/100 (5.00%) per cent per annum. Other terms and conditions are stated in the note, which is of record herein.

8. To better secure the payment of the note described above, the said Lenora Scurry and Patrick Scurry made, executed and delivered to Mortgage Electronic Registration Systems, Inc. as nominee for Primary Capital Advisors LC a mortgage in writing dated the 12th day of February, 2010, covering real property in Newberry County, which is the same as that described in the Complaint. The mortgage was filed on the 16th day of February, 2010 and is of record in the Office of the Register of Mesne Conveyances for Newberry County in Mortgage Book 1482 at page 181.

(a) Thereafter, by assignment dated February 28, 2012, and recorded in the said RMC's office on March 6, 2012 in Mortgage Book 1610 at page 178, the said Mortgage Electronic Registration Systems, Inc. as nominee for Primary Capital Advisors LC assigned the subject mortgage to EverBank, who is now the owner and holder thereof and the debt secured thereby.

9. This mortgage constitutes a purchase money mortgage first lien on the subject property.

10. Payment due on the note has not been made as provided for therein and the Plaintiff, as the holder thereof, has elected to require immediate payment of the entire amount due thereon and has placed the note and mortgage in the hands of the attorney herein for collection.

11. The sum of \$5,200.00 is a reasonable amount to allow as attorney fees for Plaintiff's attorney for services performed and anticipated to be performed until final adjudication of the within action under the terms of the note and mortgage.

12. The amount due and owing on the note, with interest at the rate provided in the note, and other costs and expenses of collection, including an attorney's fee, secured by the note and mortgage, is as follows:

a. Principal balance 10/1/11	\$148,781.19
b. Interest from 9/1/11 at five and no/100 (5.00%) per cent per annum	\$12,398.40
c. Escrow / corporate advances	\$7,218.00
d. Late charges	\$727.03
e. Costs of collection before hearing	\$50.00
f. Attorney fee	\$5,200.00

Total debt secured by note and mortgage,
including interest to date shown

\$174,374.62

Interest for the period from the date shown in (b) above through the date of this judgment at above stated rate to be added to the above stated "Total Debt" to comprise the amount of the judgment debt herein and interest after the date of judgment at the rate of five and no/100 (5.00%) per cent per annum (pursuant to the terms of the note and mortgage) on the judgment debt should be added to such judgment debt to comprise the amount of Plaintiff's debt secured by the mortgage through the date to which such interest is computed.

13. The Plaintiff is seeking the usual foreclosure of the mortgage and has in the Complaint, or subsequent thereto in writing, expressly waived the right to a personal or deficiency judgment.

14. The Defendant(s) below named claim or may claim a lien upon or interest in the subject property by virtue of the matters and things hereinbelow alleged and in the event there is a surplus from the sale of the subject property, the validity, priority and amount of any such lien claim will be determined at a hearing subsequent to the sale, in accordance with Rule 71(c) SCRCP.

(a) The Defendant, The South Carolina Department of Revenue by virtue of the following state tax liens filed against Patrick and Lenora Scurry (SS# xxx-xx-8611):

<u>Amount</u>	<u>Date Filed</u>	<u>Tax Lien#</u>	<u>Book/Page</u>
\$1,138.58	10-05-2011	3-51304710-8	2011LN3600722

Any such interest in or lien upon the said property is junior and subordinate to Plaintiff's Mortgage.

15. The Plaintiff's Complaint alleges that no Defendant is entitled to relief under the South Carolina Supreme Court Administrative Order 2009-05-22-01. This averment was not challenged by any Defendant and it is therefore determined that no Defendant is entitled to relief under this Order.

CONCLUSIONS OF LAW

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. The Plaintiff's Mortgage be declared a purchase money mortgage first lien and Plaintiff should have judgment of foreclosure of the mortgage and the mortgaged property should be ordered sold at public auction after due advertisement.

2. That the Plaintiff has complied with the mandates of South Carolina Supreme Court Administrative Order 2009-05-22-01.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

1. That there is due to the Plaintiff on the obligation and mortgage set forth in the Complaint the sum of \$174,374.62, representing the total debt due Plaintiff as set out in Paragraph 12, supra, together with interest at the rate provided therein on the balance of principal from the date aforesaid to the date hereof.

2. The amount due in the preceding paragraph (the "Total Debt" as set forth in Paragraph 12, supra, and later accrued interest on the principal), shall constitute the total judgment debt due Plaintiff and shall bear interest hereafter at the rate of five and no/100 (5.00%) per cent per annum. The amount of the judgment shall be subject to increase to permit the Plaintiff to recover additional costs, commissions and expenses not included in the judgment figures set forth herein. It may also increase to include supplemental compensation for attorney's services not contemplated by the initial fee awarded. Jurisdiction over the fee award and total debt is reserved to facilitate the assessment and payment of any such costs and/or supplemental compensation. Such additional costs, commissions and expenses may be established by affidavit and shall be adjudicated by the Court without further hearing.

3. The Defendant is liable for the aforesaid mortgage debt and shall, on or before the date of sale of the property hereinafter described, pay to Plaintiff, or Plaintiff's attorney, the amount of Plaintiff's debt as aforesaid, together with the costs and disbursements of this action.

4. That on default of payment at or before the time herein indicated, the mortgaged premises described in the Complaint, as hereinafter set forth, shall be sold by the Special Referee at public auction at the Newberry County Courthouse on some convenient sales day hereafter (and should the regular day of judicial sales fall on a legal holiday, then and in such event the sales day shall be on Tuesday next succeeding such holiday) on the following terms:

A. FOR CASH: The Special Referee will require a deposit of 5% on the amount of the bid (in cash or equivalent) at time of bid, same to be applied on the purchase price only upon compliance with the bid, but in the case of non-compliance within 30 days, same to be forfeited and applied to the costs and Plaintiff's debt.

B. Interest on the balance of the bid shall be paid to the day of compliance at the rate of five and no/100 (5.00%) per cent.

C. The sale shall be subject to real property taxes and assessments, existing easements and restrictions of record, and any senior encumbrances.

D. The Purchaser is to pay for deed stamps and costs of recording the deed.

5. If Plaintiff is the successful bidder at sale for a sum not exceeding the amount of costs, expenses and the indebtedness of Plaintiff in full, Plaintiff may pay the Special Referee only the amount of costs and expenses, crediting the balance of the bid on Plaintiff's indebtedness.

6. Personal or deficiency judgment being waived, the bidding will not remain open after the date of sale, but compliance with the bid may be made immediately.

7. That the Special Referee will, by advertisement according to law, give notice of the time and place of sale and the terms thereof and will execute to the Purchaser, or Purchasers, a deed to the premises sold. The Plaintiff, or any other party to this action, may become a purchaser at such sale, and if, upon such sale being made, the Purchaser, or Purchasers, should fail to comply with the terms thereof within 30 days after the date of sale, the Special Referee may advertise the said premises for sale on the next or some other subsequent sales day at the risk of the highest bidder, and so from time to time thereafter until a full compliance shall be secured.

8. That the Special Referee will apply the proceeds of the sale as follows:

FIRST: To the payment of the amount of the costs and expenses of this action, including plaintiff's attorney fee and including any Guardian ad Litem fee or fees of attorneys appointed under Order of Court;

NEXT: To the payment to the Plaintiff, or Plaintiff's attorney, of the amount of Plaintiff's debt and interest or so much thereof as the purchase money will pay on same.

NEXT: Any surplus will be held pending further Order of this Court.

9. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event the successful bidder is other than the Defendant in possession herein, upon full compliance with the bid the Sheriff of Newberry County is ordered and directed to eject and remove from the premises the defendants of the

property sold, together with all personal property located therein, and put the successful bidder or his assigns in full, quiet and peaceable possession of said premises without delay, and to keep the successful bidder or his assigns in such peaceable possession. Pursuant to S.C. Code Ann. Sec. 27-40-710, personal property will be placed on the street or public highway for disposal, and removed after forty-eight hours.

10. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each Defendant named herein and all persons whosoever claiming under him, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said mortgaged premises so sold, or any part thereof.

11. IT IS FURTHER ORDERED that the deed of conveyance made pursuant to said sale shall contain the names of only the first-named Plaintiff and the first-named Defendant, and the Defendant who was the titleholder of the mortgaged property at the time of filing of the notice of pendency of the within action and the name of the grantee, and the Register of Mesne Conveyance is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deed.

12. The undersigned Special Referee will retain jurisdiction to do all necessary acts incident to this foreclosure including, but not limited to, the issuance of a Writ of Assistance.

13. This case was referred to the Special Referee for Newberry County to direct entry of final judgment in this action under Rule 53, SCRCPP. Any appeal from the final judgment entered by the Special Referee shall be directly to the South Carolina Court of Appeals.

14. The following is a description of the premises herein ordered to be sold:

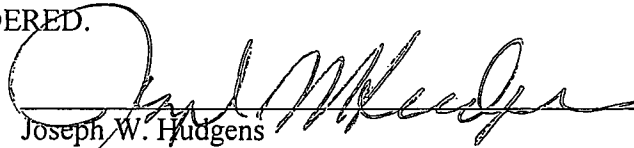
ALL that certain piece, parcel or lot of land, together with the improvements thereon, if any, situate, lying and being in the County of Newberry, State of South Carolina, located on Nursery Road at the intersection of Windsong Trail, and being shown and designated as Lot 8, containing 1.31 acres, more or less, on that Boundary Survey & Subdivision plat prepared for Larry W. Higgins by C.A. Shealy, III, SCRLS 15182, dated May 27, 2006, and recorded August 23, 2006 in the Clerk of Courts Office in Newberry County in Plat Book C-156 at page 9; reference being made to said plat for a more complete and accurate description of said property.

This being the same piece of property conveyed to Lenora Scurry and Patrick Scurry by deed of Abbeville Savings and Loan Association recorded February 16, 2010 in Deed Book 1482 at page 179.

TMS No. 698-79

The current address of the property is 1360 Nursery Road Little Mountain, SC 29075.

AND IT IS SO ORDERED.


Joseph W. Hudgens
Special Referee for Newberry County

Newberry, South Carolina
March 8, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF NEWBERRY)

EverBank)

Plaintiff,)

vs.)

Lenora Scurry, Patrick Scurry, The South
Carolina Department of Revenue,)

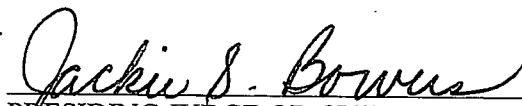
Defendant(s).)

IN THE COURT OF COMMON PLEAS
DOCKET NO. 2012-CP-36-0103

**MOTION AND
ORDER OF REFERENCE**

The above captioned case is an action to foreclose real property and the issues to be tried are equitable in nature. Therefore, pursuant to Rules 53(b) and 71 SCRPC, and the common law of this state, this case is proper for mandatory reference to The Honorable Joseph Hudgens, Special Referee for the above county with authority to enter a final judgment in the cause. Any appeal from this case shall be directed to the South Carolina Court of Appeals. Now, on motion of the undersigned, attorney for Plaintiff,

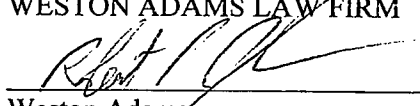
IT IS THEREFORE ORDERED that this action be, and the same hereby is, referred to the Master in Equity Special Referee for the above county to take the testimony arising under the pleadings and to make his findings of fact and conclusions of law, with authority to enter a final judgment in the cause and to hear any issues after sale or judgment, including but not limited to issues involving appraisal proceedings under Section 29-3-680, et seq., and with the authority to sell the subject property at public auction on some convenient sales day hereafter, and any appeal therefrom shall be directed to the South Carolina Court of Appeals.


PRESIDING JUDGE OR CLERK OF COURT


Newberry, South Carolina
March 30, 2011

WE SO MOVE:

WESTON ADAMS LAW FIRM


Weston Adams

Caroline R. Glenn

Leigh B. Brown

William P. Stork

Robert P. Jackman

Attorney for Plaintiff

1501 Richland Street

Columbia, South Carolina 29201

(803) 254-1675

FILED
NEWBERRY COUNTY
2012 MAR 30 A 11:58
J. S. BOWERS
CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

EverBank

Plaintiff,

vs.

Lenora Scurry, Patrick Scurry, The South
Carolina Department of Revenue,

Defendant(s).

IN THE COURT OF COMMON PLEAS

2012CP3600103

2012LP3600042

LIS PENDENS

JACKIE S. BOWERS
CLERK OF COURT

2012 FEB 27 P 12:01

FILED
NEWBERRY COUNTY

NOTICE IS HEREBY GIVEN THAT an action has been commenced and is now pending in this Court upon the Complaint of the above named Plaintiff for the purpose of foreclosing a certain mortgage of real estate heretofore given by Lenora Scurry and Patrick Scurry to Mortgage Electronic Registration Systems, Inc. as nominee for Primary Capital Advisors LC bearing date of February 12, 2010 and recorded February 16, 2010 in Mortgage Book 1482 at page 181 in the RMC Office for Newberry County, in the original principal sum of one hundred fifty two thousand one hundred ninety two and 00/100 Dollars (\$152,192.00), and that the premises affected by said mortgage and by the foreclosure thereof is situated in the County of Newberry, State of South Carolina, and is described as follows:

All that certain piece, parcel or lot of land, together with the improvements thereon, if any, situate, lying and being in the County of Newberry, State of South Carolina, located on Nursery Road at the intersection of Windsong Trail, and being shown and designated as Lot 8, containing 1.31 acres, more or less, on that Boundary Survey & Subdivision plat prepared for Larry W. Higgins by C.A. Shealy, III, SCRLS 15182, dated May 27, 2006, and recorded August 23, 2006 in the Clerk of Courts Office in Newberry County in Plat Book C-156, at Page 9; reference being made to said plat for a more complete and accurate description of said property.

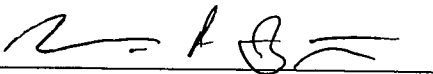
This being the same piece of property conveyed to Lenora Scurry and Patrick Scurry by deed of Abbeville Savings and Loan Association recorded February 16, 2010 in Deed Book 1482 at page 179.

Which has the address of: 1360 Nursery Road
Little Mountain, SC 29075

TMS# 698-79

WESTON ADAMS LAW FIRM

Columbia, South Carolina
February 24, 2012

BY: 
Weston Adams
Leigh B. Brown
Caroline R. Glenn
Robert P. Jackman
William P. Stork
Attorneys for Plaintiff
Post Office Box 291
Columbia, South Carolina 29202
Phone: (803)254-1675

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

EverBank

Plaintiff,

vs.

Lenora Scurry, Patrick Scurry, The South
Carolina Department of Revenue,
Defendant(s).

IN THE CIRCUIT COURT FOR THE
8th JUDICIAL CIRCUIT

CIVIL ACTION COVER SHEET

2012-CP- 36 -00123

(Please circle)

Submitted by: Weston Adams (SC Bar# 303); Leigh B. Brown (SC Bar # 77462); Caroline R. Glenn (SC Bar # 77157); Robert P. Jackman (SC Bar # 78755); William P. Stork (SC Bar # 100242)
Telephone: 803-254-1675; Fax #: 803-799-3141; Address: 1501 Richland Street, Columbia, SC 29201

Note: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint ☒ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

Contracts

- ☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)

Torts - Professional Malpractice

- ☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case#
20 -CP- -
☐ Notice / File Med Mal (230)
☐ Other (299)

Torts - Personal Injury

- ☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399)

Real Property

- ☐ Claim & Delivery (400)
☐ Condemnation (410)
☒ **Foreclosure (420)**
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

Inmate Petitions

- ☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

Judgments/Settlements

- ☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgt (720)
☐ Minor Settlement (730)
☐ Transcript Judgt (740)
☐ Lis Pendens (750)
☐ Transfer of Structured
Settlement Payment Rights
Application (760)
☐ Other (799)

Administrative Law/Relief

- ☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899)

Appeals

- ☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Commission (990)
☐ Employment See Comm (991)
☐ Other (999)

Special/Complex/Other

- ☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of-State Depositions (650)
☐ Motion to Quash Subpoena in
Out-of-County Action (660)
☐ Sexual Predator (510)

Submitting Party Signature: _____

Weston Adams/Leigh B. Brown/Caroline R. Glenn/ Robert P. Jackman/William P. Stork
WESTON ADAMS LAW FIRM / Attorneys for Plaintiff
Address: P.O. Box 291, Columbia, SC 29202 / phone: (803) 254-1675

Date: February 24, 2012

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 et. seq. SCCA/234 (1/2011)

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)
)
EverBank)
)
Plaintiff,)
vs.)
)
Lenora Scurry, Patrick Scurry, The South)
Carolina Department of Revenue,)
)
Defendant(s).)
_____)

IN THE COURT OF COMMON PLEAS
8th JUDICIAL CIRCUIT

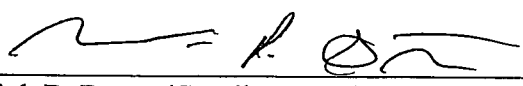
**CERTIFICATE OF
EXEMPTION / WITHDRAWAL
FROM ARBITRATION**

Docket No. 2012CP3600103

I CERTIFY THAT THIS ACTION IS EXEMPT FROM ARBITRATION BECAUSE:

- ___ monetary relief requested in this case exceeds \$25,000;
___ this is a class action;
___ there is a substantial claim for injunction or declaratory relief requested in this case;
☒ this case involves (check one or more of the following)
___ title to real estate;
___ wills, trusts and decedents' estates;
☒ mortgage foreclosure;
___ partition;
___ this is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
___ monetary relief requested in this case is unspecified but exceeds \$25,000;
___ this case is a companion or related to similar actions pending in other courts with which the action might be consolidated but for lack of jurisdiction or venue;
___ this action is appellate in nature;
___ this is a post-conviction relief matter;
___ this is forfeiture proceeding brought by the State; or
___ this is a contempt of court proceeding.

Date: February 24, 2012



Weston Adams/Leigh B. Brown/Caroline R. Glenn/Robert P. Jackman/William P. Stork
WESTON ADAMS LAW FIRM
Attorneys for Plaintiff
Post Office Box 291
Columbia, South Carolina 29202
(803)254-1675

NOTE: Motion must be presented to the court, a hearing held, and a finding made, for exemption or withdrawal from arbitration for "strong and compelling reason" sought pursuant to Rule 1(d), Rules of Circuit Court Arbitration.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
8th JUDICIAL CIRCUIT

COUNTY OF NEWBERRY)

EverBank)

Plaintiff,)

**CERTIFICATE OF EXEMPTION
FROM MEDIATION**

vs.)

Lenora Scurry, Patrick Scurry, The South
Carolina Department of Revenue,)

Defendant(s).)

Docket No. 2012 CP3600103

I certify that this action is exempt from mediation because:

___ this is a special proceeding or action seeking extraordinary relief such as
mandamus, habeas corpus, or prohibition;

___ this action is appellate in nature;

___ this is a post-conviction relief matter;

___ this is forfeiture proceeding brought by the State;

___ this is a contempt of court proceeding; or,

___ the parties submitted the case to voluntary mediation with a certified mediator
prior to the filing of this civil action.

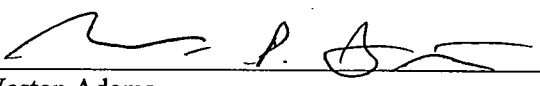
JACKIE S. BOWERS
CLERK OF COURT

2012 FEB 27 P 12:01

FILED
NEWBERRY COUNTY

X **OTHER: MORTGAGE FORECLOSURE**

Date: February 24, 2012


Weston Adams
Leigh B. Brown
Caroline R. Glenn
Robert P. Jackman
William P. Stork
WESTON ADAMS LAW FIRM
Attorneys for Plaintiff
Post Office Box 291
Columbia, South Carolina 29202
(803)254-1675

STATE OF SOUTH CAROLINA)

COUNTY OF NEWBERRY)

EverBank)

Plaintiff,)

vs.)

Lenora Scurry, Patrick Scurry, The South
Carolina Department of Revenue,)

Defendant(s).)

IN THE COURT OF COMMON PLEAS

2012CP3600103

SUMMONS and NOTICES

FILED
NEWBERRY COUNTY
2012 FEB 27 P 12:01
JACKIE S. BOWERS
CLERK OF COURT

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in the above entitled action copy of which is herewith served upon you, and to serve copy of your answer upon the undersigned at his office, 1501 Richland Street, Columbia, South Carolina, 29201, within Thirty (30) days, after service hereof upon you, exclusive of the day of such service; except that the United States of America, if named, shall have sixty (60) days to answer after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for relief demanded in the Complaint.

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

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

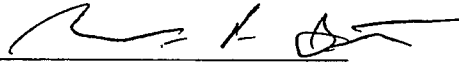
YOU ARE FURTHER SUMMONED AND NOTIFIED to apply for the appointment of a guardian ad litem within thirty (30) days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by Plaintiff.

YOU WILL ALSO TAKE NOTICE that under the provisions of South Carolina Code §29-3-100, effective June 16, 1993, any collateral assignment of rents contained in the attached Mortgage is perfected and Plaintiff hereby gives notice that all rents shall be payable directly to it

by delivery to its undersigned attorneys from the date of default. In the alternative, Plaintiff will move before a judge of this Circuit on the 10th day after service hereof, or as soon thereafter as counsel may be heard, for an Order enforcing the assignment of rents, if any, and compelling payment of all rents covered by such assignment directly to the Plaintiff, which motion is to be based upon the original Note and Mortgage and the Complaint attached hereto.

WESTON ADAMS LAW FIRM

Columbia, South Carolina
February 24, 2012

By: 
Weston Adams
Leigh B. Brown
Caroline R. Glenn
Robert P. Jackman
William P. Stork
Attorneys for Plaintiff
Post Office Box 291
Columbia, South Carolina 29202
Phone: (803)254-1675

STATE OF SOUTH CAROLINA)

COUNTY OF NEWBERRY)

EverBank)

Plaintiff,)

vs.)

Lenora Scurry, Patrick Scurry, The South
Carolina Department of Revenue,)

Defendant(s).)

IN THE COURT OF COMMON PLEAS

2012CP3600103

COMPLAINT
Foreclosure (Non-Jury)

JACKIE S. BOWERS
CLERK OF COURT

2012 FEB 27 P 12:02

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NEWBERRY COUNTY

The Plaintiff above named, complaining of the Defendant(s) herein alleges that:

1. Plaintiff, EverBank, is a corporation or other legal entity doing business in the State of Florida.
2. The subject of this action is real property located in the County of Newberry, State of South Carolina.
3. Some lien on or interest in the real estate, the subject of this action, may be claimed by the Defendant(s) herein.
4. Heretofore, under date the 12th day February, 2010, Lenora Scurry and Patrick Scurry made, executed, and delivered to Primary Capital Advisors LC a certain Mortgage Note in writing, wherein and whereby Lenora Scurry and Patrick Scurry promised to pay to Primary Capital Advisors LC, the principal sum of one hundred fifty two thousand one hundred ninety two and 00/100 Dollars (\$152,192.00), together with interest at the rate of five and 00/100 (5.00%) per cent per annum on the unpaid balance; said principal and interest being payable in monthly installments of eight hundred seventeen and 00/100 Dollars (\$817.00), commencing on the 1st day of April, 2010, and on the 1st day of each month thereafter until the said Note is fully paid.
5. In order to secure the payment of said Note, the said Lenora Scurry and Patrick Scurry, did on the same date, to wit, the 12th day of February, 2010, make, execute, and deliver to Mortgage Electronic Registration Systems, Inc. as nominee for Primary Capital Advisors LC, its successors and assigns, a certain real estate Mortgage ("Mortgage") covering real property

located in the County and State aforesaid and in said Mortgage described as follows:

All that certain piece, parcel or lot of land, together with the improvements thereon, if any, situate, lying and being in the County of Newberry, State of South Carolina, located on Nursery Road at the intersection of Windsong Trail, and being shown and designated as Lot 8, containing 1.31 acres, more or less, on that Boundary Survey & Subdivision plat prepared for Larry W. Higgins by C.A. Shealy, III, SCRLS 15182, dated May 27, 2006, and recorded August 23, 2006 in the Clerk of Courts Office in Newberry County in Plat Book C-156, at Page 9; reference being made to said plat for a more complete and accurate description of said property.

This being the same piece of property conveyed to Lenora Scurry and Patrick Scurry by deed of Abbeville Savings and Loan Association recorded February 16, 2010 in Deed Book 1482 at page 179.

PROPERTY ADDRESS: 1360 Nursery Road
Little Mountain, SC 29075

TMS# 698-79

6. On the 16th day of February, 2010, said Mortgage was recorded in the office of the RMC for Newberry County in Mortgage Book 1482 at page 181.

(a) Thereafter, the said Mortgage Electronic Registration Systems, Inc. as nominee for Primary Capital Advisors LC assigned said mortgage to EverBank, who is now the owner and holder thereof and the debt secured thereby, assignment to be recorded.

7. The Mortgage evidences and secures the repayment of money advanced by the Mortgagee to, or on behalf of, the mortgagor(s) and constitutes a purchase money first lien on the Mortgaged premises.

8. In and by the terms of said Note and the Mortgage securing the same, it is provided, among other things, that on failure to pay any installment of either principal or interest or any portion thereof when due, or if any of the conditions and requirements in the Mortgage securing the same not be complied with, then the whole principal sum and accrued interest shall at the option of the legal holder thereof become at once due and payable without notice, and collectible by foreclosure.

9. In and by the terms of the said Note, it is further provided that the maker thereof shall pay all collection costs, including reasonable attorneys fees, if the said Note be placed in the hands of an attorney for collection after default.

10. Any notice required by the terms of the Mortgage or by state or federal law has

been given to the applicable defendant(s) prior to the commencement of this action.

11. The installment of principal and interest falling due from and after the 1st day of September, 2011, have not been paid although demand for the payment thereof has been made and the Plaintiff, as holder of the said Note and Mortgage, has and does hereby elect to declare the entire balance of said principal and interest due and payable at once; that there is now due and owing and unpaid upon the said Note and Mortgage the full and just principal sum of one hundred forty eight thousand nine hundred seventy seven and 45/100 Dollars (\$148,977.45), together with interest thereon at the rate of five and 00/100 (5.00%) per cent per annum from the 1st day of August, 2011, together with reasonable attorneys fees for the collection thereof and the costs of this action.

12. Under the provisions of South Carolina Code §29-3-100, effective June 16, 1993, any collateral assignment of rents contained in the subject Mortgage is perfected and Plaintiff hereby gives notice that all rents shall be payable directly to it by delivery to its undersigned attorneys from the date of default.

13. Upon information and belief, said information having been obtained from the records of the RMC/Clerk of Court for Newberry County, South Carolina, the Defendant(s) below named has, have or may claim to have some interest in or lien upon the said property.

(a) The Defendant, The South Carolina Department of Revenue by virtue of the following state tax liens filed against Patrick and Lenora Scurry (SS# xxx-xx-8611):

<u>Amount</u>	<u>Date Filed</u>	<u>Tax Lien#</u>	<u>Book/Page</u>
\$1,138.58	10-05-2011	3-51304710-8	2011LN3600722

Any such interest in or lien upon the said property is junior and subordinate to Plaintiff's Mortgage.

14. The Plaintiff demands no personal or deficiency judgment and any right to the same is specifically waived.

15. The loan IS NOT owned, securitized or guaranteed by Fannie Mae or Freddie Mac and the servicer IS NOT participating in the Home Affordable Modification Program.

WHEREFORE, Plaintiff prays judgment that:

(a) The amount due upon the said Note and Mortgage held by the Plaintiff be ascertained and determined under the direction of this Court, together with attorney's fees and costs of this action.

(b) Plaintiff's Mortgage be declared a purchase money mortgage first lien and that Plaintiff have judgment of foreclosure for the amount so found to be due and owing thereon, together with any taxes or insurance premiums which may be due or which may be or have been paid by Plaintiff, together with attorney's fees and for the costs of this action.

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

(d) The Mortgaged premises be sold according to law and the practice of this Court, the equity of redemption be barred and that the proceeds of sale be applied as follows:

First, to the costs and expenses of the within action and said sale:

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

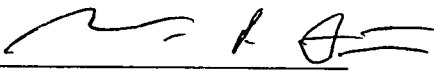
Third, to the distribution of any surplus pursuant to Rule 71, SCRPC.

(e) For such other and further relief as may be just and proper.

FURTHER, in the event the successful bidder (at the time of this foreclosure sale) is other than the Defendant(s) in possession herein, the Sheriff of Newberry will be ordered and directed to eject and remove from the premises the occupants of the property sold, together with all personal property located therein, and put the successful bidder or his assigns in full, quiet and peaceable possession of said premises without delay, and to keep the successful bidder or his assigns in such peaceable possession.

WESTON ADAMS LAW FIRM

Columbia, South Carolina
February 24, 2012

By: 
Weston Adams
Leigh B. Brown
Caroline R. Glenn
Robert P. Jackman
William P. Stork
Attorneys for Plaintiff
Post Office Box 291
Columbia, South Carolina 29202
Telephone: (803)254-1675

**NOTICE REQUIRED BY THE FAIR DEBT
COLLECTION PRACTICES ACT
15 U.S.C. Section 1601, As Amended**

1. The amount of the debt is stated in paragraph eleven of the Complaint attached hereto.
2. The plaintiff as named in the attached Summons and Complaint is the creditor to whom the debt is owed.
3. The debt described in the Complaint attached hereto and evidenced by the copy of the Mortgage Note attached hereto will be assumed to be valid by the creditor's law firm, unless the debtor, within thirty days after the receipt of this notice, disputes, in writing, the validity of the debt or some portion thereof.
4. If the debtor notifies the creditor's law firm in writing within thirty days of the receipt of this notice that the debt or any portion thereof is disputed, the creditor's law firm will obtain a verification of the debt and a copy of the verification will be mailed to the debtor by the creditor's law firm.
5. If the creditor named as plaintiff in the attached Summons and Complaint is not the original creditor, and if the debtor makes a written request to the creditor's law firm within thirty days from the receipt of this notice, the name and address of the original creditor will be mailed to the debtor by the creditor's law firm. That Creditor was: Primary Capital Advisors LC.
6. Written requests should be addressed to Weston Adams, Esquire, P.O. Box 291, Columbia, S.C. 29202.
7. This notice should not be construed as a thirty (30) day grace period. Creditor may pursue collection efforts immediately and not wait thirty (30) days.

**THIS IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION
OBTAINED WILL BE USED FOR THAT PURPOSE.**

STATE OF SOUTH CAROLINA)

COUNTY OF NEWBERRY)

EverBank)

Plaintiff(s),)

vs.)

Lenora Scurry, Patrick Scurry, The South
Carolina Department of Revenue,)

Defendant(s).)

IN THE COURT OF COMMON PLEAS

2012CP3600103

Notice of Foreclosure Intervention

PLEASE TAKE NOTICE THAT pursuant to the South Carolina Supreme Court Administrative Order 2011-05-02-01, you may have a right to foreclosure intervention.

To be considered for any available Foreclosure Intervention, you must communicate with and otherwise deal with the Plaintiff through its law firm, Weston Adams Law Firm.

Weston Adams Law Firm represents the Plaintiff in this action. Our law firm does not represent you. Under our ethical rules, we are prohibited from giving you any legal advice.

You must submit any requests for Foreclosure Intervention consideration to Weston Adams Law Firm within 30 days from the date you are served with this Notice. **IF YOU FAIL, REFUSE, OR VOLUNTARILY ELECT NOT TO PARTICIPATE IN FORECLOSURE INTERVENTION, THE FORECLOSURE ACTION MAY PROCEED.**

WESTON ADAMS LAW FIRM

BY: 

Weston Adams

Leigh B. Brown

Caroline R. Glenn

Robert P. Jackman

William P. Stork

Attorneys for Plaintiff

Post Office Box 291

Columbia, South Carolina

Phone: (803) 254-1675

JACKIE S. BOWERS
CLERK OF COURT

2012 FEB 27 P 12:02

FILED
NEWBERRY COUNTY

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-36-103

EverBank,

Plaintiff,

vs.

Lenora Scurry, Patrick Scurry, The
South Carolina Department of Revenue,

Defendants.

MOTION TO VACATE
JUDGMENT AND SALE

YOU WILL PLEASE TAKE NOTICE that Defendants Patrick Scurry and Lenora Scurry (hereinafter "the Defendants" move before this Court pursuant to Rule 60(b), SCRCP, as well as pursuant to all other applicable law, for an Order vacating and/or granting him relief from the foreclosure judgment in the above-captioned action and vacating the sale that was held pursuant thereto.

The Defendant so moves on the following grounds:

1. Rule 60(b), SCRCP, provides that:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) **mistake, inadvertence, surprise, or excusable neglect;**
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) **fraud, misrepresentation, or other misconduct of an adverse party;**
- (4) **the judgment is void;**
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

FILED
NEWBERRY COUNTY
2013 APR 26 PM 12 43
JACKIE S. BOWERS
CLERK OF COURT

(emphasis added).

2. South Carolina “favor[s] the disposition of issues on their merits rather than on technicalities” and “where there is a good faith mistake of fact, and no attempt to thwart the judicial system, there is a basis for relief” under Rule 60(b)(1), SCRPC. Micronics, Inc. v. S.C. Dept. of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001).
3. The Defendants are entitled to relief from the judgment under Rule 60(b)(1), (3), (4), and/or (5), SCRPC.
4. In deciding a motion under Rule 60(b), SCRPC, the court hearing the motion is charged with deciding whether the party seeking relief has shown, by the preponderance of the evidence, that the conditions of a subsection of the Rule are met and, ordinarily, that he has a meritorious defense. See Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456, 458 (Ct. App. 2005); Bowers v. Bowers, 304 S.C. 65, 67-68, 403 S.E.2d 127 (Ct. App. 1991). “To establish a meritorious defense, a party is not required to show an absolute defense.” Micronics, 345 S.C. at 511. In examining whether there is a meritorious defense, the appropriate assessment of this factor is whether the defense in question “is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.” Id. (quoting Graham v. Town of Loris, 272 S.C. 442, 453, 248 S.E.2d 594 (1978)). To require more would essentially substitute the motion hearing for a trial on the merits, and one

in which the burden has shifted to the defendant to disprove the plaintiff's allegations. Cf. id.

5. A party may achieve relief from a final judgment where the party demonstrates "fraud, misrepresentation, or other misconduct of an adverse party." Rule 60(b)(3), SCRCP. In South Carolina, in order for a party to be entitled to relief under this subsection, the moving party must demonstrate that the fraud, misrepresentation, or other misconduct was extrinsic. Raby Constr., LLP v. Orr, 358 S.C. 10, 20-21, 594 S.E.2d 478, 484 (2005); Hagy v. Pruitt, 339 S.C. 425, 431, 529 S.E.2d 714, 717 (2000) ("A judgment may be set aside on the ground of fraud only if the fraud is 'extrinsic' and not 'intrinsic.'"). Misrepresentation and misconduct is extrinsic when it is collateral to the issues tried in a case and effectively deprives the litigant of a fair hearing or the opportunity to present its case. Id. (citing Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C., 294 S.C. 9, 362 S.E.2d 176 (1987)); Mr. G. v. Mrs. G., 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995). "Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." Chewning v. Ford Motor Co., 354 S.C. 72, 81, 579 S.E.2d 605, 610 (2003) (citing Hilton Head, 294 S.C. at 11, 362 S.E.2d at 177).
6. The judgment rendered in this case was based on the Defendants' default. The Plaintiff's process server led the Defendants to believe that they should not take any action in response to the service of the summons and complaint on them.

This is the essence of extrinsic misrepresentation. A person acting on the Plaintiff's behalf told the Defendants that they need not worry about the foreclosure pleadings served on them.

7. The judgment rendered in this case was also based on the Defendants' failure to attend the hearing in this case. The Defendants believed the hearing was cancelled because of the actions and representations of persons acting on behalf of the Plaintiff. This, too, is the essence of extrinsic misrepresentation.
8. The Plaintiff sought and was awarded an amount of \$5,200.00 in the judgment as ostensible reimbursement for attorney's fees, but documents attached hereto show that that amount grossly exceeded the amount of attorney's fees actually incurred by the Plaintiff.
9. A judgment rendered against a party for his default for failure to appear "shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." Rule 54(c), SCRPC. A non-appearing defendant would be prejudiced by his lack of notice if the plaintiff were to be awarded relief other than that sought in the complaint; in this way, Rule 54(c) ensures due process. See id.; Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); cf. Roche v. Young Brothers, Inc., 318 S.C. 207, 456 S.E.2d 897, 899 (1995).
10. Judgments rendered without due process are void, and Rule 60(b)(4), SCRPC, provides for relief from such a judgment. Linda Mc Company v. Shore, Op. No. 4279 (S.C. Ct. App. filed July 26, 2007) (Shearouse Adv. Sh. No. 30 at 43, 47); Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 183, 561 S.E.2d 659 (Ct. App. 2002). Relief is proper where a default judgment renders an award

in excess of the demand in the plaintiff's complaint. River Road Co. v. Energy Master Products, Inc., 300 S.C. 316, 316-17, 387 S.E.2d 694 (Ct. App. 1989).

The Court of Appeals has previously held that a default judgment in excess of the amount sought in the complaint is "clearly unlawful[.]" Id. at 317. The Plaintiff's pleading failed to give the Defendants any notice that the Plaintiff would seek an attorney's fee award greater in amount than its actual fees. (R. 14-18, p. 89 ln. 21-25, 177). The \$5,200.00 attorney's fee award was clearly unlawful. Mullane, 339 U.S. 306; Universal Benefits, 349 S.C. at 183; River Road, 300 S.C. at 317; see Rule 54(c), SCRPC.

11. Further, a \$5,200.00 attorney's fee to handle a default residential mortgage foreclosure is patently unreasonable.
12. The Defendants affidavits attached hereto, and the other materials attached hereto, are incorporated herein as if here set forth verbatim.
13. Further, the attached affidavits and other materials show that the Defendants have defenses that are worthy of inquiry. The Defendants accordingly have meritorious defenses.
14. As the foreclosure sale in this case was the product of a judgment that should itself be vacated, it is proper for the Court to vacate or set aside the foreclosure sale that was held in this case.
15. Setting aside the sale would not prejudice the Plaintiff vis-a-vis the successful bidder, as the Defendants are informed that the successful bidder is the Plaintiff.

16. The Defendants will be serving an answer and counterclaim in this case, which is not served herewith because of the imperative that this motion be served as soon as possible.

17. This motion is also based upon all applicable statutory law, case law, common law, the record in this action, and any memoranda the Defendants may submit.

Consultation with opposing counsel concerning the substance of matters subject of this motion could not be timely held before this motion was made and, as this is a real estate foreclosure case, is not required in any event.

Respectfully submitted,



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

ATTORNEY FOR DEFENDANTS
PATRICK AND LENORA SCURRY

Columbia, South Carolina
April 26, 2013

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-36-103

EverBank,

Plaintiff,

vs.

Lenora Scurry, Patrick Scurry, The
South Carolina Department of Revenue,

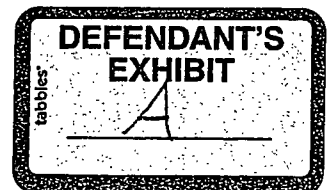
Defendants.

AFFIDAVIT OF
LENORA SCURRY

FILED
NEWBERRY COUNTY
2013 APR 26 PM 12 43
JACKIE S. POWERS
CLERK OF COURT

Personally appeared before me Lenora Scurry, who, first being duly sworn, deposes and says as follows:

1. My name is Lenora Scurry. I have personal knowledge of the facts set forth in this affidavit and am competent to testify about them.
2. When my husband, Patrick Scurry, and I got the loan that is involved in this case, we made a year's worth of payments in advance. We fell behind on payments when our household income decreased. I was out of work, and my husband was also looking for a second, part-time job.
3. The man who served us the papers to begin this foreclosure case met with us inside our home and sat at our dining room table with my husband and me. I asked him what the documents were, and he said that they were nothing to worry about. I noticed the name "EverBank" on the documents, and I told him that we were trying to get a modification. The man told us that Obama was coming out with a program to help homeowners, and he made conversation with us and generally acted like these papers were nothing for us to worry about.



4. Because of what the man told me, I did not worry about the papers, examine them, or take them to a lawyer. If he had not said that, I probably would have taken them to a lawyer. My husband and I were working with Everhome Mortgage (who we thought we had our mortgage with) to obtain a modification. I primarily handled the communications with Everhome.
5. An Everhome employee named "Vanetta" told me that Everhome would send us an agreement for us to make three payments to them and, if we made the payments, we would be approved for a modification.
6. We received a letter dated April 24, 2012, entitled "SPECIAL FORBEARANCE AGREEMENT[.]" A copy of that letter is attached to this affidavit. That letter called for us to make three payments, so I believed this was what Vanetta was talking about. We made the payments, as shown by the attached copies of official check receipts. Everhome accepted the payments and never returned them, but they then said we had been denied a modification because we needed to make an extra thousand dollars a month.
7. Not knowing what else to do, we filed bankruptcy in November of 2012. That bankruptcy was dismissed in January because the plan did not meet some requirements.
8. We continued to seek a modification with Everhome Mortgage. By letter dated February 21, 2013, Everhome sent us a "Loss Mitigation Qualification package" that we filled out and returned to them. A copy of that letter is attached to this affidavit.
9. We then got a letter dated February 22, 2013, saying that a foreclosure hearing was set for March 8. A copy of that letter is attached to this affidavit. I called Weston Adams Law Firm and spoke to an employee there. I told the employee about the fact

that we were in the modification process, and the employee told me that they would cancel the hearing if their client told them to.

10. Based on what Everhome's employees were telling me about the modification process, I believed Everhome would instruct the law firm not to go forward with the hearing. As I thought the hearing was cancelled, we did not attend it.

11. We then got a letter on March 11, 2013, stating that Everhome anticipated that it would provide us with their decision on a modification within 30 days. A copy of that letter is attached to this affidavit.

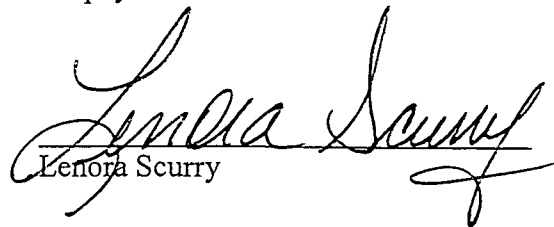
12. We got a letter dated March 16, 2013, stating that additional documentation was needed. A copy of that letter is attached to this affidavit. My husband had just gotten a part-time job lined up, and we did not have paystubs for him from that job yet.

13. We then got a letter dated March 29, 2013. A copy of that letter is attached to this affidavit. It stated we were turned down for a modification because we had not yet submitted that documentation.

14. On April 3, 2013, I called Everhome and spoke with a young woman who told me to just fax in the paystub once my husband got his first paycheck.

15. On April 11, 2013, I discovered that our property had been sold at a foreclosure sale on April 1. I immediately called Everhome Mortgage, and I spoke to a supervisor who said that the employee I spoke with on April 3 never should have told me to fax in the paystub once my husband got his first paycheck.

FURTHER AFFIANT SAYETH NOT.


Lenora Scurry

SWORN to before me this
25th day of April, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 5/21/2017

Everhome[®]

MORTGAGE

Homeowner Solutions Group

Re: Loan No. 9000791069

COPY FOR YOUR
RECORDS

April 24, 2012

Lenora Scurry
Patrick Scurry
1360 Nursery Rd
Little Mountain, SC 29075

RE: SPECIAL FORBEARANCE AGREEMENT

Property Address: 1360 Nursery Rd Little Mountain SC 29075

Dear Valued Customer(s):

Your account is presently due for the September 01, 2011 and all subsequent payments. The arrearage totals \$9291.72, which does not include current late charges of \$549.50, property inspections of \$ 40.00 or credit for partial payments made if any, but does include estimated foreclosure attorney fees/costs of \$765.00 as of 04/25/2012.

The indebtedness in the captioned case is in default and, in consideration of Everhome Mortgage extending forbearance for a period of time, it is necessary that you indicate, by signing this letter of agreement, your acceptance of the following conditions:

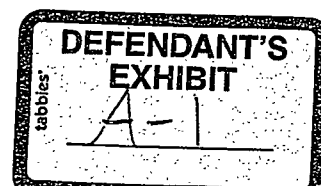
The signed agreement is due in our office by 05/01/2012 along with the required contribution of \$532.92 as the initial installment in this plan. All payments must be made payable to Everhome Mortgage and tendered by certified funds, money order or Western Union Quick Collect for the duration of this plan. Payment should be sent to Everhome Mortgage, Attn: Default Cash, 8100 Nations Way, Jacksonville, FL 32256.

Monthly installments are to be remitted in accordance with the following payment schedule. Payment amounts due under the plan are subject to change due to interest rate changes or changes in your escrow analysis. Please contact our office if you are notified of a payment change.

PLAN	DATE	AMT	PLAN	DATE	AMT
01	05/01/12	532.92	02	06/01/12	532.92
03	07/01/12	532.92			

Page 1 of 3

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CLERK OF COURT



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— MORTGAGE —

Please remember that this plan is not designed to fully reinstate your account. As previously discussed, we will review your account again to determine the most viable alternative to foreclosure option.

All of the provisions of the Note and Security Instrument, except as herein provided, shall remain in full force and effect. Upon the breach of any provisions of this agreement, Everhome Mortgage may terminate this agreement and, at the option of Everhome Mortgage continue foreclosure proceedings according to the terms of the Note and Security Instrument without regard to this instrument. Please understand that the pending foreclosure action will not be dismissed but merely held in abeyance, and any payments that you make on this plan during the pendency of this foreclosure action shall not constitute a waiver to continue with the suit should you fail to make all of the necessary payments. If you file a bankruptcy this plan will automatically become null and void. Also if the plan is broken, all funds tendered will be applied to the loan and not refunded to you. Your loan will continue to be classified as in default and will be reported to the credit bureaus as such until the delinquency is cured.

Should you fail to make the scheduled payments in the proper amounts on or before the date stated, the foreclosure action will be resumed on your loan without further notice to you.

Please sign the original of this agreement and return it no later than 05/01/2012, together with certified funds, bank check or money order payable to Everhome Mortgage, in the amount of \$2012 as the initial installment on this plan. If we have not received the executed agreement by the requested date, the forbearance agreement will be rescinded and the terms will no longer apply.

This is a reminder that MARK TILLMAN has been assigned as your Relationship Manager. MARK TILLMAN can help you navigate through this process. MARK TILLMAN can be reached at 866-839-7151, ext. 6902. Relationship Managers are available 8:30 AM - 8:00 PM ET, Monday - Friday.

Sincerely,



MARK TILLMAN

Homeowner Solutions Group
Helping Families Find Solutions
Everhome Mortgage

Everhome[®]

— MORTGAGE —

Accepted and agreed to this ____ day of _____

Lenora Scurry

Patrick Scurry

Everhome Mortgage is a debt collector. We are attempting to collect a debt and any information obtained will be use for that purpose.

Homeowner's HOPE Hotline If you have questions about the program that your servicer can not answer or need further counseling, call the Homeowner's HOPE Hotline at 1.888.995.HOPE (4673). The Hotline can help with questions about the program and offers access to free HUD certified counseling services in English and Spanish. You may also refer to the HUD website by going to the website address below:
<http://www.hud.gov/offices/hsg/sfh/hcc/fc/>.

Please note that notwithstanding anything in this notice to the contrary, the following applies if you filed a bankruptcy petition and there is either an "automatic stay" in effect, or if you received a discharge from the Bankruptcy Court of your personal liability under the Note: (i) Everhome Mortgage will not pursue collection of that obligation from you personally, (ii) this notice is not intended as a demand for payment from you personally, and (iii) unless the Bankruptcy Court has ordered otherwise, Everhome Mortgage continues to retain whatever rights Everhome Mortgage holds in the property that secures the Note, despite your bankruptcy filing.

LM052

Page 3 of 3

OFFICIAL CHECK RECEIPT
Non-Negotiable

STATE CREDIT UNION
P.O. Box 726 Columbia, SC 29202
800-868-8740 803-343-0300
www.scsu.com

NO. 958654

DATE AMOUNT
05-03-2012 \$ *****532.92

PAY TO THE ORDER OF Five Hundred Thirty-Two and 92/100*****
Everhome Mortgage

DESCRIPTION: Re: Loan 900791069 Scurry

1141 Broad River Road 10 05-03-2012 11:23:36 AM
Relationship Checking

OFFICIAL CHECK RECEIPT
Non-Negotiable

STATE CREDIT UNION
P.O. Box 726 Columbia, SC 29202
800-868-8740 803-343-0300
www.scsu.com

NO. 961145

DATE AMOUNT
05-31-2012 \$ *****532.92

PAY TO THE ORDER OF Five Hundred Thirty-Two and 92/100*****
Everhome Mortgage

DESCRIPTION: Re: Loan 900791069 Scurry

78672 Broad River Road 10 05-31-2012 02:56:39 PM
Relationship Checking

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OFFICIAL CHECK RECEIPT
Non-Negotiable

STATE CREDIT UNION
P.O. Box 726 Columbia, SC 29202
800-868-8740 803-343-0300
www.scsu.com

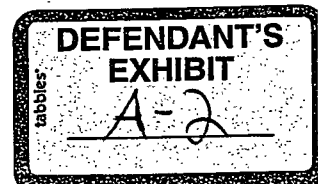
NO. 965357

DATE AMOUNT
07-12-2012 \$ *****532.92

PAY TO THE ORDER OF Five Hundred Thirty-Two and 92/100*****
Lenora M. Scurry

DESCRIPTION: Re: Loan 900791069 Scurry

1141 Broad River Road -42- 10 07-12-2012 02:57:25 PM
Relationship Checking



Everhome[®]

MORTGAGE

Loan No. 9000791069

February 21, 2013

Lenora Scurry
Patrick Scurry
1360 Nursery Rd
Little Mountain, SC 29075

Re: Loss Mitigation Qualification package

Dear Lenora Scurry :

At Everhome Mortgage, a division of EverBank, we realize that everyone goes through difficult times. And that is when it is important to have someone on your side. We are on your side and we want you to keep your home.

Please find enclosed the Loss Mitigation Qualification package you requested. Return the items listed below to Everhome Mortgage, Homeowner Solutions Group, P.O. Box 45077, Jacksonville, FL 32232-5077.

1. Completed Uniform Borrower Assistance (UBA) Form
2. Signed and dated copy of the IRS Form 4506T-EZ for each borrower
3. Documentation to verify all income for each borrower

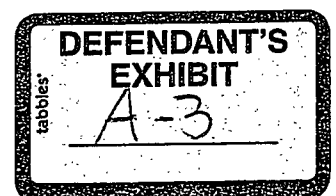
Once we receive all of the above items, we will review your file for available loss mitigation options, and will contact you with our decision within 30 days. Please continue to send payments as they become due. Normal servicing of your loan will continue. This includes, but is not limited to, telephone calls, correspondences and notices, late charges or other fee assessment, and possible foreclosure. Please note that a modification program is not guaranteed and is subject to approval.

In an ongoing effort to provide you with the best service possible, we have assigned Deidre Pearson as your Relationship Manager to assist you throughout this process. Your Relationship Manager is your advocate and will be there to answer your questions and help you explore all options available to you.

LM099 | 12EHS0036.05 Solicitation

Page 1 of 2

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Contact Deidre Pearson as soon as possible at 866.839.7151, ext. 7315, Monday through Friday, 8:30 a.m. to 8:00 p.m. ET.

If your assigned Relationship Manager is unavailable, we encourage you to speak with the next available Relationship Manager who can also assist you.

Sincerely,

Homeowner Solutions Group
Helping Families Find Solutions

EverBank is an Equal Housing Lender

EverhomeMortgage.com
Everhome Mortgage
P.O. Box 45077
Jacksonville, FL 32232-5077

Everhome Mortgage is a debt collector. This is an attempt to collect a debt and any information obtained will be used for that purpose.

Notice to Any Recipient Who Has (a) Filed for Bankruptcy or (b) Received a Discharge in Bankruptcy:

In the event you are subject to an Automatic Stay issued by a United States Bankruptcy Court, this communication is not intended to collect, assess, or recover a debt. In the event the referenced debt has been discharged in bankruptcy, this communication is not intended to collect, recover, or offset any such debt as your personal liability.

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Page 2 of 2

WESTON ADAMS LAW FIRM, P.A.
1501 RICHLAND STREET 29201
POST OFFICE BOX 291
COLUMBIA, SOUTH CAROLINA 29202
WWW.WESTONADAMS.COM

TELEPHONE NUMBER
803-254-1675
FACSIMILE NUMBER
803-799-3141

February 22, 2013

Lenora Scurry
Patrick Scurry
1360 Nursery Road
Little Mountain, SC 29075

SC Department of Revenue
Attn: Milton G. Kimpson
P.O. Box 12265
Columbia, SC 29211

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2013 APR 26 PM 12 43
JACKIE S. BOWERS
CLERK OF COURT

Re: EverBank -v- Lenora and Patrick Scurry, et al.
Docket No. 2012-CP-36-0103

TO THE DEFENDANT(S) ABOVE NAMED:

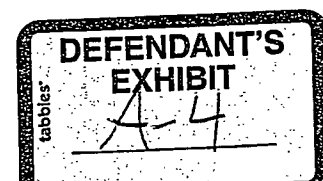
This is to advise you that a foreclosure hearing in the above case will be held before The Honorable Joseph W. Hudgens, Special Referee for the County of Newberry, 1508 College Street, Newberry, South Carolina 29108, at 10:00 A.M. on Friday, March 8, 2013. Please call this office if you have any questions about your attendance at this hearing.

**This office is attempting to collect a debt.
Any information obtained will be used for that purpose.**

Sincerely,

Amber A. Bair

Amber A. Bair
Legal Assistant





Re: Loan No. 9000791069

March 11, 2013

Lenora Scurry
Patrick Scurry
1360 Nursery Rd
Little Mountain, SC 29075

Re: Short Sale Offer, second notice

Dear Lenora Scurry :

This is a reminder that Everhome Mortgage, a division of EverBank, has received your application/short sale offer. We are currently review your file and anticipate contacting you with our decision within 30 days, providing that all required items have been received.

It is important to remember:

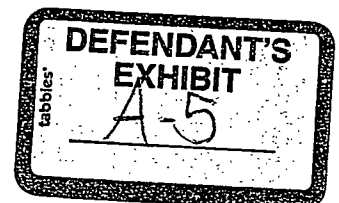
- * During this evaluation period, normal servicing efforts will continue; however, if we have received all required documentation to evaluate your situation, we will not refer the loan to foreclosure during the evaluation process.
- * If a foreclosure proceeding has already begun, it will continue during the evaluation period, which may result in additional costs or loss of the property, so it is important that you send all required documentation as soon as possible.
- * If a foreclosure sale date is scheduled in the next 37 days, we will attempt to evaluate your documentation as quickly as possible, but we may not be able to suspend or halt the sale depending on the foreclosure court's procedural requirements.
- * If you qualify for assistance, we will notify you in writing with an Evaluation Notice, which you will have 14 days to accept. We will not refer your loan to an attorney to begin foreclosure proceedings during the 14-day response time; however, if we have already referred your loan to foreclosure, the foreclosure proceedings will continue during this acceptance period.

In an ongoing effort to provide you with the best service possible, we have assigned DEIDRE PEARSON as your Relationship Manager to assist you throughout this process. Your Relationship Manager is your advocate and will be there to answer your questions and help you explore all options available to you.

LM139 | 12EHS0036.06 LM PK Reminder

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CLERK OF COURT





Contact DEIDRE PEARSON as soon as possible at 866.839.7151, ext.7315 Monday through Friday, 8:30 a.m. to 8:00 p.m. ET.

If your assigned Relationship Manager is unavailable, we encourage you to speak with the next available Relationship Manager who can also assist you.

Sincerely,

Homeowner Solutions Group
Helping Families Find Solutions

EverBank is an Equal Housing Lender

EverhomeMortgage.com
Everhome Mortgage
P.O. Box 45077
Jacksonville, FL 32232-5077

Enclosure: Everhome Pledge

Everhome Mortgage, Homeowner Solutions Group, PO Box 45077,
Jacksonville, FL 32231-5077

Everhome Mortgage is a debt collector. This is an attempt to collect a debt, and any information obtained will be used for that purpose.

Notice to Any Recipient Who Has (a) Filed for Bankruptcy or (b) Received a Discharge in Bankruptcy:

In the event you are subject to an Automatic Stay issued by a United States Bankruptcy Court, this communication is not intended to collect, assess, or recover a debt. In the event the referenced debt has been discharged in bankruptcy, this communication is not intended to collect, recover, or offset any such debt as your personal liability.

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Page 2 of 2

Everhome[®]

— MORTGAGE —

Re: Loan No. 9000791069

March 16, 2013

Lenora Scurry
Patrick Scurry
1360 Nursery Rd
Little Mountain, SC 29075

Dear Lenora Scurry :

Thank you for contacting Everhome Mortgage, a division of EverBank. We are reviewing your application for payment assistance. However, we are unable to complete the process due to missing information. To help us expedite the process, please provide the items checked below:

- ☐ Letter explaining the financial difficulties you are having
- ☐ Completed and signed 4506T Form
- ☐ Completed Borrower Assistance Form (Form 710) listing proof of hardship
- ☐ Copy of two most recent bank statements for all accounts, all pages
- ☒ Copy of two most recent paystubs with all deductions
- ☐ Copy of year to date profit and loss statement
- ☐ Award/Benefits Letter
- ☐ Proof of all additional income
- ☐ Copy of most recent years signed tax returns, all pages
- ☒ Rental agreement. Other:

Mail the information immediately to Everhome Mortgage, Homeowners Solutions Group, P.O. Box 45077, Jacksonville, FL 32232. You may also fax it to 904.281.2337.

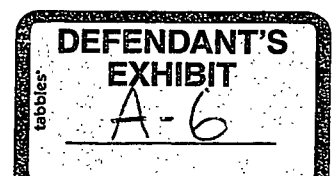
Once we receive all of the above items, we will continue processing your application, and will contact you with our decision within 30 days.

Please continue to send payments as they become due. Normal servicing of your loan will continue. This includes, but is not limited to, telephone calls, correspondences and notices, late charges or other fee assessment, and possibly foreclosure. Please note that a modification program is not guaranteed and is subject to approval.

LM000

Page 1 of 2

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MORTGAGE

In an ongoing effort to provide you with the best service possible, we have assigned DEIDRE PEARSON as your Relationship Manager to assist you through this process. Your Relationship Manager is your advocate and will be there to answer your questions and help you explore all options available to you.

Contact DEIDRE PEARSON as soon as possible at 866.839.7151, ext. 7315 Monday through Friday, 8:30 a.m. to 8:00 p.m. ET.

If your assigned Relationship Manager is unavailable, we encourage you to speak with the next available Relationship Manager who can also assist you.

Sincerely,

Homeowner Solutions Group
Helping Families Find Solutions

EverBank is an Equal Housing Lender

EverhomeMortgage.com
Everhome Mortgage
P.O. Box 45077
Jacksonville, FL 32232-5077

Homeowner's HOPE Hotline

If you have questions about foreclosure prevention Homeowner's HOPE Hotline programs that your servicer cannot answer, need assistance submitting a complete package, or need further counseling, call the Homeowner's HOPE Hotline at 1.888.995.HOPE (4673). This on-demand counseling service is available 24 hours a day, 7 days a week. The Hotline can help with questions about the programs and offers access to free HUD-certified counseling services in English and Spanish. You may also refer to the HUD website, <http://hud.gov/offices/hsg/sfh/hcc/fc/>.

Everhome Mortgage is a debt collector. This is an attempt to collect a debt, and any information obtained will be used for that purpose.

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In the event you are subject to an Automatic Stay issued by a United States Bankruptcy Court, this communication is not intended to collect, assess, or recover a debt. In the event the referenced debt has been discharged in bankruptcy, this communication is not intended to collect, recover, or offset any such debt as your personal liability.

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LM000 | 12EHS0036.07 Missing Info

Page 2 of 2

Everhome[®]

MORTGAGE

March 29, 2013

Loan No. 9000791069

Lenora Scurry
Patrick Scurry
1360 Nursery Rd
Little Mountain, SC 29075

1360 Nursery Rd
Little Mountain SC 29075

Dear Valued Customer(s):

We received your request for loan assistance and thoroughly reviewed the package you submitted to us. We worked to find a program that could help you. Unfortunately, we are not able to assist you with a foreclosure prevention option at this time due to the following:

Necessary documentation to determine eligibility was not received.

Please understand that normal servicing of your loan will continue to occur. This includes but is not limited to, telephone calls, correspondences and notices, late charge or other fee assessment and possibly foreclosure.

If you have questions or concerns about this letter, or how to reinstate your mortgage, please contact your Relationship Manager, DEIDRE PEARSON, at 866-839-7151 ext. 7315, Monday - Friday 8:30 AM - 8:00 PM ET.

We pride ourselves on being able to help so many of our customers especially now when times are tough. So if your circumstances change, or if you have other information that wasn't included with your initial package, we urge you to reach out to us once more. We will be glad to review your file again, taking your new circumstances into consideration.

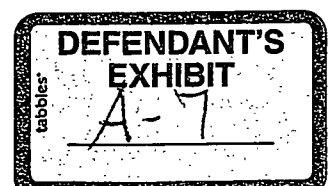
If you are unable to remain in the home, Everhome Mortgage may be able to offer a Non-Retention Program. If approved and you meet certain conditions, you may also qualify for cash back. Everhome Mortgage offers the following two Non-Retention Programs:

Deed-in Lieu: Also known as a "voluntary conveyance", occurs when a borrower voluntarily transfers title to and possession of the property to the investor to satisfy the mortgage loan debt, and avoid foreclosure. This voluntary transfer may take place without listing the property for sale. When the Deed-in-Lieu is complete, you may qualify to receive cash back.

Short Sale: With the Short Sale option, the borrower is allowed to satisfy the mortgage debt by selling the property for an amount that is less than that owed (subject to the approval by the note holder). Short sales may be a beneficial option for borrowers whose property value is less than the amount owed on the property and/or in circumstances in which the borrower has a long-term documented hardship.

Page 1 of 3

FILED
NEWBERRY COUNTY
2013 APR 26 PM 12 44
JACKIE S. BOWERS
CLERK OF COURT



Everhome[®]

MORTGAGE

The consumer reporting agency that provided information that influenced our decision in whole or in part was Equifax, P.O. Box 740256, Atlanta GA 30374, 800-685-1111, www.equifax.com. While information from a credit reporting agency influenced our decision, the reporting agency did not make this decision and cannot provide information about it. You have a right under the Fair Credit Reporting Act to know the information contained in your credit file at the consumer reporting agency. You also have a right to a free copy of your credit report from the reporting agency, if you request it no later than 60 days after you receive this notice.

In addition, if you find that any information contained in the report you receive is inaccurate or incomplete, you have a right to dispute the matter with the reporting agency. Any questions regarding such information should be directed to Equifax.

NOTICE: The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit application on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance programs; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is the Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20006.

Please note that notwithstanding anything in this notice to the contrary, the following applies if you filed a bankruptcy petition and there is either an 'automatic stay' in effect, or if you received a discharge from the Bankruptcy Court of your personal liability under the Note: (i) Everhome Mortgage will not pursue collection of that obligation from you personally, (ii) this notice is not intended as a demand for payment from you personally, and (iii) unless the Bankruptcy Court has ordered otherwise, Everhome Mortgage continues to retain whatever rights Everhome Mortgage holds in the property that secures the Note, despite your bankruptcy filing.

Page 2 of 3

Everhome[®]

— M O R T G A G E —

Homeowner's HOPE Hotline: If you have questions about the program that your servicer cannot answer or need further counseling, call the Homeowner's HOPE Hotline at 888-995-HOPE (4673). The Hotline can help with questions about the program and offers access to free HUD-certified counseling services in English and Spanish. You may also refer to the HUD website by going to: <http://www.hud.gov/offices/hsg/sfh/hcc/fc/>.

If you have a concern regarding any phase of the assistance process that your Relationship Manager was unable to resolve, contact the Homeowners Assistance Review Team at: Everhome Mortgage, Attention: Homeowners Review Team, P.O. Box 2167, Jacksonville, FL. 32233 or 888-632-9320

Sincerely,
DEIDRE PEARSON
Relationship Manager

Everhome Mortgage is a debt collector. We are attempting to collect a debt, and any information obtained will be used for that purpose.

For New York borrowers: If you believe the loss mitigation request has been wrongly denied, you may file a complaint with the New York State Department of Financial Services at 1-877-BANK-NYS (226-5679) or www.dfs.ny.gov.

For North Carolina borrowers: If you believe the loss mitigation request has been wrongly denied, you may file a complaint with the North Carolina Office of the Commissioner of Banks website, www.nccob.gov.

LM097

Page 3 of 3

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS

Case No. 2010-CP-36-86

EverBank,

Plaintiff,

vs.

Patrick Scurry, Patrick Scurry, The
South Carolina Department of Revenue,

Defendants.

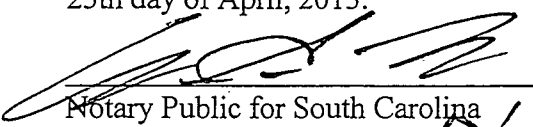
AFFIDAVIT OF
PATRICK SCURRY

Personally appeared before me Patrick Scurry, who, first being duly sworn, deposes and says as follows:

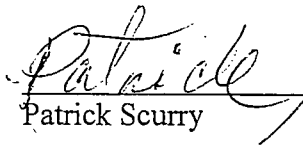
1. My name is Patrick Scurry. I have personal knowledge of the facts set forth in this affidavit and am competent to testify about them.
2. I have reviewed my wife Lenora's affidavit that she gave today, and the facts in it are true and correct to the best of my knowledge.
3. I relied on her to handle communications with Everhome, and it appears that Everhome misled her or at least caused her to have mistaken impressions about what was happening.

FURTHER AFFIANT SAYETH NOT.

SWORN to before me this
25th day of April, 2013.


Notary Public for South Carolina
My Commission Expires: 5/21/2017

(L.S.)


Patrick Scurry

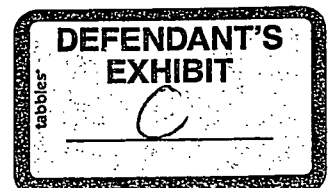
FILED
NEWBERRY COUNTY
2013 APR 26 PM 12 44
JACKIE S. BOWERS
CLERK OF COURT

DEFENDANT'S
EXHIBIT

B

B 10 (Official Form 10) (12/12)

UNITED STATES BANKRUPTCY COURT		PROOF OF CLAIM
Name of Debtor: Patrick Leon Scurry Lenora M. Scurry	Case Number: 12-06918-dd	COURT USE ONLY
NOTE: Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.		
Name of Creditor (the person or other entity to whom the debtor owes money or property): Everbank		
Name and address where notices should be sent: Everhome Mortgage 8100 Nations Way Jacksonville, FL 32256 Telephone number: _____ email: _____		☐ Check this box if this claim amends a previously filed claim. Court Claim Number: _____ (If known) Filed on: _____
Name and address where payment should be sent (if different from above): Everhome Mortgage 8100 Nations Way Jacksonville, FL 32256 Telephone number: _____ email: _____		☐ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.
1. Amount of Claim as of Date Case Filed: <u>\$163,451.57</u> If all or part of the claim is secured, complete item 4. If all or part of the claim is entitled to priority, complete item 5. ☒ Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.		
2. Basis for Claim: <u>Money Loaned</u> (See instruction #2)		
3. Last four digits of any number by which credit identifies debtor: XXXXXX1069	3a. Debtor may have scheduled account as: _____ (See instruction #3a)	3b. Uniform Claim Identified (optional): _____ (See instruction #3b)
4. Secured Claim (See instruction #4) Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information. Nature of property or right of setoff: ☒ Real Estate ☐ Motor Vehicle ☐ Other Describe: _____ Value of Property: \$ _____ Annual Interest Rate <u>5.0%</u> Fixed (when case was filed)		Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any: <u>\$18,399.00</u> Basis for perfection: <u>Mortgage</u> Amount of Secured Claim: <u>\$163,451.57</u> Amount Unsecured: \$ _____
5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507 (a). If any part of the claim falls in one of the following categories, check the box specifying the priority and state the amount.		
☐ Domestic support obligations under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B). ☐ Up to \$2,600* of deposits toward purchase, lease or rental of property or services for personal, family, or household use - 11 U.S.C. § 507 (a)(7).	☐ Wages, salaries, or commissions (up to \$11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier - 11 U.S.C. § 507 (a)(4). ☐ Taxes or penalties owed to governmental units - 11 U.S.C. § 507 (a)(8).	☐ Contributions to an employee benefit plan - 11 U.S.C. § 507 (a)(5). ☐ Other - Specify applicable paragraph of 11 U.S.C. § 507 (a)(). Amount entitled to priority: \$ _____
* Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.		
6. Credits. The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)		



7. Documents: Attached are redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements or, in the case of a claim based on an open-end or revolving consumer credit agreement, a statement providing the information required by FRBP 3001(c)(3)(A). If the claim is secured, box 4 has been completed, and redacted copies of documents providing evidence of perfection of a security interest are attached (See instruction #7, and the definition of "redacted".)

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8)
Check the appropriate box.

☐ I am the creditor. ☒ I am the creditor's authorized agent. ☐ I am the trustee, or the debtor, or ☐ I am a guarantor, surety, indorser, or other codebtor.
(attach copy of power of attorney, if any.) their authorized agent. (See Bankruptcy Rule 3005.)
(See Bankruptcy Rule 3004.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: Leigh B. Brown
Title: Attorney for Creditor
Company: Weston Adams Law Firm

Address and telephone number (if different from notice address above): PO /s/ Leigh B. Brown, #11160 December 21, 2012
Box 291 (Signature) (Date)
Columbia, SC 29202

Telephone number: (803) 254-1675 email: leigh@westonadams.com

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definition below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:

Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court all of this information is at the top of the notice.

Creditor's Name and Address:

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

I. Amount of Claim as of Date Case Filed:

State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:

State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:

Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:

If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:

Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. §507 (a).

If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:

An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:

Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:

The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, attach a complete copy of any power of attorney, and provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

B10A (Attachment A) (12/11)

Mortgage Proof of Claim Attachment

Debtor(s) Name: Patrick Leon Scurry
 Lenora M. Scurry
 Bankruptcy No.: 12-06918-dd
 Creditor Name: Everbank
 Last four loan digits: XXXXXX1069

Part 1: Statement of Principal and Interest Due as of the Petition Date

Itemize the principal and interest due on the claim as of the petition date (included in the Amount of Claim listed in item 1 on your Proof of Claim form)

1. Principal due: \$ 148,781.19

2. Interest due

Interest rate	From	To	Amount
5.0%	9/1/11	11/1/12	\$8,678.88

Total interest due as of the petition date \$ 8,678.88

TOTAL PRINCIPAL AND INTEREST DUE: \$ 157,460.07

Part 2: Statement of Prepetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges due on the claim as of the petition date (included in the Amount of Claim listed in item 1 on your Proof of Claim form)

Description	Dates Incurred	Amount
1. Late charges:	12/22/11, 2/16, 3/16, 4/16	
	8/16, 9/17, 10/16/12	\$ 684.03
2. NSF fees:		\$ 0.00
3. Attorney fees:	3/23/12, 11/5/12	\$ 835.00
4. Filing fees and court costs:		\$ 351.00
5. Advertisement costs:		\$ 0.00
6. Sheriff/auctioneer fees:		\$ 0.00
7. Title costs:	9/13/12	\$ 117.08
8. Recording fees:		\$ 0.00
9. Appraisal/Broker's price opinion fees:		\$ 0.00
10. Property inspection fees:		\$ 80.00
11. Tax advances (non-escrow):		\$ 0.00
12. Insurance advances (non-escrow):		\$ 0.00
13. Escrow Shortage or deficiency:		\$ 910.13
14. Property preservation expenses. Specify:		\$ 0.00
15. Other. Specify:		\$ 0.00
16. Other. Specify:		\$ 0.00
17. Other. Specify:		\$ 0.00

TOTAL PREPETITION FEES, EXPENSES, AND CHARGES: \$ 3,477.24

Part 3: Statement of Amount Necessary to Cure Default as of the Petition Date

Does the installment payment include an escrow deposit?

☐ No

☒ Yes. Attach to the Proof of claim an escrow account statement prepared as of the petition date in a form consistent with applicable nonbankruptcy law.

1.	Installment payments due	Date last payment received by creditor:	7/18/12
		Number of installment payments due:	14
2.	Amount of installment payments due:	14 installments due @ \$1.065.84	\$ 14,921.76
		Total installment payments due as of The petition date	\$ 14,921.76
3.	Calculation of cure amount:	Add total prepetition fees, expenses, and charges	\$ 3,477.24
		Subtract total of unapplied funds	\$ 0.00
		Total amount necessary to cure default as of the petition date:	\$ 18,399.00

T1401-37P

11/14/12

LENORA SCURRY
 PATRICK SCURRY
 1360 NURSERY RD
 LITTLE MOUNTAIN SC 29075

ANNUAL ESCROW ACCOUNT DISCLOSURE STATEMENT

ACCOUNT HISTORY

THIS IS A STATEMENT OF ACTUAL ACTIVITY IN YOUR ESCROW ACCOUNT FROM
 09/01/12 THROUGH 12/31/12.
 YOUR MONTHLY MORTGAGE PAYMENT FOR THE PAST YEAR WAS
 1,065.84 OF WHICH 817.00 WAS FOR PRINCIPAL AND INTEREST
 AND 248.84 WENT INTO YOUR ESCROW ACCOUNT.

MO	PROJ ESCROW DEPOSIT	ACTUAL ESCROW DEPOSIT	PROJ ESCROW PAYMENTS	DESCRIPTION	ACTUAL ESCROW PAYMENTS	PROJ ESCROW BALANCE	ACTUAL ESCROW BALANCE
STARTING BALANCE						1727.36	1892.86-
SEP	257.89	*	65.97	MTG INS	*	1919.20	1092.86-
SEP				MTG INS	65.97*	1919.28	1958.83-
OCT	257.89	*	65.97	MTG INS	*	2111.20	1958.83-
OCT				MTG INS	65.97*	2111.20	2024.80-
NOV	257.89	3483.76 *Y	65.97	MTG INS	*Y	2303.12	1450.96
NOV				MTG INS	65.97*	2303.12	1392.99
DEC	257.89	248.84 *Y	65.97	MTG INS	67.06*Y	2495.04	1574.77
DEC			Y 1236.77	CONS TAX	1236.77 Y	1258.27	338.00
JAN	257.89	*	65.97	MTG INS	*	1450.19	
JAN			1066.35	PROP INS	*	383.84	
FEB	257.89	*	65.97	MTG INS	*	575.76	
MAR	257.89	*	65.97	MTG INS	*	767.68	
APR	257.89	*	65.97	MTG INS	*	959.60	
MAY	257.89	*	65.97	MTG INS	*	1151.52	
JUN	257.89	*	65.97	MTG INS	*	1343.44	
JUL	257.89	*	65.97	MTG INS	*	1535.36	
AUG	257.89	*	65.97	MTG INS	*	1727.28	

11/14/12

LAST YEAR, WE ANTICIPATED THAT PAYMENTS FROM YOUR ACCOUNT WOULD BE MADE DURING THIS PERIOD EQUALING 3,094.76. UNDER FEDERAL LAW, YOUR LOWEST MONTHLY BALANCE SHOULD NOT HAVE EXCEEDED 383.84 (NO MORE THAN TWICE LAST YEARS PROJECTED MONTHLY ESCROW PAYMENT), UNLESS YOUR MORTGAGE CONTRACT OR STATE LAW SPECIFIES A LOWER AMOUNT. UNDER YOUR MORTGAGE CONTRACT AND STATE LAW, YOUR LOWEST MONTHLY BALANCE SHOULD NOT HAVE EXCEEDED 383.84.

AN ASTERISK (*) INDICATES A DIFFERENCE FROM A PREVIOUS ESTIMATE EITHER IN THE DATE OR THE AMOUNT. IF YOU WANT A FURTHER EXPLANATION, PLEASE CALL OUR TOLL-FREE NUMBER.

ACCOUNT PROJECTION

MORTGAGE INS	:	791.64
HAZARD INS	:	1,066.35
TAXES	:	1,236.77

ANNUAL DISBURSEMENTS	:	3,094.76
3,094.76 / 12 =		257.89 ESCROW PAYMENT

NO	PAYMENTS TO	PAYMENTS FROM	DESCRIPTION	CURRENT BAL PROJECTION	REQUIRED BAL PROJECTION
	BALANCE AS OF 12/31/12			338.00	1,258.27
JAN	257.89	65.97	MTG INS	529.92	1,450.19
JAN		1,066.35	PROP INS	536.43	383.84
FEB	257.89	65.97	MTG INS	344.51	575.76
MAR	257.89	65.97	MTG INS	152.59	767.68
APR	257.89	65.97	MTG INS	39.33	959.60
MAY	257.89	65.97	MTG INS	231.25	1,151.52
JUN	257.89	65.97	MTG INS	423.17	1,343.44
JUL	257.89	65.97	MTG INS	615.09	1,535.36
AUG	257.89	65.97	MTG INS	807.01	1,727.28
SEP	257.89	65.97	MTG INS	998.93	1,919.20
OCT	257.89	65.97	MTG INS	1,190.85	2,111.12
NOV	257.89	65.97	MTG INS	1,382.77	2,303.04
DEC	257.89	65.97	MTG INS	1,574.69	2,494.96
DEC		1,236.77	CONS TAX	337.92	1,258.19

11/14/12

THE EXPECTED AMOUNT IN YOUR ESCROW ACCOUNT IS 338.00 . YOUR
STARTING BALANCE ACCORDING TO THIS ANALYSIS SHOULD BE 1,258.27 .

THIS MEANS YOU HAVE A SHORTAGE OF 10.14.** THIS SHORTAGE MAY
BE COLLECTED FROM YOU OVER A PERIOD OF 12 MONTHS OR MORE UNLESS THE
SHORTAGE IS LESS THAN 1 MONTHS DEPOSIT, IN WHICH CASE WE HAVE THE
OPTION OF REQUESTING PAYMENT WITHIN 30 DAYS. WE HAVE DECIDED TO
COLLECT IT WITHIN 30 DAYS

** THIS AMOUNT HAS BEEN ADJUSTED FOR THE BANKRUPTCY PROOF OF CLAIM.

YOUR MONTHLY MORTGAGE PAYMENT FOR THE COMING YEAR WILL BE
1,085.03 OF WHICH 817.00 WILL BE FOR PRINCIPAL AND
INTEREST AND 257.89 WILL GO INTO YOUR ESCROW ACCOUNT.

NEW PAYMENT INFORMATION:	
PRINCIPAL AND INTEREST	817.00
ESCROW PAYMENT	257.89
OVER/SHORT SPREAD	10.14

NEW PAYMENT EFFECTIVE 01/01/13 1,085.03

KEEP THIS STATEMENT FOR COMPARISON WITH THE ACTUAL ACTIVITY IN YOUR
ACCOUNT AT THE END OF THE NEXT ESCROW ACCOUNTING COMPUTATION YEAR.

Loan # [REDACTED]
MIN [REDACTED]

Multistate

NOTE

FHA Case No. [REDACTED]

February 12, 2010

1360 NURSERY RD
LITTLE MOUNTAIN, SOUTH CAROLINA 29675
(Property Address)

1. PARTIES

"Borrower" means each person signing at the end of this Note, and the person's successors and assigns.
"Lender" means **PRIMARY CAPITAL ADVISORS LC** and its successors and assigns.

2. BORROWER'S PROMISE TO PAY; INTEREST

In return for a loan received from Lender, Borrower promises to pay the principal sum of **ONE HUNDRED FIFTY-TWO THOUSAND ONE HUNDRED NINETY-TWO AND NO/100 Dollars (U.S. \$152,192.00)**, plus interest, to the order of Lender. Interest will be charged on unpaid principal, from the date of disbursement of the loan proceeds by Lender, at the rate of **FIVE percent (5.000%)** per year until the full amount of principal has been paid.

3. PROMISE TO PAY SECURED

Borrower's promise to pay is secured by a mortgage, deed of trust or similar security instrument that is dated the same date as this Note and called the "Security Instrument." The Security Instrument protects the Lender from losses which might result if Borrower defaults under this Note.

4. MANNER OF PAYMENT

(A) Time

Borrower shall make a payment of principal and interest to Lender on the 1st day of each month beginning on April 1, 2010. Any principal and interest remaining on the 1st day of March, 2040, will be due on that date, which is called the "Maturity Date."

(B) Place

Payment shall be made at

PRIMARY CAPITAL ADVISORS LC
PO BOX 724628
ATLANTA, GEORGIA 31139

or at such place as Lender may designate in writing by notice to Borrower.

(C) Amount

Each monthly payment of principal and interest will be in the amount of **U.S. \$817.00**. This amount will be part of a larger monthly payment required by the Security Instrument, that shall be applied to principal, interest and other items in the order described in the Security Instrument.

FHA Multistate Fixed Rate Note - (10/95)
VMP-1R (0210).02
IDS, Inc.

Page 1 of 3

Borrower(s) Initials

[Handwritten Signature]

(D) Allonge to this Note for payment adjustments

If an allonge providing for payment adjustments is executed by Borrower together with this Note, the covenants of the allonge shall be incorporated into and shall amend and supplement the covenants of this Note as if the allonge were a part of this Note. (Check applicable box.)

☐ Graduated Payment Allonge ☐ Growing Equity Allonge ☐ Other (specify)

5. BORROWER'S RIGHT TO PREPAY

Borrower has the right to pay the debt evidenced by this Note, in whole or in part, without charge or penalty, on the first day of any month. Lender shall accept prepayment on other days provided that Borrower pays interest on the amount prepaid for the remainder of the month to the extent required by Lender and permitted by regulations of the Secretary. If Borrower makes a partial prepayment, there will be no changes in the due date or in the amount of the monthly payment unless Lender agrees in writing to those changes.

6. BORROWER'S FAILURE TO PAY**(A) Late Charge for Overdue Payments**

If Lender has not received the full monthly payment required by the Security Instrument, as described in Paragraph 4(C) of this Note, by the end of FIFTEEN calendar days after the payment is due, Lender may collect a late charge in the amount of FOUR percent (4.000%) of the overdue amount of each payment.

(B) Default

If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. Lender may choose not to exercise this option without waiving its rights in the event of any subsequent default. In many circumstances regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults. This Note does not authorize acceleration when not permitted by HUD regulations. As used in this Note, "Secretary" means the Secretary of Housing and Urban Development or his or her designee.

(C) Payment of Costs and Expenses

If Lender has required immediate payment in full, as described above, Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note to the extent not prohibited by applicable law. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note.

7. WAIVERS

Borrower 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 Lender to demand payment of amounts due. "Notice of dishonor" means the right to require Lender to give notice to other persons that amounts due have not been paid.

8. GIVING OF NOTICES

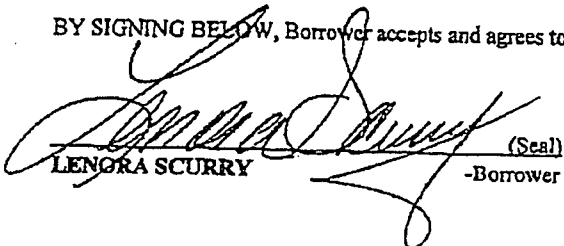
Unless applicable law requires a different method, any notice that must be given to Borrower under this Note will be given by delivering it or by mailing it by first class mail to Borrower at the property address above or at a different address if Borrower has given Lender a notice of Borrower's different address.

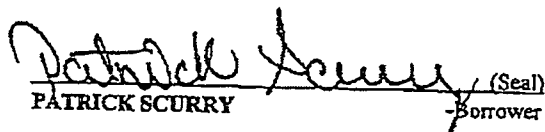
Any notice that must be given to Lender under this Note will be given by first class mail to Lender at the address stated in Paragraph 4(B) or at a different address if Borrower is given a notice of that different address.

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 of 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 of the promises made in this Note. Lender may enforce its rights under this Note against each person individually or against all signatories together. Any one person signing this Note may be required to pay all of the amounts owed under this Note.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Note.

 (Seal)
LENORA SCURRY
-Borrower

 (Seal)
PATRICK SCURRY
-Borrower

Pay to the Order of

BECKY SLATTON, P.A.

Without Recourse


BECKY SLATTON - AVP
PRIMARY CAPITAL ADVISORS LC

PAY TO THE ORDER OF

WITHOUT RECOURSE
BANK OF AMERICA, N.A.

BY



MICHELE SJLANDER
SENIOR VICE PRESIDENT

201000000548
 Filed for Record in
 NEWBERRY COUNTY, SC
 JACKIE S. BOWERS, CLERK OF COURT
 02-15-2010 At 11:39 am.
 MORTGAGE 12.00
 OR Book 1482 Page 191 - 133

Return To:
 PRIMARY CAPITAL ADVISORS LC
 1000 PARKWOOD CIRCLE SUITE 600
 ATLANTA, GEORGIA 30339

This instrument was prepared by:
 PRIMARY CAPITAL ADVISORS LC
 1000 PARKWOOD CIRCLE SUITE 600
 ATLANTA, GEORGIA 30339
 770-226-8181

[Space Above This Line For Recording Data]

State of South Carolina

MORTGAGE

FHA Case Number

THIS MORTGAGE ("Security Instrument") is given on February 12, 2010.

The Mortgagor is **LENORA SCURRY & PATRICK SCURRY**, ("Borrower").

This Security Instrument is given to Mortgage Electronic Registration Systems, Inc. ("MERS"), (solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns), as mortgagee. 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.

PRIMARY CAPITAL ADVISORS LC, ("Lender")
 is organized and existing under the laws of **GEORGIA**,
 and has an address of **1000 PARKWOOD CIRCLE SUITE 600, ATLANTA, GEORGIA 30339**.

Borrower owes Lender the principal sum of **ONE HUNDRED FIFTY-TWO THOUSAND ONE HUNDRED NINETY-TWO AND NO/100 Dollars (U.S. \$152,192.00)**. This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which provides for monthly payments, with the full debt, if not paid earlier, due and payable on **March 1, 2040**. This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the Note; (b) the payment of all other sums, with interest, advanced under paragraph 7 to protect the security of this Security Instrument; and (c) 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 **NEWBERRY County, South Carolina**:

SEE ATTACHED EXHIBIT "A"

which has the address of **1360 NURSERY RD
 LITTLE MOUNTAIN, SOUTH CAROLINA 29075**, ("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 or canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to mortgage, 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.

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.

FHA South Carolina Mortgage with MERS - 4/86

Page 1 of 5

IDS, Inc.

Borrower(s) Initials

Amended 2/01

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest and Late Charge. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and late charges due under the Note.

2. Monthly Payment of Taxes, Insurance and Other Charges. Borrower shall include in each monthly payment, together with the principal and interest as set forth in the Note and any late charges, a sum for (a) taxes and special assessments levied or to be levied against the Property, (b) leasehold payments or ground rents on the Property, and (c) premiums for insurance required under paragraph 4. In any year in which the Lender must pay a mortgage insurance premium to the Secretary of Housing and Urban Development ("Secretary"), or in any year in which such premium would have been required if Lender still held the Security Instrument, each monthly payment shall also include either: (i) a sum for the annual mortgage insurance premium to be paid by Lender to the Secretary, or (ii) a monthly charge instead of a mortgage insurance premium if this Security Instrument is held by the Secretary, in a reasonable amount to be determined by the Secretary. Except for the monthly charge by the Secretary, these items are called "Escrow Items" and the sums paid to Lender are called "Escrow Funds."

Lender may, at any time, collect and hold amounts for Escrow Items in an aggregate amount not to exceed the maximum amount that may be required for Borrower's escrow account under the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. Section 2601 *et seq.* and implementing regulations, 24 CFR Part 3500, as they may be amended from time to time ("RESPA"), except that the cushion or reserve permitted by RESPA for unanticipated disbursements or disbursements before the Borrower's payments are available in the account may not be based on amounts due for the mortgage insurance premium.

If the amounts held by Lender for Escrow Items exceed the amounts permitted to be held by RESPA, Lender shall account to Borrower for the excess funds as required by RESPA. If the amounts of funds held by Lender at any time are not sufficient to pay the Escrow Items when due, Lender may notify the Borrower and require Borrower to make up the shortage as permitted by RESPA.

The Escrow Funds are pledged as additional security for all sums secured by this Security Instrument. If Borrower tenders to Lender the full payment of all such sums, Borrower's account shall be credited with the balance remaining for all installment items (a), (b), and (c) and any mortgage insurance premium installment that Lender has not become obligated to pay to the Secretary, and Lender shall promptly refund any excess funds to Borrower. Immediately prior to a foreclosure sale of the Property or its acquisition by Lender, Borrower's account shall be credited with any balance remaining for all installments for items (a), (b), and (c).

3. Application of Payments. All payments under paragraphs 1 and 2 shall be applied by Lender as follows:

First, to the mortgage insurance premium to be paid by Lender to the Secretary or to the monthly charge by the Secretary instead of the monthly mortgage insurance premium;

Second, to any taxes, special assessments, leasehold payments or ground rents, and fire, flood and other hazard insurance premiums, as required;

Third, to interest due under the Note;

Fourth, to amortization of the principal of the Note; and

Fifth, to late charges due under the Note.

4. Fire, Flood and Other Hazard Insurance. Borrower shall insure all improvements on the Property, whether now in existence or subsequently erected, against any hazards, casualties, and contingencies, including fire, for which Lender requires insurance. This insurance shall be maintained in the amounts and for the periods that Lender requires. Borrower shall also insure all improvements on the Property, whether now in existence or subsequently erected, against loss by floods to the extent required by the Secretary. All insurance shall be carried with companies approved by Lender. The insurance policies and any renewals shall be held by Lender and shall include loss payable clauses in favor of, and in a form acceptable to, Lender.

In the event of loss, Borrower shall give Lender immediate notice by mail. Lender may make proof of loss if not made promptly by Borrower. Each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Lender, instead of to Borrower and to Lender jointly. All or any part of the insurance proceeds may be applied by Lender, at its option, either (a) to the reduction of the indebtedness under the Note and this Security Instrument, first to any delinquent amounts applied in the order in paragraph 3, and then to prepayment of principal, or (b) to the restoration or repair of the damaged Property. Any application of the proceeds to the principal shall not extend or postpone the due date of the monthly payments which are referred to in paragraph 2, or change the amount of such payments. Any excess insurance proceeds over an amount required to pay all outstanding indebtedness under the Note and this Security Instrument shall be paid to the entity legally entitled thereto.

In the event of foreclosure of this Security Instrument or other transfer of title to the Property that extinguishes the indebtedness, all right, title and interest of Borrower in and to insurance policies in force shall pass to the purchaser.

5. Occupancy, Preservation, Maintenance and Protection of the Property; Borrower's Loan Application; Leaseholds. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within sixty days after the execution of this Security Instrument (or within sixty days of a later sale or transfer of the Property) and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender determines that requirement will cause undue hardship for Borrower, or unless extenuating circumstances exist which are beyond Borrower's control. Borrower shall notify Lender of any extenuating circumstances. Borrower shall not commit waste or destroy, damage or substantially change the Property or allow the Property to deteriorate, reasonable wear and tear excepted. Lender may inspect the Property if the Property is vacant or abandoned or the loan is in default. Lender may take reasonable action to protect and preserve such vacant or abandoned Property.

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Borrower shall also be in default if Borrower, during the loan application process, gave materially false or inaccurate information or statements to Lender (or failed to provide Lender with any material information) in connection with the loan evidenced by the Note, including, but not limited to, representations concerning Borrower's occupancy of the Property as a principal residence. If this Security Instrument is on a leasehold, Borrower shall comply with the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and fee title shall not be merged unless Lender agrees to the merger in writing.

6. Condemnation. The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of any part of the Property, or for conveyance in place of condemnation, are hereby assigned and shall be paid to Lender to the extent of the full amount of the indebtedness that remains unpaid under the Note and this Security Instrument. Lender shall apply such proceeds to the reduction of the indebtedness under the Note and this Security Instrument, first to any delinquent amounts applied in the order provided in paragraph 3, and then to prepayment of principal. Any application of the proceeds to the principal shall not extend or postpone the due date of the monthly payments, which are referred to in paragraph 2, or change the amount of such payments. Any excess proceeds over an amount required to pay all outstanding indebtedness under the Note and this Security Instrument shall be paid to the entity legally entitled thereto.

7. Charges to Borrower and Protection of Lender's Rights in the Property. Borrower shall pay all governmental or municipal charges, fines and impositions that are not included in paragraph 2. Borrower shall pay these obligations on time directly to the entity which is owed the payment. If failure to pay would adversely affect Lender's interest in the Property, upon Lender's request Borrower shall promptly furnish to Lender receipts evidencing these payments.

If Borrower fails to make these payments or the payments required by paragraph 2, or fails to perform any other covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, for condemnation or to enforce laws or regulations), then Lender may do and pay whatever is necessary to protect the value of the Property and Lender's rights in the Property, including payment of taxes, hazard insurance and other items mentioned in paragraph 2.

Any amounts disbursed by Lender under this paragraph shall become an additional debt of Borrower and be secured by this Security Instrument. These amounts shall bear interest from the date of disbursement, at the Note rate, and at the option of Lender, shall be immediately due and payable.

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; (b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings which in the Lender's opinion operate to prevent the enforcement of the lien; 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 may attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Borrower shall satisfy the lien or take one or more of the actions set forth above within 10 days of the giving of notice.

8. Fees. Lender may collect fees and charges authorized by the Secretary.

9. Grounds for Acceleration of Debt.

(a) **Default.** Lender may, except as limited by regulations issued by the Secretary, in the case of payment defaults, require immediate payment in full of all sums secured by this Security Instrument if:

(i) Borrower defaults by failing to pay in full any monthly payment required by this Security Instrument prior to or on the due date of the next monthly payment, or

(ii) Borrower defaults by failing, for a period of thirty days, to perform any other obligations contained in this Security Instrument.

(b) **Sale Without Credit Approval.** Lender shall, if permitted by applicable law (including Section 341(d) of the Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C. 1701j-3(d)) and with the prior approval of the Secretary, require immediate payment in full of all sums secured by this Security Instrument if:

(i) All or part of the Property, or a beneficial interest in a trust owning all or part of the Property, is sold or otherwise transferred (other than by devise or descent), and

(ii) The Property is not occupied by the purchaser or grantee as his or her principal residence, or the purchaser or grantee does so occupy the Property but his or her credit has not been approved in accordance with the requirements of the Secretary.

(c) **No Waiver.** If circumstances occur that would permit Lender to require immediate payment in full, but Lender does not require such payments, Lender does not waive its rights with respect to subsequent events.

(d) **Regulations of HUD Secretary.** In many circumstances regulations issued by the Secretary will limit Lender's rights, in the case of payment defaults, to require immediate payment in full and foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary.

(e) **Mortgage Not Insured.** Borrower agrees that if this Security Instrument and the Note are not determined to be eligible for insurance under the National Housing Act within 60 days from the date hereof, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. A written statement of any authorized agent of the Secretary dated subsequent to 60 days from the date hereof, declining to insure this Security Instrument and the Note, shall be deemed conclusive proof of such ineligibility. Notwithstanding the foregoing, this option may not be exercised by Lender when the unavailability of insurance is solely due to Lender's failure to remit a mortgage insurance premium to the Secretary.

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10. Reinstatement. Borrower has a right to be reinstated if Lender has required immediate payment in full because of Borrower's failure to pay an amount due under the Note or this Security Instrument. This right applies even after foreclosure proceedings are instituted. To reinstate the Security Instrument, Borrower shall tender in a lump sum all amounts required to bring Borrower's account current including, to the extent they are obligations of Borrower under this Security Instrument, foreclosure costs and reasonable and customary attorneys' fees and expenses properly associated with the foreclosure proceeding. Upon reinstatement by Borrower, this Security Instrument and the obligations that it secures shall remain in effect as if Lender had not required immediate payment in full. However, Lender is not required to permit reinstatement if: (i) Lender has accepted reinstatement after the commencement of foreclosure proceedings within two years immediately preceding the commencement of a current foreclosure proceeding, (ii) reinstatement will preclude foreclosure on different grounds in the future, or (iii) reinstatement will adversely affect the priority of the lien created by this Security Instrument.

11. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time of payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to any successor in interest of Borrower shall not operate to release the liability of the original Borrower or Borrower's successor in interest. Lender shall not be required to commence proceedings against any successor in interest or 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 Borrower's successors in interest. Any forbearance by Lender in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.

12. Successors and Assigns Bound; Joint and Several Liability; Co-Signers. The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower, subject to the provisions of paragraph 9(b). Borrower's covenants and agreements shall be joint and several. Any Borrower who co-signs this Security Instrument but does not execute the Note: (a) is co-signing this Security Instrument only to mortgage, grant and convey that Borrower'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 may agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without that Borrower's consent.

13. Notices. Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender. Any notice to Lender shall be given by first class mail to Lender's address stated herein or any address Lender designates by notice to Borrower. Any notice provided for in this Security Instrument shall be deemed to have been given to Borrower or Lender when given as provided in this paragraph.

14. Governing Law; Severability. This Security Instrument shall be governed by Federal law and the law of the jurisdiction in which the Property is located. 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. To this end the provisions of this Security Instrument and the Note are declared to be severable.

15. Borrower's Copy. Borrower shall be given one conformed copy of the Note and of this Security Instrument.

16. Hazardous Substances. Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property that is in violation of any Environmental Law. 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.

Borrower shall promptly give Lender written notice of 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. If Borrower learns, or is notified by any governmental or regulatory authority, that any removal or other remediation of any Hazardous Substances affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law.

As used in this paragraph 16, "Hazardous Substances" are those substances defined as toxic or hazardous substances 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. As used in this paragraph 16, "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

17. Assignment of Rents. Borrower unconditionally assigns and transfers to Lender all the rents and revenues of the Property. Borrower authorizes Lender or Lender's agents to collect the rents and revenues and hereby directs each tenant of the Property to pay the rents to Lender or Lender's agents. However, prior to Lender's notice to Borrower of Borrower's breach of any covenant or agreement in the Security Instrument, Borrower shall collect and receive all rents and revenues of the Property as trustee for the benefit of Lender and Borrower. This assignment of rents constitutes an absolute assignment and not an assignment for additional security only.

If Lender gives notice of breach to Borrower: (a) all rents received by Borrower shall be held by Borrower as trustee for benefit of Lender only, to be applied to the sums secured by the Security Instrument; (b) Lender shall be entitled to collect and receive all of the

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rents of the Property; and (c) each tenant of the Property shall pay all rents due and unpaid to Lender or Lender's agent on Lender's written demand to the tenant.

Borrower has not executed any prior assignment of the rents and has not and will not perform any act that would prevent Lender from exercising its rights under this Paragraph 17.

Lender shall not be required to enter upon, take control of or maintain the Property before or after giving notice of breach to Borrower. However, Lender or a judicially appointed receiver may do so at any time there is a breach. Any application of rents shall not cure or waive any default or invalidate any other right or remedy of Lender. This assignment of rents of the Property shall terminate when the debt secured by the Security Instrument is paid in full.

18. Foreclosure Procedure. If Lender requires immediate payment in full under Paragraph 9, Lender may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Paragraph 18, 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.

If the Lender's interest in this Security Instrument is held by the Secretary and the Secretary requires immediate payment in full under Paragraph 9, the Secretary may invoke the nonjudicial power of sale provided in the Single Family Mortgage Foreclosure Act of 1994 ("Act") (12 U.S.C. 3751 *et seq.*) by requesting a foreclosure commissioner designated under the Act to commence foreclosure and to sell the Property as provided in the Act. Nothing in the preceding sentence shall deprive the Secretary of any rights otherwise available to a Lender under this Paragraph 18 or applicable law.

19. 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 without charge to Borrower. Borrower shall pay any recordation costs.

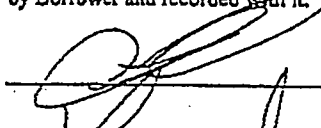
20. Waivers. Borrower waives all rights of homestead exemption in the Property.

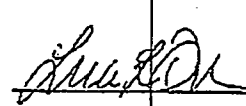
21. Future Advances. The lien of this Security Instrument shall secure the existing indebtedness under the Note and any future advances made under this Security Instrument up to one hundred fifty percent (150%) of the original principal amount of the Note plus interest thereon, attorneys' fees and court costs.

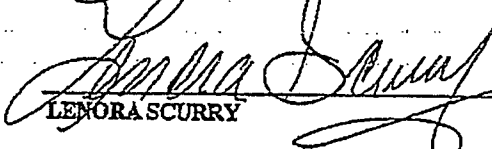
22. Riders to this Security Instrument. If one or more riders are executed by Borrower and recorded together with this Security Instrument, the covenants of each such rider shall be incorporated into and shall amend and supplement the covenants and agreements of this Security Instrument as if the rider(s) were a part of this Security Instrument. [Check applicable box(es).]

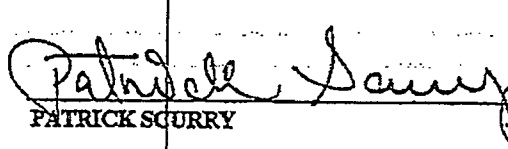
☐ Condominium Rider ☐ Graduated Payment Rider ☐ Adjustable Rate Rider
☐ Planned Unit Development Rider ☐ Growing Equity Rider ☐ Other:

BY SIGNING BELOW, Borrower accepts and agrees to the terms contained in this Security Instrument and in any rider(s) executed by Borrower and recorded with it.

 -Witness

 -Witness

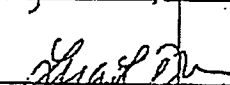
 (Seal)
LENORA SCURRY -Borrower

 (Seal)
PATRICK SCURRY -Borrower

STATE OF SOUTH CAROLINA,
County of Wichita

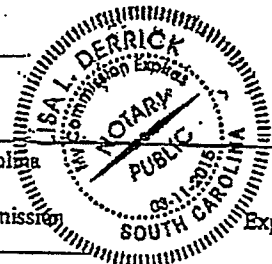
I, Lisa L. Derrick, do hereby certify that LENORA SCURRY and PATRICK SCURRY personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this 12th day of February, 2010


Notary Public for South Carolina

My

Commission



Expires:

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EXHIBIT A

All that certain piece, parcel or lot of land, together with the improvements thereon, if any, situate, lying and being in the County of Newberry, State of South Carolina, located on Nursery Road at the intersection of Windsong Trail, and being shown and designated as Lot 8, containing 1.31 acres, more or less, on that Boundary Survey & Subdivision plat prepared for Larry W. Higgins by C.A. Shealy, III, SCRLS 15182, dated May 27, 2006, and recorded August 23, 2006 in the Clerk of Courts Office in Newberry County in Plat Book C-156, at Page 9; reference being made to said plat for a more complete and accurate description of said property.

Derivation: This being the same piece of property conveyed to LENORA SCURRY AND PATRICK SCURRY by Deed of ABBEVILLE SAVINGS AND LOAN ASSOCIATION dated February 12, 2010 and recorded in the Office of the Register of Deeds for Newberry County simultaneously herewith.

LENORA SCURRY AND PATRICK SCURRY
1360 Nursery Road
Little Mountain, SC 29075

RE-10-088

Recording requested by:
Weston Adams Law Firm
P.O. Box 291
Columbia, SC 29202
Phone: (803) 254-1675 (recording info above this line)

Lenora Scurry and Patrick Scurry Loan [REDACTED]
Property Address: 1360 Nursery Road Little Mountain, SC 29075

M [REDACTED]
MERS Phone [REDACTED]

ASSIGNMENT OF MORTGAGE

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

FOR VALUE RECEIVED, Mortgage Electronic Registration Systems, Inc. as nominee for Primary Capital Advisors LC, and its successors and/or assigns hereby transfers, sets over, and assigns to:

EverBank
c/o EverHome Mortgage Company
8100 Nations Way, Bldg 100
Jacksonville, FL 32256

its successors and assigns, that certain mortgage and note thereby secured executed by Lenora Scurry and Patrick Scurry to Mortgage Electronic Registration Systems, Inc. as nominee for Primary Capital Advisors LC in the original principal amount of \$152,192.00 which mortgage is dated February 12, 2010 and was recorded on February 16, 2010 in Mortgage Book 1482 at page 181 in the Office of the RMC for Newberry County, South Carolina.

Witness our hands and seals this 28 day of Feb (month), 2012 (year).

WITNESSES:

Signed, sealed and delivered
in the presence of 2 witnesses:

Mortgage Electronic Registration Systems, Inc. as
nominee for Primary Capital Advisors LC and its
successors and/or assigns

Jacquelyn Brace
(Signature: Witness #1 - THIS WITNESS
MUST CO-SIGN WITH NOTARY BELOW)
Agnes V. Johnson
(Signature: Witness #2) Agnes V. Johnson

BY: [Signature]
(Signature):
Vice President

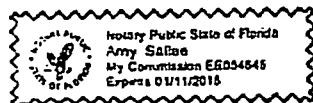
STATE OF: Florida
COUNTY OF: Duval

Personally appeared before me the undersigned witness, who being duly sworn says that he/she saw Mortgage Electronic Registration Systems, Inc. as nominee for Primary Capital Advisors LC and its successors and/or assigns, by its duly authorized officer or attorney in fact whose signature appears above, attest the same, and the said Corporation, by said Officer or Attorney in Fact, seal said Assignment of Mortgage, and as its act and deed, deliver the same, and he/she with the other witness named above witnessed the execution thereof.

Witness my hand and official seal, this 28 day of Feb (month), 2012 (year).

Amy Saltee
(Signature: Notary) Amy Saltee
Notary Public for the State of FL
My Commission Expires: 7/1/15

Jacquelyn Brace
(Signature: Witness #1 - SAME
PERSON AS WITNESS #1 ABOVE)
Jacquelyn Brace



COPY

STATE OF SOUTH CAROLINA
COUNTY OF CHESTER

GMAC Mortgage, LLC,
Plaintiff,
vs.
Ebonee D. Brown et al.,
Defendants.

IN THE COURT OF COMMON PLEAS

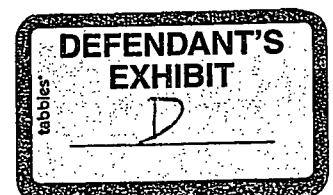
Case No. 2009-CP-12-0237

FILED
NEWBERRY COUNTY
2013 APR 26 PM 12 44
JACKIE BOWERS
CLERK OF COURT
AFFIDAVIT
Shawn M. French, Sr.

Personally appeared before me Shawn M. French, Sr., who, first being duly sworn,
deposes and says as follows:

I am an attorney with The French Law Firm, LLC.

2. I have reviewed the affidavit of the Plaintiff's attorney that was submitted September 28, 2009 as Exhibit 7, in the above-captioned action.
3. I am familiar with the customary fees that lawyers charge clients to prosecute mortgage foreclosure actions in South Carolina. I was admitted to the South Carolina Bar in November of 2006 and practiced plaintiffs' foreclosure law at Perrie Bone & Burr from that time until July of 2007. From July of 2007 until September of 2008, I practiced plaintiffs' foreclosure law at Morris Schneider & Prior from July of 2007 to September of 2008.
4. The usual fee charged by an attorney to prosecute a mortgage foreclosure action in South Carolina is between \$800.00 and \$1,000.00.
5. I have reviewed the aforesaid affidavit submitted by the Plaintiff's attorney. Its description of services performed and duties undertaken recites no more than what is



- ordinarily done by an attorney representing a plaintiff in an uncontested mortgage foreclosure action. The current going rate for such work is around \$1,000.00.
6. The Plaintiff's attorneys have not made an "enormous investment in time" in this case. There is nothing in their affidavit suggesting that they did anything more than what is standard in the majority of mortgage foreclosure cases.
 7. In the current world of South Carolina mortgage foreclosure law firms, the ordinary investment of time by a plaintiff's attorney in a mortgage foreclosure action is minimal.
 8. While the documents listed in Plaintiff's Affidavit of Attorney's fees might take 20 hours to draft from scratch, the use of templates and software to merge the information vastly reduces the time it takes to complete the documents. Work done on a prior case cannot be double billed for in a later case.
 9. Furthermore, it is industry practice for the documents in a standard foreclosure action to be drafted by paralegals using form documents and document merging programs and then reviewed and signed by the attorney.
 10. For each of the months of December of 2009 and January of 2010, the Finkel law firm had approximately 200 properties for sale, according to a list published at www.finkellaw.com/CM/custom/FC-Sales.asp. At 20 hours per case, this would mean that each month represented 4000 hours of work by attorneys at the Finkel Law firm. There are also additional cases that never make it to sale.
 11. It would be unreasonable to expect a mortgagee to pay a fee of more than \$1,000.00 to an attorney to prosecute an uncontested mortgage foreclosure action in this State.

12. I have represented clients in actually litigated matters in which I did not feel that I could in good conscience charge my client anything close \$4,500.00 for my work.

13. The amount of \$4,500.00, even if it were the Plaintiff's actually incurred attorney's fee, would not be a reasonable attorney's fee for the Plaintiff's attorney's work in this case.

FURTHER AFFIANT SAYETH NAUGHT.


Shawn M. French, Sr

SWORN to before me this
24th day of February, 2010.


Notary Public for South Carolina

My Commission Expires: 2-15-17

(L.S.)

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-36-103

EverBank,

Plaintiff,

vs.

Lenora Scurry, Patrick Scurry, The
South Carolina Department of Revenue,

Defendants.

CERTIFICATE OF SERVICE

I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A., attorneys for Defendants Lenora and Patrick Scurry, do hereby certify and say that I, on the 26th day of April, 2013, served the foregoing document in the above-captioned action by depositing the same in the U.S. Mail, first class, postage prepaid, with the return address clearly noted, addressed as follows:

Weston Adams Law Firm
P.O. Box 291
Columbia, SC 29202


Andrew S. Radeker

FILED
NEWBERRY COUNTY
2013 APR 26 PM 12 45
JACKIE S. BOWERS
CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-36-103

EverBank,

Plaintiff,

vs.

Lenora Scurry, Patrick Scurry, The
South Carolina Department of Revenue,

Defendants.

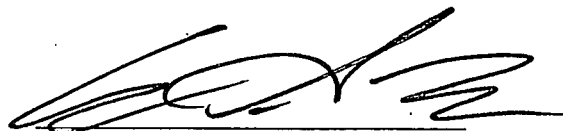
MOTION TO RECONSIDER

FILED
NEWBERRY COUNTY
2013 SEP 23 PM 11:12
JACKIE S. BOWEN
CLERK OF COURT

YOU WILL PLEASE TAKE NOTICE that Defendants Patrick Scurry and Lenora Scurry (hereinafter "the Defendants") move before this Court pursuant to Rules 52(b) and 59(e), SCRCF, as well as pursuant to all other applicable law, in the above-captioned action for an Order that reconsiders and/or alters or amends this Court's Order dated and filed September 6, 2013¹, in this action. The grounds for this motion are more particularly shown in the attached memorandum, and are also shown by the attached exhibits to the memorandum and the arguments reflected in the transcript of record, all of which are incorporated herein by reference.

Consultation by the undersigned with opposing counsel about the substance of this motion in advance of the making hereof would have served no useful purpose, as this is a motion to reconsider that must be made in order to preserve arguments for appeal.

Respectfully submitted,



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

Columbia, South Carolina
September 23, 2013

¹ The Defendants received written notice of the entry of this Order on September 11, 2013. As September 21, 2013, was a Saturday, this motion is timely pursuant to Rule 6(a), SCRCF.

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-36-103

EverBank,

Plaintiff,

vs.

Lenora Scurry, Patrick Scurry, The
South Carolina Department of Revenue,

Defendants.

MEMORANDUM IN SUPPORT OF
MOTION TO RECONSIDER

FILED
NEWBERRY COUNTY
SEP 26 PM 1:12
JACKIE S. BOWERS
CLERK OF COURT

Defendants Patrick Scurry and Lenora Scurry (hereinafter "the Defendants") submits for the Court's review and consideration this memorandum in support of their motion for an Order that reconsiders and/or alters or amends this Court's Order dated and filed September 6, 2013, in the above-captioned action.

A copy of that Order and printouts of relevant correspondence with the Court sent by email are attached hereto.

LAW AND ANALYSIS

In deciding a motion under Rule 60(b), SCRPC, the court hearing the motion is charged with deciding whether the party seeking relief has shown, by the preponderance of the evidence, that the conditions of a subsection of the Rule are met and, ordinarily, that he has a meritorious defense. See Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456, 458 (Ct. App. 2005); Bowers v. Bowers, 304 S.C. 65, 67-68, 403 S.E.2d 127 (Ct. App. 1991). "To establish a meritorious defense, a party is not required to show an absolute defense." Micronics, Inc. v. S.C. Dept. of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001). In examining whether there is a meritorious defense, the appropriate assessment of this factor is whether the defense in question "is worthy of a hearing or judicial inquiry because it raises a question of law deserving

of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.” Id. (quoting Graham v. Town of Loris, 272 S.C. 442, 453, 248 S.E.2d 594 (1978)). To require more would essentially substitute the motion hearing for a trial on the merits, and one in which the burden has shifted to the defendant to disprove the plaintiff’s allegations. Cf. id.

The subsections of Rule 60(b) provide relief for the following:

- (1) **mistake, inadvertence, surprise, or excusable neglect;**
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) ***fraud, misrepresentation, or other misconduct of an adverse party;***
- (4) **the judgment is void;**
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or **it is no longer equitable that the judgment should have prospective application.**

Rule 60(b), SCRPC (emphasis added).

South Carolina “favor[s] the disposition of issues on their merits rather than on technicalities[.]” Mictronics, 345 S.C. at 511. The availability of a challenge to a default judgment under Rule 60(b), SCRPC, is one of the primary reasons the Rule exists. See Winesett v. Winesett, 287 S.C. 332, 334, 338 S.E.2d 340 (1985) (“default judgment may not be appealed”; correct practice is to move for relief from judgment); Belue v. Belue, 276 S.C. 120, 121, 276 S.E.2d 295 (1981) (“no appeal lies for a default judgment”; correct practice is to move for relief from judgment); Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 99 (2d ed. 2002).

MISTAKE/EXCUSABLE NEGLIGENCE

“[W]here there is a good faith mistake of fact, and no attempt to thwart the judicial system, there is a basis for relief” under Rule 60(b)(1), SCRPC. Mictronics, 345 S.C. at 511. This is not limited to mistakes about the underlying facts of the action but may extend to mistakes about procedural facts as well. Id. at 508. In Mictronics, the movant seeking relief under Rule 60(b)(1) was found to be entitled to such relief where it did not attend a hearing because its president was mistaken about the date of the hearing. Id.

If Mictronics was entitled to relief from a judgment under Rule 60(b) where its president simply wrote down the wrong hearing date and then failed to appear, surely the Defendants are entitled to a rehearing or new trial here, where their failure to attend was a product of more reasonable and justified confusion than that of Mictronics’ president (which does not seem to have been very justified at all, but was apparently justified enough to afford relief from a judgment). Here, the process server who delivered the summons and complaint to the Defendants told them that these documents were nothing for them to worry about, so they did not worry about them or take any action with regard to them.

The Plaintiff presented an affidavit of the process server in which he swears he never said any such thing. While the Plaintiff lauds the process server for years of experience, Plaintiff’s counsel stated at the hearing that his firm does not use this process server any longer. This begs the question of why not. Perhaps it is because he would say misleading things to foreclosure defendants when he handed them pleadings.

As noted in previous filings and in argument at the hearing, an affidavit of service is only “*prima facie* evidence of service which may be impeached by extrinsic evidence.” Richardson

Construction Co., Inc. v. Meek Engineering and Construction Inc., 274 S.C. 307, 311, 262 S.E.2d 913 (1980).

The proof by affidavit in this case is insufficient when confronted with the other facts and circumstances attending it. When these factors are coupled with [a] counter affidavit denying service, the cumulative effect entitled the defendant to relief from judgment as a matter of right[.]

Id. (internal citation omitted). Here, whether service occurred is not the issue; rather, what is at issue is what the process server said in conjunction with service. The principle, though, is the same: here, the process server has only given an affidavit stating that things did not happen as described in the Defendants' affidavits. Lenora Scurry's affidavit provides the only detail about what happened. In addition, the affidavits of service that Mr. Costner originally gave in this case indicate that he delivered the process to a "female" – evidence that he did have interaction with Mrs. Scurry, contrary to what he now avers. The Defendants' detailed showing prevails over the process server's simple blanket denial that things occurred as described in Mrs. Scurry's affidavit.

The Defendants' mistake in failing to attend the hearing in this case is also justified. The Plaintiff led the Defendants to believe that the hearing would be cancelled because modification efforts were ongoing – and they were, as the Plaintiff's own letters show.

The judgment at issue was the product of mistake. Mistake does not require misrepresentation or any misconduct on the part of the other party for it to provide a ground for relief from a judgment. The Court's Order seems to assume that such is required. It was error for the Court to fail to grant relief from the judgment on this ground. As noted previously, the Defendants had more than one ground for their motion, and any one of the grounds for relief

noted in the motion would be sufficient for the Court to grant relief, even if all the other grounds failed.

MISREPRESENTATION AND OTHER MISCONDUCT

A party may achieve relief from a final judgment where the party demonstrates “fraud, misrepresentation, or other misconduct of an adverse party.” Rule 60(b)(3), SCRPC. In South Carolina, in order for a party to be entitled to relief under this subsection, the moving party must demonstrate that the fraud, misrepresentation, or other misconduct was extrinsic. Raby Constr., LLP v. Orr, 358 S.C. 10, 20-21, 594 S.E.2d 478, 484 (2005); Hagy v. Pruitt, 339 S.C. 425, 431, 529 S.E.2d 714, 717 (2000) (“A judgment may be set aside on the ground of fraud only if the fraud is ‘extrinsic’ and not ‘intrinsic.’”). Misrepresentation and misconduct is extrinsic when it is collateral to the issues tried in a case and effectively deprives the litigant of a fair hearing or the opportunity to present its case. Id. (citing Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm’n of S.C., 294 S.C. 9, 362 S.E.2d 176 (1987)); Mr. G. v. Mrs. G., 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995). “Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action.” Chewning v. Ford Motor Co., 354 S.C. 72, 81, 579 S.E.2d 605, 610 (2003) (citing Hilton Head, 294 S.C. at 11, 362 S.E.2d at 177). “Intrinsic fraud, on the other hand, is fraud which was presented and considered in the trial. It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud.” Id. For example, perjury is usually intrinsic in character. Id. Intrinsic misrepresentations are usually made in court, while extrinsic misrepresentations are usually made outside of court. See id.

Under South Carolina law, fraud is not the only species of misrepresentation or misconduct that can provide a basis to relieve a party from a judgment. Rule 60(b)(3), SCRCF. If only out-and-out actual fraud did so, there would be no reason for Rule 60(b)(3), SCRCF, to state that relief may be granted for “fraud, *misrepresentation, or other misconduct* of an adverse party.” (emphasis added).

Here, the Plaintiff and those acting on its behalf engaged in extrinsic misrepresentation and misconduct that misled the Defendants and caused them not to appear and defend this foreclosure action. The Plaintiff’s process server misrepresented to the Defendants that the pleadings in this case were nothing for them to be concerned about, so they took no action about them. The Defendants’ belief that this matter was being handled through the modification process and was on its way to resolution through a modification, not a court proceeding, was entirely consistent with what the process server told them and what the Plaintiff kept telling them until after the foreclosure sale had already happened. It is plain from the record that the Plaintiff engaged in the pernicious (but commonplace) practice of “dual tracking,” in which a foreclosure action is pursued at the same time as review for a modification is taking place. By its very nature, such a practice very often leads foreclosure defendants to believe that they are keeping abreast of what they need to do to oppose foreclosure when, procedurally, they are not. Our Supreme Court recognized this in In re: Mortgage Foreclosure Actions, 396 S.C. 209, 210, 720 S.E.2d 908 (2011) (South Carolina Supreme Court Administrative Order 2011-05-02-01), in which Chief Justice Toal wrote that “breakdowns [in mutually beneficial loss mitigation efforts] are largely the result of difficulty in communication between lender-servicers and debtors, and the fact that foreclosure actions are proceeding to conclusion without regard to ongoing loss mitigation efforts by the parties.”

The Court's decision concerning what the process server told the Defendants appears to turn on whether the process server was an agent or apparent agent of the Plaintiff's, acting in that capacity when he told the Defendants not to worry about the summons and complaint. "Under South Carolina law, the elements which must be proven to establish apparent agency are: (1) that the purported principal consciously *or impliedly* represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Froneberger v. Smith, Op. No. 5168 (S.C. Ct. App. filed Aug. 28, 2013) (Shearouse Adv. Sh. No. 38 at 144, 150) (emphasis added, internal quotation marks and quotation-related punctuation omitted). "The first element of apparent agency can be established by either: (1) affirmative conduct or (2) conscious and voluntary inaction." Id. at 151. Under the second of these, "the principal implies authority by passively permitting another to appear to third parties to have authority to act on his behalf." Id.

Here, the Plaintiff's acts are what put the process server in the position he was in when he served the Defendants, and it placed him in a position that a layperson would reasonably interpret as the process server being authorized to communicate on behalf of the Plaintiff with regard to matters subject of the mortgage foreclosure case.¹ After all, the process server is delivering a communication about that very matter. The Court's Order decides that the fact that the process server was authorized by the Plaintiff to deliver the summons and complaint did not give rise to an inference that the process server was authorized to speak on behalf of the Plaintiff. This goes against case law concerning when a person acts in the scope of his employment. The question is not whether the person is authorized to do the specific act or make the specific representation. One is "liable for the torts of his servant even when the servant acts against the express instructions of his master," and "[a]ny doubt as to whether the servant was acting within

the scope of his authority when he [engaged in the conduct at issue] must be resolved against the master[.]” Id. at 155 (internal quotation marks omitted).

“Generally, ‘[a]gency is a question of fact.’” Id. at 153 (quoting Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984)). It was a question of fact here and, given the lack of information provided by the Plaintiff to contradict the Defendants’ affidavit testimony, it should have been resolved in favor of the Defendants. See Richardson Construction, 274 S.C. at 311.

It does not appear that Plaintiff’s counsel was involved in misleading the Defendants in this regard, but the process server was, and the Plaintiff itself was. To let this judgment stand rewards the Plaintiff for tricking the Defendants into not opposing the Plaintiff’s case. This is a result justice will not countenance.

THE JUDGMENT IS VOID

The purpose of a mortgage foreclosure is to allow the mortgagor an opportunity to exercise his right to redeem the property by paying the debt in full. Bartles v. Livingston, 282 S.C. 448, 455, 319 S.E.2d 707 (Ct. App. 1984). A mortgage foreclosure action is a proceeding to collect a debt, not to create one. See S.C. Code Ann. § 29-3-10 (2007); Bartles, 282 S.C. at 455. The foreclosure judgment in this action effectively created debt by awarding the Plaintiff an amount as an ostensible “attorney’s fee” that exceeds the amount the court could lawfully award. See American Federal Bank, FSB v. Number One Main Joint Venture, 321 S.C. 169, 175, 467 S.E.2d 439 (1996). The judgment that contains this fee award is void, and Rule 60(b)(4), SCRCF, requires the Court to grant relief to the Defendants from the judgment.

The \$5,200.00 awarded as an attorney’s fee in fact bears no relationship to any obligation of the Plaintiff to pay its attorneys. We know how much the attorney’s fees actually are, because

¹ It is fairly plain that the Defendants relied to their detriment on the process server’s representation.

the Plaintiff has told us in the proof of claim it filed in the bankruptcy court (using the same law firm, by the way): \$835.00. No evidence that the Plaintiff ever actually incurred more in attorney's fees in this case has ever been put before the Court. For the Court to award the Plaintiff an amount as attorney's fees that is more than six times greater than the only documented attorney's fees ever incurred is plainly not reasonable. The Court's discretion in the amount of attorney's fees awarded is not unfettered.

Where attorney's fees are recoverable pursuant to a contract, the language of the contract controls the scope of what is recoverable as an attorney's fee. E.g., American Federal Bank, 321 S.C. at 175; West v. Gladney, 341 S.C. 127, 135-36, 533 S.E.2d 334 (Ct. App. 2000); Ralph King Anderson, Jr., Attorney's Fees: How to Get Them & Keep Them on Appeal, in 2005 Master-in-Equity Bench/Bar: "Attorneys Fees, Easements & Equitable Remedies" 3, 24 (S.C. Bar 2005) (citing Nationsbank v. Scott Farm, 320 S.C. 299, 465 S.E.2d 98 (Ct. App. 1995)). A court cannot award more attorney's fees than are made collectable by the parties' agreement. See id. Notes and mortgages are contractual documents. See Saro Investments v. Ocean Holiday Partnership, 314 S.C. 116, 122, 441 S.E.2d 835 (Ct. App. 1994) (construing mortgage transaction in accordance with "settled principles of contract law"). "Uniformly, the language in a Note and Mortgage providing for an award of attorney's fees and court costs provides that the lender is entitled to reimbursement for the attorney's fees and costs that it actually incurs in its efforts to collect from a non-paying borrower." Curtis L. Coltrane, Ethical Issues for Attorney Fees & Costs, in 2006 Master-in-Equity Bench/Bar: 45 (S.C. Bar 2006). An award of attorney's fees "is made to the party, not to his lawyer[.]" and its purpose is to reimburse the party for his litigation expenses. Id. at 48 (citing Reid v. Reid, 280 S.C. 367, 312 S.E.2d 724 (Ct. App. 1984)).

The Court's Order implies that the documents at issue in this case authorized an attorney's fee award unconnected to what fees the Plaintiff actually incurred. This is not supported by the language of the documents at issue. In this case, the object of the provisions in the note concerning attorney's fees is, by its plain language, the lender's reimbursement for money it has expended in paying an attorney to bring a foreclosure action. Id. at 45. The note provides that if the lender has accelerated the debt, "Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note to the extent not prohibited by applicable law." (Emphasis added). The note and mortgage provide only that the lender is entitled to recover its costs and expenses, including the money it expends to hire a lawyer, provided that amount is reasonable. It does not authorize the Plaintiff to "recover" more in attorney's fees than it has incurred in attorney's fees. Moreover, such an interpretation would be patently unreasonable: Why should the Defendants, who have lost their house as a result of the efforts of Plaintiff's counsel, "reimburse" the Plaintiff for more in attorneys' fees than the Plaintiff has paid in attorneys' fees?

The contractual language here provides for the collection of such actual fees, provided they are reasonable. American Federal Bank, 321 S.C. at 175. Otherwise, a mortgage foreclosure action would cease to be a suit of debt collection and become a device of debt creation.

Additionally, even if the Plaintiff actually had incurred \$5,200.00 or some greater amount in attorney's fees, the attorney's fee award would not have been reasonable. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313 (1991) (setting forth reasonableness factors for attorney's fee award, among them "customary legal fees for similar services"). It is not true that the \$5,200.00 "fee is in line with the fee customarily charged by counsel with similar experience

in this particular locality.” A fee of \$5,200.00 is not what other attorneys charge clients for residential mortgage foreclosures. Ostensibly, the \$5,200.00 attorney’s fee award was based on the Plaintiff’s lawyers handling a default residential mortgage foreclosure.

In its complaint, the Plaintiff nowhere states that it will be asking the court to award it, as attorney’s fees, thousands of dollars more than it is paying its lawyers to handle the foreclosure action. In the complaint, the Plaintiff states “[i]n and by the terms of the said Note, it is further provided that the maker thereof shall pay all collection costs, including reasonable attorney’s fees, if the said Note be placed in the hands of an attorney for collection after default.” Nothing in the complaint could have apprised the Defendants of the risk that the Plaintiff could be awarded an extra amount of several thousand dollars that is not recoverable under his loan documents. The complaint does not let the reader know that the Plaintiff will be seeking “attorney’s fees” that are not collection costs; in fact, it expressly limits what is sought in that regard to “collection costs[.]”

A judgment rendered against a party for his default for failure to appear “shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.” Rule 54(c), SCRPC. A non-appearing defendant would be prejudiced by his lack of notice if the plaintiff were to be awarded relief other than that sought in the complaint; in this way, Rule 54(c) ensures due process. See id.; Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Pinckney v. Atkins, 317 S.C. 340, 343, 454 S.E.2d 339 (Ct. App. 1995); cf. Roche v. Young Brothers, Inc., 318 S.C. 207, 456 S.E.2d 897, 899 (1995).

Judgments rendered without due process are void, and Rule 60(b)(4), SCRPC, provides for relief from such a judgment. Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 183, 561 S.E.2d 659 (Ct. App. 2002). Relief is proper where a default judgment renders an award in

excess of the demand in the plaintiff's complaint. Pinckney, 317 S.C. at 343; River Road Co. v. Energy Master Products, Inc., 300 S.C. 316, 316-17, 387 S.E.2d 694 (Ct. App. 1989). A default judgment in excess of the amount sought in the complaint is "clearly unlawful[.]" River Road, 300 S.C. at 317. The Plaintiff's pleading failed to give the Defendants any notice that the Plaintiff would seek an attorney's fee award greater in amount than its actual fees. The judgment containing the \$5,200.00 attorney's fee award is clearly unlawful. Mullane, 339 U.S. 306; Universal Benefits, 349 S.C. at 183; River Road, 300 S.C. at 317; see Rule 54(c), SCRPC.

Additionally, what forms the basis of the Plaintiff's judgment is the representation of its attorney that "[t]here is now due and owing on Plaintiff's note and mortgage . . . attorney's fees in the amount of \$5,200.00[.]" Plaintiff's counsel knew that was not true. A lawyer's representations to a court must be counted on for their honesty, accuracy, and completeness; otherwise, the integrity of the court is compromised. Chewning v. Ford Motor Co., 354 S.C. 72, 83-84, 579 S.E.2d 605 (2003) ("[a]ttorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice"); In re James, 267 S.C. 474, 478, 229 S.E.2d 594 (1976) (attorney owed "duty to speak the truth to the courts"); see Rule 11(a), SCRPC.

The instant case is similar to Chewning in a significant respect: in both that case and this one, the conduct of a litigant's attorneys with respect to the truth-seeking function of the tribunal is at issue. 354 S.C. at 76-77. Here, Plaintiff's counsel withheld from the court the most salient information they had concerning the amount of attorney's fees properly awardable to their client and instead represented that the Plaintiff had incurred the much higher amount of \$5,200.00 in attorney's fees.

South Carolina has traditionally afforded relief to a party where the judgment rendered against him was procured by an officer of the court's misrepresentation, viewing this attorney misconduct as inherently extrinsic in character. See Davis v. Davis, 236 S.C. 277, 281-82, 113 S.E.2d 819 (1960) (attorney's false representation to the court that party was in default was extrinsic and provided other party relief even where "the record indicates that it was a *bona fide* mistake of counsel"). The Court should do so here.

Embodied in S.C. Code Ann. § 29-3-10 is the principle that only the debt actually owed is recoverable out of a mortgage foreclosure sale; the purpose of a foreclosure action is not to manufacture additional debt to the plaintiff. See S.C. Code Ann. § 29-3-10. The notion that a foreclosure action may create debt out of whole cloth runs counter to the public policy of this State. See id. Relief from a default judgment that is appropriate neither under the parties' contractual documents nor pursuant to the complaint is just and, indeed, required. See Mullane, 339 U.S. 306; Universal Benefits, 349 S.C. at 183; River Road, 300 S.C. at 317; Rules 54(c) and 60(b)(4), SCRPC.

Contrary to the Court's Order, prejudice is simply not the issue here with respect to whether the Defendants are entitled to relief because the judgment is void. If a judgment is void, relief from the judgment *must* be granted, and there is no need for further analysis. BB&T v. Taylor, 369 S.C. 548, 552 n. 1, 633 S.E.2d 501, 503 n. 1 (2006). Prejudice, timing, and the existence of a meritorious defense are not relevant to the inquiry of whether a judgment must be vacated if it is void. Id.

MERITORIOUS DEFENSES

Based on the evidence the Plaintiff put before the Court, it is not entitled to any relief at all in this case. At the time the Plaintiff commenced this action, it did not own the mortgage it

sought to foreclose. Even assuming that the mortgage assignment from Mortgage Electronic Registration Systems, Inc. (hereinafter “MERS”) was valid, the assignment did not occur until after the commencement of this action. This case was filed on February 27, 2012, and the Defendants were served the same day. The assignment to the Plaintiff had not been done at that time. The assignment is dated – not recorded but, rather, *dated* – February 28, 2012. The Plaintiff has no standing in this case.

“Standing refers to ‘[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.’” Powell ex rel. Kelley v. Bank of America, 665 S.E.2d 237, 241 (Ct. App. 2008) (quoting Black’s Law Dictionary 1413 (7th ed. 1999)). In 1945, in a case about whether a plaintiff had standing to prosecute an action on a judgment, the Supreme Court of South Carolina stated as follows:

Generally, an action cannot properly be commenced until all of the essential elements of the cause of action are in existence – that is, until the cause of action is complete, the subsequent occurrence of a material fact will not avail in maintaining it. *The rights and liabilities of the parties, that is, their rights to an action for judgment or relief, depend upon the facts as they existed at the time of the commencement of the action, and not at the time of trial.*

American Agricultural Chemical Co. v. Thomas, 206 S.C. 355, 360, 34 S.E.2d 592, 594 (1945) (emphasis added).

A South Carolina Court of Appeals case supports this as well. In Brock v. Bennett, 313 S.C. 513, 518, 519, 443 S.E.2d 409, 412 (Ct. App. 1994), the Court of Appeals vacated the trial court’s order and dismissed Brock’s complaint for lack of standing, analyzing whether he had standing “at the time this action was commenced.” The Court of Appeals noted that “[s]tanding is a fundamental requirement for *instituting* an action.” Id. at 519 (emphasis added).

Since MERS owned the mortgage at the time of the commencement of the case, even if the Plaintiff were the holder of the note, it could not be the owner of the mortgage. Ownership of the note and mortgage did not go together; they were split at the outset of the loan, with the mortgagee being one entity (MERS) and the noteholder being another. See Mortgage Electronic Registration Systems, Inc. v. Neb. Dept. of Banking & Finance, 704 N.W.2d 784, 270 Neb. 529 (2005) (generally describing how the MERS system operates). By acquiring ownership of the note, the Plaintiff could not have acquired ownership of the mortgage, which was still owned by MERS. If this issue had been litigated, the Plaintiff would have lost the case. This is surely a defense worthy of inquiry, a meritorious defense.

Further, the Defendants have the defense of unclean hands. Unclean hands exists where the party asserting a claim has acted inequitably toward the other party in a way that has prejudiced the defending party. Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010); see Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 814 (1945); Whitlock v. Creswell, 190 S.C. 314, 2 S.E.2d 838 (1939); Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130 (Ct. App. 1984); Roger Young & Stephen Spitz, SUEM: Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose, 55 S.C. L. Rev. 175, 187 (2003). That has happened here. The Plaintiff's actions essentially caused the Defendants to pay the Plaintiff money (under the forbearance agreement) for no discernible reason and caused the Defendants to believe they were headed toward a modification with the Plaintiff when in fact they were not.

THE JUDGMENT VIOLATES NORRIS V. HEYWARD AND RULE 54(a)

The foreclosure judgment the Plaintiff obtained in this case provides that "[t]he amount of the judgment shall be subject to increase" to permit the Plaintiff to recover additional amounts

not awarded in the judgment and further specifically provides for the award of still more in attorney's fees to the Plaintiff at a later time. The judgment provides that not even a hearing is necessary for this to occur; "[s]uch additional costs, commissions and expenses may be established by affidavit and shall be adjudicated by the court without further hearing." This does not comport with due process.

Rule 54(a), SCRCP, provides that a judgment is an order that finally determines the rights of the parties to the litigation. Just as a party to any other case cannot return to the Court after prevailing upon its claim to get a still larger award, this is not permitted in a foreclosure case. Indeed, our state Supreme Court has specifically rejected the idea of a "continuing judgment" in a case in which "the master ruled the judgment would be continuing and upon submission of a Motion to Amend Judgment and affidavits, respondents could amend the judgment to reflect additional payments for reimbursement." Norris v. Heyward, 312 S.C. 67, 439 S.E.2d 264 (1993). "There is no procedure allowing a continuing judgment." Id. If Plaintiff can add additional amounts to the judgment, then the judgment does not finally determine the rights of the parties and is not a judgment at all. Id. Relief from a clearly unlawful judgment is unquestionably warranted. See id.; River Road, 300 S.C. at 317.

THE PLAINTIFF WOULD HAVE SUFFERED NO PREJUDICE

If the Plaintiff is truly entitled to the foreclosure of its mortgage, it will ultimately prevail against the Defendants if this Court grants this motion to reconsider and the Defendants are granted relief from the judgment. If the Plaintiff is not entitled to prevail on the merits of the case, the Plaintiff will lose nothing to which it is entitled if relief from the judgment is granted.

The Defendants must be afforded some relief under the facts of this case. This foreclosure action sounds in equity. Gardner v. Travis, 316 S.C. 315, 317, 450 S.E.2d 54, 56 (Ct.

App. 1994). It is axiomatic that equity will not suffer a wrong to be without a remedy. Key Corp. Capital, Inc. v. County of Beaufort, 360 S.C. 513, 602 S.E.2d 104 (Ct. App. 2004). One of the wrongs in this action, the excessive and unlawful attorneys' fee award, could not have occurred without the Defendants being in the very procedural situation in which they finds themselves now. The Plaintiff has succeeded in arguing that the procedural posture of this case means that the Defendants cannot have relief from this judgment; thus, the Plaintiff has achieved that which equity does not permit: a wrong without a remedy. Id.

The Plaintiff was the successful bidder at the foreclosure sale; thus, there is no third party who successfully bid in good faith and without notice of the matters subject of this motion who now owns this land and would be entitled to significant recourse if the motion were granted. Had the Court granted the Defendants' motion, the Plaintiff would not have had to pay such a person or the Defendants for the value of their land; rather, things would simply return to where they were before the Defendants were in default. Again, if the Plaintiff is entitled to win, it would still win, just on the merits.

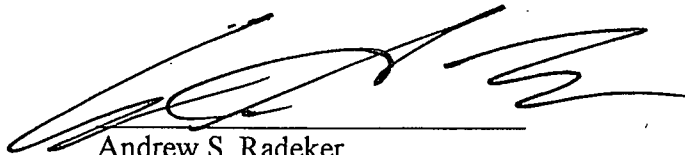
The only thing the Plaintiff has put forth in support of an argument that it will be prejudiced by the Court granting the Defendants' motion is that "the Plaintiff would be prejudiced by the granting of the Defendant's motion as it has acted diligently and expensed time and attorney's fees in order to bring this action to a conclusion." Prejudice is "[d]amage or detriment to one's legal rights or claims[.]" Black's Law Dictionary 545 (2d pocket ed 2001) (definition of prejudice). What the Plaintiff argues does not constitute prejudice. The Court of Appeals recently rejected a similar argument that a bank should allowed to proceed with trial of its foreclosure claim before a jury trial was held on a defendant's counterclaims. Plantation Fed. Bank v. Gray, 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013). The bank "argued that the

foreclosure action should proceed because the value of the lot was declining based on the general state of the economy and because Bank would have to pay taxes on the lot to prevent it from being sold at a tax sale scheduled for later in the year.” Id. at 517. In rejecting this argument, the court noted that “[t]hese circumstances would possibly, if not likely, occur in every foreclosure action currently pending.” Id. To show prejudice, the Plaintiff here would have had to show more than that it has spent money on this foreclosure case and would probably spend more if the Court granted relief from the judgment.

CONCLUSION

For the reasons given herein and as may further appear from the record, the Defendants’ motion to reconsider should be granted.

Respectfully submitted,



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

ATTORNEY FOR DEFENDANTS
PATRICK AND LENORA SCURRY

Columbia, South Carolina
September 23, 2013

Drew Radeker

From: Joseph W. Hudgens <jwhudgens@popeandhudgens.com>
Sent: Wednesday, July 17, 2013 3:34 PM
To: William Stork; Drew Radeker
Subject: Fw: Scanned from MFP-07091179 07/17/2013 14:42
Attachments: DOC071713.pdf

Gentlemen. I am sending to each of you a preliminary draft of an order in EverBank v Scurry for your review. I would like your comments as to my approach and any authorities you, especially Will, may want to give me in opposition or support to my thinking. I think the question of EverBank's right to sue when it did was not specifically raised in the motion based on Rule 60(b) (1), (3), (4), (5) although it was argued by Drew and responded to by Will, and because of its significance in my mind I think I should hear from him. Any comments or authorities he may have should be submitted to Drew who may respond. Can you have time to do so by the end of the month?
Or earlier?

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

From: "Pope & Hudgens Scanner" <copier@popeandhudgens.com>
To: "JW Hudgens" <jwhudgens@popeandhudgens.com>
Sent: Wednesday, July 17, 2013 5:42 PM
Subject: Scanned from MFP-07091179 07/17/2013 14:42

> Scanned from MFP-07091179.
> Date: 07/17/2013 14:42
> Pages:3
> Resolution:200x200 DPI
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FILED
NEWBERRY COUNTY
2013 SEP 26 AM 11 12
JACKIE S. BOWERS
CLERK OF COURT



This matter arises out of an action for the foreclosure of a mortgage which previously resulted in a decree of foreclosure and sale in favor of the plaintiff EverBank on March 11, 2013. A sale was held on sales day April 1, 2013. The plaintiff was the successful bidder. Before the sale was confirmed the defendants Scurry filed a motion to set aside the judgment and sale.

On February 12, 2010 the defendants Scurry, husband and wife, executed and delivered a promissory note in the amount of \$152,192.00 to Primary Capital Advisors LC in the amount of \$152,192.00 plus interest payable in installments payable to Primary Capital Advisors LC, identified as "Lender" in the note, or its order in consideration and payment of a loan to the defendants Scurry by the lender. The note provided that it is secured by a mortgage dated on the same day, February 12, 2010. The was made to "Mortgage Electronic Registration Systems, Inc. ('MERS') (solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns, as mortgagee." Primary Capital Advisors LC is identified as "Lender", and the mortgage further states that it "secures to Lender" payment of the debt. The mortgage again states that MERS holds "solely as nominee for Lender and Lender's successors and assigns," and also "to the successors and assigns of MERS."

On February 28, 2012 MERS executed an assignment "as nominee for Primary Capital Advisors LC, and its successors and/or assigns" purporting to assign the "mortgage and note thereby secured" to EverBank c/o EverHome Mortgage Company."

The foreclosure action was commenced by EverBank against the defendants Scurry and the South Carolina Department of Revenue (which is not participating in this proceeding relating to the motion of the defendants Scurry). The pleadings were filed on February 27, 2012, and, on the same day the defendants Scurry were served with the summons, complaint, lis pendens and Notice of Foreclosure Intervention evidenced by affidavits of service dated February 27, 2012, filed on February 28, 2012 amended by affidavits of service dated on March 5, 2012, filed on March 6, 2012 but stating the same time of service. (The amendments clarified the person actually served, and there is no dispute or issue by the Scurrys as to effective service).

On March 30, 2012 the plaintiff filed an affidavit of default as to the defendants Scurry. The defendant South Carolina Department of Revenue has answered alleging its lien for unpaid taxes. Also, on March 30, 2012 by order of the Clerk of Court the undersigned was appointed special referee to make appropriate findings of fact and conclusions of law with authority to enter final judgment. After notice to all parties a hearing on the foreclosure action was held on March 8, 2013. (The delay in scheduling a hearing was due to bankruptcy proceedings filed by the defendants Scurry). The defendants Scurry did not appear at the hearing. On March 11, 2013 an Order and Judgment of Foreclosure and Sale was filed. After due advertisement a sale was held on sales day, April 1, 2013. The plaintiff was successful bidder. Before the sale was confirmed



and a deed to the plaintiff issued the defendants Scurry on April 26, 2013 filed their Motion to Vacate the Judgment and Sale.

The motion of the defendants Scurry was based on Rule 60(b) (1), (3), (4) "and/or" (5). A hearing on the motion was held by me after scheduling with counsel for the defendants Scurry and counsel for the plaintiff attended by both counsel and the defendants Scurry. No testimony was taken. Memoranda was filed by both counsel, and conflicting affidavits as to events and conversations occurring at the time of service of the pleadings between Mr. and Ms. Scurry and the process server were filed. The Scurrys contended that the process server misled them in thinking that they did not need to file a response to the summons and complaint. The process server in his affidavit denied any conversations with the Scurrys. Other arguments related to conduct of the plaintiff in misleading the Scurrys as to the need to obtain counsel and respond to the foreclosure action and as to whether a hearing on the foreclosure was to be held because of continuing discussions and correspondence between them and the plaintiff bank for modification or reinstatement of the loan. The amount of reward of attorney fees to plaintiff counsel was also an issue.

Also raised and argued at the hearing by both parties was an issue of standing of plaintiff and its right to sue at time of filing of the action. This issue is the overriding question in the matter. If the defendants Scurry are entitled to have the judgment and sale set aside and be allowed to answer the complaint, to which they may well be entitled on the basis of their claim of being misled as to the need to respond to the complaint and being misled as to whether a hearing on the foreclosure as a result of the negotiations between them and the plaintiff bank for modification or reinstatement of the loan, those two overriding issues will certainly be raised by them. That being the situation, if the issues as to standing and the right of the plaintiff to bring the foreclosure action are resolved in their favor the plaintiff would have to file a new foreclosure action if it was able to remedy the defect. Consequently those issues should be addressed first.

The question as to standing relates to the assignment of the mortgage to the plaintiff by the mortgagee MERS. On February 28, 2012 Mers by written assignment assigned to the plaintiff "its successors and assigns, that certain mortgage and note thereby secured (emphasis supplied) executed by Lenora Scurry and Patrick Scurry to Mortgage Electronic Registration Systems, Inc. as nominee for Primary Capital Advisors LC." The language purports to assign the note from the Scurrys to Primary Capital Advisors LC. If MERS held the note the assignment of the mortgage would assign the debt. If MERS did not hold the note the assignment of the mortgage did not carry with it the debt evidenced by the note. Without assignment of the debt to MERS the plaintiff did not acquire the debt and would have no right or standing to foreclose the mortgage. South Carolina National Bank v. Halter 359 S.E. 2d 74 (S.C. App. 1987).

The record does not contain any evidence of an assignment of the note from the "Lender" to MERS. Rather the note of February 12, 2010 contains a blank indorsement by "Becky Slatton-AVP Primary Capital Advisors LC" and an indorsement to Bank of America N. A. by "Michele Sjolender Senior Vice President." "The assignment of a mortgage as distinct from the debt it secures is nugatory and confers no rights upon the transferee. Hahn v. Smith, 157 SA. C. 157, 154 S. E. 112 (1930), absent some indication that the parties also intended to transfer the

debt. 59 C.J.S Mortgages Section 359" quoted in South Carolina National Bank v. Halter.*supra*. (59 C.J. S. Sec 359 in now 59 C.J.S. Mortgages, Sec. 350. Here the prior the prior indorsement prevents an assignment of the debt by MERS.

Assuming a valid assignment by MERS to the plaintiff it occurred subsequent to the commencement of the action. The foreclosure action was commenced by filing of the summons and complaint on February 27, 2012, but the assignment by MERS was not until February 28, 2012. Hence, at the time the foreclosure action was filed the plaintiff had no interest in the mortgage and no right to sue. American Agricultural Chemical Co. v. Thomas, 206 S.C. 355, 34 S.E.2d 592 (1945).

IT IS THEREFORE ORDERED, that the judgment of foreclosure and sale are set aside and vacated.

IT IS FURTHER ORDERED that the plaintiff may re-file an action upon acquiring the proper right and standing to foreclose the mortgage.

IT IS SO ORDERED.

Drew Radeker

From: Drew <Drew@harrisonfirm.com>
Sent: Monday, July 29, 2013 10:57 AM
To: 'Joseph W. Hudgens'; 'William Stork'
Subject: RE: Scanned from MFP-07091179 07/17/2013 14:42 (Everbank v. Scurry)

Judge Hudgens:

I looked at the law and the record with regard to the matters discussed in Your Honor's draft order and email below. As to the substantive issues, I really do not have anything to add to what is in the memorandum and proposed order I have already provided. As to notice concerning the standing issue, I point out the following:

- The Scurrys' written motion noted that "[t]o establish a meritorious defense, a party is not required to show an absolute defense." Micronics, 345 S.C. at 511. In examining whether there is a meritorious defense, the appropriate assessment of this factor is whether the defense in question 'is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.' Id. (quoting Graham v. Town of Loris, 272 S.C. 442, 453, 248 S.E.2d 594 (1978)). To require more would essentially substitute the motion hearing for a trial on the merits, and one in which the burden has shifted to the defendant to disprove the plaintiff's allegations. Cf. id." It also stated that "the attached affidavits and other materials show that the Defendants have defenses that are worthy of inquiry. The Defendants accordingly have meritorious defenses." Attached to the motion were, among other things, copies of the note, mortgage, and assignment at issue. The purpose of Rule 7(b) (which requires that motions state their grounds) is to put the other party on notice of the issues. The Scurry's motion did that with regard to the issue of whether the attached materials, including the assignment document, showed they have a meritorious defense.

- Even if the motion had not complied strictly with Rule 7(b), Everbank did not demonstrate any prejudice with regard to that, and "when neither party is prejudiced and the court is able to deal fairly with a motion . . . applying an overly technical application does not serve the purpose of Rule 7(b), SCRPC." Lucey v. Meyer, 401 S.C. 122, 736 S.E.2d 274, 279 (Ct. App. 2012); see also Chastain v. Hiltabidle, 381 S.C. 508, 517, 673 S.E.2d 826, 831 (Ct. App. 2009) (to obtain relief in this regard, "[a]s a general rule, a party must establish prejudice as the result of another's failure to comply with Rule 7(b)(1), SCRPC").

- As the Court points out, Everbank addressed the merits of the issue and did not argue it was prejudiced.

Thank you. Of course, if you have any questions or concerns, please do not hesitate to contact me.

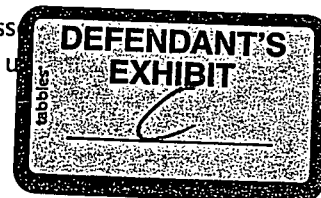
Drew Radeker

Harrison & Radeker, P.A.
ATTORNEYS AT LAW

Real Estate / Property Disputes · Foreclosure · Media Law · Zoning · Criminal Defense · Appeals
Personal Injury · Consumer Law · Mediation/Arbitration · False Arrest · Commercial Litigation

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Telephone: (803) 779-2211
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-----Original Message-----

From: Joseph W. Hudgens [mailto:jwhudgens@popeandhudgens.com]
Sent: Wednesday, July 17, 2013 3:34 PM
To: William Stork; Drew Radeker
Subject: Fw: Scanned from MFP-07091179 07/17/2013 14:42

Gentlemen. I am sending to each of you a preliminary draft of an order in EverBank v Scurry for your review. I would like your comments as to my approach and any authorities you, especially Will, may want to give me in opposition or support to my thinking. I think the question of EverBank's right to sue when it did was not specifically raised in the motion based on Rule 60(b) (1), (3), (4), (5) although it was argued by Drew and responded to by Will, and because of its significance in my mind I think I should hear from him. Any comments or authorities he may have should be submitted to Drew who may respond. Can you have time to do so by the end of the month?

Or earlier?

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

From: "Pope & Hudgens Scanner" <copier@popeandhudgens.com>
To: "JW Hudgens" <jwhudgens@popeandhudgens.com>
Sent: Wednesday, July 17, 2013 5:42 PM
Subject: Scanned from MFP-07091179 07/17/2013 14:42

> Scanned from MFP-07091179.
> Date: 07/17/2013 14:42
> Pages:3
> Resolution:200x200 DPI
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>

Drew Radeker

From: Drew Radeker <Drew@harrisonfirm.com>
Sent: Saturday, August 03, 2013 4:42 PM
To: 'Joseph W. Hudgens'
Cc: 'William Stork'
Subject: RE: Scurry, Lenora & Patrick

Judge Hudgens:

In response, I point out two things:

- 1) It is somewhat late (and, under the rules of civil procedure, too late) for Everbank to be attempting to submit an affidavit or other (and unauthenticated) factual material in an attempt to prove it is a holder of the note and was at the time of the commencement of the action. I note Rule 6(d), SCRPC, provides that "opposing affidavits may be served not later than two days before the hearing, unless the court permits them to be served at some other time." Your Honor did not, to my knowledge and recollection, permit Everbank to submit any affidavit after the hearing on our motion. Further, nothing tending to indicate what is now in Everbank's affidavit was presented to the Court at the foreclosure hearing. Finally, the affiant's testimony in the affidavit is an obvious legal conclusion (just examine the phrase "proper and legal possession of all necessary documents").
- 2) Everbank's argument misses the point with regard to the note/mortgage ownership split in the history of this case. Even if Everbank owned the *note* at the time of the commencement of the action, Everbank did not own the *mortgage* at the time of the commencement of the action, since ownership of the note and mortgage had been split, so a transfer of the note *could not have* also transferred the mortgage, which was still owned by MERS at that time.

Thank you. I am sorry not to have responded sooner, but I have been out of town. Of course, if you have any questions or concerns, please do not hesitate to contact me.

Drew Radeker

HARRISON & RADEKER, P.A.

ATTORNEYS AT LAW

Real Estate / Property Disputes · Foreclosure · Media Law · Zoning · Criminal Defense · Appeals
Personal Injury · Consumer Law · Mediation/Arbitration · False Arrest · Commercial Litigation

923 Calhoun Street, Columbia, South Carolina 29201
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From: William Stork [mailto:will@westonadams.com]
Sent: Wednesday, July 31, 2013 9:23 AM
To: Joseph W. Hudgens
Cc: Drew
Subject: Scurry, Lenora & Patrick

Dear Judge Hudgens,



Please see attached documents.

Best regards,
Will Stork

William P. Stork, Esq.
Weston Adams Law Firm
1501 Richland Street
Columbia, SC 29201
Phone: 803-254-1675
Fax: 803-799-3141

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COPY

STATE OF SOUTH CAROLINA)
)
)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS
DOCKET NO. 2010-CP-36-0103

EverBank)

Plaintiff,)

vs.)

Lenora Scurry, Patrick Scurry, The)
South Carolina Department of)
Revenue,)

Defendants)

ORDER

FILED
NEWBERRY COUNTY
2013 SEP 6 PM 4 18
JACQUE S. DUNCAN
CLERK OF COURT

This matter arises out of an action for the foreclosure of a mortgage which previously resulted in a decree of foreclosure and sale in favor of the plaintiff EverBank on March 11, 2013. A sale was held on sales day April 1, 2013. The plaintiff was the successful bidder. Before the sale was confirmed and deed delivered the defendants Scurry filed a motion to set aside the judgment and sale. The motion was made pursuant to Rule 60 (b) (1), (3), (4), and/or (5). The defendants also submitted an answer and counterclaim setting forth their contention that they have meritorious defenses. Although under the Rule the motion "does not affect the finality of a judgment or suspend its operation" the final operation of the judgment and delivery of the deed to the plaintiff was held in abeyance until determination of the motion.

The defendant South Carolina Department of Revenue answered the complaint alleging it has a tax lien against the defendants Scurry and has not responded to their motion which does not affect its position.

On February 12, 2010 the defendants Scurry, husband and wife, executed and delivered a promissory note in the amount of \$152,192.00 to Primary Capital Advisors LC in the amount of \$152,192.00 plus interest payable in installments payable to Primary Capital Advisors LC, identified as "Lender" in the note, or its order, in consideration and payment of a loan to the defendants Scurry by the lender. The note provided that it is secured by a mortgage dated on the same day, February 12, 2010. The was made to "Mortgage Electronic Registration Systems. Inc. ('MERS') (solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns), as mortgagee." Primary Capital Advisors LC is identified as "Lender", and the mortgage further states that it "secures to Lender" payment of the debt. The mortgage again states



that MERS holds "solely as nominee for Lender and Lender's successors and assigns," and also "to the successors and assigns of MERS."

On February 28, 2012 MERS executed a written assignment "as nominee for Primary Capital Advisors LC, and its successors and/or assigns" purporting to assign the "mortgage and note thereby secured" to EverBank c/o EverHome Mortgage Company. It was recorded on March 6, 2012 in Book 1610, page 178 by the plaintiff's law firm.

The foreclosure action was commenced by EverBank against the defendants Scurry and the South Carolina Department of Revenue (which is not participating in this proceeding relating to the motion of the defendants Scurry and any reference herein to "defendants" without and specific identification refers only to the Scurry defendants). The pleadings were filed on February 27, 2012, and, on the same day the defendants Scurry were served with the summons, complaint, lis pendens and notice of foreclosure intervention evidenced by affidavits of service dated February 27, 2012, filed on February 28, 2012 amended by affidavits of service dated on March 5, 2012, filed on March 6, 2012 but stating the same time of service as the February 27 affidavits. (The amendments clarified the person actually served, and there is no dispute or issue by the Scurrys as to effective service).

On March 30, 2012 the plaintiff filed an affidavit of default as to the defendants Scurry and on February 11, 2013 filed certification of compliance with Administrative Order 2011-05-02-01 and that the defendants Scurry "failed, refused, or voluntarily elected not to participate in any foreclosure intervention process." The defendant South Carolina Department of Revenue has answered alleging its lien for unpaid taxes.

On March 30, 2012 by order of the Clerk of Court the undersigned was appointed special referee to make appropriate findings of fact and conclusions of law with authority to enter final judgment. After notice to all parties a hearing on the foreclosure action was held on March 8, 2013. (The delay in scheduling a hearing was due to bankruptcy proceedings filed by the defendants Scurry). The defendants Scurry did not appear at the hearing. On March 11, 2013 an Order and Judgment of Foreclosure and Sale was filed. After due advertisement a sale was held on sales day, April 1, 2013. The plaintiff was successful bidder. Before the sale was confirmed and a deed to the plaintiff issued the defendants Scurry on April 26, 2013 filed their Motion to Vacate the Judgment and Sale.

The defendants Scurry in their motion assert that they did not answer the complaint of the plaintiff due to mistake, inadvertence, surprise, or excusable neglect, Rule 60(b) (1); and that they did not attend the scheduled hearing of the foreclosure reference after notice of the time and place of the hearing because of misrepresentations by the plaintiff bank that the hearing was not going to be held. Rule 60(b) (3) and perhaps because of the vices of 60(b) (1). The motion was also based on the assertion that the judgment was void, Rule (60) (b) (4) and contrary to Rule 60(b) (5), specifically that "it is no longer equitable that the judgment should have prospective application."

A hearing on the motion was held by me after scheduling with counsel for the defendants

Scurry and counsel for the plaintiff attended by both counsel and the defendants Scurry. No testimony was taken. memoranda were filed and arguments made by both counsel.

The factual basis for relief pursuant to Rule 60 (b) (1) and (3) from the failure to answer the complaint or attend the foreclosure reference was presented by affidavits of Mr. and Ms. Scurry. Defendants Exhibits A and B. The asserted reasons for relief by virtue of Rule 60 (b) (3) and (5) were legal arguments.

As to the failure to answer the complaint and attend the foreclosure reference:

Failure to answer:

In their affidavits the Scurrys contended that the process server made statements to them which led them to believe that they did not have to take the summons and complaint seriously and misled them to think that they did not need seek legal advice or file a response to the summons and complaint. The affidavit of Ms. Lenora Scurry, Exhibit A, set out her recollection of the events of service of the foreclosure papers and her communications with the plaintiff bank. The affidavit of her husband, Mr. Patrick Scurry, Exhibit B, added no factual averments and that her statements were "true and correct to the best of my knowledge."

In paragraph 3 of her affidavit Ms. Scurry stated:

The man who served us the papers to begin this foreclosure case met with us inside our home and sat at our dining room table with my husband and me. I asked him what the documents were, and he said they were nothing to worry about. I noticed the name 'EverBank' on the documents, and I told him that we were trying to get a modification. The man told us that Obama was coming out with a program to help homeowners, and he made conversation with us and generally acted like these papers were nothing for us to worry about.

Because of what the man told me, I did not worry about the papers, examine them, or take them to a lawyer.

Plaintiff's counsel filed an affidavit of the process server by which he denied any conversations with the Scurrys and denied any entry to their home.

There is no evidence, or even indication, that the process server, identified by Ms. Scurry in her affidavit as "the man who served the papers," had any authority to speak on behalf of the plaintiff bank, or its attorneys, or that anything occurred in the conversation as related by Ms. Scurry that would indicate to her or her husband that he knew what he was talking about or that the Scurrys would be justified in relying on what he may have said with respect to the significance of the papers being served upon them at a time when they were discussing a loan modification with the plaintiff bank as the result of a default in payments from the September 01, 2011 payment due date as indicated in Defendant's Exhibit A-1. Nothing in the items supporting the defendant's motion indicates that the process server was any thing more than that. The

defendant's counsel states in the motion, paragraph 6, that the process server was a "person acting on the plaintiff's behalf," but furnishes nothing to leap to a conclusion that he could speak "on the plaintiff's behalf" as to the significance of the foreclosure action.

I find no credible evidence or argument that the failure to answer or otherwise respond to the Summons and Complaint based upon the requirements of Rule 60(b) (1) or (3) sufficient to set aside and vacate the judgment of foreclosure and sale pursuant to that judgment.

Failure to attend the foreclosure reference hearing.

The defendants Scurry also contend that the judgment of foreclosure and sale should be vacated and set aside because of "the Defendants' failure to attend the hearing in this case [i.e. the foreclosure reference hearing]. The Defendants believed the hearing was cancelled because of the actions and representations of persons acting on behalf of the Plaintiff." Defendants' motion paragraph 7. The basis for this contention is presented by the Scurry's affidavits, Exhibits A and B and Exhibits A-1 - A-7. Exhibits A-1 - A-7 are letters or notices from the plaintiff bank relating to the efforts of the Scurrys to obtain a modification of their loan. Although the Scurrys did not participate in foreclosure intervention (see supra certification of compliance with Administrative Order 2011-05-02-01) they were attempting to obtain a modification of the loan with the plaintiff bank at the time of the commencement of the foreclosure action. Affidavit of Lenora Scurry, Exhibit A, paragraphs 3 and 4.

Ms. Scurry in her affidavit stated that she received a notice of the foreclosure hearing but thought the plaintiff bank, "[b]ased on what Everhome's employees were telling me about the modification process, I believed Everhome would instruct the law firm not to go forward with the hearing. As I thought the hearing was cancelled, we did not attend it." What Everhome employees were "telling" Ms. Scurry can only be found in Exhibits A-1 - A-7. A reading of those exhibits does not support or justify her belief that the hearing was going to be cancelled or that the foreclosure action was not proceeding. Ms. Scurry stated in her affidavit that she telephoned the Weston Adams law firm, plaintiff's foreclosure counsel, and asked an unidentified employee if the hearing was going to be cancelled in view of the modification process and was told only that it would be cancelled "if their client told them to." Exhibit A, paragraph 9. There is no claim by the Scurrys of a follow up inquiry to the Adams law firm of a communication to it from the plaintiff bank of a cancellation of the hearing. The Scurry's effort to have the loan modified was unsuccessful, and Ms. Scurry was so notified by the plaintiff bank for lack submission of necessary documentation. Exhibit A, paragraph 13, Exhibit A-7.

I find nothing in Exhibits A-1 - A-7 suggesting intentional or even unintentional misrepresentation of a cancellation of the foreclosure reference hearing.

I find that the defendants are not entitled to have the judgement and sale vacated under Rule 60(b) (1) or (3).

Rule 60(b) (4) and (5)

Subsection (4) of Rule 60(b) applies to a judgment that is void; subsection (5) applies to a judgment when "it is no longer equitable that the judgment should have prospective application".

The defendants argue that the judgment of foreclosure and sale should be set aside and vacated because of the amount of the award of attorney's fees and the provision of the decree that

the amount of the judgment shall be subject to increase to permit the Plaintiff to recover additional costs, commissions and expenses not included in the judgment figures set forth [in the decree]. It may also increase to include supplemental compensation for attorney's services not contemplated by the initial fee awarded. Jurisdiction over the fee award and total debt is reserved to facilitate the assessment and payment of any such costs and/or supplemental compensation. Such additional costs, commissions and expenses may be established by affidavit and shall be adjudicated by the Court without further hearing.

The attorney's fees awarded by the decree were "for services performed and anticipated to be performed until final adjudication of the within action under the terms of the note and mortgage."

Attorney's fees and costs are authorized by the note and mortgage. The defendants argue that the purpose of an action of the nature of the present one is to determine debt not to create debt. That may be true, but the note and mortgage authorize collection of fees and costs in actions to collect money because of default in payment of the initial debt. If such fees and costs are incurred in actions to collect a debt and are authorized by the agreed upon documents creating the debt they are not unauthorized additions to debt. Moreover, in the present case, since a personal deficiency judgment against the defendants is waived, the plaintiff's remedy was recovery of the real property subject to the mortgage which has occurred by its successful nominal bid and acknowledgment that it has paid all fees and costs without any recourse against the defendants personally. Consequently, the defendants are not prejudiced thereabout and have no legal or equitable claim justifying the Court to vacate the judgment and sale under Rule 60(b) (4) and (5).

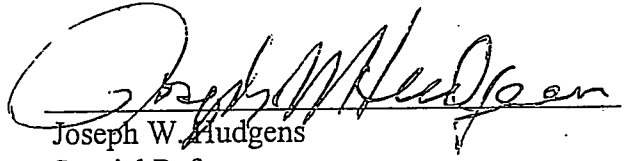
Meritorious defense

The defendants have submitted in support of their motion an answer and counterclaim. In order to obtain relief from a default judgment the defendants as moving parties in addition to meeting the burden of establishing entitlement to relief under Rule 60 (b) (1), (3), (4) and (5) must also show a meritorious defense. The defenses and counterclaims alleged by the defendants are based upon the evidence presented in support of their motion. That evidence as presented

does not meet the burden of showing that they are entitled to relief. They the same insufficient showing which fails to show that they are entitled to relief on the basis of their claim under Rule 60(b) cannot be turned into defenses to the foreclosure action.

IT IS THEREFORE ORDERED that the motion of the defendants is denied.

Newberry, S. C.
September 6, 2013


Joseph W. Hudgens
Special Referee

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-36-103

EverBank,

Plaintiff,

vs.

**Lenora Scurry, Patrick Scurry, The
South Carolina Department of Revenue,**

Defendants.

CERTIFICATE OF SERVICE

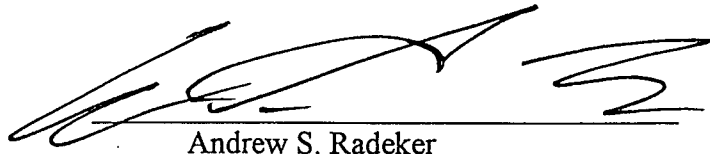
I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A., attorneys for Defendants Lenora and Patrick Scurry, do hereby certify and say that I, on the 23rd day of September, 2013, served the foregoing document in the above-captioned action by depositing the same in the U.S. Mail, first class, postage prepaid, with the return address clearly noted, addressed as follows:

The Hon. Joseph W. Hudgens
Special Referee for Newberry County
P.O. Box 190
Newberry, SC 29108

William P. Stork, Esq.
Weston Adams Law Firm
P.O. Box 291
Columbia, SC 29202

Milton G. Kimpson, Esq.
S.C. Dept. of Revenue
P.O. Box 12265
Columbia, SC 29211

FILED
NEWBERRY COUNTY
2013 SEP 26 AM 11 12
JACKIE S. BOWERS
CLERK OF COURT



Andrew S. Radeker

STATE OF SOUTH CAROLINA)

COUNTY OF NEWBERRY)

EverBank,)

Plaintiff,)

vs.)

Lenora Scurry, Patrick Scurry, The South
Carolina Department of Revenue,)

Defendants.)

IN THE COURT OF COMMON PLEAS
DOCKET NO. 2012-CP-36-0103

TRANSCRIPT OF TESTIMONY

SCANNED

FILED
NEWBERRY COUNTY
2013 MAR 11 AM 11 46
JACKIE S. BOWERS
CLERK OF COURT

Pursuant to the Order of Reference granted in the above action, a hearing was held before Joseph W. Hudgens, Special Referee attended by counsel as follows:

APPEARANCES: Weston Adams Law Firm, Attorneys for Plaintiff

REPORTED BY: KIMBERLY R. BICKFORD

By the Special Referee: The below signed attorney for Plaintiff calls attention to the filing of the Lis Pendens in the Office of the Clerk of Court for Newberry County on February 27, 2012. Also calls attention to the filing of the Summons and Complaint in the Clerk's Office on February 27, 2012. Also calls attention to the Affidavits of Service showing service of the Summons and Complaint on each defendant as indicated in the Affidavits.

Also calls attention to the Affidavit of Default and Non-Military Status. Also calls attention to the Order of Reference signed by the Clerk of Court on March 30, 2012 and filed on March 30, 2012 whereby this matter was referred to me for the purposes stated therein.

WHEREUPON, THE BELOW SIGNED ATTORNEY FOR PLAINTIFF, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

BY THE BELOW SIGNED ATTORNEY FOR PLAINTIFF: I am the attorney for Plaintiff.

From the original records in my possession and from the Complaint herein and from examination of the records in the Office of the Clerk of Court for Newberry County, I find that on the 12th day February, 2010, Lenora Scurry and Patrick Scurry gave a promissory note unto Primary Capital Advisors LC in the principal amount of \$152,192.00, together with interest thereon at the rate of five and no/100 (5.00%) per

cent per annum, payable in accordance with the terms and provisions of the note respecting the amounts, manner and times of payments, and the rights of the holder upon default in compliance with its terms. Other terms and conditions are stated in the note, which I would offer into evidence.

ORIGINAL/COPY OF NOTE RECEIVED INTO EVIDENCE AS PLAINTIFF'S EXHIBIT A.

I would call the Court's attention to the provisions of the note with reference to the payment of costs and attorney's fees. I would also call the Court's attention to the provisions of said note with reference to default.

On the same date, Lenora Scurry and Patrick Scurry gave a certain written mortgage unto Mortgage Electronic Registration Systems, Inc. as nominee for Primary Capital Advisors LC, which mortgage contains the same terms and provisions as the note just offered into evidence and conveyed by way of mortgage the property therein described, being the identical property set forth and described in the Complaint herein, which property is situate in Newberry County, South Carolina.

Thereafter, said mortgage was recorded in the RMC Office for Newberry County on February 16, 2010, in Mortgage Book 1482 at page 181.

This mortgage constitutes a purchase money mortgage first lien covering the property described therein.

I would offer the mortgage into evidence.

ORIGINAL/COPY OF MORTGAGE RECEIVED INTO EVIDENCE AS PLAINTIFF'S EXHIBIT B.

(a) Thereafter, by assignment dated February 28, 2012, and recorded in the said RMC's office on March 6, 2012 in Mortgage Book 1610 at page 178, the said Mortgage Electronic Registration Systems, Inc. as nominee for Primary Capital Advisors LC assigned the subject mortgage to EverBank, who is now the owner and holder thereof and the debt secured thereby.

I would call the Court's attention to the Defendants below:

(a) The Defendant, The South Carolina Department of Revenue by virtue of the following state tax liens filed against Patrick and Lenora Scurry (SS# xxx-xx-8611):

<u>Amount</u>	<u>Date Filed</u>	<u>Tax Lien#</u>	<u>Book/Page</u>
\$1,138.58	10-05-2011	3-51304710-8	2011LN3600722

Any such interest in or lien upon the said property is junior and subordinate to Plaintiff's Mortgage.

Upon examination of the records in the said Clerk's Office and in my office, and upon my personal investigation of the matter, and upon information and belief, there were no persons other than the parties to this action having any liens or claims against the subject property by way of assessment or otherwise as of the date of the filing of the Lis Pendens.

The monthly installments as provided for in said note and mortgage were not paid in accordance with the terms and provisions thereof, and therefore said note and mortgage are in default, and, as a result thereof, the Plaintiff has elected to declare the entire unpaid amount immediately due and payable.

There is now due and owing on Plaintiff's note and mortgage as of 10/1/11 the principal sum of \$148,781.19, together with interest thereon from 9/1/11 in the amount of \$12,398.40, PLUS escrow advances in the amount of \$7,218.00, PLUS late charges in the amount of \$727.03, PLUS costs of collection in the amount of \$50.00, PLUS attorney's fees in the amount of \$5,200.00 based on examination of title, preparation of pleadings, correspondence, preparation for foreclosure hearing and attendance at hearing.

Demand has been made upon the Defendants, but payment has not been received.

By the Complaint herein, the Plaintiff specifically waived the right to a personal or deficiency judgment.

The Plaintiff has complied with South Carolina Supreme Court Administrative Order 2009-05-22-01 and asserts that no Defendant is entitled to relief under the aforementioned Order.

WESTON ADAMS LAW FIRM

BY: Caroline Glenn

Weston Adams

Leigh B. Brown

Caroline R. Glenn

Robert P. Jackman

William P. Stork

Attorneys for Plaintiff

Post Office Box 291

Columbia, South Carolina 29202

Phone: (803) 254-1675

SWORN TO BEFORE ME this
6th day of March, 2013

Kimberly R. Binkford

NOTARY PUBLIC FOR SOUTH CAROLINA

My commission expires: 09/18/2022

WESTON ADAMS LAW FIRM, P.A.
1501 RICHLAND STREET 29201
POST OFFICE BOX 291
COLUMBIA, SOUTH CAROLINA 29202
WWW.WESTONADAMS.COM

TELEPHONE NUMBER
803-254-1675
FACSIMILE NUMBER
803-799-3141

February 22, 2013

Lenora Scurry
Patrick Scurry
1360 Nursery Road
Little Mountain, SC 29075

SC Department of Revenue
Attn: Milton G. Kimpson
P.O. Box 12265
Columbia, SC 29211

FILED
NEWBERRY COUNTY
2013 MAR 11 AM 11 47
JACKIE S. BOWERS
CLERK OF COURT

Re: EverBank -v- Lenora and Patrick Scurry, et al.
Docket No. 2012-CP-36-0103

TO THE DEFENDANT(S) ABOVE NAMED:

This is to advise you that a foreclosure hearing in the above case will be held before The Honorable Joseph W. Hudgens, Special Referee for the County of Newberry, 1508 College Street, Newberry, South Carolina 29108, at 10:00 A.M. on Friday, March 8, 2013. Please call this office if you have any questions about your attendance at this hearing.

This office is attempting to collect a debt.
Any information obtained will be used for that purpose.

Sincerely,

Amber A. Bair

Amber A. Bair
Legal Assistant

Loan No.: 3000069271
MIN: 100229330000692719

Multistate

NOTE

FHA Case No.
461-4877275-703

#9000791069

February 12, 2010

1360 NURSERY RD
LITTLE MOUNTAIN, SOUTH CAROLINA 29075
(Property Address)

1. PARTIES

"Borrower" means each person signing at the end of this Note, and the person's successors and assigns.
"Lender" means **PRIMARY CAPITAL ADVISORS LC** and its successors and assigns.

2. BORROWER'S PROMISE TO PAY; INTEREST

In return for a loan received from Lender, Borrower promises to pay the principal sum of **ONE HUNDRED FIFTY-TWO THOUSAND ONE HUNDRED NINETY-TWO AND NO/100 Dollars (U.S. \$152,192.00)**, plus interest, to the order of Lender. Interest will be charged on unpaid principal, from the date of disbursement of the loan proceeds by Lender, at the rate of **FIVE percent (5.000%)** per year until the full amount of principal has been paid.

3. PROMISE TO PAY SECURED

Borrower's promise to pay is secured by a mortgage, deed of trust or similar security instrument that is dated the same date as this Note and called the "Security Instrument." The Security Instrument protects the Lender from losses which might result if Borrower defaults under this Note.

4. MANNER OF PAYMENT

(A) Time

Borrower shall make a payment of principal and interest to Lender on the 1st day of each month beginning on **April 1, 2010**. Any principal and interest remaining on the **1st day of March, 2040**, will be due on that date, which is called the "Maturity Date."

(B) Place

Payment shall be made at

**PRIMARY CAPITAL ADVISORS LC
PO BOX 724628
ATLANTA, GEORGIA 31139**

or at such place as Lender may designate in writing by notice to Borrower.

(C) Amount

Each monthly payment of principal and interest will be in the amount of U.S. **\$817.00**. This amount will be part of a larger monthly payment required by the Security Instrument, that shall be applied to principal, interest and other items in the order described in the Security Instrument.

[Handwritten Signature]

(D) Allonge to this Note for payment adjustments

If an allonge providing for payment adjustments is executed by Borrower together with this Note, the covenants of the allonge shall be incorporated into and shall amend and supplement the covenants of this Note as if the allonge were a part of this Note. (Check applicable box.)

☐ Graduated Payment Allonge ☐ Growing Equity Allonge ☐ Other (specify)

5. BORROWER'S RIGHT TO PREPAY

Borrower has the right to pay the debt evidenced by this Note, in whole or in part, without charge or penalty, on the first day of any month. Lender shall accept prepayment on other days provided that Borrower pays interest on the amount prepaid for the remainder of the month to the extent required by Lender and permitted by regulations of the Secretary. If Borrower makes a partial prepayment, there will be no changes in the due date or in the amount of the monthly payment unless Lender agrees in writing to those changes.

6. BORROWER'S FAILURE TO PAY

(A) Late Charge for Overdue Payments

If Lender has not received the full monthly payment required by the Security Instrument, as described in Paragraph 4(C) of this Note, by the end of **FIFTEEN** calendar days after the payment is due, Lender may collect a late charge in the amount of **FOUR** percent (**4.000%**) of the overdue amount of each payment.

(B) Default

If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. Lender may choose not to exercise this option without waiving its rights in the event of any subsequent default. In many circumstances regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults. This Note does not authorize acceleration when not permitted by HUD regulations. As used in this Note, "Secretary" means the Secretary of Housing and Urban Development or his or her designee.

(C) Payment of Costs and Expenses

If Lender has required immediate payment in full, as described above, Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note to the extent not prohibited by applicable law. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note.

7. WAIVERS

Borrower 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 Lender to demand payment of amounts due. "Notice of dishonor" means the right to require Lender to give notice to other persons that amounts due have not been paid.

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to Borrower under this Note will be given by delivering it or by mailing it by first class mail to Borrower at the property address above or at a different address if Borrower has given Lender a notice of Borrower's different address.

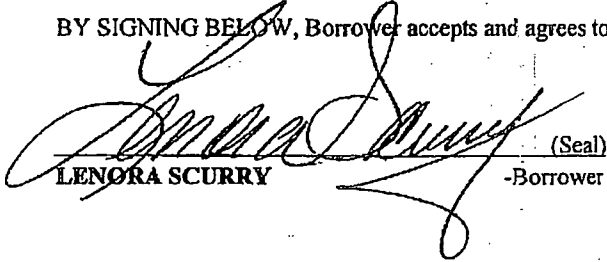
Any notice that must be given to Lender under this Note will be given by first class mail to Lender at the address stated in Paragraph 4(B) or at a different address if Borrower is given a notice of that different address.

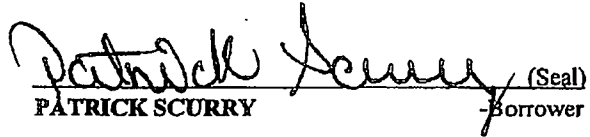
AS PS

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

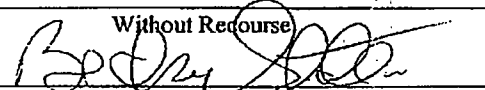
If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. Lender may enforce its rights under this Note against each person individually or against all signatories together. Any one person signing this Note may be required to pay all of the amounts owed under this Note.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Note.

 (Seal)
LENORA SCURRY -Borrower

 (Seal)
PATRICK SCURRY -Borrower

Pay to the Order of

Without Recourse

BECKY SLAFON - AVP
PRIMARY CAPITAL ADVISORS LC

PAY TO THE ORDER OF

WITHOUT RECOURSE
BANK OF AMERICA, N.A.

BY 
MICHELE SJOLANDER
SENIOR VICE PRESIDENT

BOA: 215522602

201000000548
Filed for Record in
NEWBERRY COUNTY, SC
JACKIE S. BOWERS, CLERK OF COURT
02-13-2010 At 11:39 am.
MORTGAGE 12.00
OR Book 1482 Page 121 - 134

Return To:
PRIMARY CAPITAL ADVISORS LC
1000 PARKWOOD CIRCLE SUITE 600
ATLANTA, GEORGIA 30339

This instrument was prepared by:
PRIMARY CAPITAL ADVISORS LC
1000 PARKWOOD CIRCLE SUITE 600
ATLANTA, GEORGIA 30339
770-226-8181



610 215522602 D2 001 001

[Space Above This Line For Recording Data]

State of South Carolina

MORTGAGE

FHA Case Number:
461-4877275-703

MIN: 100229330000692719

THIS MORTGAGE ("Security Instrument") is given on February 12, 2010.

The Mortgagor is **LENORA SCURRY & PATRICK SCURRY**, ("Borrower").

This Security Instrument is given to **Mortgage Electronic Registration Systems, Inc. ("MERS")**, (solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns), as mortgagee. 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**.

PRIMARY CAPITAL ADVISORS LC, ("Lender")
is organized and existing under the laws of **GEORGIA**,
and has an address of **1000 PARKWOOD CIRCLE SUITE 600, ATLANTA, GEORGIA 30339**.

Borrower owes Lender the principal sum of **ONE HUNDRED FIFTY-TWO THOUSAND ONE HUNDRED NINETY-TWO AND NO/100 Dollars (U.S. \$152,192.00)**. This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which provides for monthly payments, with the full debt, if not paid earlier, due and payable on **March 1, 2040**. This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the Note; (b) the payment of all other sums, with interest, advanced under paragraph 7 to protect the security of this Security Instrument; and (c) 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 **NEWBERRY County, South Carolina**:

SEE ATTACHED EXHIBIT "A"

which has the address of **1360 NURSERY RD
LITTLE MOUNTAIN, SOUTH CAROLINA 29075**, ("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 or canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to mortgage, 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.

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 and Late Charge. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and late charges due under the Note.

2. Monthly Payment of Taxes, Insurance and Other Charges. Borrower shall include in each monthly payment, together with the principal and interest as set forth in the Note and any late charges, a sum for (a) taxes and special assessments levied or to be levied against the Property, (b) leasehold payments or ground rents on the Property, and (c) premiums for insurance required under paragraph 4. In any year in which the Lender must pay a mortgage insurance premium to the Secretary of Housing and Urban Development ("Secretary"), or in any year in which such premium would have been required if Lender still held the Security Instrument, each monthly payment shall also include either: (i) a sum for the annual mortgage insurance premium to be paid by Lender to the Secretary, or (ii) a monthly charge instead of a mortgage insurance premium if this Security Instrument is held by the Secretary, in a reasonable amount to be determined by the Secretary. Except for the monthly charge by the Secretary, these items are called "Escrow Items" and the sums paid to Lender are called "Escrow Funds."

Lender may, at any time, collect and hold amounts for Escrow Items in an aggregate amount not to exceed the maximum amount that may be required for Borrower's escrow account under the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. Section 2601 *et seq.* and implementing regulations, 24 CFR Part 3500, as they may be amended from time to time ("RESPA"), except that the cushion or reserve permitted by RESPA for unanticipated disbursements or disbursements before the Borrower's payments are available in the account may not be based on amounts due for the mortgage insurance premium.

If the amounts held by Lender for Escrow Items exceed the amounts permitted to be held by RESPA, Lender shall account to Borrower for the excess funds as required by RESPA. If the amounts of funds held by Lender at any time are not sufficient to pay the Escrow Items when due, Lender may notify the Borrower and require Borrower to make up the shortage as permitted by RESPA.

The Escrow Funds are pledged as additional security for all sums secured by this Security Instrument. If Borrower tenders to Lender the full payment of all such sums, Borrower's account shall be credited with the balance remaining for all installment items (a), (b), and (c) and any mortgage insurance premium installment that Lender has not become obligated to pay to the Secretary, and Lender shall promptly refund any excess funds to Borrower. Immediately prior to a foreclosure sale of the Property or its acquisition by Lender, Borrower's account shall be credited with any balance remaining for all installments for items (a), (b), and (c).

3. Application of Payments. All payments under paragraphs 1 and 2 shall be applied by Lender as follows:

First, to the mortgage insurance premium to be paid by Lender to the Secretary or to the monthly charge by the Secretary instead of the monthly mortgage insurance premium;

Second, to any taxes, special assessments, leasehold payments or ground rents, and fire, flood and other hazard insurance premiums, as required;

Third, to interest due under the Note;

Fourth, to amortization of the principal of the Note; and

Fifth, to late charges due under the Note.

4. Fire, Flood and Other Hazard Insurance. Borrower shall insure all improvements on the Property, whether now in existence or subsequently erected, against any hazards, casualties, and contingencies, including fire, for which Lender requires insurance. This insurance shall be maintained in the amounts and for the periods that Lender requires. Borrower shall also insure all improvements on the Property, whether now in existence or subsequently erected, against loss by floods to the extent required by the Secretary. All insurance shall be carried with companies approved by Lender. The insurance policies and any renewals shall be held by Lender and shall include loss payable clauses in favor of, and in a form acceptable to, Lender.

In the event of loss, Borrower shall give Lender immediate notice by mail. Lender may make proof of loss if not made promptly by Borrower. Each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Lender, instead of to Borrower and to Lender jointly. All or any part of the insurance proceeds may be applied by Lender, at its option, either (a) to the reduction of the indebtedness under the Note and this Security Instrument, first to any delinquent amounts applied in the order in paragraph 3, and then to prepayment of principal, or (b) to the restoration or repair of the damaged Property. Any application of the proceeds to the principal shall not extend or postpone the due date of the monthly payments which are referred to in paragraph 2, or change the amount of such payments. Any excess insurance proceeds over an amount required to pay all outstanding indebtedness under the Note and this Security Instrument shall be paid to the entity legally entitled thereto.

In the event of foreclosure of this Security Instrument or other transfer of title to the Property that extinguishes the indebtedness, all right, title and interest of Borrower in and to insurance policies in force shall pass to the purchaser.

5. Occupancy, Preservation, Maintenance and Protection of the Property; Borrower's Loan Application; Leaseholds. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within sixty days after the execution of this Security Instrument (or within sixty days of a later sale or transfer of the Property) and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender determines that requirement will cause undue hardship for Borrower, or unless extenuating circumstances exist which are beyond Borrower's control. Borrower shall notify Lender of any extenuating circumstances. Borrower shall not commit waste or destroy, damage or substantially change the Property or allow the Property to deteriorate, reasonable wear and tear excepted. Lender may inspect the Property if the Property is vacant or abandoned or the loan is in default. Lender may take reasonable action to protect and preserve such vacant or abandoned Property.

Borrower shall also be in default if Borrower, during the loan application process, gave materially false or inaccurate information or statements to Lender (or failed to provide Lender with any material information) in connection with the loan evidenced by the Note, including, but not limited to, representations concerning Borrower's occupancy of the Property as a principal residence. If this Security Instrument is on a leasehold, Borrower shall comply with the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and fee title shall not be merged unless Lender agrees to the merger in writing.

6. Condemnation. The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of any part of the Property, or for conveyance in place of condemnation, are hereby assigned and shall be paid to Lender to the extent of the full amount of the indebtedness that remains unpaid under the Note and this Security Instrument. Lender shall apply such proceeds to the reduction of the indebtedness under the Note and this Security Instrument, first to any delinquent amounts applied in the order provided in paragraph 3, and then to prepayment of principal. Any application of the proceeds to the principal shall not extend or postpone the due date of the monthly payments, which are referred to in paragraph 2, or change the amount of such payments. Any excess proceeds over an amount required to pay all outstanding indebtedness under the Note and this Security Instrument shall be paid to the entity legally entitled thereto.

7. Charges to Borrower and Protection of Lender's Rights in the Property. Borrower shall pay all governmental or municipal charges, fines and impositions that are not included in paragraph 2. Borrower shall pay these obligations on time directly to the entity which is owed the payment. If failure to pay would adversely affect Lender's interest in the Property, upon Lender's request Borrower shall promptly furnish to Lender receipts evidencing these payments.

If Borrower fails to make these payments or the payments required by paragraph 2, or fails to perform any other covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, for condemnation or to enforce laws or regulations), then Lender may do and pay whatever is necessary to protect the value of the Property and Lender's rights in the Property, including payment of taxes, hazard insurance and other items mentioned in paragraph 2.

Any amounts disbursed by Lender under this paragraph shall become an additional debt of Borrower and be secured by this Security Instrument. These amounts shall bear interest from the date of disbursement, at the Note rate, and at the option of Lender, shall be immediately due and payable.

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; (b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings which in the Lender's opinion operate to prevent the enforcement of the lien; 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 may attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Borrower shall satisfy the lien or take one or more of the actions set forth above within 10 days of the giving of notice.

8. Fees. Lender may collect fees and charges authorized by the Secretary.

9. Grounds for Acceleration of Debt.

(a) **Default.** Lender may, except as limited by regulations issued by the Secretary, in the case of payment defaults, require immediate payment in full of all sums secured by this Security Instrument if:

- (i) Borrower defaults by failing to pay in full any monthly payment required by this Security Instrument prior to or on the due date of the next monthly payment, or
- (ii) Borrower defaults by failing, for a period of thirty days, to perform any other obligations contained in this Security Instrument.

(b) **Sale Without Credit Approval.** Lender shall, if permitted by applicable law (including Section 341(d) of the Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C. 1701j-3(d)) and with the prior approval of the Secretary, require immediate payment in full of all sums secured by this Security Instrument if:

- (i) All or part of the Property, or a beneficial interest in a trust owning all or part of the Property, is sold or otherwise transferred (other than by devise or descent), and
- (ii) The Property is not occupied by the purchaser or grantee as his or her principal residence, or the purchaser or grantee does so occupy the Property but his or her credit has not been approved in accordance with the requirements of the Secretary.

(c) **No Waiver.** If circumstances occur that would permit Lender to require immediate payment in full, but Lender does not require such payments, Lender does not waive its rights with respect to subsequent events.

(d) **Regulations of HUD Secretary.** In many circumstances regulations issued by the Secretary will limit Lender's rights, in the case of payment defaults, to require immediate payment in full and foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary.

(e) **Mortgage Not Insured.** Borrower agrees that if this Security Instrument and the Note are not determined to be eligible for insurance under the National Housing Act within 60 days from the date hereof, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. A written statement of any authorized agent of the Secretary dated subsequent to 60 days from the date hereof, declining to insure this Security Instrument and the Note, shall be deemed conclusive proof of such ineligibility. Notwithstanding the foregoing, this option may not be exercised by Lender when the unavailability of insurance is solely due to Lender's failure to remit a mortgage insurance premium to the Secretary.

10. Reinstatement. Borrower has a right to be reinstated if Lender has required immediate payment in full because of Borrower's failure to pay an amount due under the Note or this Security Instrument. This right applies even after foreclosure proceedings are instituted. To reinstate the Security Instrument, Borrower shall tender in a lump sum all amounts required to bring Borrower's account current including, to the extent they are obligations of Borrower under this Security Instrument, foreclosure costs and reasonable and customary attorneys' fees and expenses properly associated with the foreclosure proceeding. Upon reinstatement by Borrower, this Security Instrument and the obligations that it secures shall remain in effect as if Lender had not required immediate payment in full. However, Lender is not required to permit reinstatement if: (i) Lender has accepted reinstatement after the commencement of foreclosure proceedings within two years immediately preceding the commencement of a current foreclosure proceeding, (ii) reinstatement will preclude foreclosure on different grounds in the future, or (iii) reinstatement will adversely affect the priority of the lien created by this Security Instrument.

11. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time of payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to any successor in interest of Borrower shall not operate to release the liability of the original Borrower or Borrower's successor in interest. Lender shall not be required to commence proceedings against any successor in interest or 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 Borrower's successors in interest. Any forbearance by Lender in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.

12. Successors and Assigns Bound; Joint and Several Liability; Co-Signers. The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower, subject to the provisions of paragraph 9(b). Borrower's covenants and agreements shall be joint and several. Any Borrower who co-signs this Security Instrument but does not execute the Note: (a) is co-signing this Security Instrument only to mortgage, grant and convey that Borrower'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 may agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without that Borrower's consent.

13. Notices. Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender. Any notice to Lender shall be given by first class mail to Lender's address stated herein or any address Lender designates by notice to Borrower. Any notice provided for in this Security Instrument shall be deemed to have been given to Borrower or Lender when given as provided in this paragraph.

14. Governing Law; Severability. This Security Instrument shall be governed by Federal law and the law of the jurisdiction in which the Property is located. 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. To this end the provisions of this Security Instrument and the Note are declared to be severable.

15. Borrower's Copy. Borrower shall be given one conformed copy of the Note and of this Security Instrument.

16. Hazardous Substances. Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property that is in violation of any Environmental Law. 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.

Borrower shall promptly give Lender written notice of 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. If Borrower learns, or is notified by any governmental or regulatory authority, that any removal or other remediation of any Hazardous Substances affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law.

As used in this paragraph 16, "Hazardous Substances" are those substances defined as toxic or hazardous substances 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. As used in this paragraph 16, "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

17. Assignment of Rents. Borrower unconditionally assigns and transfers to Lender all the rents and revenues of the Property. Borrower authorizes Lender or Lender's agents to collect the rents and revenues and hereby directs each tenant of the Property to pay the rents to Lender or Lender's agents. However, prior to Lender's notice to Borrower of Borrower's breach of any covenant or agreement in the Security Instrument, Borrower shall collect and receive all rents and revenues of the Property as trustee for the benefit of Lender and Borrower. This assignment of rents constitutes an absolute assignment and not an assignment for additional security only.

If Lender gives notice of breach to Borrower: (a) all rents received by Borrower shall be held by Borrower as trustee for benefit of Lender only, to be applied to the sums secured by the Security Instrument; (b) Lender shall be entitled to collect and receive all of the

rents of the Property; and (c) each tenant of the Property shall pay all rents due and unpaid to Lender or Lender's agent on Lender's written demand to the tenant.

Borrower has not executed any prior assignment of the rents and has not and will not perform any act that would prevent Lender from exercising its rights under this Paragraph 17.

Lender shall not be required to enter upon, take control of or maintain the Property before or after giving notice of breach to Borrower. However, Lender or a judicially appointed receiver may do so at any time there is a breach. Any application of rents shall not cure or waive any default or invalidate any other right or remedy of Lender. This assignment of rents of the Property shall terminate when the debt secured by the Security Instrument is paid in full.

18. Foreclosure Procedure. If Lender requires immediate payment in full under Paragraph 9, Lender may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Paragraph 18, 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.

If the Lender's interest in this Security Instrument is held by the Secretary and the Secretary requires immediate payment in full under Paragraph 9, the Secretary may invoke the nonjudicial power of sale provided in the Single Family Mortgage Foreclosure Act of 1994 ("Act") (12 U.S.C. 3751 et seq.) by requesting a foreclosure commissioner designated under the Act to commence foreclosure and to sell the Property as provided in the Act. Nothing in the preceding sentence shall deprive the Secretary of any rights otherwise available to a Lender under this Paragraph 18 or applicable law.

19. 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 without charge to Borrower. Borrower shall pay any recordation costs.

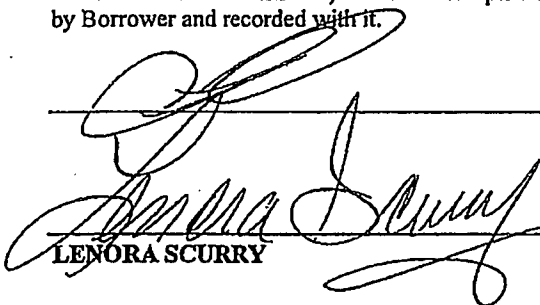
20. Waivers. Borrower waives all rights of homestead exemption in the Property.

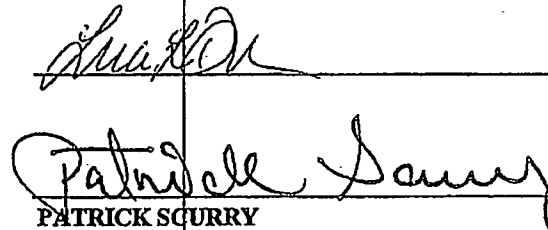
21. Future Advances. The lien of this Security Instrument shall secure the existing indebtedness under the Note and any future advances made under this Security Instrument up to one hundred fifty percent (150%) of the original principal amount of the Note plus interest thereon, attorneys' fees and court costs.

22. Riders to this Security Instrument. If one or more riders are executed by Borrower and recorded together with this Security Instrument, the covenants of each such rider shall be incorporated into and shall amend and supplement the covenants and agreements of this Security Instrument as if the rider(s) were a part of this Security Instrument. [Check applicable box(es).]

☐ Condominium Rider ☐ Graduated Payment Rider ☐ Adjustable Rate Rider
☐ Planned Unit Development Rider ☐ Growing Equity Rider ☐ Other:

BY SIGNING BELOW, Borrower accepts and agrees to the terms contained in this Security Instrument and in any rider(s) executed by Borrower and recorded with it.

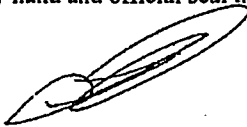

 _____ -Witness
 _____ (Seal)
 LENORA SCURRY -Borrower


 _____ -Witness
 _____ (Seal)
 PATRICK SCURRY -Borrower

STATE OF SOUTH CAROLINA,
 County of WILKINSON

I, Lisa L. Derrick, do hereby certify that **LENORA SCURRY** and **PATRICK SCURRY** personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

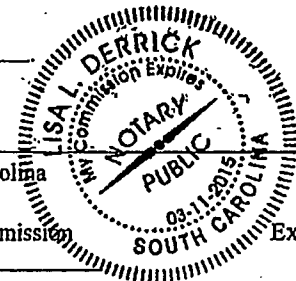
Witness my hand and official seal this 12th day of February, 2010




 Notary Public for South Carolina

My

Commission



Expires:

EXHIBIT A

All that certain piece, parcel or lot of land, together with the improvements thereon, if any, situate, lying and being in the County of Newberry, State of South Carolina, located on Nursery Road at the intersection of Windsong Trail, and being shown and designated as Lot 8, containing 1.31 acres, more or less, on that Boundary Survey & Subdivision plat prepared for Larry W. Higgins by C.A. Shealy, III, SCRLS 15182, dated May 27, 2006, and recorded August 23, 2006 in the Clerk of Courts Office in Newberry County in Plat Book C-156, at Page 9; reference being made to said plat for a more complete and accurate description of said property.

Derivation: This being the same piece of property conveyed to LENORA SCURRY AND PATRICK SCURRY by Deed of ABBEVILLE SAVINGS AND LOAN ASSOCIATION dated February 12, 2010 and recorded in the Office of the Register of Deeds for Newberry County simultaneously herewith.

LENORA SCURRY AND PATRICK SCURRY
1360 Nursery Road
Little Mountain, SC 29075

RE-10-088

Recording requested by:
Weston Adams Law Firm
P.O. Box 291
Columbia, SC 29202
Phone: (803) 254-1675(recording info above this line)

201200010337
RECORDED
SERIAL: 10000000000000000000
JACQUELYN BRACE, CLERK OF COURT
03-06-2012 AT 03:00 PM
ASSIGNMENT \$1.00
RE BOOK 1410 Page 110

Lenora Scurry and Patrick Scurry Loan No. 9000791069
Property Address: 1360 Nursery Road Little Mountain, SC 29075

MIN: 100229330000692719
MERS Phone: 1-888-679-6377

ASSIGNMENT OF MORTGAGE

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

FOR VALUE RECEIVED, Mortgage Electronic Registration Systems, Inc. as nominee for Primary Capital Advisors LC, and its successors and/or assigns hereby transfers, sets over, and assigns to:

EverBank
c/o EverHome Mortgage Company
8100 Nations Way, Bldg 100
Jacksonville, FL 32256

its successors and assigns, that certain mortgage and note thereby secured executed by Lenora Scurry and Patrick Scurry to Mortgage Electronic Registration Systems, Inc. as nominee for Primary Capital Advisors LC in the original principal amount of \$152,192.00 which mortgage is dated February 12, 2010 and was recorded on February 16, 2010 in Mortgage Book 1482 at page 181 in the Office of the RMC for Newberry County, South Carolina.

Witness our hands and seals this 28 day of Feb (month), 2012 (year).

WITNESSES:

Signed, sealed and delivered
In the presence of 2 witnesses:

Mortgage Electronic Registration Systems, Inc. as
nominee for Primary Capital Advisors LC and its
successors and/or assigns

Jacquelyn Brace
(Signature: Witness #1 - THIS WITNESS
MUST CO-SIGN WITH NOTARY BELOW)
Agnes V. Johnson
(Signature: Witness #2) Agnes V. Johnson

BY: [Signature]
(Signature: Vice President

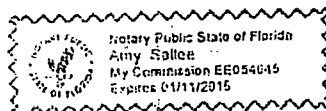
STATE OF: Florida
COUNTY OF: Duval

Personally appeared before me the undersigned witness, who being duly sworn says that he/she saw Mortgage Electronic Registration Systems, Inc. as nominee for Primary Capital Advisors LC and its successors and/or assigns, by its duly authorized officer or attorney in fact whose signature appears above, attest the same, and the said Corporation, by said Officer or Attorney in Fact, sent said Assignment of Mortgage, and as its act and deed, deliver the same, and he/she with the other witness named above witnessed the execution thereof.

Witness my hand and official seal, this 28 day of Feb (month), 2012 (year).

Amy Sallee
(Signature: Notary) Amy Sallee
Notary Public for the State of FL
My Commission Expires: 7/1/12

Jacquelyn Brace
(Signature: Witness #1 - SAME
PERSON AS WITNESS #1 ABOVE)
Jacquelyn Brace



STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
COUNTY OF NEWBERRY) C/A No. 2012-CP-36-103

EverBank,

Plaintiff,

v.

Lenora Scurry, Patrick
Scurry, The South Carolina
Department of Revenue,

Defendants.

(COPY)

HEARING

Wednesday, June 5, 2013
2:00 p.m. - 2:35 p.m.

The hearing before the Honorable Joseph W. Hudgens, for Newberry County, was held at the law offices of Pope & Hudgens, 1508 College Street, Newberry, South Carolina on the 5th day of June, 2013, before Amy G. Byrd, Court Reporter and Notary Public in and for the State of South Carolina.

CREEL COURT REPORTING, INC.

1230 Richla 21 / Columbia, SC 29201
(803) 2-123-5 / (800) 822-0896

APPEARANCES:

William P. Stork, Esquire

Weston Adams Law Firm
 1501 Richland Street
 Columbia, South Carolina 29201
 Attorney for the Plaintiff

Andrew Sims Radeker, Esquire

Harrison & Radeker, P.A.
 923 Calhoun Street
 Columbia, South Carolina 29201
 Attorney for the Defendants,
 Lenora Scurry and Patrick Scurry

Also Present:

Lenora Scurry
 Patrick Scurry

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EXHIBITS

Defendant's Exhibit Number 1 3
 (Answer and Counterclaim)
 Defendant's Exhibit Number 2 21
 (Affidavit of Service)
 Defendant's Exhibit Number 3 21
 (Amended Affidavit of Service)
 Plaintiff's Exhibit Number 1 33
 (Case Summary)

1 (Defendant's Exhibit Number 1 was marked for
2 identification purposes prior to the beginning of the
3 hearing.)

4 **THE COURT:** All right. This is a hearing, the day is
5 June 5, 2013 on a motion by the defendants
6 EverBank, excuse me, Scurry. And you represent
7 the Department of Revenue too?

8 **MR. RADEKER:** No, Your Honor, I do not represent the
9 Department of Revenue.

10 **THE COURT:** They're not represented are they? They
11 probably don't care.

12 **MR. RADEKER:** So, they are represented by Milton
13 Kimpson. I tried to get in touch with him to
14 find out what his position is on this motion.
15 He never would get back to me, so ...

16 **THE COURT:** All right. Well, we're here on a Motion
17 to Vacate Judgement and the sale of property
18 which was subject to a foreclosure brought by
19 EverBank against the defendants, Scurry. Okay.
20 So, if everybody is ready. We need to talk
21 about anything?

22 **MR. STORK:** I don't believe so, Your Honor.

23 **THE COURT:** All right.

24 **MR. RADEKER:** No, sir.

25 **THE COURT:** All right. So if everybody is ready

1 then, we'll commence with the plaintiff's
2 attorney. If you want to proceed.

3 **MR. STORK:** Your Honor, with the plaintiff's
4 attorney or with the defense -- the Scurry's
5 attorney?

6 **THE COURT:** Excuse me, excuse me. I'm sorry.

7 **MR. RADEKER:** That's us. I think we were both
8 pausing waiting on something.

9 **MR. STORK:** Yes.

10 **THE COURT:** We'll get around it here.

11 **MR. RADEKER:** Thank you, Your Honor. I'm Drew
12 Radeker, as I said a little bit earlier before
13 we got started. I represent Lenora and Patrick
14 Scurry in this case.

15 **MR. COURT:** Right.

16 **MR. RADEKER:** They are here with us today. And this
17 on a Motion to Vacate the Foreclosure Judgement
18 rendered in this case and sale that was held
19 pursuant to it. The first ground we'd advance
20 on that is the mistake, excusable neglect.
21 Now, as noted in the case of Mictronics versus
22 South Carolina Department of Revenue, a mistake
23 can be a mistake ---

24 **THE COURT:** What's the case number?

25 **MR. RADEKER:** I can get it to you, it's in the

1 memorandum.

2 **THE COURT:** Oh, okay.

3 **MR. RADEKER:** And ---

4 **MR. COURT:** In the one you sent today?

5 **MR. RADEKER:** Yes, correct, Your Honor. It's 345 SC
6 506.

7 **MR. COURT:** Okay.

8 **MR. RADEKER:** But, in any event, in that case, the
9 mistake that was at issue there, that the court
10 said afforded Mictronics relief from the
11 judgement was a mistake about a procedural
12 fact. In that case, Mictronics president had
13 simply written down the wrong hearing date. He
14 had been advised of it, wrote down the wrong
15 month, so didn't appear at the original hearing
16 date and appeared after the judgement had
17 already been rendered at a later date. And the
18 court said that that was a good enough mistake
19 to afford him relief from the judgement. I
20 think we've got a much more reasonable mistake
21 than that here. What we've got here in this
22 case is the process server, I don't think he
23 had any ill intent when he went to do this,
24 probably just trying to be nice, put some
25 people at ease. But he told the Scurrys, these

1 pleadings I'm serving you with aren't anything
2 to worry about. And so they didn't worry about
3 them. So they didn't answer them. So they
4 became to be in default. Now, there's
5 something of a discrepancy between the process
6 servers affidavit, which we got attached to the
7 plaintiff's memorandum, and Ms. Scurry's
8 affidavit which is the one that provides the
9 detail about what happened when the process
10 server came out to the house. Now, Ms. Scurry
11 provides a detailed account of what happened
12 and the process server really doesn't. He just
13 basically says no, it didn't happen that way,
14 I wouldn't have done that. You know, cited in
15 our memorandum is the case, Richardson's
16 Construction and in that case stands with
17 proposition implacable in a different context
18 that where there's an Affidavit of Service, the
19 defendant denies service and makes a detailed
20 showing. And the only thing that the plaintiff
21 has to prove service is that Affidavit of
22 Service then the defendants entitled to relief
23 as a matter of right without a detailed showing
24 from the other side about what happened. Then
25 the party who makes the detailed showing

1 prevails on that issue. Now, here the issue is
2 not whether service occurred, it did. It
3 happened on the day this action was filed,
4 February 27th of last year. But the principle
5 is the same. And the principle is that the
6 party who makes the detailed showing, that that
7 showing can't be trumped by simply a denial
8 saying no, it didn't happen like that. And I
9 think that's what we've got here. Also, the
10 process server says, I only interacted with
11 Patrick Scurry but if -- they actually filed an
12 original Affidavit of Service, which is in the
13 record in the case, and I've got copies of it
14 here, and an Amended Affidavit of Service.
15 Now, the Amended Affidavit of Service -- I'll
16 hand this to the court, you can look at it if
17 you'd like. Well, what the plaintiff attached
18 to their memorandum but the original Affidavit
19 of Service list that the process server left
20 the documents with a female not with Patrick
21 Scurry, who obviously, seated here at the end
22 of the table, is a man. And shows that he did
23 have some interaction ---

24 **MR. COURT:** Let me see it.

25 **MR. RADEKER:** --- with Ms. Scurry.

1 THE COURT: Ms. Scurry. They served Ms. Scurry?

2 MR. RADEKER: Now, he says he served Patrick Scurry
3 by handing them to Patrick Scurry and Ms.
4 Scurry by handing it to Patrick Scurry.

5 THE COURT: Do they live together?

6 MR. RADEKER: So that's what he says in his Amended
7 Affidavit ---

8 THE COURT: Do they live together?

9 MR. RADEKER: Sir?

10 THE COURT: Do they live together?

11 MR. RADEKER: Yes, they do.

12 THE COURT: That's fine.

13 MR. RADEKER: And we're not contesting whether
14 service occurred.

15 MR. COURT: Okay.

16 MR. RADEKER: It's about what the process server
17 told them as service occurred. And that led to
18 them being mistaken about whether they ought to
19 oppose this foreclosure case, come in and
20 answer it or not. And that occurred also in
21 the context of a discussion about, hey, we see
22 EverBanks name on this, we're working on a
23 modification. The process server says, you
24 know, you don't need to be concerned about this
25 ---

1 THE COURT: Say that again.

2 MR. RADEKER: The Scurrys told the processor ---

3 THE COURT: Uh-huh (affirmative response).

4 MR. RADEKER: --- when they saw EverBanks name on
5 the documents, we're working toward a
6 modification. The process server says, well,
7 you don't need to be concerned about this. The
8 Obama administration's coming out with all these
9 programs to help you with it. So they weren't
10 concerned about it. Similarly, they were
11 mistaken about whether there was a hearing to be
12 held. It's abundantly clear from the record
13 they were working with EverHome, who's just a
14 part of EverBank and their servicer, to work
15 toward a modification in this case. They called
16 plaintiff's attorneys office and plaintiff's
17 attorneys office tells them, quite truthful,
18 they didn't have any part in any
19 misrepresentation in this -- in this matter.
20 And they say we've got a hearing notice, do we
21 need to come to this hearing, is it going to be
22 canceled? They said, we'll cancel it if our
23 client tells us to cancel. Based on the
24 communications they were having with EverHome
25 Mortgage, they thought that they would be

1 telling them to cancel, saying we're working on
 2 a modification with them. What you've got here
 3 is what's kind of coming to be referred to with
 4 the term dual tracking, where the plaintiff is
 5 working with the borrower defendants on trying
 6 to work toward a modification at the same time
 7 as it peruses the foreclosure action. One of
 8 the dangers in that is it tends to create a lot
 9 of confusion and mistake on part of the borrower
 10 defendants and that's what it did here. We've
 11 got another ground here and that's extrinsic
 12 misrepresentation by the plaintiff. Now some of
 13 that's by the process server who says, hey,
 14 don't worry about these things and other parts
 15 of it are actually by employees of EverHome.
 16 Extrinsic misrepresentations, usually are
 17 misrepresentations made out of court, as these
 18 were here and it induces the other party not to
 19 present their case. It deprives the litigant of
 20 a fair hearing. And that's really what happened
 21 here. You don't have to show that there was
 22 some intent to defraud or anything. But here
 23 the plaintiff kept telling the Scurrys that
 24 we're working on modification and we're still
 25 working on it. And were working on that

1 process, telling them that even after the sale
2 had occurred. Before Ms. Scurry discovered that
3 the sale had happened. This is a classic dual
4 tracking scenario. To uphold this judgement
5 would essentially be to reward EverBank for the
6 actions of its employees and its process server
7 in deceiving these people in to thinking they
8 didn't need to do anything about this
9 foreclosure case. So we note we're entitled to
10 relief under Rule 60(b)(3). Now, an interesting
11 issue in this case is that of attorneys fees.
12 Your Honor, is certainly not the first judge in
13 a foreclosure case who's made a rather large
14 award of attorney's fees to the plaintiff but
15 here the actual attorney's fees appear to be
16 \$835.00. And we know that because there was a
17 previous bankruptcy that was filed while this
18 case was going on. It's explained in Ms.
19 Scurry's affidavit. And the plaintiff, through
20 the same law firm they've got now, submitted a
21 proof of claim in that case that listed the
22 amount of attorney's fees as \$835.00. That's
23 the only evidence before the court of what the
24 actually incurred attorney's fees are in this
25 case. So an award of attorney's fees of

1 \$5200.00 exceeds the amount of attorney's fees
2 incurred. And that's the most that could be
3 awarded under the parties contract. The note
4 provides that the plaintiff is entitled to
5 recover its cost of collection, including
6 reasonable attorney's fees. And what that means
7 is that they're entitled to recover the amount
8 they've incurred in attorney's fees, if it's a
9 reasonable amount. Here, plaintiff didn't ask
10 for the amount it incurred in attorney's fees
11 instead, asked for \$5200.00. Never told this
12 court what the actual amount of attorney's fees
13 incurred was. So we end up with an award of
14 attorney's fees that exceeds more than six times
15 the amount of attorney's fees actually incurred
16 by the plaintiff. And it's not a reasonable
17 interpretation to think that that language would
18 authorize a court to allow the plaintiff to
19 quote/unquote, recover sums as attorney's fees
20 that it's never incurred as attorney's fees.
21 Should the defendants have to pay more
22 attorney's fees than the plaintiff has had to
23 pay for plaintiff's counsel to take the
24 defendants house away? That's not a reasonable
25 interpretation and these fees aren't a

1 reasonable amount in any event. They're not
2 customary or reasonable. If, Your Honor, or Mr.
3 Stork here, were to come to me and say, I'd like
4 you to foreclose a mortgage, what would you
5 charge me to prosecute a default residential
6 mortgage foreclosure and I told you I'd have to
7 charge you a flat fee of \$5200.00, you'd
8 probably walk out of my office and think why
9 would that man demand such a high amount of
10 money in order to do this piece of work. That's
11 not customary. It's not what the market bares.
12 The purpose of a foreclosure case is not to
13 create debt in favor of the plaintiff but to
14 allow the plaintiff, if it's entitled to recover
15 debt, to recover the actual amount of the debt.
16 Now, here the complaint says that the plaintiff
17 is seeking to recover its collection cost
18 including attorney's fees. And that gets us in
19 to Rule 54(c), it says, a judgement by default
20 cannot exceed the amount sought in the
21 complaint. And it gets us in the realm of the
22 River Road versus Energy Masters Products case,
23 also cited in the memorandum. And that case
24 notes that a judgement that -- by default, that
25 exceeds what is sought in the Complaint is

1 quote, clearly unlawful, end quote and requires
2 relief. That judgement is void, it violates due
3 process. The defendants are on notice that
4 that's the kind of thing that's being sought
5 against them in a given case. And here, you
6 know, the plaintiff's counsel knew that the
7 attorney's fees weren't in the amount of
8 \$5200.00 but they represented to the court that
9 that's what the debt was. As to whether their
10 meritorious defenses, the question is just are
11 the defenses worthy of inquiry? I mentioned a
12 couple of the defenses in this case. One, the
13 plaintiff did not own mortgage at the time the
14 Action was commenced. Here you've got a
15 situation in which what we've got is a MERS, a
16 Mortgage Electronic Registration Systems
17 mortgage. The ownership of the note and the
18 ownership of the mortgage are split at the time
19 the mortgage is created. So even if the
20 plaintiff was the holder of the note at the time
21 that the case was commenced, it certainly did
22 not own the mortgage at the time the case was
23 commenced. Because the date -- and I'm not
24 talking about the recording date, I'm talking
25 about the date given on the document, is the

1 date that the assignment was done, is February
2 28th, 2012, after this case was commenced. And
3 our case law, Matson, Memorandum and Swell (ph)
4 notes that standing, the right to seek relief in
5 an action, is measured from the time that the
6 action has commenced. And here, at the time
7 this action was commenced, it's abundantly clear
8 Mortgage Electronic Registration Systems, who's
9 not the plaintiff, was still the owner of the
10 mortgage at that time. Further, here we've got
11 unclean hands. These people at EverHome
12 basically strang these defendants along,
13 thinking we're going to put you in a
14 modification only until they find out, after the
15 sale has happened, oh by the way, we're not
16 going to do that. Unclean hands is inequitable
17 conduct on the part of the party seeking relief
18 toward the other party that causes prejudice to
19 that party. And here we've got that so we've
20 certainly got unclean hands as a defense. Also
21 here we've got something, again, common
22 practice. Certainly not unique to foreclosures
23 that, Your Honors, ruled on but also not lawful.
24 What we've got here is a judgement -- it's a
25 continuing judgement and our Supreme Court said

1 that's not lawful either. This judgement
2 provides for its amount to increase and go up
3 for the plaintiff to be awarded still more
4 attorney's fees, if other things happen later.
5 A judgement is a final determination of the
6 rights of the parties. We certainly wouldn't
7 think it would be proper in a wreck case for the
8 plaintiff to come in put up evidence of damages
9 and receive a verdict and then come back later
10 and say oh, I've got more damages, up my
11 verdict. But that's what we've got here.
12 Further, the judgement provides for that to
13 happen without even a hearing being held, which
14 would violate due process in anything. Lastly,
15 there's no prejudice to the plaintiff who this
16 motion is granted. The plaintiff was a
17 successful bidder at the sale/ So it's not as
18 though we're dealing with a situation in which
19 there's some third party bidder who may be a
20 bonafide purchaser for value out there who says
21 hey, you're trying to affect my rights here, you
22 can't take this land away from me. We don't
23 have that here. This can be undone as easily as
24 it was done and it will put the plaintiffs
25 simply back in the position they were in before

1 the defendants became into default. And if the
 2 plaintiffs entitled to win this case, they'll
 3 win it. And if they're not, which we think
 4 they're not, they won't. And so that's not
 5 prejudice here. We don't have prejudice. The
 6 only argument the defendant makes about
 7 prejudice is we've spent money to get where we
 8 are. Now, in a similar context, the Court of
 9 Appeals recently rejected an argument that --
 10 that in a case that was bifurcated, where there
 11 were jury claims -- to be tried by a jury and
 12 foreclosure claim to be tried, that the
 13 plaintiff -- before closing plaintiff should get
 14 to go first and the plaintiffs argument was,
 15 well, we might incur the cost of maintaining the
 16 property and taxes while this is pending and the
 17 Court of Appeals said, well, that would be true
 18 in any foreclosure case. And so that's not
 19 prejudice. If the plaintiffs argument is this
 20 is going -- might cost us some money to go
 21 forward and continue to litigate this case,
 22 well, that would be true in any case in which a
 23 motion for relief from judgement is granted.
 24 And so if that's all you've got to show to
 25 defeat such a motion, there's no point in having

1 the rule that allows you to achieve relief from
2 a judgement. So we know that's not the law.
3 Here basically what we've got, is we've got
4 these people led to believe by this company,
5 we're going to help you. In fact, they send
6 them something saying if you make these three
7 payments we'll put you in a modification. If
8 you actually look at the document, that's not
9 what it says. It says, you know, if you make
10 these three payments we'll hold off doing
11 anything for three months and you're back
12 exactly where you were. They made the payments
13 in reliance on what was told to them and it's
14 put them where they are today. And so we note
15 that relief from the judgement is proper. I
16 won't belabor the memorandum, we sent it to Your
17 Honor, and we just incorporate it into our
18 arguments and if you don't have any further
19 questions for me right now, I'd be happy to let
20 Mr. Stork go ahead.

21 **THE COURT:** Mr. Stork.

22 **MR. STORK:** Okay. Thank you, Your Honor. I'm Will
23 Stork, I'm an attorney with Weston Adams Law
24 Firm. Regarding some of Mr. Radeker's
25 arguments, regarding the excusable neglect.

1 First off, Mr. Radeker states that in affidavit
2 form his clients have stated that the process
3 server on February 27th showed up to the
4 defendant's house, came in, sat inside, sat
5 down, drank some tea, told the defendants that
6 they had nothing to worry about with these
7 papers, they weren't any big deal and that
8 President Obama is coming out with a -- with a
9 program to save them. Now, the process server
10 is a gentleman named Jeff Costner, who's worked
11 with -- who works with ProVest Process Serving,
12 he's been a process server for over 26 years
13 now. He's a professional, he knows how to do
14 his job and he had signed an affidavit sworn
15 under oath that has been notarized that stated
16 that he has never entered into someone's house,
17 sat down at the table and had tea with them. He
18 has certainly never told any defendants that
19 President Obama is going to come out with a
20 program to save them. This gentleman is a
21 professional. He does his job. He takes pride
22 in his job and he has done his job for a very
23 long number of years. Now, if he were the sort
24 of process server who would go into someone's
25 house and make outrageous claims like you don't

1 need to worry about the Summons and Complaint,
2 would he still be serving papers 26 years into
3 his career? No, that would have been nipped in
4 the bud a pretty long time ago. That would be
5 the equivalent of malpractice on the part of an
6 attorney. And, you know, as Mr. Radeker knows,
7 as I know and as Your Honor knows, if an
8 attorney commits malpractice they're not going
9 to have a practice for very long. Now, Mr.
10 Radeker has provided, looks like two separate
11 Affidavits of Service here. The first Affidavit
12 of Service which was filed states that service
13 of process was upon Patrick Scurry but due to
14 what appears to be a scriveners error, they put
15 down the sex as female. If you would look at
16 the age, 41 to 45, the height approximately 6
17 feet and the weight approximately 212 pounds,
18 it's very obvious, Ms. Scurry, you are not 6
19 feet tall or 212 pounds. So having recognized
20 this scriveners error they would file the
21 Amended Affidavit of Service which is perfectly
22 allowable under our law and happens from time to
23 time, especially when you're doing something
24 like serving process, you have all these sort of
25 documents that you're doing. Every now and then

1 you slip up, you put something down in the wrong
2 column.

3 **THE COURT:** Are all those in the record? Are they
4 exhibits in the record?

5 **MR. RADEKER:** They're already in the record Your
6 Honor. I think they've already been on file so.

7 **MR. STORK:** Yes, Your Honor.

8 **MR. RADEKER:** So it should be on record, they're
9 filed with the court house.

10 **THE COURT:** Okay. All right. Are they in this
11 record today? Are you making them exhibits in
12 today's?

13 **MR. RADEKER:** We certainly can.

14 **THE COURT:** Well do that.

15 **MR. RADEKER:** We shall.

16 **MR. COURT:** Whatever they were. Let's do that.
17 Same one's you've got?

18 **MR. STORK:** Yes, Your Honor, the same ones.

19 **(Defendant's Exhibit Number Two and Three was marked**
20 **for identification purposes.)**

21 **MR. RADEKER:** And I'd already asked the Court
22 Reporter to do that with the proposed Answer and
23 Counterclaim.

24 **MR. STORK:** Ready for me to continue Your Honor?

25 **THE COURT:** Yes.

1 **MR. STORK:** Okay. Regarding the modification that
2 Mr. and Ms. Scurry say that they were being
3 reviewed for at the time of this action, we
4 filed our Certification of Compliance with the
5 South Carolina Administrative Order based on a
6 communication we got from our client EverHome on
7 February 6th, stating that there's been no --
8 let's see here, there's no active loss
9 mitigation review on this file. Now, according
10 to the May 2nd, 2011 Administrative Order issued
11 by Justice Toal, and the subsequent letter
12 issued by Desa Ballard, further -- let's see
13 here, further explaining that Administrative
14 Order, once the Certification of Compliance is
15 filed there is nothing stopping EverHome or the
16 Scurrys from continuing to seek a modification.
17 All the Certification of Compliance says is that
18 we went through the modification process or
19 we've attempted to contact them without any luck
20 and therefore we're in compliance with this
21 order. Now, once that -- once that -- once
22 again, once that Certification of Compliance is
23 filed that doesn't necessarily mean that any
24 sort of loss mitigation is completely and
25 totally off the table after that. Ms. Scurry

1 and Mr. Scurry were more than welcome to apply
2 again with EverHome in that regard and it
3 appears that they did. Now, in regards to
4 attorney's fees. It is up to the court to
5 decide what would be reasonable attorney's fees.
6 Now, I have cited in my plaintiffs memorandum
7 and I have a copy of the case for Mr. Radeker
8 and for Your Honor. Here you go Drew.

9 **MR. RADEKER:** Thank you.

10 **MR. STORK:** And, Your Honor. I'll put a little star
11 by the applicable law. There you are Your
12 Honor. Okay. Now, the South Carolina Supreme
13 Court held in the case Dedes v. Strickland, that
14 where the contract referring to the note
15 provides for reasonable attorney's fees, which
16 we have in this case. Without specifying a rate
17 or amount, which it did not, the issue of
18 attorney's fees is left to the discretion of the
19 trial judge and will not be reversed on appeal
20 unless a showing of abuse of discretion. Now,
21 regarding the standing issue, Your Honor, that
22 Mr. Radeker brought up. Standing in a
23 foreclosure would be governed by the South
24 Carolina Rules of Civil Procedure, specifically
25 Rule 17(a), which states that an action shall be

1 prosecuted in the name of the real party in
2 interest. Now, there's not law in the state of
3 South Carolina which states that in order to be
4 the real party of interest there has to be a
5 recorded assignment or even an executed
6 assignment. Essentially, what it means is that
7 you'd have to be a holder. Now, Mr. Radeker, in
8 his argument had stated that the assignment
9 wasn't executed before the date that this began
10 and the assignment wasn't executed -- or wasn't
11 recorded before the date that this action was
12 filed. Well, that's really just not at issue
13 here. At issue would be rather my client was a
14 holder and it would be up to Mr. Radeker to
15 prove that my client was not the holder, which
16 he has not done for this issue right now. Okay.
17 Now, regarding the continuing judgement that Mr.
18 Radeker was discussing, what we were referring
19 to in our pleadings would be the necessity for
20 a supplemental hearing, which is perfectly
21 common practice in foreclosure hearings and
22 happens really all the time. Now -- and also
23 regarding prejudice. Mr. Radeker has stated
24 that my client would not be prejudice by this
25 action if it were to be granted. Well, my

1 client had acted diligently in this foreclosure.
 2 My client had dotted all their I's and crossed
 3 all their T's as far as this goes. Mr. Radeker
 4 has stated that, you know, just money wouldn't
 5 matter. Well, my client has spent a large deal
 6 of money on this and not just in attorney's fees
 7 but also in insurance, in taxes, in time. Spent
 8 a large amount of time for this action. This
 9 has been over a year that this has been going
 10 on. Where will this end if we were to throw
 11 this out right now? You know, saying that oh,
 12 well, there would be no prejudice to our client
 13 because if they were entitled to foreclosure
 14 they could foreclose anyway. Well, that's very
 15 much though a slippery slope argument. Now,
 16 Your Honor, the defendants in this case haven't
 17 -- not -- let's see here real quick. Have not
 18 -- well, let's do it this way. They filed for
 19 bankruptcy in Nov- -- on November 5th, 2012 so
 20 therefore they knew that there was something
 21 that needed to be done to save this house to go
 22 on with something like this. So they would have
 23 some sort of idea about the judicial process.
 24 Now, I think that this bankruptcy filing would,
 25 you know, be evidence of that as well. Okay.

1 If you have any questions for me Your Honor, I'd
2 be happy to give my time.

3 **MR. COURT:** No.

4 **MR. STORK:** Okay.

5 **MR. RADEKER:** Thank you. Just briefly, I won't
6 rehash what I've already gone over. There is an
7 amount specified in the note what's recoverable
8 as attorney's fees and that's that the lender
9 may require borrower to pay cost and expenses
10 including reasonable and customary attorney's
11 fees.

12 **THE COURT:** Yes.

13 **MR. RADEKER:** So what's included is within this
14 broader category that's ---

15 **MR. COURT:** If the note and the mortgage is there, I
16 mean, they know the language and terms of those
17 documents are going to speak to what the rights
18 are with respect to cost, attorney's fees and
19 expenses that are provided in the mortgage about
20 what the holder can do if the borrower does not
21 do that those are recoverable cost and become
22 part of the mortgage debt.

23 **MR. RADEKER:** Yes.

24 **MR. COURT:** So the documents are going to deal with
25 that. Your problem seems to be that with

1 respect to the fees, it's not that they aren't
2 entitled to it, it's just too much.

3 **MR. RADEKER:** Well, when I say this is -- I don't
4 think they're entitled to it because I don't
5 think they're entitled to win the case. But if
6 they were entitled to win they were definitely
7 awarded too much in attorney's fees.

8 **THE COURT:** Okay. Right.

9 **MR. RADEKER:** So, if -- I'm not conceding that
10 that's the only issue but ---

11 **THE COURT:** Right.

12 **MR. RADEKER:** --- even if they were to totally
13 prove that they're entitled to win, they -- you
14 know, they did get awarded ---

15 **THE COURT:** Yeah.

16 **MR. RADEKER:** --- far greater amount in attorney's
17 fees than are recoverable under the loan. And
18 I'd say this too, on the issue of whether
19 EverBank was a holder of the note. Say, if I am
20 the owner of a note and mortgage and I transfer
21 the note to Mr. Stork and make him holder of
22 that note, there's law -- most other
23 jurisdictions really, that says that the
24 mortgage would go with that. But in a different
25 situation in which I am the owner of the note

1 and you are the owner, Your Honor, of the
2 mortgage that secures that note and I transfer
3 the note to Mr. Stork, it can't take ownership
4 for the mortgage from you because you're a third
5 party in that situation.

6 **THE COURT:** Yes.

7 **MR. RADEKER:** As to the process server being a
8 process server for 26 years, well, that also
9 means he's invested in remaining a process
10 server because that's probably about all he
11 really knows how to do for a living. I mean,
12 I've only been practicing law for not nearly
13 that long and I don't know what I would do if I
14 had to do something else. And he's invested in
15 making sure he continues his business with a
16 firm that brings a lot of foreclosure actions
17 and gives him a lot of paying work.

18 **THE COURT:** Yeah.

19 **MR. RADEKER:** So he's got some motivation to save --
20 -

21 **THE COURT:** I understand, I understand.

22 **MR. RADEKER:** And why would he have written female
23 on these affidavits if he didn't have any
24 interaction with Ms. Scurry.

25 **THE COURT:** Yeah, yeah.

1 **MR. RADEKER:** And that's really about all we have.

2 **MR. STORK:** Okay. Your Honor, if I could just re-
3 address real quick. Just a few things. I
4 believe I stated and I believe that if you take
5 a look at this female, it was really just a
6 scrivener's error on this. Ms. Scurry is not 6
7 feet tall, she's not 212 pounds.

8 **THE COURT:** You would agree with that?

9 **MR. RADEKER:** I would agree that she's not 6 feet
10 tall and 212 pounds.

11 **MR. STORK:** Absolutely.

12 **MR. RADEKER:** Unless she's denser than the average
13 person. I don't think she's made of lead or
14 anything.

15 **MR. STORK:** Okay. And also regarding our process
16 server having an interest to keep any sort of
17 business with our firm, we don't use ProVest
18 anymore. He has absolutely no interest
19 whatsoever. They were used by American Home
20 Mortgage ---

21 **MR. COURT:** That's not an issue for me.

22 **MR. STORK:** Okay. Thank you, Your Honor. And let's
23 see. And also, Your Honor, this really is just
24 getting too complicated as far as this goes.
25 The borrower signed a note and a mortgage. The

1 borrowers made a promise to pay that back. They
2 defaulted. Demand was made. My client is
3 entitled to return the property under the agreed
4 to contract, the agreed to note and mortgage.
5 That's all Your Honor.

6 **MR. COURT:** I understand the note and mortgage. I
7 understand what they do.

8 **MR. STORK:** Yes, Your Honor.

9 **MR. COURT:** Okay. And, the defense -- meritorious
10 defense that the rule requires to be shown is
11 basically -- well, I haven't read it all but it
12 sounds like there will be no assertion that the
13 defendants were not behind in paying the debt?

14 **MR. RADEKER:** That's right.

15 **THE COURT:** Would the defense have been that they're
16 talking to the bank about a modification?

17 **MR. RADEKER:** I think, probably. If this had been
18 answered at the outset. Probably the majority
19 of the defense would have centered on basically
20 a prove it defense saying you really didn't own
21 this mortgage at the time that you commenced
22 this action ---

23 **MR. COURT:** Okay. That would be your main defense?

24 **MR. RADEKER:** That would have been the defense at
25 that time. I mean, that would -- if they had

1 answered at that time that would have been
2 before a lot of these events occurred.

3 **MR. COURT:** All right. So if you -- right of the
4 party, is that part of -- would that be the part
5 of the defense -- that's the main defense?

6 **MR. RADEKER:** That -- if this had come into my office
7 ---

8 **MR. COURT:** Is that the main meritorious defense that
9 you would show that they have in support of the
10 Motion to Vacate?

11 **MR. RADEKER:** That would be the defense that we
12 raise to show that the plaintiff can't prove the
13 elements of their case. So anything else would
14 be an affirmative defense so.

15 **MR. STORK:** And, Your Honor, as far as that defense
16 would go, I don't know of a court in the state
17 that wouldn't let us sub in the real party in
18 interest once this thing started. I mean, that
19 once again, would also be common practice in the
20 courts as well, so I wouldn't really view that
21 as any defense anyway.

22 **THE COURT:** Well, okay.

23 **MR. RADEKER:** I'd say that's different. Now, you're
24 talking about -- it's one thing when the proper
25 party brings the suit and then the ownership of

1 the cause of that -- cause of the action changes
2 to somebody else. But that's not what we have.

3 **MR. STORK:** Well, and what we have isn't necessarily
4 that you've shown that that's a defense. You've
5 stated that at the outset that would've been the
6 defense that you would've brought. Now, and I
7 just don't believe that that would -- well, I
8 don't believe and my client doesn't believe,
9 that necessarily meets the Rule 60 bar. So, the
10 60(b) bar for that, sir.

11 **THE COURT:** Yes. Okay. So your position is that we
12 have the wrong plaintiff and that EverBank has no
13 standing?

14 **MR. RADEKER:** Nods affirmatively.

15 **THE COURT:** Okay. And the other defense would be
16 that the defendants are talking to EverBank about a
17 modification?

18 **MR. RADEKER:** And at this point, that they mislead
19 them about that.

20 **MR. COURT:** Okay. All right. And attorney's fees
21 are too much?

22 **MR. RADEKER:** Yes, sir. That's correct.

23 **MR. COURT:** Okay.

24 **MR. STORK:** Well, thank you, Your Honor.

25 **MR. RADEKER:** All right. Thank you, Your Honor.

(There being no further questions, the hearing was concluded at 2:35 p.m.)

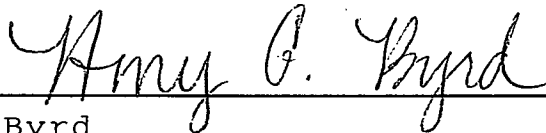
(Plaintiff's Exhibit Number One was marked for identification purposes following the conclusion of the hearing.)

CERTIFICATE

This is to certify that the within hearing consisting of Thirty-Three (33) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on June 6, 2013.



Amy G. Byrd
Court Reporter

Notary Public for South Carolina
My Commission Expires: 4/10/2023

COPY

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-36-103

EverBank,

Plaintiff,

vs.

Lenora Scurry, Patrick Scurry, The
South Carolina Department of Revenue,

Defendants.

ANSWER AND COUNTERCLAIM
(JURY TRIAL DEMANDED AS TO
MATTERS TRIABLE BY JURY)

Defendants Patrick Scurry and Lenora Scurry (hereinafter "the Defendants") in answer to the Plaintiff's Complaint and as counterclaim, answer and allege as follows:

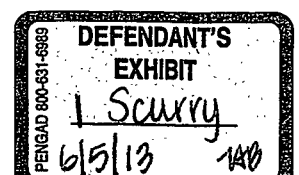
FOR A FIRST DEFENSE

1. Any allegation of the Complaint not herein admitted, qualified, or explained is denied. Any allegations of the Complaint subject of qualified admissions made herein are denied insofar as the allegations are not qualifiedly admitted, and any allegations of the Complaint subject of any other qualifications or explanations herein are denied insofar as they are not otherwise qualified or explained.

2. Answering the allegations of paragraph 1 of the Complaint, the Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the same.

3. Answering the allegations of paragraph 2 of the Complaint, the Defendants admit the same.

4. Answering the allegations of paragraph 3 of the Complaint, the Defendants admit the same as to themselves.



5. Answering the allegations of paragraphs 4 and 5 of the Complaint, the Defendants admit the same to the extent the allegations are consistent with the note document and mortgage document.

6. Answering the allegations of paragraph 6 of the Complaint, the Defendants admit the mortgage document appears to have been recorded at the book and page number given on the date given, but the Defendants deny the remaining allegations of the paragraph. No such assignment had occurred at the time of the filing of the Complaint.

7. Answering the allegations of paragraph 7 of the Complaint, the Defendants deny the same as written. The mortgagee was Mortgage Electronic Registration Systems, Inc., which has never advanced any money to or on behalf of the Defendants.

8. Answering the allegations of paragraph 8 of the Complaint, the Defendants deny the same.

9. Answering the allegations of paragraph 9 of the Complaint, the Defendants admit the same to the extent the allegations are consistent with the note document.

10. Answering the allegations of paragraph 10 of the Complaint, the Defendants deny the same.

11. Answering the allegations of paragraph 11 of the Complaint, the Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the same.

12. Answering the allegations of paragraph 12 of the Complaint, the Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the same.

13. Answering the allegations of paragraph 13 of the Complaint, the Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the same.

14. Answering the allegations of paragraph 14 of the Complaint, the Defendants admit the same.

15. Answering the allegations of paragraph 15 of the Complaint, the Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the same.

16. No answer to the prayer in the Complaint is required.

FOR A SECOND DEFENSE

17. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

18. The Plaintiff, itself and/or by and through its agents and servants, has engaged in such conduct with respect to the loan subject of this action as to make the Plaintiff's hands unclean with regard to the matters subject of this action.

19. This conduct includes, but is not necessarily limited to, representing to the Defendants that they were being processed for a modification and that they should continue in that vein when the Plaintiff was proceeding with a foreclosure action.

20. This conduct includes, but is not necessarily limited to, leading the Defendants to believe they were entering into a three-month trial period plan that would result in a modification of the mortgage loan at issue if the Defendants made the payments thereunder, then failing to honor that representation.

21. This conduct relates directly to the subject matter of this action.

22. The said conduct has proximately caused the Defendants prejudice and injury.

FOR A THIRD DEFENSE

23. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

24. The Plaintiff, itself and/or by and through its agents and servants, has engaged in conduct that was calculated to convey the impression to the Defendants that the status of the matters subject of this action are not as the Plaintiff claims, including, but not necessarily limited to, conduct calculated to convey the impression to the Defendants that the Plaintiff was working toward a modification of the loan at issue, as well as conduct calculated to get Defendants to believe they were entering into a three-month trial period plan that would result in a modification of the mortgage loan at issue if the Defendants made the payments thereunder.

25. The Plaintiff, itself and/or by and through its agents and servants, intended, or at least expected or desired, that the Defendants would rely upon the impressions conveyed by this conduct.

26. The Plaintiff knew that the status of those matters could not be both as it represented to the Defendants and as it has claimed in this case.

27. The Defendants lacked the means to determine the true status of these matters.

28. The Defendants accordingly relied on these representations to their prejudice.

FOR A FOURTH DEFENSE

29. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

30. The Plaintiff has no standing to bring this case.

31. The Plaintiff, upon information and belief, does not own the note subject of this case.

32. The Plaintiff, upon information and belief, does not own the mortgage subject of this case.

33. At most, the Plaintiff acquired from Mortgage Electronic Registration Systems, Inc., its nominee status with respect to the loan at issue.

34. Further, no assignment of the mortgage to the Plaintiff existed at the time of the commencement of this action.

FOR A FIFTH DEFENSE

35. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

36. The note and mortgage at issue were created through a process designed to deprive registers of deeds and clerks of court (and, here, the Newberry County Clerk of Court) of their lawful fees for the recording of mortgage assignments.

37. The note and mortgage are void for illegality.

FOR A SIXTH DEFENSE AND AS COUNTERCLAIM

38. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

39. Actions of the Plaintiff itself and/or by and through its agents and servants, such actions including, but not necessarily being limited to, those stated in this pleading, constitute violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*

40. The Plaintiff knew or should have known that the said actions were violations of the Unfair Trade Practices Act and were unfair and deceptive acts in trade or commerce.

41. These actions are capable of repetition, including, but not necessarily limited to, in that the Plaintiff and its predecessors, if any, is a lender and mortgage servicer that engages in collection practices and brings and directs mortgage foreclosure actions.

42. The Defendants have suffered damages as a result of the said actions.

43. The Defendants are entitled to treble damages, reasonable attorney's fees, and costs.

FOR A SEVENTH DEFENSE AND AS COUNTERCLAIM

44. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

45. The Plaintiff, itself and/or by and through its agents and servants, represented that it would be providing the Defendants with a trial period plan calling for them to make three payments and that, if they made the payments, the Plaintiff would offer them a permanent modification.

46. This representation was material to the Defendants' entry into a forbearance agreement (provided by the Plaintiff under circumstances calculated to cause the Defendants to believe that the forbearance agreement document was a document memorializing the trial period plan agreement) that did nothing for the Defendants and only caused them to pay the Plaintiff money in exchange for what has amounted to nothing. Relying on the Plaintiff's representation, the Defendants signed the forbearance agreement and made the payments called for thereunder believing, because of these representations, that this would result in a permanent modification of their mortgage loan.

47. The Plaintiff made these representations for the purpose of inducing the Defendants to enter into the forbearance agreement and pay the Plaintiff money even while it continued to prosecute this foreclosure action.

48. These representations were false.

49. The Defendants did not know the representations were false, and they could not reasonably have known they were false.

50. The Plaintiff knew that these representations were false. The Plaintiff never intended to offer the Defendants a modification.

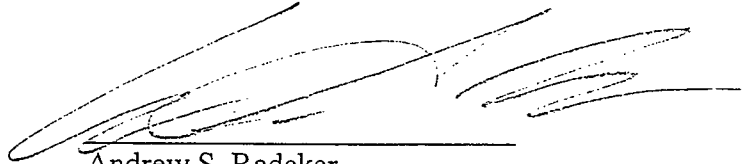
51. The Defendants had a right to rely on the Plaintiff's representations. The Defendants had no reasonable means of independently ascertaining whether the Plaintiff would be doing as it represented it would do.

52. The Defendants' reliance on the Plaintiff's representations has proximately and consequently caused them injury and damage, such including, but not necessarily limited to, in that their entry into and payments under the forbearance agreement have not resulted in a modification of the mortgage loan at issue.

WHEREFORE, the Defendants pray for the Court to:

- (a) Issue an Order dismissing the Complaint with prejudice;
- (b) Deny the Plaintiff the relief it seeks in this action;
- (c) Award the Defendants actual damages, punitive damages, treble damages, and all applicable statutory penalties;
- (d) Award the Defendants reasonable attorney's fees;
- (e) Award the Defendants the costs and expenses of this action; and
- (f) Grant the Defendants such other and further relief as the court deems just and proper.

Respectfully submitted,



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

ATTORNEY FOR DEFENDANTS
PATRICK AND LENORA SCURRY

Columbia, South Carolina
June 5, 2013

Affidavit of Service

DOCKET NUMBER: 2012 CP-36-00103FILE NUMBER: LENORA SCURRYCOURT OF COMMON PLEAS FOR NEWBERRY COUNTY, SC

CASE STYLE:

PLAINTIFF EVERBANK; et seq.

vs.

DEFENDANT LENORA AND PATRICK SCURRY, ET AL.SERVICE OF PROCESS ON: PATRICK SCURRY

METHOD OF SERVICE: A true and correct copy of the above-described papers were served on the below-named party in the following manner:

☒ (PERSONAL) By personally delivering a copy into the hands of the person to be served.PLACE OF SERVICE: 1360 NURSERY ROAD
LITTLE MOUNTAIN, SC 29075Is the place of service the dwelling house or usual place of abode for the party being served? ☒ Yes ☐ NoDATE OF SERVICE: 02/27/2012 TIME OF SERVICE: 6:00 PMTYPE OF DOCUMENTS: ☒ SUMMONS & COMPLAINT ☒ LIS PENDENS
☒ OTHER: NOTICE OF FORECLOSURE INTERVENTION

DESCRIPTION OF PARTY RECEIVING DOCUMENTS: The person receiving the documents is described as follows:

Sex FEMALE; Race BLACK; Facial Hair No;
Age(prox.) 41-45; Height(prox.) 6' 0"; Weight(prox.) 212MARITAL STATUS: ☐ Single ☒ Married ☐ Separated ☐ UnknownMILITARY STATUS: PER MY INVESTIGATION, SAID PERSON
☐ WAS ☒ WAS NOT ENGAGED IN THE U.S. MILITARY AT THE TIME OF SERVICE ☐ UNKNOWN
MILITARY BRANCH, IF APPLICABLE:IS THE SUBJECT PROPERTY ☐ YES ☒ NO ☐ MOBILE HOME VIN NOT VISIBLE
A MOBILE HOME? VIN #:

COMMENTS:

SCANNED

Signature of Process Server: The undersigned declares, under penalty of perjury, that the foregoing is true and correct and that the deponent is over the age of 18 and is not a party to nor interested in this action.

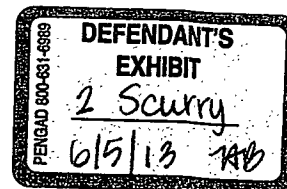
NAME: Jeff Costner

Signature of Process Server

Date

2/27/2012STATE OF South CarolinaCOUNTY OF RichlandSworn and subscribed before me this 27th day of February in the year of 2012.☒ Personally known to me or ☐ identified by the following document:

Type: _____ Number/Reference: _____

Rhonda Costner Notary Public for South Carolina
Notary Public (Legal Signature)
Commission Expiration July 15, 2012

Affidavit of Service

DOCKET NUMBER: 2012 CR-36-00103FILE NUMBER: LENORA SCURRYCOURT OF COMMON PLEAS FOR NEWBERRY COUNTY, SC

CASE STYLE:

PLAINTIFF

EVERBANK, et seq.

vs.

DEFENDANT

LENORA AND PATRICK SCURRY, ET AL.SERVICE OF PROCESS ON: LENORA SCURRY

METHOD OF SERVICE: A true and correct copy of the above-described papers were served on the below-named party in the following manner:

☒ (SUBSTITUTE) By leaving a copy at dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.PLACE OF SERVICE: 1360 NURSERY ROAD
LITTLE MOUNTAIN, SC 29075Is the place of service the dwelling house or usual place of abode for the party being served? ☒ Yes ☐ NoDATE OF SERVICE: 02/27/2012 TIME OF SERVICE: 6:00 PMTYPE OF DOCUMENTS: ☒ SUMMONS & COMPLAINT ☒ LIS PENDENS
☒ OTHER: NOTICE OF FORECLOSURE INTERVENTION

DESCRIPTION OF PARTY RECEIVING DOCUMENTS: The person receiving the documents is described as follows:

Name PATRICK SCURRY; Relationship/Title SPOUSESex FEMALE; Race BLACK; Facial Hair No;Age(prox.) 41-45; Height(prox.) 6' 0"; Weight(prox.) 212MARITAL STATUS: ☐ Single ☒ Married ☐ Separated ☐ UnknownMILITARY STATUS: PER MY INVESTIGATION, SAID PERSON
☐ WAS ☒ WAS NOT ENGAGED IN THE U.S. MILITARY AT THE TIME OF SERVICE ☐ UNKNOWN
MILITARY BRANCH, IF APPLICABLE:IS THE SUBJECT PROPERTY ☐ YES ☒ NO ☐ MOBILE HOME VIN NOT VISIBLE
A MOBILE HOME? VIN #:

COMMENTS:

FILED
NEWBERRY COUNTY
2012 FEB 28 A 8:26
JACQUE S. BOWERS
CLERK OF COURT

Signature of Process Server: The undersigned declares, under penalty of perjury, that the foregoing is true and correct and that the deponent is over the age of 18 and is not a party to nor interested in this action.

NAME: Jeff Costner

Signature of Process Server

Date

2/27/2012

STATE OF

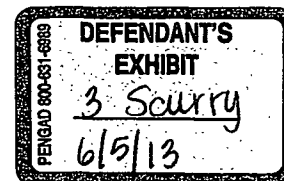
South Carolina

COUNTY OF

RichlandSworn and subscribed before me this 27 day of February in the year of 2012☒ Personally known to me or ☐ identified by the following document:

Type:

Number/Reference:

Rhonda Costner Notary Public for South Carolina
Notary Public (Legal Signature)
Commission Expiration July 15, 2012

Source: My Sources > South Carolina > Find Cases > SC State Cases, Combined

Terms: elements w/s foreclosure (Suggest Terms for My Search)

☛ Select for FOCUS™ or Delivery

└

*307 S.C. 155, *, 414 S.E.2d 134, **;
1992 S.C. LEXIS 39, ***; 43 A.L.R.5th 847*

George P. Dedes, Respondent, v. Bobby W. Strickland, Northwoods Auto Sales, Inc., BWS Enterprises, a South Carolina General Partnership, First Federal Savings & Loan Association of South Carolina and Georgia-Pacific Investment Company, Defendants, of whom First Federal Savings and Loan Association of South Carolina is Appellant-Respondent, and Bobby W. Strickland is Respondent-Appellant.

Opinion No. 23569

SUPREME COURT OF SOUTH CAROLINA

307 S.C. 155; 414 S.E.2d 134; 1992 S.C. LEXIS 39; 43 A.L.R.5th 847

March 6, 1991, Heard
February 10, 1992, Filed

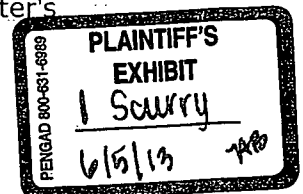
PRIOR HISTORY: [***1] Appeal From Charleston County. Louis E. Condon, Master-In-Equity

DISPOSITION: AFFIRMED IN PART; REMANDED IN PART

CASE SUMMARY

PROCEDURAL POSTURE: Appellants, a bank and a debtor, sought review of the decision of the a master-in-equity, Charleston County (South Carolina), which found that a real estate mortgage of respondent creditor held priority over the bank's mortgage on the same property.

OVERVIEW: The bank loaned \$ 175,000 to the debtor secured by a mortgage on several parcels of real estate. The creditor then loaned \$ 275,000 to the debtor and his partnership. The loan was secured by a mortgage on the same real estate. The bank refinanced the balance remaining on the loan, satisfied the mortgage, and recorded the satisfaction. The debtor executed a new mortgage on the identical properties. The creditor instituted a **foreclosure** action against the debtor and the bank. The master found that the bank failed to meet the **elements** required to invoke equitable subrogation. The master determined that the creditor's mortgage was superior in priority to the bank's mortgage. The court affirmed the judgment and held that the bank paid itself the debtor's outstanding debt by refinancing the balance owed and that there was no showing of any direct interest necessitating discharge of the debt. Thus, the creditor reasonably anticipated that once the bank's first note was paid, his mortgage would become a first lien superior to any subsequent mortgage. However, due to a related appeal reversing part of the master's



decision, the issue of attorney fees was remanded for recomputation.

OUTCOME: The court affirmed the decision holding the creditor's lien superior and remanded the issue of attorneys fees.

CORE TERMS: mortgage, attorneys' fees, acre tract, foreclosure, real estate, equitable subrogation, collection, recorded, abuse of discretion, mortgage holder, lienholder, direct interest, legal services, subrogated, equitably, notice, mortgage lien, affirmative defense, principal amount, master-in-equity, satisfaction, cancellation, refinancing, outstanding, injustice, ignorance, securing, loaned, parcel, misled

LEXISNEXIS® HEADNOTES

≡ Hide

Insurance Law > Claims & Contracts > Subrogation > Voluntary Payment 

Real Property Law > Financing > Secondary Financing > Lien Priorities 

Real Property Law > Nonmortgage Liens > Lien Priorities 

HN1 The elements necessary to establish the right to be equitably subrogated are as follows: (1) The party claiming subrogation has paid the debt. (2) The party was not a volunteer but had a direct interest in the discharge of the debt or lien. (3) The party was secondarily liable for the debt or for the discharge of the lien. (4) No injustice will be done to the other party by the allowance of the equity. Additionally, the party asserting the doctrine must not have had actual notice of the prior mortgage. More Like This Headnote | *Shepardize*: Restrict By Headnote

Civil Procedure > Appeals > Costs & Attorney Fees 

Contracts Law > Contract Conditions & Provisions

HN2 With regard to the notes which provide for attorneys fees at a specific rate in the event collection becomes necessary, it is a well established principle of law that where there is a contract providing for such, the amount of attorneys fees is governed by the contract. More Like This Headnote | *Shepardize*: Restrict By Headnote

Civil Procedure > Judicial Officers > Judges > Discretion 

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion 

Contracts Law > Contract Conditions & Provisions

HN3 Where the contract provides for "reasonable" attorneys fees without specifying a rate or amount, the issue of attorneys fees is left to the discretion of the trial judge and will not be reversed on appeal unless there is a showing of abuse of discretion. Factors to be considered by the trial court in making a determination as to attorneys fees are: (1) The nature, extent and difficulty of the legal services rendered; (2) The time and

labor necessarily devoted to the case; (3) The professional standing of counsel; (4) The contingency of compensation; (5) The fee customarily charged in the locality for similar legal services; and (6) The beneficial results obtained. More Like This Headnote |
Shepardize: Restrict By Headnote

COUNSEL: John R. Chase, of Florence, for appellant-respondent.

Joseph F. Kent, of Charleston, for respondent-appellant.

Lawrence E. Richter, Jr.; and Thad H. Vincent, both of Charleston, for respondent.

JUDGES: FINNEY, GREGORY, HARWELL, CHANDLER, TOAL

OPINION BY: FINNEY

OPINION

[*157] [135]** FINNEY, A.J.: Appellant-Respondent First Federal Savings and Loan Association v. of South Carolina (First Federal) appeals from the master-in-equity's finding that a real estate mortgage of Respondent George P. Dedes' held priority over First Federal's mortgage on the same property. We affirm in part and remand in part.

On February 27, 1986, First Federal loaned \$ 175,000 to Respondent-Appellant Bobby W. Strickland secured by a mortgage on several parcels of real estate, including the 1.72 acre tract which is the subject of this controversy. First Federal's mortgage was recorded March 3, 1986.

On August 10, 1987, Dedes loaned \$ 275,000 to Strickland and BWS Enterprises, a General Partnership, of which Strickland was a general partner. The loan was secured **[***2]** by a mortgage on real estate, including the same 1.72 acre tract. Dedes' mortgage was recorded August 25, 1987. Concurrent with the execution of the note and mortgage, Strickland, as President of Northwoods Auto Sales, Inc., entered an agreement to execute and deliver within six months a mortgage on another parcel of land as additional security for the loan.

On February 5, 1988, First Federal refinanced the balance of approximately \$ 167,512 remaining on the loan Strickland obtained February 27, 1986, satisfied the mortgage, and recorded the satisfaction. Strickland executed a new note dated February **[**136]** 5, 1988, and another mortgage of even date on the identical properties, including the 1.72 acres. The mortgage was recorded February 10, 1988.

On December 19, 1988, Dedes instituted this foreclosure action against Strickland, First Federal, and the other named defendants seeking foreclosure on real estate securing debts owed him by Strickland, including the 1.72 acre tract in question.

First Federal answered, and subsequently moved to amend its Answer to assert as a second and affirmative defense the doctrine of equitable subrogation as to its mortgage on the 1.72 acre tract. The trial **[***3]** court ruled that First Federal's Answer should be treated in all respects as if the affirmative **[*158]** defense of equitable subrogation had been asserted *ab initio* "if First Federal shall prove to the satisfaction of the court that it is entitled to assert such defense . . ." This and other issues were referred with finality to the master-in-equity.

The master held a hearing and found that First Federal had failed to meet the four elements required to invoke the doctrine of equitable subrogation. As a result, the master (a) awarded attorneys' fees to Dedes in the amount of \$ 103,710.52; (b) determined that Dedes' mortgage on the 1.72 acre tract was superior in priority to First Federal's mortgage; (c) held that Dedes was entitled to foreclosure; and (d) directed a sale of the security properties, including the 1.72 acre tract.

First Federal and Strickland appealed. A supersedeas bond for the appeal of First Federal was approved and the sale of the 1.72 acre tract was stayed pending disposition of the appeal.

On appeal, First Federal alleges the master erred in the following particulars:

1. In failing to hold that First Federal was entitled to be equitably subrogated to a first mortgage *****4** position superior to Dedes on the 1.72 acre tract.
2. In determining that unusual procedure was utilized by First Federal in refinancing Strickland's debt.
3. In awarding Dedes attorneys' fees of \$ 103,710.52.

We disagree.

In *Pee Dee State Bank v. Prosser*, 295 S.C. 229, 367 S.E.2d 708, 712 (S.C. App. 1988), our Court of Appeals cited the elements necessary to establish the right to be equitably subrogated. ^{HN1} They are as follows:

1. The party claiming subrogation has paid the debt.
2. The party was not a volunteer but had a direct interest in the discharge of the debt or lien.
3. The party was secondarily liable for the debt or for the discharge of the lien.
4. No injustice will be done to the other party by the allowance of the equity.

Additionally, the party asserting the doctrine must not have had actual notice of the prior mortgage. *Id.*

[*159] We conclude that this record supports the master's finding that First Federal's proof fails to meet the test for entitlement to equitable subrogation. First Federal paid itself Strickland's outstanding debt by refinancing the balance owed. There is no showing of any direct interest necessitating *****5** discharge of the debt or lien. The record is silent as to what secondary liability First Federal could have had for Strickland's debt secured by its own first mortgage lien. Dedes could reasonably anticipate that once First Federal's 1986 note was paid and the mortgage satisfied, his mortgage would become a first lien superior to any subsequent mortgage. In our view, Dedes would suffer a grave injustice if First Federal were restored to priority lienholder under these circumstances.

First Federal asserts that its 1988 loan to Strickland was made upon the strength of representations by Strickland's attorney that the 1988 mortgage would constitute a first lien on the subject property. First Federal claims lack of notice, in that it did not discover the

existence of Dedes' mortgage until after its 1986 mortgage was satisfied, and relies upon *Maxwell v. Epton*, 177 S.C. 184, 181 S.E. 16 (1935).

[137]** The facts in *Maxwell* are distinguishable. In *Maxwell*, this Court held that a private mortgage holder was entitled to have a cancellation invalidated and his mortgage reinstated to its prior position where the subsequent mortgage holder would not be injured **[***6]** by such restoration. There, the mortgage holder asserted that he had been misled, and the master found that the cancellation was due to mistake and ignorance of the existence of a subsequent mortgage.

To the contrary, there is no allegation that the conduct of Dedes misled or contributed to First Federal's ignorance of Dedes' mortgage at the time First Federal extinguished its first mortgage lien. Furthermore, we would not construe as a mistake the failure of First Federal, a commercial lender, to search the appropriate records and ascertain the existence of other liens. This Court does not find an abuse of discretion on the part of the master. Accordingly, we affirm his holding that Dedes occupies the position of priority lienholder superior to First Federal.

[*160] First Federal also argues that the master abused his discretion in allowing attorney fees in the amount of \$ 103,710.52.

In this action, Dedes sought foreclosure on properties securing several loans by Dedes to Strickland. The notes for the respective loans contained provisions for attorneys fees as follows:

Note dated August 10, 1987, for the principal amount of \$ 175,000. All costs and reasonable attorney's fees not less **[***7]** than ten (10%) percent of the amount involved in the event of foreclosure.

Note dated May 24, 1988, for the principal amount of \$ 205,000. All costs and expenses of the collection of this note including reasonable attorney's fees of not less than fifteen (15%) percent of the outstanding principal and interest.

Promissory Note Agreement dated November 2, 1988, evidencing indebtedness of \$ 100,500. In the event the document was placed in the hands of an attorney for collection, all costs of collection together with reasonable attorney's fees would be paid by Strickland.

^{HN2} ¶ With regard to the notes which provide for attorneys fees at a specific rate in the event collection becomes necessary, it is a well established principle of law that where there is a contract providing for such, the amount of attorneys fees is governed by the contract.

^{HN3} ¶ Where the contract provides for "reasonable" attorneys fees without specifying a rate or amount, the issue of attorneys fees is left to the discretion of the trial judge and will not be reversed on appeal unless there is a showing of abuse of discretion. Factors to be considered by the trial court in making a determination as to attorneys **[***8]** fees are:

1. The nature, extent and difficulty of the legal services rendered;
2. The time and labor necessarily devoted to the case;
3. The professional standing of counsel;
4. The contingency of compensation;

5. The fee customarily charged in the locality for similar legal services; and

6. The beneficial results obtained.

[*161] *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989). The record reflects that the master gave ample consideration to the foregoing and other factors in determining the attorneys' fee award. We do not find an abuse of discretion by the master in making the attorneys fee determination.

However, other issues in this action relating to foreclosure were separately and simultaneously appealed to this Court, which reversed and remanded. *Dedes v. Strickland*, Op. No. 23568 (S.C. Sup. Ct. filed 2/10/92). Hence, the issue of attorney fees is remanded for recomputation in accordance with the final disposition of the case.

Accordingly, we affirm so much of the master's report as holds that Dedes occupies the position of first mortgage lienholder and remand the issue of attorneys fees.

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

EverBank

Plaintiff,

v.

Lenora Scurry, Patrick Scurry, The South
Carolina Department of Revenue,

Defendants.

EIGHTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS
C/A No.: 2012-CP-36-103

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
MOTION TO VACATE JUDGMENT
AND SALE**

Introduction

The instant action is an action for foreclosure of property located in Newberry County, South Carolina. The Plaintiff initiated this action on February 27, 2012. On May 30, 2012, counsel for the Plaintiff filed an Affidavit of Default indicating that the only Defendant to submit an Answer in this action is The South Carolina Department of Revenue and the matter was referred to the Honorable Joseph Hudgens as Special Referee for Newberry County on that same date. On March 11, 2013, a Special Referee's Order and Judgment of Foreclosure and Sale was filed, and on April 1, 2013 the subject property was sold at auction with the Plaintiff as the high bidder. The Defendants Lenora Scurry and Patrick Scurry (hereinafter referred to as the "Defendants") submitted the instant motion for relief from judgment and to vacate the sale on April 26, 2013.

The Defendants' motion seeks to set aside the entry of the foreclosure judgment on the basis of generally citing Rule 60(b). This memorandum will reflect that the Defendants' have not presented evidence which entitles them to relief from the foreclosure judgment, nor have they demonstrated the existence of a meritorious defense. Given these shortcomings, the Defendants' motion fails as a matter of law and should be denied and the Master in Equity's Order of Judgment of Foreclosure and Sale should remain in full force and effect.

Law/Discussion

A more rigorous standard is applied in determining whether relief should be granted from a default judgment pursuant to Rule 60(b) than that of Rule 55(c), which provides that an entry of default may be set aside for "good cause shown". *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E. 2d

535. Further, the burden of presenting evidence entitling them to relief from the foreclosure judgment rests with the Defendants. *Lanier v. Lanier*, 364 S.C. 211, 612 S.E.2d 456 (Ct. App. 2005). In addition to having the burden of presenting evidence which shows that the Defendants are entitled to the requested relief, in order to obtain relief from a default judgment the Defendants must also show a meritorious defense. *Tri-County Ice and Fuel v. Palmetto Ice*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

Service

On February 27, 2012, Patrick Scurry was personally served and Lenora Scurry was served by leaving a copy of the summons and complaint with Patrick Scurry in accordance with Rule 4(d)(1). On March 6, 2012 counsel for Plaintiff filed Affidavits of Service for Patrick Scurry and Lenora Scurry which are included as **Exhibit A1 and A2**. Defendants have stated in an affidavit filed with the court that the process server entered their home, told them that the papers were nothing to worry about, and stated that President Obama was going to come out with a program to help homeowners.

The process server in question is Jeff Costner. Mr. Costner is a 26 year veteran process server. At no time in his long career has he ever told anyone he served that the summons and complaint were "nothing to worry about," or that President Obama was coming out with a plan to help homeowners. In an affidavit marked **Exhibit B** Mr. Costner swears under oath that none of these allegations are true and that the service of process in this matter was done in the same professional manner which he has conducted himself for the past 26 years.

Even if Mr. Costner had made these statements and committed these actions, this is not a meritorious defense to the underlying foreclosure action. The borrower raises no claims regarding the loan origination, servicing of the loan, collection of payments, or compliance with the terms of the note or mortgage. The underlying action is a foreclosure action, and no defenses to the underlying action have been brought. Since a meritorious defense is required for a Rule 60(b) motion to be successful, and since no meritorious defense to the foreclosure action has been identified in the Defendant's pleadings, this Rule 60(b) motion fails as a matter of law.

Attorney's Fees

Defendants additionally claim that the award of attorney's fees was too high. This also is not a meritorious defense to a foreclosure action and is not grounds to vacate a judgment under Rule 60(b). Attorney's fees are governed by the contract entered into by the mortgagor and

mortgagee. In the note attached as **Exhibit C** the contract clearly states that in the event of default the mortgagor may be required to pay reasonable attorney's fees. What amount is considered "reasonable" is left to the discretion of the trial judge. *Dedes v. Strickland*, 303 S.C. 155, 160, 414 S.E.2d 134, 137 (1992).

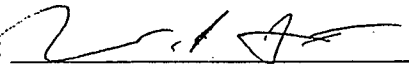
The current case was heard on March 8, 2013 and at that hearing the amount of \$5,200.00 in attorney's fees was requested. At the March 8, 2013 hearing, Judge Hudgens fully reviewed all the debt figures and determined that \$5,200.00 was a reasonable amount of attorney's fees. The only exhibit which Defendants have provided to counter the reasonableness of this attorney's fees award is an affidavit from Sean M. French who currently specializes in foreclosure defense. Given Mr. French's current specialty it is not surprising that he is willing to state that a firm is only entitled to the unreasonably low amount \$1000 per case. Additionally, the affidavit sworn to by Mr. French was drafted specifically for another case and is totally unrelated to this particular case. As such, the relevance of this affidavit is extremely questionable for this current matter. Given the amount of time put into this file, the amount of documents which were drafted, the preparation for the hearing, the attendance of the hearing, and the post foreclosure legal work, the amount of \$5,200.00 is a reasonable attorney's fee award.

The Defendants have offered no evidence which show that they are entitled to relief under Rule 60(b). No meritorious defense has been raised which would allow for relief under Rule 60(b). Additionally, the Plaintiff would be prejudiced by the granting of the Defendant's motion as it has acted diligently and expensed time and attorney's fees in order to bring this action to a conclusion. As such, the Defendants' motion should be denied.

CONCLUSION

The Defendants were properly served pursuant to the South Carolina Rules of Civil Procedure, attorney's fees were awarded in accordance with South Carolina law, and the Defendants have offered no showing that a meritorious defense exists to the Plaintiff's action for foreclosure. Further, the Plaintiff would be highly prejudiced by the granting of the Defendant's motion. As a result, the Defendant's motion to vacate judgment and sale should be denied.

WESTON ADAMS LAW FIRM
Post Office Box 291
Columbia, South Carolina 29202
Telephone: (803) 254-1675

By: 
Weston Adams
Leigh B. Brown
Caroline R. Glenn
William P. Stork
Attorneys for the Plaintiff

Dated: May 29, 2013
Columbia, South Carolina



COPY

Amended
Affidavit of Service

DOCKET NUMBER: 12-CP-36-0103
COURT OF COMMON PLEAS FOR NEWBERRY COUNTY, SC
CASE STYLE:

FILE NUMBER: LENORA SCURRY

PLAINTIFF EVERBANK; et seq.
vs.
DEFENDANT LENORA AND PATRICK SCURRY, ET AL,
SERVICE OF PROCESS LENORA SCURRY
ON:

METHOD OF SERVICE: A true and correct copy of the above-described papers were served on the below-named party in the following manner:

☒ (SUBSTITUTE) By leaving a copy at dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

PLACE OF SERVICE: 1360 NURSERY ROAD
LITTLE MOUNTAIN, SC 29075

Is the place of service the dwelling house or usual place of abode for the party being served? ☒ Yes ☐ No

DATE OF SERVICE: 02/27/2012 TIME OF SERVICE: 6:00 PM

TYPE OF DOCUMENTS: ☒ SUMMONS & COMPLAINT ☒ LIS PENDENS
☒ OTHER: NOTICE OF FORECLOSURE INTERVENTION

DESCRIPTION OF PARTY RECEIVING DOCUMENTS: The person receiving the documents is described as follows:

Name PATRICK SCURRY; Relationship/Title SPOUSE
Sex MALE; Race BLACK; Facial Hair No;
Age(prox.) 41-45; Height(prox.) 6' 0"; Weight(prox.) 212

MARITAL STATUS: ☐ Single ☒ Married ☐ Separated ☐ Unknown

MILITARY STATUS: PER MY INVESTIGATION, SAID PERSON
☐ WAS ☒ WAS NOT ENGAGED IN THE U.S. MILITARY AT THE TIME OF SERVICE ☐ UNKNOWN
MILITARY BRANCH, IF APPLICABLE:

IS THE SUBJECT PROPERTY A MOBILE HOME? ☐ YES ☒ NO ☐ MOBILE HOME VIN NOT VISIBLE
VIN #:

COMMENTS:

Signature of Process Server: The undersigned declares, under penalty of perjury, that the foregoing is true and correct and that the deponent is over the age of 18 and is not a party to nor interested in this action.

NAME: Jeff Costner

Signature of Process Server

Date

STATE OF

COUNTY OF

Sworn and subscribed before me this 5th day of March, in the year of 2012.
☒ Personally known to me or ☐ identified by the following document:

Type:

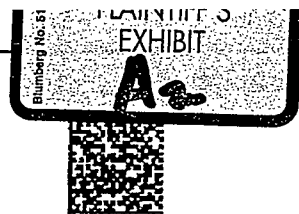
Number/Reference:

Rhondell Costner
Notary Public for South Carolina
Notary Public (Legal Signature)
Commission Expiration July 13, 2012

FILED
NEWBERRY COUNTY
2012 MAR - 6 P 12:25
JACKIE S. BOWERS
CLERK OF COURT

**COPY**

Affidavit of Service

Amended

DOCKET NUMBER: 12-CP-36-0103

FILE NUMBER: LENORA SCURRY

COURT OF COMMON PLEAS FOR NEWBERRY COUNTY, SC

CASE STYLE:

PLAINTIFF EVERBANK; et seq.

vs.

DEFENDANT LENORA AND PATRICK SCURRY, ET AL,

SERVICE OF PROCESS PATRICK SCURRY

METHOD OF SERVICE: A true and correct copy of the above-described papers were served on the below-named party in the following manner:

☒ (PERSONAL) By personally delivering a copy into the hands of the person to be served.PLACE OF SERVICE: 1369 NURSERY ROAD
LITTLE MOUNTAIN, SC 29075Is the place of service the dwelling house or usual place of abode for the party being served? ☒ Yes ☐ No

DATE OF SERVICE: 02/27/2012 TIME OF SERVICE: 6:00 PM

TYPE OF DOCUMENTS: ☒ SUMMONS & COMPLAINT ☒ LIS PENDENS
☒ OTHER: NOTICE OF FORECLOSURE INTERVENTION

DESCRIPTION OF PARTY RECEIVING DOCUMENTS: The person receiving the documents is described as follows:

Sex MALE; Race BLACK; Facial Hair No;
Age(prox.) 41-45; Height(prox.) 6' 0"; Weight(prox.) 212MARITAL STATUS: ☐ Single ☒ Married ☐ Separated ☐ UnknownMILITARY STATUS: PER MY INVESTIGATION, SAID PERSON
☐ WAS ☒ WAS NOT ENGAGED IN THE U.S. MILITARY AT THE TIME OF SERVICE
MILITARY BRANCH, IF APPLICABLE:IS THE SUBJECT PROPERTY A MOBILE HOME? ☐ YES ☒ NO ☐ MOBILE HOME VIN NOT VISIBLE
VIN#:

COMMENTS:

Signature of Process Server: The undersigned declares, under penalty of perjury, that the foregoing is true and correct and that the deponent is over the age of 18 and is not a party to nor interested in this action.

NAME: Jeff Costner

Signature of Process Server

Date

3/5/2012

STATE OF

South Carolina

COUNTY OF

*Richland*Sworn and subscribed before me this *5th* day of *March*, in the year of *2012*

Personally known to me or identified by the following document:

Type:

Number/Reference:

Shondale Costner

Notary Public for South Carolina

Notary Public (Legal Signature)

Commission Expiration July 15, 2012

FILED
NEWBERRY COUNTY
2012 MAR -6 P 2:25
JACKIE S. BOWERS
CLERK OF COURT



STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

EverBank

Plaintiff,

v.

Lenora Scurry, Patrick Scurry, The South Carolina
Department of Revenue,

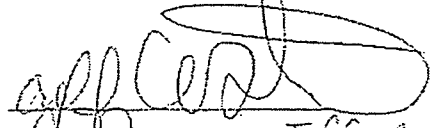
Defendant(s).

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT
C/A No.: 2012-CP-36-0103

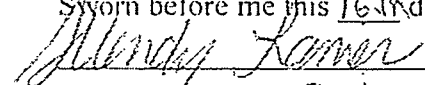
AFFIDAVIT OF JEFF COSTNER

Personally appeared before me, Jeff Costner who, after being duly sworn, does depose
and say as follows:

1. My name is Jeff Costner. I have personal knowledge of the facts set forth in this affidavit and am competent to testify about them.
2. I have been employed as a process server for 26 years.
3. I have never told anyone whom I have served that they do not have to worry about the legal documents they are being served with. I have never provided any form of advice to anyone whom I have served. I have never told anyone whom I have served that President Obama is coming out with a program to help homeowners.
4. In this particular instance, I served the husband, Patrick Scurry, personally and with papers for his wife Lenora Scurry. I did not meet Lenora Scurry, I only met Patrick Scurry. I served these papers at the front door. I did not go into the house and did not have any conversation with Patrick Scurry or Lenora Scurry.


(signature of affiant) Jeff Costner

Sworn before me this 16th day of May, 2013


Notary Public for South Carolina

My commission expires: 3/12/2023.



Loan No.: 3000069271
MIN: 100229330000692719

Multistate

NOTE

FHA Case No.
461-4877275-703

#9000791069

February 12, 2010

1360 NURSERY RD
LITTLE MOUNTAIN, SOUTH CAROLINA 29075
(Property Address)

1. PARTIES

"Borrower" means each person signing at the end of this Note, and the person's successors and assigns.
"Lender" means **PRIMARY CAPITAL ADVISORS LC** and its successors and assigns.

2. BORROWER'S PROMISE TO PAY; INTEREST

In return for a loan received from Lender, Borrower promises to pay the principal sum of **ONE HUNDRED FIFTY-TWO THOUSAND ONE HUNDRED NINETY-TWO AND NO/100** Dollars (U.S. \$152,192.00), plus interest, to the order of Lender. Interest will be charged on unpaid principal, from the date of disbursement of the loan proceeds by Lender, at the rate of **FIVE** percent (5.000%) per year until the full amount of principal has been paid.

3. PROMISE TO PAY SECURED

Borrower's promise to pay is secured by a mortgage, deed of trust or similar security instrument that is dated the same date as this Note and called the "Security Instrument." The Security Instrument protects the Lender from losses which might result if Borrower defaults under this Note.

4. MANNER OF PAYMENT

(A) Time

Borrower shall make a payment of principal and interest to Lender on the **1st** day of each month beginning on **April 1, 2010**. Any principal and interest remaining on the **1st day of March, 2040**, will be due on that date, which is called the "Maturity Date."

(B) Place

Payment shall be made at

PRIMARY CAPITAL ADVISORS LC
PO BOX 724628
ATLANTA, GEORGIA 31139

or at such place as Lender may designate in writing by notice to Borrower.

(C) Amount

Each monthly payment of principal and interest will be in the amount of U.S. \$**817.00**. This amount will be part of a larger monthly payment required by the Security Instrument, that shall be applied to principal, interest and other items in the order described in the Security Instrument.

[Handwritten signature]

(D) Allonge to this Note for payment adjustments

If an allonge providing for payment adjustments is executed by Borrower together with this Note, the covenants of the allonge shall be incorporated into and shall amend and supplement the covenants of this Note as if the allonge were a part of this Note. (Check applicable box.)

☐ Graduated Payment Allonge ☐ Growing Equity Allonge ☐ Other (specify)

5. BORROWER'S RIGHT TO PREPAY

Borrower has the right to pay the debt evidenced by this Note, in whole or in part, without charge or penalty, on the first day of any month. Lender shall accept prepayment on other days provided that Borrower pays interest on the amount prepaid for the remainder of the month to the extent required by Lender and permitted by regulations of the Secretary. If Borrower makes a partial prepayment, there will be no changes in the due date or in the amount of the monthly payment unless Lender agrees in writing to those changes.

6. BORROWER'S FAILURE TO PAY

(A) Late Charge for Overdue Payments

If Lender has not received the full monthly payment required by the Security Instrument, as described in Paragraph 4(C) of this Note, by the end of **FIFTEEN** calendar days after the payment is due, Lender may collect a late charge in the amount of **FOUR** percent (**4.000%**) of the overdue amount of each payment.

(B) Default

If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. Lender may choose not to exercise this option without waiving its rights in the event of any subsequent default. In many circumstances regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults. This Note does not authorize acceleration when not permitted by HUD regulations. As used in this Note, "Secretary" means the Secretary of Housing and Urban Development or his or her designee.

(C) Payment of Costs and Expenses

If Lender has required immediate payment in full, as described above, Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note to the extent not prohibited by applicable law. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note.

7. WAIVERS

Borrower 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 Lender to demand payment of amounts due. "Notice of dishonor" means the right to require Lender to give notice to other persons that amounts due have not been paid.

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to Borrower under this Note will be given by delivering it or by mailing it by first class mail to Borrower at the property address above or at a different address if Borrower has given Lender a notice of Borrower's different address.

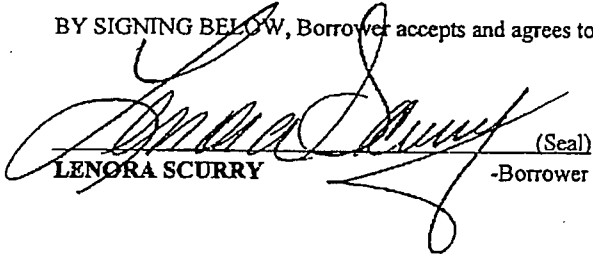
Any notice that must be given to Lender under this Note will be given by first class mail to Lender at the address stated in Paragraph 4(B) or at a different address if Borrower is given a notice of that different address.

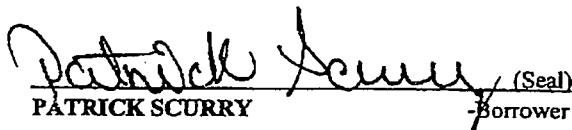
JA PS

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

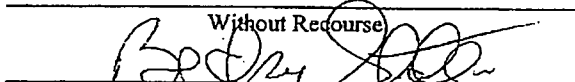
If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. Lender may enforce its rights under this Note against each person individually or against all signatories together. Any one person signing this Note may be required to pay all of the amounts owed under this Note.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Note.

 (Seal)
LENORA SCURRY -Borrower

 (Seal)
PATRICK SCURRY -Borrower

Pay to the Order of

Without Recourse

BECKY SLAFON - AVP
PRIMARY CAPITAL ADVISORS LC

PAY TO THE ORDER OF

WITHOUT RECOURSE
BANK OF AMERICA, N.A.

BY 
MICHELE SJOLANDER
SENIOR VICE PRESIDENT

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

EIGHTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS
C/A No.: 2012-CP-36-103

EverBank,

Plaintiff,

v.

Lenora Scurry, Patrick Scurry, The South
Carolina Department of Revenue,

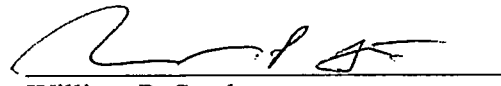
Defendants.

CERTIFICATE OF MAILING

The undersigned hereby certifies that on May 31, 2013
he served a copy of Plaintiff's Memorandum in Opposition to Defendant's Motion to Vacate
Judgment and Sale, supporting exhibits, and Certificate of Mailing upon the person(s) below by
depositing the same in the US Mail with proper postage affixed and addressed as follows:

The Honorable Joseph W. Hudgens
Newberry County Special Referee
1508 College St.
Newberry, SC 29108

Andrew S. Radeker, Esq.
Harrison & Radeker, P.A.
923 Calhoun St.
Columbia, SC 29201


William P. Stork
Attorney for the Plaintiff

Dated: May 31, 2013
Columbia, South Carolina

COPY

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-36-103

EverBank,

Plaintiff,

vs.

Lenora Scurry, Patrick Scurry, The
South Carolina Department of Revenue,

Defendants.

MEMORANDUM IN SUPPORT OF
MOTION TO VACATE
JUDGMENT AND SALE

FILED
NEWBERRY COUNTY
2013 JUN 5 PM 1:16
JACKIE S. BOWEN
CLERK OF COURT

Defendants Patrick Scurry and Lenora Scurry (hereinafter "the Defendants") submits for the Court's review and consideration this memorandum in support of the judgment and sale in the above-captioned action.

LAW AND ANALYSIS

In deciding a motion under Rule 60(b), SCRCP, the court hearing the motion is charged with deciding whether the party seeking relief has shown, by the preponderance of the evidence, that the conditions of a subsection of the Rule are met and, ordinarily, that he has a meritorious defense. See Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456, 458 (Ct. App. 2005); Bowers v. Bowers, 304 S.C. 65, 67-68, 403 S.E.2d 127 (Ct. App. 1991). "To establish a meritorious defense, a party is not required to show an absolute defense." Micronics, Inc. v. S.C. Dept. of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001). In examining whether there is a meritorious defense, the appropriate assessment of this factor is whether the defense in question "is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence." Id. (quoting Graham v. Town of Loris, 272 S.C. 442, 453, 248 S.E.2d 594 (1978)). To require more would essentially substitute the motion hearing for a trial on the

merits, and one in which the burden has shifted to the defendant to disprove the plaintiff's allegations. Cf. id.

The subsections of Rule 60(b) provide relief for the following:

- (1) **mistake, inadvertence, surprise, or excusable neglect;**
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) **fraud, misrepresentation, or other misconduct of an adverse party;**
- (4) **the judgment is void;**
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or **it is no longer equitable that the judgment should have prospective application.**

Rule 60(b), SCRCP (emphasis added).

South Carolina “favor[s] the disposition of issues on their merits rather than on technicalities[.]” Mictronics, 345 S.C. at 511. The availability of a challenge to a default judgment under Rule 60(b), SCRCP, is one of the primary reasons the Rule exists. See Winesett v. Winesett, 287 S.C. 332, 334, 338 S.E.2d 340 (1985) (“default judgment may not be appealed”; correct practice is to move for relief from judgment); Belue v. Belue, 276 S.C. 120, 121, 276 S.E.2d 295 (1981) (“no appeal lies for a default judgment”; correct practice is to move for relief from judgment); Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 99 (2d ed. 2002).

MISTAKE/EXCUSABLE NEGLIGENCE

“[W]here there is a good faith mistake of fact, and no attempt to thwart the judicial system, there is a basis for relief” under Rule 60(b)(1), SCRCP. Mictronics, 345 S.C. at 511. This is not limited to mistakes about the underlying facts of the action but may extend to mistakes about procedural facts as well. Id. at 508. In Mictronics, the movant seeking relief

under Rule 60(b)(1) was found to be entitled to such relief where it did not attend a hearing because its president was mistaken about the date of the hearing. Id.

If Micronics was entitled to relief from a judgment under Rule 60(b) where its president simply wrote down the wrong hearing date and then failed to appear, surely the Defendants are entitled to a rehearing or new trial here, where their failure to attend was a product of more reasonable and justified confusion than that of Micronics' president (which does not seem to have been very justified at all, but was apparently justified enough to afford relief from a judgment). Here, the process server who delivered the summons and complaint to the Defendants told them that these documents were nothing for them to worry about, so they did not worry about them or take any action with regard to them.

The Plaintiff has now presented an affidavit of the process server in which he swears he never said any such thing. Obviously, the process server has an interest in continuing to receive business from the Plaintiff; he has been apparently been serving process for 26 years, and he likely does not know how to do much of anything else for a living. A plaintiff's foreclosure firm like Weston Adams Law Firm that sues a lot of people for foreclosure generates a lot of paying work for a process server. He is not going to compromise that continued business by *acknowledging* that he misled the Defendants into believing that the pleadings he served them with were nothing to be concerned about.

Further, let us examine a legal principle about service of process that provides a rationale that applies here as well. An affidavit of service is only "*prima facie* evidence of service which may be impeached by extrinsic evidence." Richardson Construction Co., Inc. v. Meek Engineering and Construction Inc., 274 S.C. 307, 311, 262 S.E.2d 913 (1980).

The proof by affidavit in this case is insufficient when confronted with the other facts and circumstances attending it. When these

factors are coupled with [a] counter affidavit denying service, the cumulative effect entitled the defendant to relief from judgment as a matter of right[.]

Id. (internal citation omitted). Here, whether service occurred is not the issue; rather, what is at issue is what the process server said in conjunction with service. The principle, though, is the same: here, the process server has only given an affidavit stating that things did not happen as described in the Defendants' affidavits. Lenora Scurry's affidavit provides the only detail about what happened. In addition, the affidavits of service that Mr. Costner originally gave in this case indicate that he delivered the process to a "female" – evidence that he did have interaction with Mrs. Scurry, contrary to what he now avers. The Defendants' detailed showing prevails over the process server's simple blanket denial that things occurred as described in Mrs. Scurry's affidavit.

The Defendants' mistake in failing to attend the hearing in this case is also justified. The Plaintiff led the Defendants to believe that the hearing would be cancelled because modification efforts were ongoing – and they were, as the Plaintiff's own letters show. The judgment at issue was the product of mistake, and

MISREPRESENTATION AND OTHER MISCONDUCT BY THE PLAINTIFF

A party may achieve relief from a final judgment where the party demonstrates "fraud, misrepresentation, or other misconduct of an adverse party." Rule 60(b)(3), SCRPC. In South Carolina, in order for a party to be entitled to relief under this subsection, the moving party must demonstrate that the fraud, misrepresentation, or other misconduct was extrinsic. Raby Constr., LLP v. Orr, 358 S.C. 10, 20-21, 594 S.E.2d 478, 484 (2005); Hagy v. Pruitt, 339 S.C. 425, 431, 529 S.E.2d 714, 717 (2000) ("A judgment may be set aside on the ground of fraud only if the fraud is 'extrinsic' and not 'intrinsic.'"). Misrepresentation and misconduct is extrinsic when it

is collateral to the issues tried in a case and effectively deprives the litigant of a fair hearing or the opportunity to present its case. Id. (citing Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C., 294 S.C. 9, 362 S.E.2d 176 (1987)); Mr. G. v. Mrs. G., 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995). “Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action.” Chewning v. Ford Motor Co., 354 S.C. 72, 81, 579 S.E.2d 605, 610 (2003) (citing Hilton Head, 294 S.C. at 11, 362 S.E.2d at 177). “Intrinsic fraud, on the other hand, is fraud which was presented and considered in the trial. It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud.” Id. For example, perjury is usually intrinsic in character. Id. Intrinsic misrepresentations are usually made in court, while extrinsic misrepresentations are usually made outside of court. See id.

Under South Carolina law, fraud is not the only species of misrepresentation or misconduct that can provide a basis to relieve a party from a judgment. Rule 60(b)(3), SCRCP. If only out-and-out actual fraud did so, there would be no reason for Rule 60(b)(3), SCRCP, to state that relief may be granted for “fraud, *misrepresentation, or other misconduct* of an adverse party.” (emphasis added).

Here, the Plaintiff and those acting on its behalf engaged in extrinsic misrepresentation and misconduct that misled the Defendants and caused them not to appear and defend this foreclosure action. The Plaintiff’s process server misrepresented to the Defendants that the pleadings in this case were nothing for them to be concerned about, so they took no action about them. The Defendants’ belief that this matter was being handled through the modification process and was on its way to resolution through a modification, not a court proceeding, was

entirely consistent with what the process server told them and what the Plaintiff kept telling them until after the foreclosure sale had already happened. It is plain from the record that the Plaintiff engaged in the pernicious (but commonplace) practice of “dual tracking,” in which a foreclosure action is pursued at the same time as review for a modification is taking place. By its very nature, such a practice very often leads foreclosure defendants to believe that they are keeping abreast of what they need to do to oppose foreclosure when, procedurally, they are not. Our Supreme Court recognized this in In re: Mortgage Foreclosure Actions, 396 S.C. 209, 210, 720 S.E.2d 908 (2011) (South Carolina Supreme Court Administrative Order 2011-05-02-01), in which Chief Justice Toal wrote that “breakdowns [in mutually beneficial loss mitigation efforts] are largely the result of difficulty in communication between lender-servicers and debtors, and the fact that foreclosure actions are proceeding to conclusion without regard to ongoing loss mitigation efforts by the parties.”

It does not appear that Plaintiff’s counsel was involved in misleading the Defendants in this regard, but the process server was, and the Plaintiff certainly was. To let this judgment stand would essentially reward the Plaintiff for tricking the Defendants into not opposing the Plaintiff’s case. This is a result justice will not countenance.

THE JUDGMENT IS VOID AND EXCEEDS THE PLEADINGS AND THE LAW

The purpose of a mortgage foreclosure is to allow the mortgagor an opportunity to exercise his right to redeem the property by paying the debt in full. Bartles v. Livingston, 282 S.C. 448, 455, 319 S.E.2d 707 (Ct. App. 1984). A mortgage foreclosure action is a proceeding to collect a debt, not to create one. See S.C. Code Ann. § 29-3-10 (2007); Bartles, 282 S.C. at 455. The foreclosure judgment in this action effectively created debt by awarding the Plaintiff an amount as an ostensible “attorney’s fee” that exceeds the amount the court could lawfully award.

See American Federal Bank. FSB v. Number One Main Joint Venture, 321 S.C. 169, 175, 467 S.E.2d 439 (1996). The judgment that contains this fee award is void, and Rule 60(b)(4), SCRCF, requires the Court to grant relief to the Defendants from the judgment.

The \$5,200.00 awarded as an attorney's fee in fact bears no relationship to any obligation of the Plaintiff to pay its attorneys. We know how much the attorney's fees actually are, because the Plaintiff has told us in the proof of claim it filed in the bankruptcy court (using the same law firm, by the way): \$835.00. No evidence that the Plaintiff ever actually incurred more in attorney's fees in this case has ever been put before the Court. For the Court to award the Plaintiff an amount as attorney's fees that is more than six times greater than the only documented attorney's fees ever incurred is plainly not reasonable. The Court's discretion in the amount of attorney's fees awarded is not unfettered.

Where attorney's fees are recoverable pursuant to a contract, the language of the contract controls the scope of what is recoverable as an attorney's fee. E.g., American Federal Bank, 321 S.C. at 175; West v. Gladney, 341 S.C. 127, 135-36, 533 S.E.2d 334 (Ct. App. 2000); Ralph King Anderson, Jr., Attorney's Fees: How to Get Them & Keep Them on Appeal, in 2005 Master-in-Equity Bench/Bar: "Attorneys Fees, Easements & Equitable Remedies" 3, 24 (S.C. Bar 2005) (citing Nationsbank v. Scott Farm, 320 S.C. 299, 465 S.E.2d 98 (Ct. App. 1995)). A court cannot award more attorney's fees than are made collectable by the parties' agreement. See id. Notes and mortgages are contractual documents. See Saro Investments v. Ocean Holiday Partnership, 314 S.C. 116, 122, 441 S.E.2d 835 (Ct. App. 1994) (construing mortgage transaction in accordance with "settled principles of contract law"). "Uniformly, the language in a Note and Mortgage providing for an award of attorney's fees and court costs provides that the lender is entitled to reimbursement for the attorney's fees and costs that it actually incurs in its

efforts to collect from a non-paying borrower.” Curtis L. Coltrane, Ethical Issues for Attorney Fees & Costs, in 2006 Master-in-Equity Bench/Bar: 45 (S.C. Bar 2006). An award of attorney’s fees “is made to the party, not to his lawyer[,]” and its purpose is to reimburse the party for his litigation expenses. Id. at 48 (citing Reid v. Reid, 280 S.C. 367, 312 S.E.2d 724 (Ct. App. 1984)).

In this case, the object of the provisions in the note concerning attorney’s fees is, by its plain language, the lender’s reimbursement for money it has expended in paying an attorney to bring a foreclosure action. Id. at 45. The note provides that if the lender has accelerated the debt, “Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys’ fees for enforcing this Note to the extent not prohibited by applicable law.” (Emphasis added). The note and mortgage provide only that the lender is entitled to recover its costs and expenses, including the money it expends to hire a lawyer, provided that amount is reasonable. It does not authorize the Plaintiff to “recover” more in attorney’s fees than it has incurred in attorney’s fees. Moreover, such an interpretation would be patently unreasonable: Why should the Defendants, who have lost their house as a result of the efforts of Plaintiff’s counsel, “reimburse” the Plaintiff for more in attorneys’ fees than the Plaintiff has paid in attorneys’ fees?

The contractual language here provides for the collection of such actual fees, provided they are reasonable. American Federal Bank, 321 S.C. at 175. Otherwise, a mortgage foreclosure action would cease to be a suit of debt collection and become a device of debt creation.

Additionally, even if the Plaintiff actually had incurred \$5,200.00 or some greater amount in attorney’s fees, the attorney’s fee award would not have been reasonable. Glasscock v.

Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313 (1991) (setting forth reasonableness factors for attorney's fee award, among them "customary legal fees for similar services"). It is not true that the \$5,200.00 "fee is in line with the fee customarily charged by counsel with similar experience in this particular locality." A fee of \$5,200.00 is not what other attorneys charge clients for residential mortgage foreclosures. Ostensibly, the \$5,200.00 attorney's fee award was based on the Plaintiff's lawyers handling a default residential mortgage foreclosure.

In its complaint, the Plaintiff nowhere states that it will be asking the court to award it, as attorney's fees, thousands of dollars more than it is paying its lawyers to handle the foreclosure action. In the complaint, the Plaintiff states "[i]n and by the terms of the said Note, it is further provided that the maker thereof shall pay all collection costs, including reasonable attorney's fees, if the said Note be placed in the hands of an attorney for collection after default." Nothing in the complaint could have apprised the Defendants of the risk that the Plaintiff could be awarded an extra amount of several thousand dollars that is not recoverable under his loan documents. The complaint does not let the reader know that the Plaintiff will be seeking "attorney's fees" that are not collection costs; in fact, it expressly limits what is sought in that regard to "collection costs[.]"

A judgment rendered against a party for his default for failure to appear "shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." Rule 54(c), SCRPC. A non-appearing defendant would be prejudiced by his lack of notice if the plaintiff were to be awarded relief other than that sought in the complaint; in this way, Rule 54(c) ensures due process. See id.; Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Pinckney v. Atkins, 317 S.C. 340, 343, 454 S.E.2d 339 (Ct. App. 1995); cf. Roche v. Young Brothers, Inc., 318 S.C. 207, 456 S.E.2d 897, 899 (1995).

Judgments rendered without due process are void, and Rule 60(b)(4), SCRCPP, provides for relief from such a judgment. Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 183, 561 S.E.2d 659 (Ct. App. 2002). Relief is proper where a default judgment renders an award in excess of the demand in the plaintiff's complaint. Pinckney, 317 S.C. at 343; River Road Co. v. Energy Master Products, Inc., 300 S.C. 316, 316-17, 387 S.E.2d 694 (Ct. App. 1989). A default judgment in excess of the amount sought in the complaint is "clearly unlawful[.]" River Road, 300 S.C. at 317. The Plaintiff's pleading failed to give the Defendants any notice that the Plaintiff would seek an attorney's fee award greater in amount than its actual fees. The judgment containing the \$5,200.00 attorney's fee award is clearly unlawful. Mullane, 339 U.S. 306; Universal Benefits, 349 S.C. at 183; River Road, 300 S.C. at 317; see Rule 54(c), SCRCPP.

Additionally, what forms the basis of the Plaintiff's judgment is the representation of its attorney that "[t]here is now due and owing on Plaintiff's note and mortgage . . . attorney's fees in the amount of \$5,200.00[.]" Plaintiff's counsel knew that was not true. A lawyer's representations to a court must be counted on for their honesty, accuracy, and completeness; otherwise, the integrity of the court is compromised. Chewning v. Ford Motor Co., 354 S.C. 72, 83-84, 579 S.E.2d 605 (2003) ("[a]ttorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice"); In re James, 267 S.C. 474, 478, 229 S.E.2d 594 (1976) (attorney owed "duty to speak the truth to the courts"); see Rule 11(a), SCRCPP.

The instant case is similar to Chewning in a significant respect: in both that case and this one, the conduct of a litigant's attorneys with respect to the truth-seeking function of the tribunal is at issue. 354 S.C. at 76-77. Here, Plaintiff's counsel withheld from the court the most salient information they had concerning the amount of attorney's fees properly awardable to their client

and instead represented that the Plaintiff had incurred the much higher amount of \$5,200.00 in attorney's fees.

South Carolina has traditionally afforded relief to a party where the judgment rendered against him was procured by an officer of the court's misrepresentation, viewing this attorney misconduct as inherently extrinsic in character. See Davis v. Davis, 236 S.C. 277, 281-82, 113 S.E.2d 819 (1960) (attorney's false representation to the court that party was in default was extrinsic and provided other party relief even where "the record indicates that it was a *bona fide* mistake of counsel"). The Court should do so here.

Embodied in S.C. Code Ann. § 29-3-10 is the principle that only the debt actually owed is recoverable out of a mortgage foreclosure sale; the purpose of a foreclosure action is not to manufacture additional debt to the plaintiff. See S.C. Code Ann. § 29-3-10. The notion that a foreclosure action may create debt out of whole cloth runs counter to the public policy of this State. See id. Relief from a default judgment that is appropriate neither under the parties' contractual documents nor pursuant to the complaint is just and, indeed, required. See Mullane, 339 U.S. 306; Universal Benefits, 349 S.C. at 183; River Road, 300 S.C. at 317; Rules 54(c) and 60(b)(4), SCRPC.

MERITORIOUS DEFENSES

Based on the evidence the Plaintiff put before the Court, it is not entitled to any relief at all in this case. At the time the Plaintiff commenced this action, it did not own the mortgage it sought to foreclose. Even assuming that the mortgage assignment from Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS") was valid, the assignment did not occur until after the commencement of this action. This case was filed on February 27, 2012, and the Defendants were served the same day. The assignment to the Plaintiff had not been done at that

time. The assignment is dated – not recorded but, rather, *dated* – February 28, 2012. The Plaintiff has no standing in this case.

“Standing refers to ‘[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.’” Powell ex rel. Kelley v. Bank of America, 665 S.E.2d 237, 241 (Ct. App. 2008) (quoting Black’s Law Dictionary 1413 (7th ed. 1999)). In 1945, in a case about whether a plaintiff had standing to prosecute an action on a judgment, the Supreme Court of South Carolina stated as follows:

Generally, an action cannot properly be commenced until all of the essential elements of the cause of action are in existence – that is, until the cause of action is complete, the subsequent occurrence of a material fact will not avail in maintaining it. *The rights and liabilities of the parties, that is, their rights to an action for judgment or relief, depend upon the facts as they existed at the time of the commencement of the action, and not at the time of trial.*

American Agricultural Chemical Co. v. Thomas, 206 S.C. 355, 360, 34 S.E.2d 592, 594 (1945) (emphasis added).

A South Carolina Court of Appeals case supports this as well. In Brock v. Bennett, 313 S.C. 513, 518, 519, 443 S.E.2d 409, 412 (Ct. App. 1994), the Court of Appeals vacated the trial court’s order and dismissed Brock’s complaint for lack of standing, analyzing whether he had standing “at the time this action was commenced.” The Court of Appeals noted that “[s]tanding is a fundamental requirement for *instituting* an action.” Id. at 519 (emphasis added).

Since MERS owned the mortgage at the time of the commencement of the case, even if the Plaintiff were the holder of the note, it could not be the owner of the mortgage. Ownership of the note and mortgage did not go together; they were split at the outset of the loan, with the mortgagee being one entity (MERS) and the noteholder being another. See Mortgage Electronic Registration Systems, Inc. v. Neb. Dept. of Banking & Finance, 704 N.W.2d 784, 270 Neb. 529

(2005) (generally describing how the MERS system operates). By acquiring ownership of the note, the Plaintiff could not have acquired ownership of the mortgage, which was still owned by MERS. If this issue had been litigated, the Plaintiff would have lost the case. This is surely a defense worthy of inquiry, a meritorious defense.

Further, the Defendants have the defense of unclean hands. Unclean hands exists where the party asserting a claim has acted inequitably toward the other party in a way that has prejudiced the defending party. Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010); see Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 814 (1945); Whitlock v. Creswell, 190 S.C. 314, 2 S.E.2d 838 (1939); Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130 (Ct. App. 1984); Roger Young & Stephen Spitz, SUEM: Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose, 55 S.C. L. Rev. 175, 187 (2003). That has happened here. The Plaintiff's actions essentially caused the Defendants to pay the Plaintiff money (under the forbearance agreement) for no discernible reason and caused the Defendants to believe they were headed toward a modification with the Plaintiff when in fact they were not.

THE JUDGMENT VIOLATES NORRIS V. HEYWARD AND RULE 54(a)

The foreclosure judgment the Plaintiff obtained in this case provides that "[t]he amount of the judgment shall be subject to increase" to permit the Plaintiff to recover additional amounts not awarded in the judgment and further specifically provides for the award of still more in attorney's fees to the Plaintiff at a later time. The judgment provides that not even a hearing is necessary for this to occur; "[s]uch additional costs, commissions and expenses may be established by affidavit and shall be adjudicated by the court without further hearing." This does not comport with due process.

Rule 54(a), SCRCF, provides that a judgment is an order that finally determines the rights of the parties to the litigation. Just as a party to any other case cannot return to the Court after prevailing upon its claim to get a still larger award, this is not permitted in a foreclosure case. Indeed, our state Supreme Court has specifically rejected the idea of a “continuing judgment” in a case in which “the master ruled the judgment would be continuing and upon submission of a Motion to Amend Judgment and affidavits, respondents could amend the judgment to reflect additional payments for reimbursement.” Norris v. Heyward, 312 S.C. 67, 439 S.E.2d 264 (1993). “There is no procedure allowing a continuing judgment.” Id. If Plaintiff can add additional amounts to the judgment, then the judgment does not finally determine the rights of the parties and is not a judgment at all. Id. Relief from a clearly unlawful judgment is unquestionably warranted. See id.; River Road, 300 S.C. at 317.

THE PLAINTIFF WILL SUFFER NO PREJUDICE IF RELIEF IS GRANTED

If the Plaintiff is truly entitled to the foreclosure of its mortgage, it will ultimately prevail against the Defendants if they are granted relief from the judgment. If the Plaintiff is not entitled to prevail on the merits of the case, the Plaintiff will lose nothing to which it is entitled if relief from the judgment is granted.

The Defendants must be afforded some relief under the facts of this case. This foreclosure action sounds in equity. Gardner v. Travis, 316 S.C. 315, 317, 450 S.E.2d 54, 56 (Ct. App. 1994). It is axiomatic that equity will not suffer a wrong to be without a remedy. Key Corp. Capital, Inc. v. County of Beaufort, 360 S.C. 513, 602 S.E.2d 104 (Ct. App. 2004). One of the wrongs in this action, the excessive and unlawful attorneys’ fee award, could not have occurred without the Defendants being in the very procedural situation in which they find themselves now. If the Plaintiff succeeds in arguing that the procedural posture of this case

means that the Defendants cannot have relief from this judgment, the Plaintiff will have achieved that which equity does not permit: a wrong without a remedy. Id.

The Plaintiff was the successful bidder at the foreclosure sale; thus, there is no third party who successfully bid in good faith and without notice of the matters subject of this motion who now owns this land and would be entitled to significant recourse if the motion were granted. The Plaintiff will not have to pay such a person or the Defendants for the value of their land if the motion is granted; rather, things simply return to where they were before the Defendants were in default. Again, if the Plaintiff is entitled to win, it will still win, just on the merits.

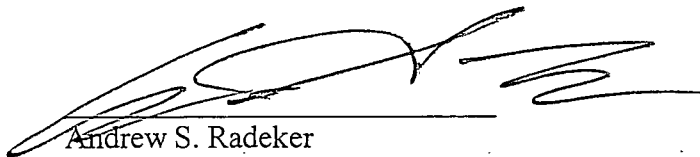
The only thing the Plaintiff has put forth in support of an argument that it will be prejudiced by the Court granting the Defendants' motion is that "the Plaintiff would be prejudiced by the granting of the Defendant's motion as it has acted diligently and expensed time and attorney's fees in order to bring this action to a conclusion." Prejudice is "[d]amage or detriment to one's legal rights or claims[.]" Black's Law Dictionary 545 (2d pocket ed 2001) (definition of prejudice). What the Plaintiff argues does not constitute prejudice. The Court of Appeals recently rejected a similar argument that a bank should allowed to proceed with trial of its foreclosure claim before a jury trial was held on a defendant's counterclaims. Plantation Fed. Bank v. Gray, 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013). The bank "argued that the foreclosure action should proceed because the value of the lot was declining based on the general state of the economy and because Bank would have to pay taxes on the lot to prevent it from being sold at a tax sale scheduled for later in the year." Id. at 517. In rejecting this argument, the court noted that "[t]hese circumstances would possibly, if not likely, occur in every foreclosure action currently pending." Id. To show prejudice, the Plaintiff here would have to

show more than that it has spent money on this foreclosure case and will probably spend more if the motion is granted.

CONCLUSION

For the reasons given herein and as may further appear from the record and at the hearing in this action, the Defendants' motion should be granted.

Respectfully submitted,



Andrew S. Radeker
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drew@harrisonfirm.com (email)

ATTORNEY FOR DEFENDANTS
PATRICK AND LENORA SCURRY

Columbia, South Carolina
June 5, 2013

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

EverBank

Plaintiff,

vs.

Lenora Scurry, Patrick Scurry, The South
Carolina Department of Revenue,

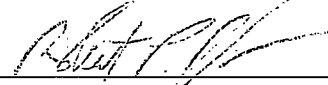
Defendant(s)

IN THE COURT OF COMMON PLEAS
DOCKET NO. 2012-CP-36-0103

AFFIDAVIT OF DEFAULT

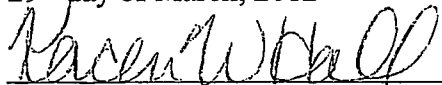
PERSONALLY APPEARS the undersigned who, being first duly sworn, states that he is the attorney for Plaintiff in the above action and that more than thirty (30) days have elapsed since the service of the Summons and Complaint. The only answering Defendant(s) is/are The Sc Department of Revenue. The other Defendant(s) is/are in default, not having filed any Answer or appearance. Further, that the defaulting Defendant(s) is/are not, on information and belief, member(s) of the military service of the United States of America as contemplated by the Soldiers' and Sailors' Civil Relief Act of 1940.

WESTON ADAMS LAW FIRM



Weston Adams
Caroline R. Glenn
Leigh B. Brown
William P. Stork
Robert P. Jackman
Attorney for Plaintiff
1501 Richland Street
Columbia, South Carolina 29201
(803) 254-1675

SWORN to before me this
29th day of March, 2012

 (L.S.)

Notary Public for South Carolina
My Commission Expires: 10/29/13

FILED
NEWBERRY COUNTY
2012 MAR 30 A 10:51
JONIE S. BOWERS
CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-36-103

EverBank,

Plaintiff,

vs.

Lenora Scurry, Patrick Scurry, The
South Carolina Department of Revenue,

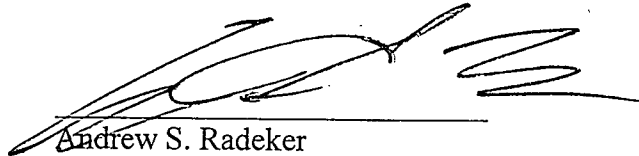
Defendants.

NOTICE OF HEARING

FILED
NEWBERRY COUNTY
2013 MAY 28 AM 9 40
JACKIE S. BOWERS
CLERK OF COURT

YOU WILL PLEASE TAKE NOTICE THAT the Honorable Joseph W. Hudgens, as Special Referee for Newberry County, has appointed June 5, 2013, at 2:00 p.m., at the law offices of Pope & Hudgens Attorneys, P.A., 1508 College Street, Newberry South Carolina, as the time and place for a hearing on Defendants Lenora and Patrick Scurry's motion to vacate judgment and sale in the above-captioned action, at which time and place all interested parties shall appear.

Respectfully submitted,



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ATTORNEY FOR DEFENDANTS
PATRICK AND LENORA SCURRY

Columbia, South Carolina
May 24, 2013

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-36-103

EverBank,

Plaintiff,

vs.

Lenora Scurry, Patrick Scurry, The
South Carolina Department of Revenue,

Defendants.

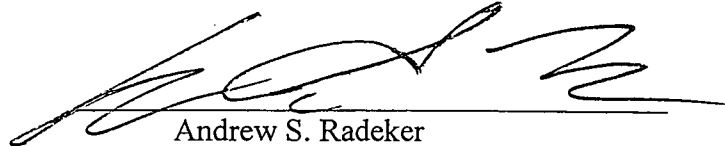
CERTIFICATE OF SERVICE

I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A., attorneys for Defendants Lenora and Patrick Scurry, do hereby certify and say that I, on the 24th day of May, 2013, served the foregoing document in the above-captioned action by depositing the same in the U.S. Mail, first class, postage prepaid, with the return address clearly noted, addressed as follows:

William P. Stork, Esq.
Weston Adams Law Firm
P.O. Box 291
Columbia, SC 29202

Milton G. Kimpson, Esq.
S.C. Dept. of Revenue
P.O. Box 12265
Columbia, SC 29211
(w/ copy of filed motion
to vacate judgment and sale)

FILED
NEWBERRY COUNTY
2013 MAY 28 AM 9 40
JACKIE S. BOWERS
CLERK OF COURT



Andrew S. Radeker

Drew Radeker

From: William Stork <will@westonadams.com>
Sent: Wednesday, July 31, 2013 9:23 AM
To: Joseph W. Hudgens
Cc: Drew
Subject: Scurry, Lenora & Patrick
Attachments: Ltr to Judge.doc; Affidavit of Everbank.pdf; Everbank Screen Shot showing Acquisition Date .pdf

Dear Judge Hudgens,

Please see attached documents.

Best regards,
Will Stork

William P. Stork, Esq.
Weston Adams Law Firm
1501 Richland Street
Columbia, SC 29201
Phone: 803-254-1675
Fax: 803-799-3141

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DEBT COLLECTOR: *This firm collects debts for mortgage lenders and other creditors. Any information obtained will be used for that purpose. However, if you have previously received a discharge in bankruptcy, this message is not and should not be construed as an attempt to collect a debt, but only as an attempt to enforce a lien.*

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TELEPHONE NUMBER
803-254-1675
FACSIMILE NUMBER
803-799-3141

July 30, 2013

Sent Via Email to jwhudgens@popeandhudgens.com

The Honorable Joseph W. Hudgens
Special Referee, Newberry County
1508 College St.
Newberry, South Carolina 29108

RE: Everbank v. Lenora Scurry, et al.
C/A No.: 2012-CP-36-0103

Dear Judge Hudgens:

In your Preliminary Draft of Order which was sent via email on July 17, 2013, you stated that the overriding issue in whether to grant or deny the Defendant's Motion to Vacate Judgment and Sale is whether the Plaintiff had standing at the time the foreclosure action was filed.

"Standing refers to 'a party's right to make a legal claim or seek judicial enforcement of a duty or right.' 'Standing is ...that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims.'" *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C., 437, 444, 655 S.E.2d 237, 241 (Ct. App. 2008). To establish standing, the plaintiff has the burden of proving that he has "suffered an 'injury in fact' – an invasion of a legally protected interest that is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'" *Bardoon Props., NV v. Eidolon Corp.*, 326 S.C. 166, 170, 485 S.E.2d 371, 373 (1997). Additionally, a party must prove that there is "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.'" *Id.* Lastly, a party asserting standing must prove that a favorable ruling from the court would remedy the Plaintiff's alleged injury. *Id.* Generally, a party must be a real party in interest to the litigation to have standing." *Hill v. S.C. Dep't of Health & Envtl. Control*: 389 S.C. 1, 22, 698 S.E. 2d 612, 623 (2010). "A real party in interest for purposes of standing is a party with a real, material, or substantial interest in the outcome of the litigation." *Id.* "It is ownership of the right sought to be enforced which qualifies one as a real party in interest." 4 S.C. Jur Action § 23 (1991).

By executing the Note, the Defendants incurred the obligation of making timely payments to the Holder. When the Defendants ceased making payments, thereby defaulting on the Note, they caused actual injury to the Holder. As the injured party, the Holder requires the court's assistance to amend its' injuries. The Holder, as the "real party in interest" is the party that has standing to bring the foreclosure action. *S.C.R.C.P 17(a)*. Everbank is the Holder of the note and therefore has standing to bring the foreclosure action. I have included a signed affidavit

from my client stating that Everbank had physical possession of the Note and other related documents at the commencement of this action. Additionally, I have included screen prints from Everhome's internal computer system which shows the specific date of the acquisition of the note.

Under South Carolina's version of the Uniform Commercial Code, a promissory note is considered a "negotiable instrument." S.C. Code § 36-3-104. An indorsement is a signature made for the purpose of negotiating the instrument, among other reasons. S.C. Code § 36-3-204. An indorsement can be a blank indorsement which does not identify the person to whom the instrument is being indorsed. S.C. Code § 36-3-205. When an instrument is indorsed in blank, the instrument becomes payable to the bearer and may be negotiated by transfer of possession. S.C. Code § 36-3-205. The Holder of an instrument is the person in possession of the instrument. S.C. Code § 36-1-201. Plaintiff is in possession of the Note, the Note is indorsed in blank, therefore under South Carolina law the Plaintiff is entitled to enforce the Note.

Under South Carolina law, the mortgage is secondary to the note in a foreclosure proceeding. "The assignment and delivery of the note carries with it the mortgage securing the same. The note is the principal and the mortgage is the incident and follows the note in its delivery from one person to another." *Union Nat'l Bank of Columbia v. Cook*, 1110 S.C. 99, 96 S.E. 484 (1918). This concept is further expounded upon in the second edition of American Jurisprudence which states, "[a] mortgage securing the repayment of a promissory note follows the note, and thus, only the rightful owner of the note has the right to enforce the mortgage." 55 Am Jur 2d *Mortgages* § 584. Therefore, in the state of South Carolina, a holder of a properly indorsed note has the right and standing to bring an action to enforce the mortgage securing the note. Since Everbank is the holder in the action before the court, Everbank has standing to sue for foreclosure.

"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." *New Hampshire Ins. Co. v. Bey Corp.*, 312 S.C. 47, 50, 435 S.E. 2d 377, 379 (Ct. All. 1993). "In addition to having the burden of presenting evidence which shows that the Defendants are entitled to the requested relief, in order to obtain relief from a default judgment the Defendants must also show a meritorious defense. *Tri-County Ice and Fuel v. Palmetto Ice*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

Standing is the meritorious defense which has been most extensively argued by opposing counsel. Opposing counsel argued that the assignment to Everbank was executed the day after the summons and complaint was filed. This is immaterial. Assignments are merely to put the public on notice of the transfer of the debt from one investor to another. As stated earlier, the proper party to bring a foreclosure action is the real party in interest, which under South Carolina law is the Holder of the Note. As is evidenced by the attached affidavit of my client and screen shot from my client's internal system, Everbank was in physical possession of the properly indorsed Note long before the foreclosure action was initiated. Because Everbank was in physical possession of the properly indorsed note, they were the Holder and therefore had standing to bring the foreclosure suit.

Opposing counsel also argues in his memorandum that my client has unclean hands by entering into a forbearance agreement with the Defendants. It is argued that Everhome caused the Defendants to think that they were headed towards a modification. In support of this contention, opposing counsel provided a copy of the forbearance agreement which is labeled as "Defendant's Exhibit A-1." On page 2, paragraph 1 of the forbearance agreement, it is written

"Please remember that this plan is not designed to fully reinstate your account. As previously discussed, we will review your account again to determine the most viable alternative to foreclosure option." Page 2, paragraph 2 of the forbearance agreement continues,

Upon the breach of any provisions of this agreement, Everhome Mortgage may terminate this agreement and, at the option of Everhome Mortgage continue foreclosure proceedings according to the terms of the Note and Security Instrument without regard to this instrument. Please understand that the pending foreclosure action will not be dismissed but merely held in abeyance, and any payments that you make on this plan during the pendency of this foreclosure action shall not constitute a waiver to continue with the suit should you fail to make all of the necessary payments.

The Defendants were required under the forbearance agreement to send in \$532.92 by May 1, 2012 as an initial installment on the forbearance plan; however the Defendants did not make this payment. As evidenced by Defendants' Exhibit A-2, this initial payment was not even drafted until May 3, 2012 which is two days after the due date. This is a violation of the terms of the forbearance agreement and, according to the above language from the agreement, Everhome can terminate the agreement and proceed with the foreclosure action. It was clearly stated that this agreement was not meant to reinstate the loan, that other options would be reviewed but were not guaranteed, and that Everhome will proceed with foreclosure if the terms of the agreement are breached. When the Defendants did not make the first payment they breached the agreement. Nowhere in the agreement is it stated that the borrower will be given a loan modification, or that their loan will be reinstated, or that any loss mitigation options are guaranteed.

Without a meritorious defense, the borrowers' Rule 60(b) motion fails. As I have shown, there is no meritorious defense available to the borrowers. Everbank had proper physical possession of the in blank indorsed Note at the time of the commencement of the foreclosure action, therefore had the requisite standing to file the case. Additionally, my client does not have unclean hands. The agreement states that it does not guarantee loss mitigation, but merely that options will be reviewed. It also states that the plan would not fully reinstate the Defendants' account. The terms of the forbearance agreement clearly stated that the foreclosure can proceed if the agreement is breached, and by sending the first payment to Everhome after the due date the Defendants breached the forbearance agreement. Since no meritorious defense is available to the Defendants, their 60(b) motion must be denied.

When considering whether to grant relief from a final judgment, "a court must balance the interest of finality against the need to provide a fair and just resolution of the dispute." *Chewning v. Ford Motor Co.*, 354 S.C. 72, 80, 579 S.E.2d 605, 609 (2003). It is recognized the court's longstanding policy towards final judgments and that "important benefits are achieved by the preservation of final judgments." *Id.* at 86.

Should you have any questions, please feel free to contact me.

With kindest regards, I am

Sincerely,

William P. Stork, Esquire

CC: Andrew S. Radeker, Esq. (Via Email ast@harrisonfirm.com)

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

EverBank,

Plaintiff,

v.

Lenora Scurry, Patrick Scurry, The South Carolina
Department of Revenue,

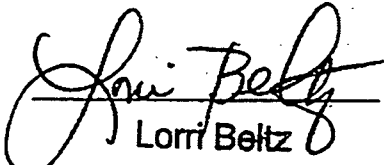
Defendants.

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT
C/A No.: 2012-CP-36-0103

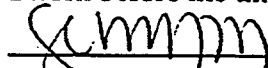
AFFIDAVIT OF EVERBANK

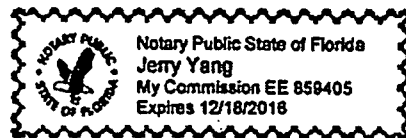
Personally appeared before me, Lorri Beltz, who, after being duly sworn, does depose and say as follows:

EverBank, had proper and legal possession of all necessary documents, including but not limited to the original promissory note, on or before February 27, 2012, which is the date the foreclosure action, with case number 2012-CP-36-0103, was initiated against Lenora Scurry and Patrick Scurry for the property located at 1360 Nursery Road, Little Mountain, SC 29075.


Lorri Beltz
Assistant Vice President

Sworn before me this 29 day of July, 2013


Notary Public for Florida
My commission expires: 12/18/16



3270 Explorer: Delinquency 1 (DLQ1/LOAN)

EVERHOME MORTGAGE -- 140

Loan Number: 9000791069

Borrower Name: SCURRY,LENORA

DLQ1 9000791069 QX D E L I N Q U E N C Y OWNR n/a 07/19/13 11:21:03
 11 F.H.A. PER/CLS/OFF D/ /46 AGE: 3Y 5M IR: 5.00000 INV: A67
 DUE(22) 23,521.97 DUE 10/01/11() (06/05) ASSUM: ACQ:12/21/11
 LATE CHRG 942.03 PAYMT @ 1,065.84 P: 1360 NURSERY RD
 BAD CK FEES .00 L/C AMT 42.63 LITTLE MOUNTAIN SC 29075
 OTHER FEES 220.00 PAYMT + LC 1,108.47 M:
 TOT DUE 24,684.00* PRIN BAL 148,781.19
 SUSPENSE .00 P&I 817.00 1360 NURSERY RD
 NET DUE 24,684.00 DLQ 9 TIME,PAY 70 DAY LITTLE MOUNTAIN SC 29075
 C/S 102 LENORA SCURRY 803-345-1811
 C/D 07/13 PATRICK SCURRY 803-318-3785

PHONE NO *FINANC'L*

-IMD:N----- * ADDITIONAL MESSAGES * -----WU: R ----

--SPOC-- PRESS PF14 FOR MEMOS

CLMESC: PENDING THE ACTUAL EVICTION DATE

-----~LOAN-----* LOAN INFORMATION *-----

ORIG MTG:	152,192.00	P & I:	817.00	LOAN DATE:	02/12/10
INT RATE:	5.00000	ESCROW:	248.84	MATURITY DATE:	03/01/40
TERM:	360	OPT INS:	.00	ASSUMPT DATE:	
BILL MODE:	1	OTHER:	1,162.03	ACQUIST DATE:	12/21/11 4
PAY HIST:	000000007000	TOT PAYMT:	1,065.84	LAST ANALYSIS:	11/13/12
DELQ TAB:	111000111111				
CBR:	CODE 4 STAT 84				

3270 Explorer: Loan Master Maint and Display (MAS1/AQN1)

EVERHOME MORTGAGE - 140

Loan Number: 9000791069

Borrower Name: SCURRY,LENORA

MAS1 LOAN 9000791069	MSP LOAN MASTER MAINT. & DISPLAY		07/19/13	11:18:34
NAME L SCURRY	TYPE 11 1ST MTG, FHA RESIDENTIAL		GROUP	
-- AQN1 -- ACQUISITION AND SALES -----				
ACQN	ACQUISITION	OLD LOAN	ACQUISITION	OLD SVCR
DATE	PRIN BAL	NUMBER	ID	NUMBER
122111	148977.45	0215522602	→ BOA122111	
(MMDDYY)				
				Y/E RPTG
				FROM ACQ DT
				N
				(Y/N)

ACQUISITION OLD LN # INDEX
 TYPE STOP DATE
 3 030141
 1-ORIGINATED (MMDDYY) MERS ORIG ORG ID _____
 2-PURCHASED
 3-SERV TRANSFER
 ORIG NOTE HLD NM

	LOAN SERV	NEW SERV	CONTRACT LOAN	SERV
	SOLD ID	LOAN NUMBER	SERV SOLD DT	TRANS DT
			MMDDYY	MMDDYY
1ST	_____	_____		
2ND	_____	_____		

-----* ADDITIONAL MESSAGES *-----
 --SPOC-- PRESS PF14 FOR MEMOS
 CLMESC: PENDING THE ACTUAL EVICTION DATE
 DCFLGL: MOTION TO VACATE JUDGMENT AND SALE

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	DOCKET NO. 2012-CP-36-0103
COUNTY OF NEWBERRY	)	
	)	
EverBank,	)	
	)	
Plaintiff,	)	
	)	REPORT ON SALE
vs.	)	AND DISBURSEMENTS
	)	
Lenora Scurry, Patrick Scurry, The South	)	
Carolina Department of Revenue,	)	
	)	
Defendants.	)	
	)	

TO THE PRESIDING MASTER IN EQUITY/SPECIAL REFEREE/CLERK OF COURT OF
THE ABOVE COUNTY:

1. Pursuant to the Order of Court and after due notice and advertisement, I sold the property subject of this action to plaintiff for the sum of \$500.00, this being the highest bid made on sales day.
2. The plaintiff thereafter paid only the costs as provided in said Order.
3. I have executed and delivered a good and sufficient deed to Secretary of Housing and Urban Development of Washington, DC.
4. I have received and disbursed the amount of \$25.00.
5. All the disbursements having been made, this case is hereby ended.

Newberry, South Carolina
April 21, 2013.


Joseph W. Hudgens

FILED
NEWBERRY COUNTY
JACKIE S. BOWERS
CLERK OF COURT
2013 SEP 19 PM 3 18

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Joseph W. Hudgens, Special Referee

Common Pleas Case No.: 2012-CP-36-103
Appellate Case No. 2013-002181

EverBank,.....Respondent,

v.

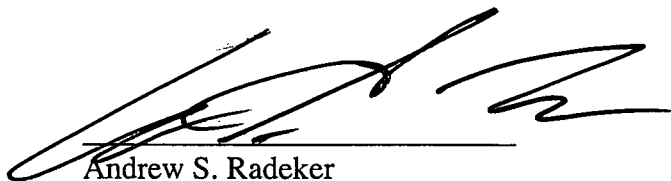
Lenora Scurry, Patrick Scurry, The South Carolina
Department of Revenue, Defendants,

Of Whom Lenora Scurry and Patrick Scurry are.....Appellants.

CERTIFICATE OF COUNSEL

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

Respectfully submitted,



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

June 17, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Joseph W. Hudgens, Special Referee

Common Pleas Case No.: 2012-CP-36-103
Appellate Case No. 2013-002181

EverBank,.....Respondent,

v.

Lenora Scurry, Patrick Scurry, The South Carolina
Department of Revenue, Defendants,

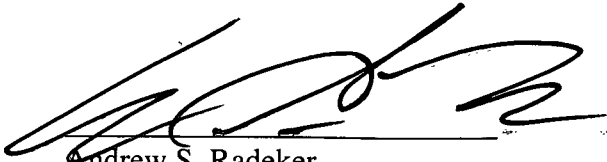
Of Whom Lenora Scurry and Patrick Scurry are.....Appellants.

PROOF OF SERVICE

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

Sean M. Foerster, Esq.
Rogers Townsend & Thomas, PC
P.O. Box 100200
Columbia, SC 29202

June 18, 2014


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

RECEIVED

JUN 18 2014

SC Court of Appeals