TABLE OF CONTENTS

Table of Authorities iii

Statement of Issues on Appeal 1

Statement of the Case 2

Argument 7

I. PETITIONERS ARE PRECLUDED FROM RAISING ISSUES ON APPEAL THAT WERE NOT PRESENTED TO OR RULED ON BY THE TRIAL COURT 7

II. PETITIONERS' AFFIDAVIT WAS SO CONCLUSORY AND DEFENSES SO VAGUE AND UNSPECIFIED THAT THERE REMAINED NO MATERIAL ISSUE OF FACT PRECLUDING SUMMARY JUDGMENT ON RESPONDENT'S FORECLOSURE ACTION 9

III. BY ACCEPTING PAYMENT ON THE ARBITRATION AWARD AND STIPULATING TO THE DISMISSAL OF THE THIRD-PARTY COMPLAINT WITH PREJUDICE, THE AWARD IS CONCLUSIVE AS TO ALL MATTERS RAISED IN THE THIRD-PARTY COMPLAINT AND IS FINAL AND BINDING ON THE PARTIES AS THE LAW OF THE CASE 10

IV. THE TRIAL COURT DID NOT COMMIT ERROR IN GRANTING WALTER MORTGAGE COMPANY THE EQUITABLE REMEDY OF FORECLOSURE 12

Conclusion 14

TABLE OF AUTHORITIES

CASES

Cowburn v. Leventis, 366 S.C. 20, 619 S.E.2d 437 (2005) 7

Germann v. New York Life Ins. Co., 286 S.C. 34, 331 S.E.2d 385 (Ct. App. 1985) 10

Kirkman v. Parex, Inc., 369 S.C. 477, 632 S.E.2d 854 (2006) 7, 8

Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011) 13

Nelson v. QHG of S.C., Inc., 354 S.C. 290, 580 S.E.2d 171(Ct. App. 2003) 12

S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007) 7

Sentry Eng'g & Const., Inc. v. Mariner's Cay Dev. Corp., 287 S.C. 346, 338 S.E.2d 631 (1985) 11, 12

Shupe v. Settle, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994) 10

Wachovia Bank v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010) 13

STATUTES

S.C. Code Ann. § 15-48-130 11

S.C. Code Ann. §15-48-140 11

S.C. Code Ann. §18-9-170 6

S.C. Code Ann. § 37-10-102 9

OTHER AUTHORITIES

Rule 59(e), SCRCP 1, 7, 8, 9, 14

Rule 210(c), SCACR 8

STATEMENT OF ISSUES ON APPEAL

1. CAN THE PETITIONERS RAISE ISSUES IN THIS PROCEEDING WHICH WERE NOT RAISED IN THE LOWER COURT AND ON WHICH PETITIONERS DID NOT SEEK RELIEF UNDER RULE 59(e)?

2. DOES THE RECORD ESTABLISH A SUFFICIENT ISSUE OF MATERIAL FACT TO PRECLUDE SUMMARY JUDGMENT?

3. CAN THE PETITIONERS RAISE ISSUES IN THIS PROCEEDING THAT WERE ADDRESSED IN THE ARBITRATION AWARD AND WHICH PETITIONERS HAVE DISMISSED WITH PREJUDICE?

4. DID THE LOWER COURT ERR IN GRANTING WALTER MORTGAGE COMPANY THE EQUITABLE REMEDY OF FORECLOSURE?

STATEMENT OF THE CASE

On or about March 7, 2007, Petitioners Natasha L. Green and Shilon L. Green entered into a construction agreement whereby Jim Walter Homes, Inc. agreed to build a house for the Greens on credit. (R. pp. 1-10) They also executed and delivered to Jim Walter Homes, Inc. a financing agreement in writing, wherein they promised to pay to Jim Walter Homes, Inc. the sum of $123,330.00, plus a finance charge. (R. pp. 11-13) Pursuant to paragraph one of the Financing Agreement, payments were to begin on the 5th day of the month following the 45th day after release of the home to the Greens. The Greens were not required to make any deposit or down payment for the house. However, in paragraph six of the financing agreement, the Greens agreed to execute and deliver to Jim Walter Homes, Inc. a mortgage on the subject real property to secure the construction of the house on credit. Thereafter, the Greens executed the subject mortgage which was recorded in the Office of the Clerk of Court for Chesterfield County in Book 419 at page 960. By assignment dated the 8th day of January, 2008, and recorded in said Clerk of Court's Office, Jim Walter Homes, Inc. assigned said mortgage to the Respondent, Walter Mortgage Company.[1]

In a Jim Walter Homes credit sale transaction such as the one with the Greens, there is no loan or disbursement of funds and the buyer pays no "closing costs." With respect to the Greens, they paid no costs or fees at all in connection

[1] In January of 2012, Walter Mortgage Company became Green Tree Servicing, LLC, as successor by merger.

with the credit sale which is not unusual in a Jim Walter Homes transaction.[2] Therefore, a HUD-1 statement was not required in this instance and would not have been relevant to the transaction.

On or about June 29, 2007, Jim Walter Homes, Inc. released the house to the Greens who accepted the house by signing the Tender Acknowledgement/Completion Certificate. (R. p. 126) The Tender Acknowledgement provided in part:

- That the home has either been fully completed or is substantially complete and is built according to their contract.

- That the Greens thoroughly inspected the home; that there is no further work to be done nor any materials or fixtures to be supplied by the Builder.

- That the Greens accept release of the home and assume full possession, control of, responsibility for, and the insurable interest in the building site, home and contracted items.

- That their obligation to make monthly home payments will now begin and that their first payment will become due and payable on the 5th day of the month following at least 45 days from today's date.

(*Id.*) Accordingly, under the terms of the construction and financing agreement, payments were to start September 5, 2007. (R. p. 50) Under Paragraph 9 of the standard Jim Walter Homes' Construction Agreement, it is clear that the contract for construction is for a partially completed home and that the buyer has certain

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[2] Jim Walter Homes closed effective January 6, 2009. After that time, it sold no more homes and is now only servicing warranty claims from its customers.

responsibilities with respect to completion and occupancy of the home.[3] (R. p. 110) In this instance, the Greens did not elect for a "turnkey" stage of construction and agreed, among other things, that they were responsible for securing the certificate of occupancy. (*Id.*)

Despite having signed the Tender Acknowledgement/Completion Certificate, the Greens complained about certain aspects and scope of the work under the construction agreement. (R. pp. 48-49) After discussion with the Greens, Jim Walter Homes agreed to extend the date for the first payment until October 5, 2007. On January 16, 2008 – three months after payments were to commence, and the Greens having failed to make a single payment – Walter Mortgage Company commenced the foreclosure action. (R. pp. 51-68) No deficiency judgment was demanded. (R. p. 055)

The Greens answered and asserted certain claims against Jim Walter Homes, Inc. which were outlined in their third-party complaint. (R. pp. 71-76) The answer admitted the execution of the construction and financing agreements, and further, raised unspecified issues of unconscionability and unspecified violations of state and federal consumer protection laws. (R. pp. 69-72) The relief prayed for in defense to the foreclosure cause of action was reforming the contract documents to require payment only after the house was completed. (R. pp. 75-76) No prayer for monetary damages was requested against Respondent. The third party claims against Jim Walter Homes, Inc.

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3 One of the fundamental concepts of Jim Walter Homes was that the buyer would self-perform some work on the home. In fact, Jim Walter Homes offered a "shell" home to customers that was essentially four walls and a roof and the customer was responsible for finishing the home.

asserted claims of breach of contract, fraud and misrepresentation, and unfair trade practices. (R. pp. 71-76)

These third party claims were submitted to binding arbitration on November 11, 2008. The Greens were represented in the arbitration by attorney Barry L. Thompson II. The arbitrator issued his award on December 3, 2008. (R. p. 127) The Arbitration Award provided:

> The undersigned James L. Bruner, the duly appointed arbitrator in the above-captioned action, having received the evidence presented by the parties and considered the argument of counsel for each party, hereby makes the following award with respect to all issues framed by the third-party pleadings and in accordance with the South Carolina Uniform Arbitration Act:
>
> The Third-Party Defendant [Jim Walter Homes] shall pay to the Third-Party Plaintiffs [The Greens] the sum of $4,300.00.
>
> **This award is in full satisfaction of all claims and issues framed by the third-party pleadings in the above-referenced case.** The claims and issues framed by the first-party pleadings are not within the scope of the parties' arbitration agreement and are not considered or decided herein. Each party shall bear his own attorneys' fees and costs.

(R. p. 127)(emphasis added)

The Arbitration Award, which represented less than 3.5% of the contract price, was subsequently paid to the Greens in full by Jim Walter Homes, Inc. and the third party action was dismissed with prejudice.

On or about February 6, 2009, Respondent moved for summary judgment on its foreclosure action. (R. pp. 103-127) The motion was heard on May 28, 2009, by William O. Spencer Jr. as Special Referee, who granted the motion by

order dated July 20, 2009. (R. pp. 133-145) The Greens were represented at the hearing by attorney Thompson.[4] On August 19, 2009, one month after entry of the order granting judgment of foreclosure to Walter Mortgage Company, the parties filed a Satisfaction of Arbitration Award and Stipulation of Dismissal with Prejudice [as to the third-party complaint]. (Supp. R. pp. 5-6)

On September 8, 2009, over two years after the Greens had accepted the house and during which time they never made a single payment, the house and property sold at foreclosure. The Greens refused to post a bond to stay the foreclosure sale as required by S.C. Code Ann. §18-9-170 (1976), and on September 8, 2009, the property was sold to the highest bidder, Walter Mortgage Company, LLC, which was deeded the property on September 14, 2009.

On August 18, 2009, the Greens, through their counsel, Barry L. Thompson II filed the Notice of Appeal. The Court of Appeals issued its unpublished summary opinion affirming the trial court's grant of summary judgment on February 23, 2011. Thereafter, the Greens, proceeding *pro se*, served their motion for rehearing on March 1, 2011. The Court of Appeals issued its order denying the motion for rehearing on March 25, 2011.

The Greens served their Petition for Writ of Certiorari on April 12, 2011. The Greens Petition set forth eight "Questions Presented" on which a Writ of Certiorari was sought. Walter Mortgage Company filed and served its Return to the Petition on May 31, 2011. This Court granted the Greens' Petition for Writ of Certiorari on March 9, 2012. Walter Mortgage Company received notice of this

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[4] After filing Appellants' initial brief and designation of matter to include in the Record in the Court of Appeals, Mr. Thompson petitioned the court to be relieved as counsel. This Petition was granted by Order of The Honorable Jasper M. Cureton, dated October 23, 2009.

Order from the clerk's office by letter dated March 9, 2012, which directed the parties to submit briefs as did the Order. However, both the letter and the Order were silent on the questions to be considered in this proceeding.

ARGUMENT

I. PETITIONERS ARE PRECLUDED FROM RAISING ISSUES ON APPEAL THAT WERE NOT PRESENTED TO OR RULED ON BY THE TRIAL COURT.

In its summary opinion affirming the trial court's grant of summary judgment, the Court of Appeals recognized that Petitioners were improperly seeking to raise issues on appeal which were not preserved for appellate review. The court relied upon well established authority in support for this fundamental concept of appellate review. *See e.g., S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007); *Cowburn v. Leventis*, 366 S.C. 20, 41, 619 S.E.2d 437, 448 (2005). Although Petitioners are proceeding *pro se* in this matter, they were not without the benefit of legal counsel throughout the proceedings in the trial court and the initial stages of their appeal. Whether the failure to seek relief under Rule 59(e) was a conscious strategic decision or a matter of neglect by counsel is of no moment. Petitioners cannot now raise issues which have not been preserved for review.

A. Petitioners' Theory of Lender Liability

Petitioners assert that a lender involved in completing construction of a home can be held legally responsible for defects in construction under *Kirkman v. Parex, Inc.*, 369 S.C. 477, 632 S.E.2d 854 (2006). In *Kirkman*, the Court held

that a lender may be liable for breach of implied warranty of habitability where it forecloses on a developer in the midst of construction of homes, takes title, has substantial involvement in completing the construction, and sells the home. *Id.* at 483, 632 S.E.2d at 857.

However, nowhere in Petitioners' affidavit, pleadings or in the lower court's order was the issue of liability under an implied warranty of habitability advanced against the Respondent as a "controlling lender." Indeed, the facts demonstrate that neither Jim Walter Homes nor Walter Mortgage Company acted as a lender. Furthermore, there was no competent evidence to support that Walter Mortgage Company had any involvement in the construction of the home. Moreover, Petitioners never sought reconsideration or clarification of the trial court's order under Rule 59(e) as to this issue.

B. Petitioners' Attorney Preference Concerns

While not raised as one of the "Questions Presented" in their Petition for Writ of Certiorari or argued before the Court of Appeals, Petitioners now raise concerns about the attorney preference form they executed in connection with the underlying transaction. The attorney preference form was not presented to the trial court and it is not part of the Record on Appeal. Petitioners have filed a "Motion to Supplement Appendix" to put this document before this Court. Respondent has opposed this motion as it is not permissible to supplement the record at this stage of the appellate process. *See* Rule 210(c), SCACR. Nevertheless, the attorney preference form is not relevant to any of the issues presented as Petitioners never specifically pled any violation of S.C. Code Ann.

§ 37-10-102 in their Answer and Third Party Complaint. (R. pp. 69-76) Nor did the Petitioners seek reconsideration or clarification of the trial court's order under Rule 59(e) as to any issues related to the attorney preference form or compliance with S.C. Code Ann. § 37-10-102. Furthermore, Petitioners did not address this issue in their Final Brief or their Reply to Respondent's Final Brief in the court below. Having never been clearly raised or ruled upon by any of the lower courts, any issues about the attorney preference form or compliance with S.C. Code Ann. § 37-10-102 cannot be raised for the first time in this proceeding.

II. PETITIONERS' AFFIDAVIT WAS SO CONCLUSORY AND DEFENSES SO VAGUE AND UNSPECIFIED THAT THERE REMAINED NO MATERIAL ISSUE OF FACT PRECLUDING SUMMARY JUDGMENT ON RESPONDENT'S FORECLOSURE ACTION.

The affidavit Mr. Green submitted in opposition to Respondent's Motion for Summary Judgment stated in part:

* * *

> As soon as the builder fixes my house or pays me the money that I won from them on arbitration for their breach of contract to me so I can fix my home, I will be glad to begin paying my mortgage payments.

(R. p. 128) It goes on to affirm that he and his wife signed the Tender Acknowledgement which triggered the timing for mortgage payments to start. (R. p. 128) It also affirms that the construction issues with the builder were resolved in arbitration; and, it further affirms that no payments were ever made on the mortgage. (*Id.*) However, it does not establish any issues of material fact as to the existence or validity of the note and mortgage or the Greens' default. The defenses were so vague, ambiguous, and unspecified, that coupled with

Petitioner's conclusory affidavit, no material issue of fact remained to be determined subsequent to the arbitration. The Greens' answer alleged the construction agreement, financing and mortgage are "unconscionable in that they were procured in violation of state and federal law." (R. p. 70; ¶ 5) Yet, the answer fails to specify how the documents were unconscionable, and what state and federal laws were violated.

When a party is faced with a motion for summary judgment that is supported by evidence, the party cannot defeat the motion by relying upon the mere allegations of his pleadings, but must disclose facts he intends to rely on by affidavit or other proof. *Shupe v. Settle*, 315 S.C. 510, 516, 445 S.E.2d 651, 655 (Ct. App. 1994). A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment. *Id.; Germann v. New York Life Ins. Co.*, 286 S.C. 34, 38, 331 S.E.2d 385, 388 (Ct. App. 1985). To allege someone has violated unspecified state and federal law is not sufficient to create an issue of fact. Moreover it was undisputed the Greens had never made a single payment on the house that they certified in 2007 to be substantially complete. Presented with such a record, the lower court properly concluded Respondent was entitled to foreclose on the subject property.

III. BY ACCEPTING PAYMENT ON THE ARBITRATION AWARD AND STIPULATING TO THE DISMISSAL OF THE THIRD-PARTY COMPLAINT WITH PREJUDICE, THE AWARD IS CONCLUSIVE AS TO ALL MATTERS RAISED IN THE THIRD-PARTY COMPLAINT AND IS FINAL AND BINDING ON THE PARTIES AS THE LAW OF THE CASE.

All matters raised in the Greens' Third-Party Complaint were submitted to binding arbitration. (R. p. 100) The arbitrator issued an award in favor of the

Greens on December 3, 2009. (*Id.*) The Greens have never sought to vacate or modify the award in any way. To the contrary, the Greens accepted payment on the award in full satisfaction thereof, and further consented to a dismissal of the third-party complaint with prejudice. (Supp. R. pp. 5-6) The Greens were represented by attorney Barry L. Thompson II throughout the arbitration and when the Satisfaction of Award and Dismissal with Prejudice [of the third party complaint] was filed. (*Id.*)

S.C.Code Ann. §§ 15-48-130 and 15-48-140 provide the exclusive procedures for vacating or modifying an arbitration award. A party seeking to vacate or modify an arbitration award must file such a motion within ninety days of delivery of a copy of the award. *See* S.C. Code Ann. §§ 15-48-130, -140. Once this timeframe has expired, the arbitration award is final and becomes the law of the case. *See Sentry Eng'g & Const., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 350-51, 338 S.E.2d 631, 634 (1985). Therefore, the Greens are fully bound by the arbitration award as to all of the issues raised in the third-party complaint.

A review of the third-party complaint reveals that it deals with the same issues that the Greens continue to raise in this proceeding which can be fairly characterized as issues relating to building code violations and final inspection of the home. (R. pp. 71-76; Petitioners' Brief; Statement of Issues #2, #3, #4, and #7) All of these issues were submitted to arbitration and addressed in the award that specifically stated that it was "in full satisfaction of all claims and issues framed by the third-party pleadings. . . ." (R. p. 100). Therefore, these issues

have been resolved through the arbitration award which has never been challenged and is binding on the parties as the law of the case. *See Sentry Eng'g, supra.* Moreover, the Greens agreed to the satisfaction of the arbitration award and stipulated to the dismissal of the third-party complaint with prejudice. By agreeing to a voluntary dismissal of these claims with prejudice, the Greens are now precluded from continuing to litigate these claims through the appellate process.[5] *See Nelson v. QHG of S.C., Inc.*, 354 S.C. 290, 311, 580 S.E.2d 171, 182 (Ct. App. 2003)(rev'd partially on other grounds)("A case that is dismissed 'with prejudice' indicates an adjudication on the merits").

IV. THE TRIAL COURT DID NOT COMMIT ERROR IN GRANTING WALTER MORTGAGE COMPANY THE EQUITABLE REMEDY OF FORECLOSURE.

Although not identified as one of the "Questions Presented" in their Petition for Writ of Certiorari, the Greens raise in their brief the issue of whether Jim Walter Homes violated South Carolina law by not having an attorney present for the execution of the underlying documents. (Petitioner's Brief pp. 4-5) The process of buying a Jim Walter Home was a credit sale that did not involve transfer of title or a loan of money, but it did involve the execution and recording of a mortgage lien on the Greens' property. While Walter Mortgage Company believes that the Greens may be correct that no licensed South Carolina attorney supervised the preparation, execution, and recording of the mortgage in this

[5] On September 12, 2011, the Greens filed a lawsuit in federal court against Jim Walter Homes and Walter Mortgage Company re-asserting the claims raised in their third-party complaint in this case. *See* C.A. No. 4:11-cv-02437-RBH-KDW. On April 18, 2012, United States Magistrate Judge Kaymani D. West issued her report and recommendation that the motion for summary judgment filed by Jim Walter Homes and Walter Mortgage Company be granted and the complaint dismissed with prejudice based upon principles of *res judicata*.

instance, the lower court did not commit error by granting foreclosure on the mortgage.

The underlying transaction in this matter took place in 2007 with the mortgage being recorded on April 16, 2007. (R. p. 135) The foreclosure action was commenced on January 23, 2008. (R. pp. 51-68) Both the filing of the mortgage and the filing of the foreclosure action occurred prior to the South Carolina Court of Appeals opinion in *Wachovia Bank v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), and this Court's opinion in *Matrix Fin. Serv. Corp. v. Frazer,* 394 S.C. 134, 714 S.E.2d 532 (2011). As this Court pronounced in *Matrix,* "[w]e take this opportunity to definitively state that a lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law. <u>We apply this ruling to all filing dates after the issuance of this opinion</u>." *Matrix Fin. Serv. Corp. v. Frazer*, 394 S.C. 134, 140, 714 S.E.2d 532, 535 (2011)(emphasis added).[6] Applying this Court's pronouncement in *Matrix* to the facts of this case, there was no error in permitting foreclosure on the mortgage since both the filing of the mortgage and the filing of the foreclosure action came before the issuance of this Court's opinion in *Matrix.* Therefore, in this instance, the issue of whether an independent South Carolina attorney supervised the execution and recording of the mortgage is not determinative of whether the trial court erred in granting the order of foreclosure. There being no established basis or authority for the trial court to deny Walter Mortgage Company the remedy of foreclosure when it

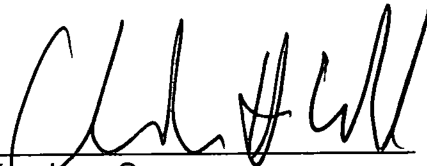
6 Walter Mortgage Company notes the concurring opinion in *Matrix* in which Justice Kittredge expresses that the holding in *Matrix* with respect to the enforcement of a mortgage is "prospective-only." *Matrix,* 394 S.C. at 140, 714 S.E.2d at 535.

issued its order on July 20, 2009, the trial court did not commit error by granting the order for judgment of foreclosure on the mortgage. Moreover, the Petitioners, while represented by counsel, never sought reconsideration on this issue or clarification of the trial court's order under Rule 59(e).

CONCLUSION

Based upon the reasoning and authorities presented herein, the ruling of the trial court and the South Carolina Court of Appeals should be affirmed.

Respectfully submitted,



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May 11, 2012

THE STATE OF SOUTH CAROLINA
Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

William O. Spencer, Jr., as Special Referee

On Certiorari to the Court of Appeals of South Carolina
Opinion No. 2011-UP-071 (S.C. Ct. App. filed February 23, 2011)

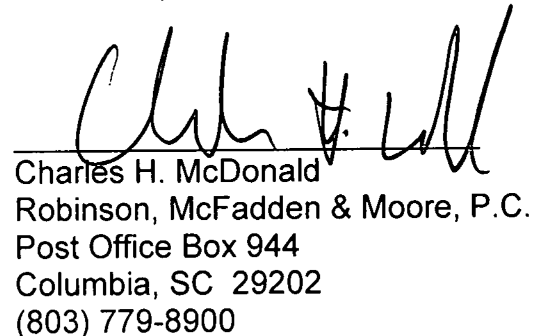
Walter Mortgage Company... Respondent,

v.

Natasha L. Green and Shilon L. Green ....Petitioners.

PROOF OF SERVICE

I certify that I have served the Brief of Respondent by placing a copy of same in the United States mail, postage prepaid and affixed thereto, and addressed to the Petitioners, Natasha L. Green, Shilon L. Green, Post Office Box 334, McBee, SC 29101.



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May 11, 2012

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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

William O. Spencer, Jr., as Special Referee

On Certiorari to the Court of Appeals of South Carolina
Opinion No. 2011-UP-071 (S.C. Ct. App. filed February 23, 2011)

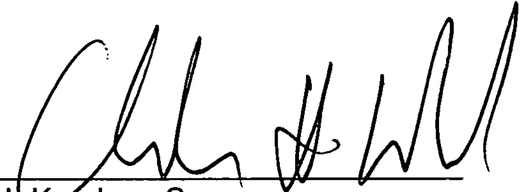
Walter Mortgage Company.. Respondent,

v.

Natasha L. Green and Shilon L. Green ....Petitioners.

CERTIFICATE OF COUNSEL

The undersigned certified that this Brief of Respondent complies with Rule 211(b), SCACR.



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May 11, 2012

The Honorable Daniel E. Shearouse, Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29211

Re: Walter Mortgage Company v. Natasha L. Green and Shilon L. Green
Case Tracking No. 2011-189826
Our File No. 30829-0062

Dear Mr. Shearouse:

Enclosed for filing are an original (unbound) and fifteen bound copies of the Brief of Respondent and Proof of Service. Please return the extra file-stamped copy with our courier.

A bound copy and proof of service is also being served upon Petitioners Natasha and Shilon Green by U.S. Mail today.

Very truly yours,

ROBINSON, MCFADDEN & MOORE, P.C.

Charles H. McDonald

CHM/rhs

cc: Natasha L. Green and Shilon L. Green – w/encls.

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