

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2014-001384

741827
RECEIVED
JAN 22 2015
SC Court of Appeals

FV-I, Inc., in trust for Morgan Stanley Mortgage
Capital Holdings LLC.....Respondent,

vs.

Byron J. Dolan; Lisa S. Dolan; First Citizens Bank and
Trust Company, Inc.; Wells Fargo Bank, N.A.; Branch
Banking and Trust Company Defendants,

Of whom

Byron J. Dolan and Lisa S. Dolan, are..... Appellants.

**RESPONDENT'S MOTION TO LIFT STAY UNDER RULE 42(b), SCRCP AND
MEMORANDUM OF LAW**

FV-I, Inc., in trust for Morgan Stanley Mortgage Capital Holdings LLC
("Respondent") hereby petitions the Court to lift the stay in this matter imposed by the
Master-in-Equity on the grounds that the equitable claims pending before the Master-in-
Equity were severed, pursuant to Rule 42(b), SCRCP, from the claims currently on
appeal and are therefore distinct and separate claims not subject to the automatic stay
provisions of Rule 241, SCACR, or under any other grounds.

This is an appeal from the order of the Honorable R. Keith Kelly that denied Appellants' motion for a new trial filed May 16, 2014, and the order of the Honorable R. Keith Kelly that denied Appellants' motion to reconsider filed on June 19, 2014. (See Exhibits A and B attached hereto). Respondent filed its Lis Pendens, Summons, and Complaint on July 9, 2012 seeking foreclosure of a certain mortgage of real estate given by Appellants dated March 28, 2005, and subsequently assigned to Respondents July 8, 2011. (See Exhibit C attached hereto). Appellants filed an Answer and Counterclaim on or about August 8, 2012. (See Exhibit D attached hereto). In their Counterclaims, Appellants sought an Accounting, as well as monetary judgments on causes of action for breach of contract and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA").

By order signed April 17, 2014 and filed May 1, 2014, Respondent and Appellants consented and stipulated to bifurcate the action pursuant to Rule 42(b), SCRPC, thereby severing the Appellants legal claims for Breach of Contract and SCUTPA from Respondent's equitable foreclosure claim and Appellants' equitable counterclaim for Accounting. The equitable foreclosure claim and equitable counterclaim for Accounting were referred to The Honorable James O. Spence, Master-in-Equity, for a separate trial. (See Exhibit E attached hereto). The legal counterclaims were heard before a jury with The Honorable R. Keith Kelly presiding on April 17, 2014. A directed verdict was granted in favor of Respondent on the SCUTPA claim, and a jury verdict was returned in favor of Respondent on the Breach of Contract counterclaim. (See Exhibit F and I pp. 139-142 attached hereto). Subsequently, Judge Kelly denied Appellants' motion for a new trial and motion to reconsider the order.

On July 14, 2014, Respondent filed a Motion to Dismiss Appellants' appeal due to the fact that there has not been a final judgment on the Respondent's equitable claims. On August 25, 2014, the Court of Appeals issued an Order denying Respondent's Motion to Dismiss but did not address the underlying merits of the motion. The Court of Appeals' Order allows the parties to address the appealability of the legal counterclaims in their briefs to the court. The Court of Appeals has not issued a stay of the equitable claims pending before the Master-in-Equity.

Also, on July 14, 2014, Respondent filed a Motion to Proceed with Trial with the Master-in-Equity seeking to go forward with its foreclosure cause of action while the Appeal was still pending. (See Exhibit G attached hereto). By Order filed November 21, 2014 the Master-In-Equity issued an Order staying the foreclosure action until such time as the Respondent's appeal of the jury verdict and directed verdict is resolved. (See Exhibit H attached hereto).

In the consent Order Bifurcating Action and Referring Foreclosure Claim to Master-In-Equity, Exhibit E attached hereto, Appellants and Respondent agreed to bifurcate the action pursuant to Rule 42(b), SCRCF. The Appellants' counterclaims for Breach of Contract and Unfair Trade Practices were severed from Plaintiff's foreclosure action and separate trials were ordered. Both parties fully consented to bifurcate the case under Rule 42(b), SCRCF.

"A trial should be bifurcated only if the issues are so distinct that trial of each alone would not result in injustice." Creighton v. Coligny Plaza Ltd. Partnership, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct.App. 1998) (citing Fortune v. Gibson, 304 S.C. 279, 403 S.E.2d 674 (Ct.App.1991)). One of the fundamental principles of bifurcation is that "a

trial may be bifurcated only if the issues are so distinct that a trial of each alone would not result in injustice.” Fortune v. Gibson, 304 S.C. 279, 281, 403 S.E.2d 674, 675 (Ct.App. 1991) “If South Carolina Rule of Civil Procedure 42(b) contemplated bifurcation before the same jury only, there would be no need for the requirement that the issues be distinct.” Id. “Indeed, it has been expressly recognized that the ‘distinct issues’ requirement ‘is dictated for the very practical reason that if separate juries are allowed to pass on issues involving overlapping legal and factual questions the verdicts rendered by each could be inconsistent.’ Id. at 281-282 (quoting Alabama v. Blue Bird Body Co., 573 F.2d 309, 318 (5th Cir.1978) (interpreting Fed.R.Civ.P. 42(b)).

In the present case, the filing of a notice of appeal as to the bifurcated jury trial on the legal counterclaims does not affect the distinct equitable claims pending before the Master-in-Equity and therefore does not create a stay. By consenting to bifurcating the case under Rule 42(b), SCRCP, the Appellants consented and acknowledged that the bifurcated claims have distinct issues, a trial of each alone would not result in injustice, and that there are no overlapping legal and factual questions that would result in inconsistent verdicts or judgments. (See Creighton v. Coligny Plaza Ltd. Partnership, 334 S.C. 96, 512 S.E.2d 510, (Ct.App. 1998) and Fortune v. Gibson, 304 S.C. 279, 403 S.E.2d 674 (Ct.App.1991))

Additionally, the claims tried before the jury on April 17, 2014 are distinct and separate from the equitable claims currently stayed by Master-in-Equity. At the jury trial on April 17, 2014, the Appellants sought only monetary damages from Respondent on the legal counterclaims for breach of contract. (See Exhibits I and F attached hereto) A potential award of monetary damages at some point in the future on the legal

counterclaims would not form the basis of a defense to Appellant's right to foreclose its mortgage in the bifurcated foreclosure trial. When the foreclosure case proceeds the Appellants are still free to assert any and all defenses they may have to the foreclosure action.

As evidence of the fact that the Appellants only sought monetary damages at the jury trial on April 17, 2014; is that the verdict form approved by all parties only lists damages for the breach of contract claim in the form of monetary damages. (See Exhibit F attached hereto). Additionally, in their Answer and Counterclaim the Appellants are only seeking monetary damages in the form of "treble damages, reasonable attorney's fees, and costs" for the violation of the Unfair Trade Practices Act. (See Exhibit D Par. 52 attached hereto).

Due to the fact that the equity claims currently pending before the Master-in-Equity have been bifurcated from the claims currently on appeal, the equity claims are not subject to the automatic stay provisions of Rule 241, SCACR or under any other grounds, and the stay imposed by the Master-in-Equity should be lifted and the equity claims proceed to trial. Respondent respectfully requests this Court issue an Order vacating the Master-in-Equity's stay Order.

Respectfully submitted,

January 20, 2015



Charles S. Gwynne Jr. (SC Bar # 73844)
Jason D. Wyman (SC Bar # 100271)
ROGERS TOWNSEND & THOMAS, PC
220 Executive Center Drive (29210)
Post Office Box 100200
Columbia, South Carolina 29202-3200
(803)771-7900
Attorney for the Respondent
Rogers Townsend & Thomas, PC and its staff are debt collectors

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2014-001384

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JAN 22 2015

SC Court of Appeals

FV-I, Inc., in trust for Morgan Stanley Mortgage
Capital Holdings LLC.....Respondent,

vs.

Byron J. Dolan; Lisa S. Dolan; First Citizens Bank and
Trust Company, Inc.; Wells Fargo Bank, N.A.; Branch
Banking and Trust Company Defendants,

Of whom

Byron J. Dolan and Lisa S. Dolan, are..... Appellants.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the **RESPONDENT'S MOTION TO LIFT STAY UNDER RULE 42(b), SCRPC AND MEMORANDUM OF LAW** on Appellants and other Defendants by depositing copies of it in the United States Mail, postage prepaid, on January 20, 2015, at the addresses shown on the attachment listing Other Counsel of Record and Parties.

January 20, 2015



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Jason D. Wyman (SC Bar # 100271)
ROGERS TOWNSEND & THOMAS, PC
220 Executive Center Drive – Suite 109
(29210)
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Attorney for the Respondent
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Other Counsel of Record and Parties:

Andrew S. Radeker, Esquire
Harrison & Radeker, P.A.
PO Box 50143
Columbia, SC 29250

Adam H. Schanz, Esquire
Crawford & von Keller, LLC
PO Box 4216
Columbia, SC 29204

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-32-2816

ORIGINAL

FILED

FV-I, Inc. etc.,

2014 MAY 16 P 1:22

Bryon J. Dolan, et al.,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Andrew S. Radeker (per direction of Court)

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

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

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order ☒ Statement of Judgment by the Court:

The Dolan Defendants' motion for a new trial is hereby denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Bruce Kelly
Circuit Court Judge

SCRPC Form 4C (10/2011)

2165
Judge Code

8 May 2014
Date

Page 1 of 2

EXHIBIT

A

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-32-2816

ORIGINAL

FV-I, Inc. etc.,

2014 JUN 19 P 12:20

Bryon J. Dolan, et al.,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Andrew S. Radeker (per direction of Court)

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

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order ☒ Statement of Judgment by the Court:

The Dolan Defendants' motion to reconsider the order denying their motion for a new trial is hereby denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge

SCRCP Form 4C (10/2011)

Judge Code

EXHIBIT

B

Date

Page 1 of 2

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

FV-I, Inc. in trust for Morgan Stanley Mortgage
Capital Holdings LLC,

Plaintiff,

v.

Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank
and Trust Company, Inc.; Wells Fargo Bank,
N.A.; Branch Banking and Trust Company;

Defendant(s).

(011792-00355)

IN THE COURT OF COMMON PLEAS

DOCKET NO.

2012 JUL -9 P 11:00

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

LIS PENDENS

Deficiency Judgment Demanded

2012-LP-32-1135

NOTICE IS HEREBY GIVEN THAT an action has been or will be commenced in this Court upon complaint of the above-named Plaintiff against the above-named Defendant(s) for the foreclosure of a certain mortgage of real estate given by Bryon J. Dolan and Lisa S. Dolan to Mortgage Electronic Registration Systems, Inc. as nominee for Branch Banking and Trust Company of South Carolina, its successors and assigns (MIN# 100159966122742991) dated March 28, 2005, and recorded in the Office of the RMC/ROD for Lexington County on March 31, 2005, in Mortgage Book R10015 at Page 280. This Mortgage was subsequently assigned to Branch Banking and Trust Company by deed of September 25, 2009 and recorded October 12, 2009 in Book R13894 at Page 6; subsequently assigned to the Plaintiff herein by assignment dated July 8, 2011 and recorded July 8, 2011 in Book R14959 at Page 331 and by assignment dated September 30, 2011 and recorded October 3, 2011 in Book R15087 at Page 321. This Mortgage is subject to a Mortgage Modification dated September 29, 2011 and recorded September 30, 2011 in Book R15084 at Page 266. Also subject to a Partial Release of Real Estate Mortgage dated October 5, 2011 and recorded October 17, 2011 in Book R15110 at Page 3.

The premises covered and affected by the said mortgage and by the foreclosure thereof were, at the time of the making thereof and at the time of the filing of this notice, described as follows:

ALL that certain piece, parcel or lot of land, with the improvements thereon, if any, situate, lying and being in the County of Lexington, State of South Carolina, being shown and delineated as Lot 5 (but sometimes known as Lot 5B or Parcel B), fronting on Winward Point Ct. on a plat prepared for Bryon J. and Lisa Dolan by Withworth & Associates, Inc., dated December 4, 2002 and recorded in the Office of the ROD for Lexington County in Book R7757 at Page 154, and having such metes and bounds as shown on said plat.



Also: A non-exclusive Easement for ingress/egress to Lot 5 (a/k/a Lot 5-B) over, through and across Lot 5-A (a/k/a Parcel A) as shown and delineated upon that certain Plat prepared for Norris L. Bowen and Jo Ann Bowen by Survey & Mapping Services dated September 14, 2011, recorded in the Office of Deeds for Lexington County and being more particularly described as "New Ingress/Egress Easement to 540 Windward Point Ct." shown as a small triangular shaped portion of Lot 5-A having an area of (206.25 square feet, more or less) located at the North-East line between Windward Point Court and Lot 5-A.

Less and Except: All that certain piece, parcel, or lot of land, with the improvements thereon, situate, located, lying and being in the County of Lexington, State of South Carolina, the same being shown and delineated as Parcel B-2 containing (1,043 square feet, more or less) more or less, as shown and delineated upon a Plat prepared for Norris L. Bowen and Jo Ann Bowen by Survey & Mapping Services, dated September 14, 2011, recorded in the Office of Deeds for Lexington County in Book R15084 at Page 258; and having such boundaries and measurements as shown thereon, more or less.

This being a portion of the property conveyed to Bryon J. Dolan by deed of James L. Casterline, Jr. and Dorothy C. Casterline dated September 30, 1999 and recorded October 15, 1999 in Book R5490 at Page 159; subsequently, Bryon J. Dolan conveyed a one half undivided interest in the subject property to Lisa S. Dolan by deed dated August 22, 2000 and recorded August 24, 2000 in Book R5936 at Page 326. Also, property conveyed to Bryon J. Dolan and Lisa S. Dolan by deed of South Carolina Electric & Gas Company dated February 4, 2002 and recorded February 5, 2002 in Book R6978 at Page 27.

Property Address: 540 Windward Pt Ct
Columbia, SC 29212

TMS# 002621-01-011

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958)
Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
Eve Moredock Stacey (SC Bar #5300)
Robert P. Davis (SC Bar #74030)
Vance L. Brabham, III (SC Bar #71250)
Andrew W. Montgomery (SC Bar #79893)

Cheryl H. Fisher (SC Bar #15213)
Jennifer W. Rubin (SC Bar #16727)
Michael P. Morris (SC Bar #73560)
Mary R. Powers (SC Bar #16534)
William S. Koehler (SC Bar #74935)
Jaclynn B. Goings (SC Bar #77501)
Andrew A. Powell (SC Bar #100210)

220 Executive Center Drive
Columbia, SC 29210

Post Office Box 100200 (29202)
(803) 744-4444

Columbia, South Carolina
July 6, 2012

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

FV-I, Inc. in trust for Morgan Stanley Mortgage
Capital Holdings LLC,

Plaintiff,

v.

Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank
and Trust Company, Inc.; Wells Fargo Bank,
N.A.; Branch Banking and Trust Company;

Defendant(s).

(011792-00355)

IN THE COURT OF COMMON PLEAS

DOCKET NO.

2012 JUL 11:00

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

SUMMONS
(NON-JURY)
FORECLOSURE OF REAL ESTATE
MORTGAGE
Deficiency Judgment Demanded

2012 CP 3202816

TO THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to appear and defend by answering the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer on the subscribers at their offices, 220 Executive Center Drive, Suite 109, Post Office Box 100200, Columbia, South Carolina 29202, within thirty (30) days after the service hereof, 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 do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

YOU WILL ALSO TAKE NOTICE that 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 in equity/special referee, pursuant to Rule 53, of the 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 FV-I, Inc. in trust for Morgan Stanley Mortgage Capital Holdings LLC.

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958)
Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
Eve Moredock Stacey (SC Bar #5300)
Robert P. Davis (SC Bar #74030)
Vance L. Brabham, III (SC Bar #71250)
Andrew W. Montgomery (SC Bar #79893)

Cheryl H. Fisher (SC Bar #15213)
Jennifer W. Rubin (SC Bar #16727)
Michael P. Morris (SC Bar #73560)
Mary R. Powers (SC Bar #16534)
William S. Koehler (SC Bar #74935)
Jaclynn B. Goings (SC Bar #77501)
Andrew A. Powell (SC Bar #100210)

220 Executive Center Drive
Columbia, SC 29210

Post Office Box 100200 (29202)
(803) 744-4444

Columbia, South Carolina
July 6, 2012

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

FV-I, Inc. in trust for Morgan Stanley Mortgage
Capital Holdings LLC,

Plaintiff,

v.

Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank
and Trust Company, Inc.; Wells Fargo Bank,
N.A.; Branch Banking and Trust Company;

Defendant(s).

IN THE COURT OF COMMON PLEAS

DOCKET NO.

2012 JUL 8 P 11:00

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

COMPLAINT

(NON-JURY)

FORECLOSURE OF REAL ESTATE
MORTGAGE
Deficiency Judgment Demanded

(011792-00355)

2012 CP 3202816

Plaintiff alleges:

1. This is an action for the foreclosure of a mortgage upon certain real estate in Lexington County, South Carolina.

2. Pursuant to S.C. Code Section 33-15-101(b)(8) Plaintiff is a corporation or other legal entity collecting debts and / or enforcing mortgages, security interests or other rights in property securing debts.

3. Plaintiff has the legal right to enforce the negotiable instrument secured by the Mortgage and is the real party in interest as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure.

4. The Plaintiff's servicing agent for the mortgage loan described in this foreclosure action is participating in the Home Affordable Modification Program ("HMP"), but the subject loan is not eligible for modification because the borrower's request is incomplete.

5. Some lien on or interest in the real estate, the subject of this action, may be claimed by the Defendant(s) herein.

6. The Defendant(s) herein described as judgment creditors have by filing said judgments designated their attorney entering the judgment as their agent for service of process under the provisions of South Carolina Code Section 15-35-840.

$$\begin{aligned}
 & \text{Let } \mathbf{A} = \begin{pmatrix} 1 & 2 \\ 3 & 4 \end{pmatrix}, \mathbf{B} = \begin{pmatrix} 4 & 3 \\ 2 & 1 \end{pmatrix}, \mathbf{C} = \begin{pmatrix} 2 & 1 \\ 1 & 2 \end{pmatrix}, \mathbf{D} = \begin{pmatrix} 3 & 4 \\ 4 & 3 \end{pmatrix} \\
 & \text{Find } \mathbf{A} + \mathbf{B}, \mathbf{A} - \mathbf{C}, \mathbf{B} + \mathbf{D}, \mathbf{A} \mathbf{C}, \mathbf{B} \mathbf{D}, \mathbf{A} \mathbf{D}, \mathbf{B} \mathbf{C} \\
 & \text{Solution: } \mathbf{A} + \mathbf{B} = \begin{pmatrix} 1+4 & 2+3 \\ 3+2 & 4+1 \end{pmatrix} = \begin{pmatrix} 5 & 5 \\ 5 & 5 \end{pmatrix} \\
 & \mathbf{A} - \mathbf{C} = \begin{pmatrix} 1-2 & 2-1 \\ 3-1 & 4-2 \end{pmatrix} = \begin{pmatrix} -1 & 1 \\ 2 & 2 \end{pmatrix} \\
 & \mathbf{B} + \mathbf{D} = \begin{pmatrix} 4+3 & 3+4 \\ 2+4 & 1+3 \end{pmatrix} = \begin{pmatrix} 7 & 7 \\ 6 & 4 \end{pmatrix} \\
 & \mathbf{A} \mathbf{C} = \begin{pmatrix} 1 \cdot 2 + 2 \cdot 1 & 1 \cdot 1 + 2 \cdot 2 \\ 3 \cdot 2 + 4 \cdot 1 & 3 \cdot 1 + 4 \cdot 2 \end{pmatrix} = \begin{pmatrix} 4 & 5 \\ 10 & 11 \end{pmatrix} \\
 & \mathbf{B} \mathbf{D} = \begin{pmatrix} 4 \cdot 3 + 3 \cdot 4 & 4 \cdot 2 + 3 \cdot 3 \\ 2 \cdot 3 + 1 \cdot 4 & 2 \cdot 2 + 1 \cdot 3 \end{pmatrix} = \begin{pmatrix} 24 & 17 \\ 10 & 7 \end{pmatrix} \\
 & \mathbf{A} \mathbf{D} = \begin{pmatrix} 1 \cdot 3 + 2 \cdot 4 & 1 \cdot 4 + 2 \cdot 3 \\ 3 \cdot 3 + 4 \cdot 4 & 3 \cdot 4 + 4 \cdot 3 \end{pmatrix} = \begin{pmatrix} 11 & 10 \\ 25 & 24 \end{pmatrix} \\
 & \mathbf{B} \mathbf{C} = \begin{pmatrix} 4 \cdot 2 + 3 \cdot 1 & 4 \cdot 1 + 3 \cdot 2 \\ 2 \cdot 2 + 1 \cdot 1 & 2 \cdot 1 + 1 \cdot 2 \end{pmatrix} = \begin{pmatrix} 11 & 10 \\ 5 & 4 \end{pmatrix}
 \end{aligned}$$

7. Heretofore, on or about March 28, 2005, Bryon J. Dolan made, executed and delivered a certain Adjustable Rate Note ("Note") in the principal sum of \$721,000.00, payable in monthly installments.

8. In order to secure the payment of the Note according to the terms and conditions thereof, Bryon J. Dolan and Lisa S. Dolan made, executed and delivered unto Mortgage Electronic Registration Systems, Inc. as nominee for Branch Banking and Trust Company of South Carolina, its successors and assigns (MDN# 100159966122742991) a certain real estate mortgage ("Mortgage") covering the following described property and any and all improvements to the property, including but not limited to a mobile/manufactured home:

ALL that certain piece, parcel or lot of land, with the improvements thereon, if any, situate, lying and being in the County of Lexington, State of South Carolina, being shown and delineated as Lot 5 (but sometimes known as Lot 5B or Parcel B), fronting on Winward Point Ct. on a plat prepared for Bryon J. and Lisa Dolan by Withworth & Associates, Inc., dated December 4, 2002 and recorded in the Office of the ROD for Lexington County in Book R7757 at Page 154, and having such metes and bounds as shown on said plat.

Also: A non-exclusive Easement for ingress/egress to Lot 5 (a/k/a Lot 5-B) over, through and across Lot 5-A (a/k/a Parcel A) as shown and delineated upon that certain Plat prepared for Norris L. Bowen and Jo Ann Bowen by Survey & Mapping Services dated September 14, 2011, recorded in the Office of Deeds for Lexington County and being more particularly described as "New Ingress/Egress Easement to 540 Windward Point Ct." shown as a small triangular shaped portion of Lot 5-A having an area of (206.25 square feet, more or less) located at the North-East line between Windward Point Court and Lot 5-A.

Less and Except: All that certain piece, parcel, or lot of land, with the improvements thereon, situate, located, lying and being in the County of Lexington, State of South Carolina, the same being shown and delineated as Parcel B-2 containing (1,043 square feet, more or less) more or less, as shown and delineated upon a Plat prepared for Norris L. Bowen and Jo Ann Bowen by Survey & Mapping Services, dated September 14, 2011, recorded in the Office of Deeds for Lexington County in Book R15084 at Page 258; and having such boundaries and measurements as shown thereon, more or less.

This being a portion of the property conveyed to Bryon J. Dolan by deed of James L. Casterline, Jr. and Dorothy C. Casterline dated September 30, 1999 and recorded October 15, 1999 in Book R5490 at Page 159; subsequently, Bryon J. Dolan conveyed a one half undivided interest in the subject property to Lisa S. Dolan by deed dated August 22, 2000 and recorded August 24, 2000 in Book R5936 at Page 326. Also, property conveyed to Bryon J. Dolan and Lisa S. Dolan by deed of South Carolina Electric & Gas Company dated February 4, 2002 and recorded February 5, 2002 in Book R6978 at Page 27.

Property Address: 540 Windward Pt Ct
Columbia, SC 29212

TMS# 002621-01-011

9. The Mortgage was signed, witnessed and probated March 28, 2005; thereafter the Mortgage was recorded in the Office of the RMC/ROD for Lexington County on March 31, 2005, in Mortgage Book R10015 at Page 280. This Mortgage was subsequently assigned to Branch Banking and

Trust Company by deed of September 25, 2009 and recorded October 12, 2009 in Book R13894 at Page 6; subsequently assigned to the Plaintiff herein by assignment dated July 8, 2011 and recorded July 8, 2011 in Book R14959 at Page 331 and by assignment dated September 30, 2011 and recorded October 3, 2011 in Book R15087 at Page 321. This Mortgage is subject to a Mortgage Modification dated September 29, 2011 and recorded September 30, 2011 in Book R15084 at Page 266. Also subject to a Partial Release of Real Estate Mortgage dated October 5, 2011 and recorded October 17, 2011 in Book R15110 at Page 3.

10. The Mortgage evidences and secures the repayment of money advanced by Plaintiff or its predecessor in interest to, or on behalf of, the mortgagor(s) and constitutes a R10015 at Page 280 lien on the mortgaged premises.

11. After all payments received by the Plaintiff have been credited to the subject loan, the loan is in default and due for March 1, 2011, and the conditions of the Note and Mortgage have been broken. Plaintiff elects to and does declare the entire balance of said indebtedness due and payable, and that there is due on the Note and Mortgage as of March 1, 2011, the principal sum of \$721,000.00, with interest from February 1, 2011, advances, late charges, and also for the costs and disbursements of this action, including attorney's fees.

12. Pursuant to South Carolina Code Sections 29-3-650 and 29-3-660, Plaintiff specifically demands or reserves its right to a personal or deficiency judgment, unless heretofore or hereafter released, against the Notemaker(s) hereby obligated for the above-described debt.

13. Pursuant to the terms of the Mortgage, Plaintiff has employed counsel to prosecute this action and a reasonable value of services of counsel in this action is the sum as the Court may find appropriate.

14. Plaintiff may be forced to pay sums for taxes and insurance and costs for securing the property, which sums, according to the terms of the Mortgage, should be added to the amount of the debt.

15. Pursuant to the terms of the Mortgage and applicable state law, Plaintiff requests the mortgage be foreclosed and that the property be sold at public auction in accordance with law, subject to any liens for taxes, special assessments of record against such property, and existing easements or restrictions of record.

16. The hereinafter named Defendant(s) may have some interest in or lien upon the premises covered by the Mortgage set forth above, or some part thereof, but that such interests or liens are junior and subsequent to the lien of Plaintiff's Mortgage or, if specified below, have been paid in full and either should be satisfied of record or the lien released from the subject real estate. Said liens or interests are of record in the Office of the RMC or Clerk of Court of the aforesaid county and are described as follows:

A. First Citizens Bank and Trust Company, Inc., by virtue of a mortgage given by Bryon Dolan a/k/a Bryon J. Dolan and Lisa S. Dolan in the amount of \$250,000.00, dated December 29, 2006, and recorded January 4, 2007 in Book R11662 at Page 69 Also including any other liens they may have. This Mortgage is subject to a Mortgage Modification dated September 29, 2011 and recorded September 30, 2011 in Book R15084 at Page 264. Also subject to a Partial Release of Mortgage Lien recorded October 17, 2011 in Book R15110 at Page 1.

B. Wells Fargo Bank, N.A., by virtue of a judgment against Bryon Dolan in the amount of \$12,319.11, dated June 17, 2010 and recorded on June 17, 2010 in Judgment Roll No. 09-CP-32-05583 Also including any other liens they may have.

C. Branch Banking and Trust Company, by virtue of a judgment against Bryon J. Dolan in the amount of \$80,483.74, dated April 25, 2011 and recorded on May 31, 2001 in Judgment Roll No. 09-CP-32-2811 Also including any other liens they may have.

17. A previous action for Foreclosure of this mortgage resulted in a Judgment of Foreclosure & Sale in the action Branch Banking and Trust Company v. Bryon J. Dolan, et al., in 09-CP-32-2263, filed May 26, 2010. That judgment included, in addition to Foreclosure of Plaintiff's mortgage: 1) Reformation of Plaintiff's mortgage to accurately described the property encumbered by Plaintiff's mortgage.

18. Plaintiff subsequently dismissed that Judgment of Foreclosure and Sale in as much as it pertained to foreclosure of Plaintiff's mortgage and released the Mortgagors from that portion of the judgment which pertained to foreclosure of Plaintiff's mortgage, but Plaintiff specifically preserved the Reformation, leaving this provision in full force and effect.

WHEREFORE, having fully set forth its Complaint, Plaintiff prays that this Honorable Court inquire into the matters as set forth herein and:

(1) Under the direction of this Court, ascertain and determine the amount due upon the Note and Mortgage held by Plaintiff together with attorney's fees and costs of this action.

(2) Declare Plaintiff's Mortgage a R10015 at Page 280 lien and render judgment of foreclosure for the amount so found to be due and owing thereon, together with any ad valorem taxes, or insurance premiums, and any other expenses which may be due and have been advanced by Plaintiff, with reasonable attorney's fees, and for the costs of this action.

(3) Order the reimbursement of all costs for inspecting and securing the property incurred by the Plaintiff as a result of the delinquency.

(4) Appoint a Receiver 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.

(5) Under the direction of this Court, sell the mortgaged premises, bar any equity of redemption, and apply the proceeds of sale as follows:

First, to the costs and expenses of the within action and 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, of the South Carolina Rules of Civil Procedure;

(6) Issue an order directing the Sheriff of Lexington County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the property should the same become necessary;

(7) Order such other and further relief as may be just and proper.

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958)
Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
Eve Moredock Stacey (SC Bar #5300)
Robert P. Davis (SC Bar #74030)
Vance L. Brabham, III (SC Bar #71250)
Andrew W. Montgomery (SC Bar #79893)

Cheryl H. Fisher (SC Bar #15213)
Jennifer W. Rubin (SC Bar #16727)
Michael P. Morris (SC Bar #73560)
Mary R. Powers (SC Bar #16534)
William S. Koehler (SC Bar #74935)
Jaclynn B. Goings (SC Bar #77501)
Andrew A. Powell (SC Bar #100210)

220 Executive Center Drive
Columbia, SC 29210

Post Office Box 100200 (29202)
(803) 744-4444

Columbia, South Carolina
July 6, 2012

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

FV-I, Inc. in trust for Morgan Stanley Mortgage Capital Holdings LLC,

Plaintiff,

v.

Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank and Trust Company, Inc.; Wells Fargo Bank, N.A.; Branch Banking and Trust Company;

Defendant(s).

(011792-00355)

IN THE COURT OF COMMON PLEAS

DOCKET NO.

FILED
2012 JUL -8 P 11:00

NOTICE OF FORECLOSURE INTERVENTION
Deficiency Judgment Demanded
JETHA CARRIGGS
CLERK OF COURT
LEXINGTON SC

2012CP3202816

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 may communicate with and otherwise deal with the Plaintiff through its law firm, Rogers Townsend & Thomas, PC.

Rogers Townsend & Thomas, PC 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 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.**

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958)
Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
Eve Moredock Stacey (SC Bar #5300)
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220 Executive Center Drive
Columbia, SC 29210

Post Office Box 100200 (29202)
(803) 744-4444

Columbia, South Carolina
July 6, 2012

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-32-2816

FV-I, Inc., in trust for Morgan Stanley
Mortgage Capital Holdings LLC,

Plaintiff,

vs.

Bryon J. Dolan; Lisa S. Dolan; First
Citizens Bank and Trust Company, Inc.;
Wells Fargo Bank, N.A.; Branch Banking
and Trust Company;

Defendants.

ANSWER AND COUNTERCLAIM
(JURY TRIAL DEMANDED)

Defendants Bryon J. Dolan and Lisa S. Dolan (hereinafter "the Defendants") in answer to the Plaintiff's Complaint and as counterclaim, answers and alleges as follows:

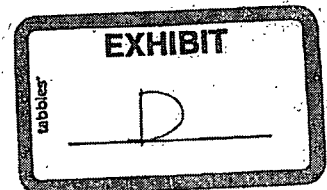
FOR A FIRST DEFENSE

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 admit the same to the extent that the Complaint states a cause of action for mortgage foreclosure.

3. Answering the allegations of paragraphs 2 and 3 of the Complaint, the Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the same.

4. Answering the allegations of paragraph 4 of the Complaint, the Defendants admit that the Plaintiff or its servicing agent is a participant in the Home Affordable Modification Program (hereinafter "HAMP"), but the Defendants deny the remaining allegations of the paragraph.



5. Answering the allegations of paragraph 5 of the Complaint, the Defendants admit the same as it pertains to Defendants Bryon J. Dolan and Lisa S. Dolan.

6. Answering the allegations of paragraph 6 of the Complaint, the Defendants admit the same.

7. Answering the allegations of paragraph 7 of the Complaint, the Defendants admit that Defendant Bryon J. Dolan signed a note, which note reads as it reads.

8. Answering the allegations of paragraph 8 of the Complaint, the Defendants admit Defendants Bryon J. Dolan and Lisa S. Dolan signed a mortgage, which document reads as it reads.

9. Answering the allegations of paragraph 9 of the Complaint, the Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the same.

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 deny the same.

12. Answering the allegations of paragraph 12 of the Complaint, the Defendants admit the Plaintiff demands what it demands, but the Defendants deny the Plaintiff is entitled to what it demands.

13. Answering the allegations of paragraph 13 of the Complaint, the Defendants deny the same.

14. Answering the allegations of paragraph 14 of the Complaint, the Defendants deny the same.

15. Answering the allegations of paragraph 15 of the Complaint, the Defendants admit that the Plaintiff requests what it requests but deny the Plaintiff is entitled to what it requests.

16. Answering the allegations of paragraph 16 of the Complaint, the Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the same.

17. Answering the allegations of paragraph 17 of the Complaint, the Defendants admit upon information and belief that a judgment was previously rendered in the referenced suit but deny that the judgment rendered any relief in favor of the Plaintiff. The judgment reads as it reads.

18. Answering the allegations of paragraph 18 of the Complaint, the Defendants deny the same as written.

19. No answer to the prayer in the Complaint is required.

FOR A SECOND DEFENSE

20. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

21. The Plaintiff's predecessor in interest settled with the Defendants the matters subject of the Plaintiff's foreclosure claims.

22. The Defendants performed under the settlement until agents of the Plaintiff and its predecessor in interest told them not to continue to perform under the settlement.

23. The Plaintiff's predecessor in interest modified the terms of the subject note and mortgage through an agreement with the Defendants.

24. The Plaintiff has knowingly, intelligently, and voluntarily relinquished any right it may have had to bring this foreclosure case.

25. This is a waiver of any right the Plaintiff may have had to bring this foreclosure case.

FOR A THIRD DEFENSE

26. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

27. The Plaintiff and its predecessors, if any, themselves and/or by and through their agents and servants, have 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.

28. This conduct includes, but is not necessarily limited to, representing to the Defendants that the matters subject of the Plaintiff's foreclosure claim were settled.

29. This conduct relates directly to the subject matter of this action.

30. The said conduct has proximately caused the Defendants prejudice and injury.

FOR A FOURTH DEFENSE

31. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

32. The Plaintiff and its predecessors, if any, themselves and/or by and through their agents and servants, have engaged in conduct that was calculated to convey the impression to the Defendants that the matters subject of the Plaintiff's foreclosure claim were settled.

33. The Plaintiff and its predecessors, if any, themselves and/or by and through their agents and servants, intended, or at least expected or desired, that the Defendants would rely upon the impressions conveyed by this conduct.

34. The Plaintiff or its predecessor in interest knew that the status of the matters subject of this action could not be both as it represented to the Defendants and as it claims in this action.

35. The Defendants lacked the means to determine the true status of these matters.

36. The Defendants accordingly relied on these representations to their prejudice.

FOR A FIFTH DEFENSE

37. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

38. The Plaintiff has no standing to bring this case.

39. The Plaintiff, upon information and belief, does not own the note subject of this case.

40. At most, the Plaintiff acquired from Mortgage Electronic Registration Systems, Inc. (or assignees thereof) its nominee status with respect to the loan at issue.

FOR A SIXTH DEFENSE AND AS COUNTERCLAIM

41. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

42. There is need in this action for discovery of the exact manner in which the Plaintiff has assessed charges and applied payments with regard to the debt subject of this action.

43. The Defendants are entitled to an accounting with regard to the same.

FOR A SEVENTH DEFENSE

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 note and mortgage at issue were created through a process designed to deprive registers of deeds (and, here, the Lexington County Register of Deeds) of their lawful fees for the recording of mortgage assignments.

46. The note and mortgage are void for illegality.

FOR AN EIGHTH DEFENSE AND AS COUNTERCLAIM

47. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

48. Actions of the Plaintiff and its predecessors, if any, themselves and/or by and through their 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.*

49. 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.

50. 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 and in that the Plaintiff is a participant in the Home Affordable Modification Program.

51. The Defendants have suffered damages as a result of the said actions.

52. The Defendants are entitled to treble damages, reasonable attorney's fees, and costs.

FOR A NINTH DEFENSE AND AS COUNTERCLAIM

53. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

54. The Plaintiff has breached the modified terms of the note and mortgage.

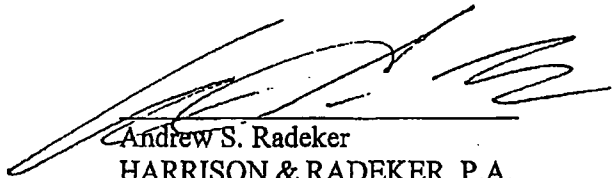
55. The Plaintiffs' aforesaid breach or breaches proximately caused damage to the Defendants.

56. The Defendant is entitled to recover damages from the Defendant.

WHEREFORE, the Defendant prays 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) Specifically enforce the modification agreement;
- (d) Award the Defendant actual damages, punitive damages, treble damages, and all applicable statutory penalties;
- (e) Award the Defendant reasonable attorney's fees;
- (f) Award the Defendant the costs and expenses of this action; and
- (g) Grant the Defendant 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
BRYON J. DOLAN AND LISA S. DOLAN

Columbia, South Carolina
August 8, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

FILED

DOCKET No. 2012-CP-32-2816

FV-I, Inc., in trust for Morgan Stanley
Mortgage Capital Holdings LLC,

2014 MAY - 1 P 3:49

vs.

Plaintiff

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON

FOR BIFURCATING ACTION AND
REFERRING FORECLOSURE CLAIM
TO MASTER-IN-EQUITY

Bryon J. Dolan; Lisa S. Dolan; First Citizens
Bank and Trust Company, Inc.; Wells Fargo
Bank, N.A.; Branch Banking and Trust
Company,

Defendants.

(511792355 CSG)

WHEREAS, Plaintiff FV-I, Inc., in trust for Morgan Stanley Mortgage Capital Holdings LLC ("Plaintiff") brought this action to foreclosure a mortgage lien on property more fully described in the Complaint;

WHEREAS, Defendants Bryon J. Dolan and Lisa S. Dolan ("Defendants") filed and Answer and Counterclaim against Plaintiff;

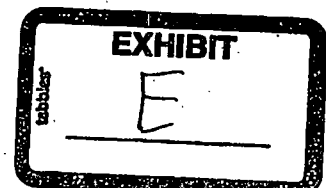
WHEREAS, the answering parties hereto have agreed and stipulated to bifurcate this action pursuant to Rule 42(b), SCRCF; and

WHEREAS, it appearing that pursuant to Rule 53 of the South Carolina Rules of Civil Procedure, that the answering parties hereto have agreed and stipulated that the Plaintiff's foreclosure claim and equitable counterclaim for Accounting be referred to The Honorable James O. Spence, as Master in Equity for Lexington County.

NOW, THEREFORE, by consent of the parties in accordance with their agreement,

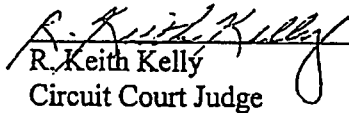
IT IS HEREBY ORDERED THAT:

1. This action is hereby bifurcated, the Defendants' counterclaims for Breach of Contract and Unfair Trade Practices are severed from Plaintiff's foreclosure action, and that Defendants may proceed on these counterclaims in a separate trial;
2. Plaintiff's foreclosure claim and equitable counterclaim for Accounting is referred to The Honorable James O. Spence, Master in Equity for Lexington County to take testimony and to direct entry of final judgment in this action under Rule 53(b), SCRCF, and all matters arising from or reasonably related to such action. The Master in Equity shall retain jurisdiction to



perform all necessary acts incident to this foreclosure action including issuance of a writ of assistance or issuance of any rule to show cause including but not limited to any rule to show cause why a party should not be bound by the judgment of foreclosure. Further, the Master in Equity shall retain jurisdiction to hear any action contesting the validity of the foreclosure action or sale or any motions pursuant to the South Carolina Rules of Civil Procedure including but not limited to Rule 60(b). Pursuant to Rule 53(e), SCRPC, any appeal from the final judgment entered by the Master in Equity shall be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.

AND IT IS SO ORDERED!


R. Keith Kelly
Circuit Court Judge

Lexington, South Carolina

17 April, 2014

COPY

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

FV-I, Inc., in trust for Morgan Stanley
Mortgage Capital Holdings LLC,)

Plaintiff,)

v.)

Bryon J. Dolan; Lisa Dolan; First Citizens
Bank and Trust Company, Inc.; Wells
Fargo Bank, N.A.; Branch Banking and
Trust Company,)

Defendant.)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

C/A No.: 2012-CP-32-2816

VERDICT

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

2014 APR 18 A 8:39

FILED

The jury must unanimously agree on the verdict. Once you have completed this form, the foreperson of the jury should sign and date the form.

Question 1: Did the Dolans prove by a preponderance of the evidence that FV-I, Inc. breached the contract?

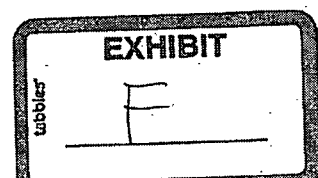
Yes X No

If your answer to Question 1 was "Yes", then please set forth the amount of the actual damages:
\$ _____

If your answer to Question 1 was "No", then the forelady should sign and date this verdict form.

April 17, 2014

Kennedy-Forbes
Foreperson



STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP3202816

FV I Inc

Morgan Stanley Mortgage
Capital Holdings LLC

Bryon J Dolan

Lisa S Dolan

2014 APR 18

First Citizens Bank and
Trust Company Inc
Branch Banking and
Company

Wells Fargo Bank NA

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Court

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

DISPOSITION TYPE (CHECK ONE)

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or
modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

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

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

4/18/2014

R. Keith Kelly
Circuit Court Judge

2165
Judge Code

17 April 2014
Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Charles Stuart Gwynne Jr. PO Box 100200 Columbia, SC
292023200

ATTORNEY(S) FOR THE PLAINTIFF(S)

Andrew Sims Radeker PO Box 50143 Columbia, SC 29250

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg ppb

Court Reporter

Beth A. Carrigg - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

FV-I, Inc., in trust for Morgan Stanley
Mortgage Capital Holdings LLC,

vs.

Bryon J. Dolan; Lisa S. Dolan; First Citizens
Bank and Trust Company, Inc.; Wells Fargo
Bank, N.A.; Branch Banking and Trust
Company,

Defendants.

FILED

IN THE COURT OF COMMON PLEAS

2014 JUL 14 P 6:21

DOCKET No. 2012-CP-32-2816

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

**PLAINTIFF'S MOTION TO PROCEED
WITH TRIAL AND MEMORANDUM IN
SUPPORT**

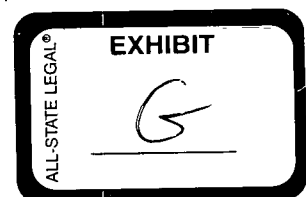
(511792.355 CSG)

YOU WILL PLEASE TAKE NOTICE that Plaintiff FV-I, Inc., in trust for Morgan Stanley Mortgage Capital Holdings LLC ("Plaintiff"), by and through its undersigned attorney, will move on the 10th day of service hereof or as soon thereafter as counsel may be heard for an order granting Plaintiff's Motion to Proceed with Trial on the grounds that Defendants Byron J. Dolan and Lisa S. Dolan's ("Defendants") appeal to the Court of Appeals of South Carolina does not stay the foreclosure action.

FACTS AND PROCEDURAL HISTORY

This lawsuit arises out of the foreclosure of a residential real estate mortgage. Plaintiff filed its Lis Pendens, Summons, and Complaint on July 9, 2012 seeking foreclosure of a certain mortgage of real estate. Defendants filed an Answer and Counterclaim on or about August 8, 2012. Defendants asserted an equitable counterclaim for Accounting, and legal counterclaims for Breach of Contract and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA").

By order filed May 1, 2014, Plaintiff and Defendants agreed and stipulated to bifurcate the action pursuant to Rule 42(b), SCRCP, thereby severing the Defendants' legal counterclaims



for Breach of Contract and SCUTPA from Plaintiff's foreclosure claim and Defendants' equitable counterclaim for Accounting. The foreclosure claim and counterclaim for Accounting were then referred to this Honorable Court.

The legal counterclaims were heard before a jury with The Honorable R. Keith Kelly presiding on April 17, 2014. A directed verdict was granted in favor of Respondent on the SCUTPA claim, and a jury verdict was returned in favor of Respondents on the Breach of Contract counterclaim. Subsequently, Judge Kelly denied Appellants' motion for a new trial and motion to reconsider the order.

On June 25, 2014, Defendants filed a Notice of Appeal to the South Carolina Court of Appeals indicating that they intend to appeal the orders of the Honorable R. Keith Kelly that denied Defendants' motion for a new trial and that denied Defendants' motion to reconsider that order.

Plaintiff seeks an order granting its Motion to Proceed with Trial on the grounds that pursuant to Rule 205, SCRAP, this court retains jurisdiction over the causes of action not affected by the appeal, even while an appeal is pending.

ARGUMENT

This court has jurisdiction to rule that the foreclosure action can proceed.

If a trial judge has not ruled upon an issue, it will not be considered on appeal. Cobb v. S. Carolina Dep't of Transp., 365 S.C. 360, 365-66, 618 S.E.2d 299, 302 (2005) (citing Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001)). Barring some statutory exceptions not applicable here, South Carolina courts have repeatedly held that as a general rule, appeal may only be taken after a final judgment has been rendered. Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005) (citing Culbertson v. Clemens, 332 S.C. 20, 23, 471 S.E.2d 163, 164 (1996)). "Any

judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final.” Id. (citing Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 336, 426 S.E.2d 777, 780 (1993)).

Rule 205, SCRAP states:

Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. *Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.* (emphasis added).

SCRAP 241 is the rule which discusses stays. Notably, it states, “[t]he lower court ... retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.”

Both Rule 205 and Rule 241 make it clear that the lower court retains jurisdiction over, and may proceed notwithstanding the notice of appeal, with portions of the case not affected by the order appealed. Otherwise, the trial Court would be forced to stop and wait for a determination from the Court of Appeals on each and every single appeal before it could proceed with any further actions in the case, even when it is clear as a matter of law that one party has filed an improper appeal only as a delay tactic. This would create a tremendous waste of time and waste court resources.

In the present case, the filing of a notice of appeal as to the jury trial on the legal counterclaims does not grant a stay of the foreclosure action. The Defendants are seeking monetary damages for Plaintiffs alleged liability for the legal counterclaim. A potential award of monetary damages at some point in the future on the legal counterclaims would not form the basis of a defense to Plaintiff’s right to foreclose its mortgage. When the

foreclosure case proceeds the Defendants are still free to assert any and all defenses they may have to the foreclosure action.

CONCLUSION

Plaintiff seeks an order granting its Motion to Proceed with Trial on the grounds stated above.

Respectfully submitted,



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ATTORNEYS FOR THE PLAINTIFF
Rogers Townsend & Thomas, PC and its staff are debt collectors

July 10, 2014

CERTIFICATE OF SERVICE BY MAIL
Civil Action # 2012-CP-32-2816

I, the undersigned attorney, for the law firm of Rogers Townsend & Thomas, PC, do hereby certify that I have caused to be served a copy of the foregoing document upon Counsel of Record below by U.S. Mail, postage prepaid, on July 10, 2014, at the following address:

Document(s) Served:

Plaintiff's Motion to Proceed with Trial and Memorandum in Support

Counsel Served:

Andrew S. Radeker, Esquire
Harrison & Radeker, P.A.
PO Box 50143
Columbia, SC 29250

Adam H. Schanz, Esquire
Crawford & von Keller, LLC
PO Box 4216
Columbia, SC 29204


Charles S. Gwynne Jr. (SC Bar # 73844)

COPY

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

Case No. 2012-CP-32-2816

FV-I, Inc., in trust for Morgan Stanley
Mortgage Capital Holdings LLC,

Plaintiff,

vs.

Bryon J. Dolan; Lisa S. Dolan; First
Citizens Bank and Trust Company, Inc.;
Wells Fargo Bank, N.A.; Branch Banking
and Trust Company;

Defendants.

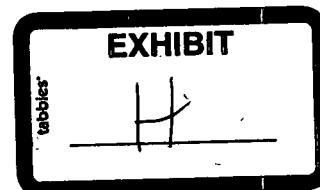
ORDER ON PLAINTIFF'S MOTION
TO PROCEED WITH TRIAL AND ON
APPEAL BOND ISSUES

FILED
NOV 21 A 9 24
CLERK OF COURT
LEXINGTON, SC

This matter comes before me upon the Plaintiff's motion that the trial of the equitable claims in this case proceed while an appeal of the denial of Defendants Bryon J. Dolan and Lisa S. Dolan (hereinafter "the Defendants")'s motion for a new trial as to their at-law counterclaims is pending. For the reasons discussed below, the court denies the motion and declines to set any bond conditions for the Defendants to meet in order for the appellate stay to remain in effect.

PROCEDURAL HISTORY

This is a case in which the Plaintiff seeks mortgage foreclosure and the Defendant asserted both legal and equitable counterclaims. This case was bifurcated by consent order on the cusp of trial, with the Defendants' at-law counterclaims tried to a jury on April 17, 2014, and the foreclosure claim and the Defendants' claim for an accounting referred to the undersigned master-in-equity to be tried later. The jury returned a verdict for the Plaintiff on the at-law counterclaims, and the Defendants moved for an order granting them a new trial as to the claims subject of the jury trial (the Defendants' counterclaims for breach of contract and violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*).



The Defendants moved for reconsideration of the order denying their motion for a new trial. That motion was denied, and the Defendants appealed the orders denying the motion for a new trial and motion to reconsider. The Plaintiff moved the Court of Appeals to dismiss the appeal, arguing that the orders were not immediately appealable. The Court of Appeals denied that motion to dismiss, but did grant leave to the parties to address the appealability of the legal counterclaims in their respective briefs.

APPEALABILITY OF APPEALED ORDERS

The Plaintiff takes the position that because this case was bifurcated and the trial on some claims has not already occurred, the order denying the Defendants' motion for a new trial as to the claims that have been tried to a directed verdict and a jury verdict in this case is not appealable. The Plaintiff takes the position that the directed verdict and jury verdict were not final judgments in this case, arguing that only after the equitable claims have been tried would any appeal lie in this case. Accordingly, the Plaintiff argues, the Defendants' appeal does not stay anything, since it is an improper appeal of an unappealable order.

South Carolina law states that "[a]n order that grants or refuses a new trial affects a substantial right and is immediately appealable" pursuant to S.C. Code Ann. § 14-3-330(2)(b). Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 97 (2d ed. 2002) (citing S.C. Code Ann. § 14-3-330(2)(b) and S.C. State Hwy. Dept. v. Clarkson, 267 S.C. 121, 126-27, 226 S.E.2d 696, 697 (1976)). The statute that speaks generally to the appealability of orders, S.C. Code Ann. § 14-3-330, specifically lists an order that "grants or refuses a new trial" as appealable. S.C. Code Ann. § 14-3-330(2)(b). The order denying the Defendants' motion for a new trial that is subject of this appeal is immediately appealable because it is an order that refuses a new trial. Id.

Rule 54(a), SCRPC, provides that the definition of "judgment" under the Rules of Civil Procedure "includes any decree or order which dismisses the action as to any party or finally determines the rights of any party." The directed verdict at the jury trial as to one of the Defendants' causes of action tried in that trial and the jury verdict as to the other cause of action tried in that trial are final judgments, for appealability purposes, as they finally determined the rights of the parties with respect to those claims. Rule 54(a), SCRPC. The directed verdict ruling and jury verdict finally determined the rights of the parties as to the breach of contract and unfair trade practices claims.

The Supreme Court of South Carolina has held that an order that ends one of several claims in a case but leaves the other claims pending is an immediately appealable order, ruling against the argument that an aggrieved party must wait until all the causes of action have been finally determined in order to appeal. Link v. Sch. Dist. of Pickens County, 302 S.C. 1, 4 fn. 2, 393 S.E.2d 176, 178 fn. 2 (1990) (overruling Plaza Dev. Services v. Joe Harden Builder, Inc., 296 S.C. 115, 370 S.E.2d 893 (Ct. App. 1988), "to the extent that it holds that one may not appeal the granting of a 12(b)(6) motion under § 14-3-330 if the ruling affects some but not all of a party's causes of action"); Lebovitz v. Mudd, 289 S.C. 476, 479, 347 S.E.2d 94, 96 (1986) ("order granting a Rule 12(b) motion as to one of multiple claims is directly appealable under § 14-3-330(2) because it affects a substantial right and strikes out part of a pleading"; rejecting argument that circuit court had to make Rule 54(b) certification to make an order appealable where it is already appealable under S.C. Code Ann. § 14-3-330). The Plaintiff's argument that the Defendants' appeal is improper because there has been no final judgment in this case is against this precedent and fails.

The denial of the Defendants' motion for a new trial under Rule 59, SCRCP, with respect to the claims tried in the jury trial is, accordingly, immediately appealable under S.C. Code Ann. § 14-3-330(1), which provides for appeals from orders "involving the merits[,] " as well as under S.C. Code Ann. § 14-3-330(2)(b). "An order 'involves the merits,' as that term is used in Section 14-3-330(1) and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense." Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006). The directed verdict and jury verdict here finally determined the causes of action tried in the jury trial, and the Defendants' new trial motion was a post-trial motion directed at those final judgments.

If a case is bifurcated into a jury trial on at-law claims and a bench trial on equitable claims, that does not mean that the result of the jury trial is not a final judgment. See Rule 54(a), SCRCP. The jury trial is no less a trial simply because it occurs before the bench trial. The verdict in the jury trial is the final judgment as to the at-law claims subject of that trial; otherwise, it would not be true that in a bifurcated case "the jury's determination of common factual issues shall be *binding* upon the court" in the following bench trial. Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 330, 755 S.E.2d 437, 442 (2014) (emphasis added). The fact that the equitable claims remain pending does not affect the finality of the at-law claims' verdict, nor does it affect appealability with regard to post-trial motions directed at that verdict. S.C. Code Ann. § 14-3-330(1)&(2)(b); Rule 54(a), SCRCP; Capital U-Drive-It, 369 S.C. at 7; Link, 302 S.C. at 4 fn. 2; Lebovitz, 289 S.C. at 479.

The Plaintiff cannot prevail on its argument that, because the appealed orders are not appealable, there is no appellate stay in effect. While it appears that the Plaintiff would be

correct if the orders at issue were indeed not appealable, that is not the situation that this case presents.

EFFECT OF THE APPELLATE STAY

Rule 205, SCACR, states as follows:

Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

Rule 241, SCACR (formerly numbered as Rule 225), entitled "Stay and Supersedeas in Civil Actions," provides in pertinent part as follows:

(a) General Rule. As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

(b) Exceptions. The exceptions to the general rule are found in statutes, court rules, and case law. Where specific conditions must be met before the exception applies, those conditions must be strictly complied with. A list of some, but not all, of the exceptions to the general rule is:

(1) Money judgments as provided in S.C. Code Ann. § 18-9-130.

(2) Judgments directing the assignment or delivery of documents or personal property as provided in S.C. Code Ann. § 18-9-150.

(3) Judgments directing the execution of conveyances or other instruments as provided in S.C. Code Ann. § 18-9-160.

(4) Judgments directing the sale or delivery of possession of real property as provided in S.C. Code Ann. § 18-9-170.

(5) Judgments directing the sale of perishable property as provided in S.C. Code Ann. § 18-9-220.

(6) Family court orders regarding a child or requiring payment of support for a spouse or child as provided in S.C. Code Ann. § 63-3-630.

(7) Worker's compensation awards as provided in S.C. Code Ann. § 42-17-60.

(8) An appeal from an order granting an injunction or temporary restraining order.

(9) Family court orders awarding temporary suit costs or attorney's fees as provided in S.C. Code Ann. § 63-3-530(A)(2).

(10) Ejectment orders as provided in S.C. Code Ann. § 27-37-130 and S.C. Code Ann. § 27-40-800.

(11) Appeals from administrative tribunals as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600(G)(5).

Discussing the appellate stay, S.C. Code Ann. § 18-9-220 provides that:

In cases not provided for in Sections 18-9-130 and 18-9-150 to 18-9-180, the notice of appeal shall stay proceedings in the court below upon the judgment appealed from, except that when it directs the sale of perishable property, the court below may order the property to be sold and the proceeds of the property to be deposited or invested in bonds of this State or of the United States, to abide the judgment of the appellate court.

The appeal at issue here does not fall within any of the exceptions to the general rule that service of a notice of appeal stays further proceedings at the trial level as to matters that are affected by the appeal (as the parties appear to agree). No perishable property is at issue here. Therefore, the stay is in effect. What the court must determine is whether trial of the equitable claims in this case falls within the scope of what is affected by the appeal. As discussed below, the court determines that it does.

As noted above, in a bifurcated case involving equitable claims and at-law claims to be tried in different trials, with the at-law claims to be tried to a jury, “[i]f there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first.” Blackburn, 407 S.C. at 330. That is because, in a case in which a jury tries the at-law claims and the court tries the equitable claims, “the jury’s determination of common factual issues shall be binding upon the court.” Id.

Here, there are factual issues common to the Defendants’ breach of contract claim and the Plaintiff’s foreclosure claim. In a previous order in this case that denied the Plaintiff’s motion to strike the Defendants’ jury demand, which the Plaintiff did not appeal¹, the Honorable Edgar W. Dickson, in deciding that the Defendants’ breach of contract counterclaim is compulsory, ruled that “[i]f what the Defendants allege is true, then they are not in default of the note and mortgage, and the Plaintiff thus cannot enforce the note or be granted foreclosure of the mortgage.” (Order filed Oct. 10, 2013.) That ruling is the law of the case. Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006); Cherry v. Myers Timber Co., Inc., 404 S.C. 596, 598 n. 3, 745 S.E.2d 405, 406 n. 3 (Ct. App. 2013).

An examination of the analysis used in Wayne Smith Const. Co., Inc. v. Wolman, Duberstein, and Thompson, 294 S.C. 140, 363 S.E.2d 115 (Ct. App. 1987), is instructive. In that case, there were multiple appeals. Id. The defendant partnership in Smith Construction initially appealed an order denying its motion to quash notices of deposition, and that appeal was dismissed, as the order was not immediately appealable. Id. at 148. The defendant partnership lost at the trial of the case and appealed that order. Id. The trial court then awarded the plaintiff attorney’s fees concerning the first, then-dismissed appeal of the order denying the motion to

¹ The *Defendants* appealed a different aspect of this order, but the parties resolved that issue, and that appeal was dismissed.

quash the deposition notices. Id. The defendant then appealed the order awarding attorney's fees, arguing that the court lacked jurisdiction because of the appeal from the order that rendered judgment for the plaintiff on the substantive case. Id. The Court of Appeals noted the rule that service of a notice of appeal does not prevent the lower court from proceeding with matters that are not affected by the appeal and stated that "Smith Construction's right to be awarded an attorney's fee as costs did not depend upon the success of the partnership's appeal of the trial court's order awarding Smith Construction judgment." Id. at 149. The Court of Appeals held that the lower court had jurisdiction to issue the order awarding attorney's fees. Id.

Here, unlike in Smith Construction, what the Plaintiff seeks to have happen during the pendency of the Defendants' appeal – the trial of the plaintiff's foreclosure claim and the issuance of a judgment on that claim – *does* depend on the success of the Defendants' appeal. If the Defendants succeed on appeal, the jury trial at which the Defendants lost on their at-law counterclaims will be of no effect, there will be no verdict finding against them on those claims, and the parties will be headed to a new jury trial, the result of which will be binding upon the master-in-equity as fact-finder with respect to the foreclosure claim. See Blackburn, 407 S.C. at 330. Whether it has been finally determined in this case that the facts underlying the counterclaims do not provide the Defendants with a defense to the foreclosure claim is very much a "matter[] decided in the order, judgment, decree or decision on appeal[.]" Rule 241(a), SCACR.

Because the trial of the equitable claims in this case would necessarily entail trial of the Plaintiff's foreclosure claim, trial of the equitable claims is a matter affected by the appeal. The appellate stay, accordingly, prevents the occurrence of that trial as long as the stay remains in effect.

ISSUES REGARDING BOND

At the hearing of the instant motion, the court requested that the parties submit memoranda on the issue of whether the court should require the Defendants to meet bond conditions to prevent the trial of the equitable claims while the appeal is pending and, if so, what those bond conditions should be. For the reasons discussed below, the court declines to impose any bond conditions on the Defendants.

"After service of notice of appeal, any party may move for an order lifting the automatic stay in cases which involve the general rule." Rule 241(c)(1), SCACR. The Appellate Court Rules appear to provide that the court's primary consideration in determining whether to lift the appellate stay is "whether such an order is necessary to preserve jurisdiction of the appeal" – which is more likely to be a consideration in determining whether to impose a supersedeas where one would otherwise not exist – "or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR.

Rule 241(c)(3), SCACR, provides as follows:

The granting of supersedeas or the lifting of the automatic stay under this Rule may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking, as the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may deem appropriate. Further, where it appears that the granting or lifting of a stay, or the issuance of a writ of supersedeas is insufficient to afford complete relief, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may order other affirmative relief upon such terms as are deemed appropriate.

Where a judgment in a mortgage foreclosure action directs the sale of real estate, the sale pursuant to that judgment is not automatically stayed while appellate proceedings are pending, unless the appellant (usually the mortgagor defendant) gives an undertaking as set forth in S.C. Code Ann. § 18-9-170 or a cash deposit as provided in S.C. Code Ann. § 15-1-250.

The Code section that sets out the undertaking conditions prescribes two slightly different undertakings, one given to stay the sale of real property to a specific party or delivery of possession of real property to a specific party while an appeal is pending, and one given to stay “the sale of land to satisfy a mortgage thereon or other lien[.]” S.C. Code Ann. § 18-9-170. The purpose of the former is to provide the party entitled to ownership of the property with compensation for the loss of the land’s possession during the time of the appeal, while the purpose of the undertaking in a mortgage foreclosure appeal is to protect the foreclosure plaintiff from impairment of the full payment of the adjudged debt caused by the property lessening in value during the pendency of the appeal. See id.; Gerald v. Gerald, 30 S.C. 348, 9 S.E. 274, 275 (1889).

The requirements of the undertaking to stay a mortgage foreclosure sale of improved land on appeal are as follows:

- 1) The undertaking must be in writing;
- 2) The undertaking must be executed by the appellant;
- 3) Two sureties must agree to be liable on the undertaking by sufficient affidavit (the sureties so doing on the undertaking document itself or in separate instruments);
- 4) The undertaking must provide that the appellant shall pay to the respondent money per the undertaking if:
 - a. The judgment is affirmed; and
 - b. The land is finally sold for less than the judgment debt and costs.
- 5) The undertaking must state that the appellant shall pay the amount payable to the respondent thereunder if the sale is affirmed and there is a deficiency, which amount is measured as follows:

- a. The appellant shall pay for any waste he commits or suffers to be committed on the premises from the time of the execution of the undertaking to the time of the sale;
- b. The appellant shall pay a reasonable rental value for the use and occupation of the land from the time of the execution of the undertaking to the time of the sale; and
- c. The amount payable per the undertaking shall not exceed the amount of the deficiency in the sale proceeds to satisfy the debt and costs.

S.C. Code Ann. § 18-9-170; Gerald, 30 S.C. 348, 9 S.E. at 275-77; see generally S.C. Code Ann. Title 18, Ch. 9. As an alternative to giving the undertaking, the appellant may make a cash deposit in lieu thereof. S.C. Code Ann. § 15-1-250.

The “manifest object of the undertaking required for the purpose of staying a sale pending an appeal is to protect the respondent, as far as practicable, from any damage which may ensue from the delay caused by the appeal, in enforcing his claim[,]” because the respondent, the foreclosure judgment creditor in that situation, has already been determined by a court to be entitled to the sale directed by the judgment. Gerald, 30 S.C. 348, 9 S.E. at 275. As it appears that Plaintiff’s counsel agreed at the hearing on this motion, S.C. Code Ann. § 18-9-170 would be applicable in this case only if there had already been a foreclosure judgment rendered. None has been.

Since the justification for imposing such conditions in order to stay the operation of the judgment directing the sale is that the court has already determined that the Plaintiff is *entitled* to the sale, the instant situation is materially different from that subject of S.C. Code Ann. § 18-9-170. The Plaintiff has never been determined by any court to be entitled to the relief it seeks in

this case, and it is by no means a foregone conclusion that the Plaintiff will be determined to be entitled to that relief, whether the Defendants succeed on appeal or not. This situation is not one which the Defendants have anything to bond off, nor is it analogous to such a situation. Nothing before the court indicates that an order lifting the appellate stay "is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR.

The court declines to impose any bond conditions on the Defendants in order for the appellate stay to remain in effect. If Plaintiff has legitimate concerns that waste is occurring on the property, Plaintiff may petition the court under the mortgage loan documents and/or applicable waste case law.

TO PROCEED WITH THE FORECLOSURE TRIAL POSES POTENTIAL PROBLEMS

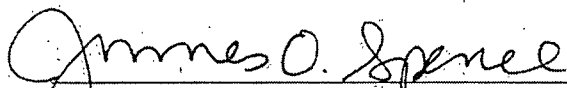
If the appellate stay were lifted, the court would be faced with the specter of this scenario: While the appeal is pending, the court goes forward with the trial of the foreclosure claim. That trial is held with the court being bound to the jury's verdict that decided the Defendants are not entitled to relief on their breach of contract counterclaim. The court finds for the Plaintiff on the foreclosure claim, a judgment of foreclosure is rendered, and the property subject of this case is sold. Afterward, the Defendants prevail on their appeal, and the Court of Appeals directs that a new jury trial be held. At that trial, the Defendants prevail on their breach of contract counterclaim, which necessarily decides, as Judge Dickson ruled, that the Defendants "are not in default of the note and mortgage, and the Plaintiff thus cannot enforce the note or be granted foreclosure of the mortgage." (Order filed Oct. 10, 2013.) This would result in judgments that are irreconcilable with one another. It is safer and more efficient to leave the stay

in effect and have the trial of the foreclosure claim only if and when it is appropriate following the conclusion of the appeal.

CONCLUSION

For the reasons discussed above, IT IS THEREFORE HEREBY ORDERED that the Plaintiff's motion to proceed with the trial of the equitable claims during the pendency of the appeal is hereby denied, and the court declines to impose any bond conditions on the Defendants in order for the appellate stay to remain in effect.

And IT IS SO ORDERED.


The Honorable James O. Spence
Master-in-Equity for Lexington County

Lexington, South Carolina

October 31, 2014

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BETH A. GARRARD
CLERK OF COURT
LEXINGTON, SC



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STATE OF SOUTH CAROLINA

County of Lexington

FV-I, Inc.,

Plaintiff,

vs.

Bryon J. Dolan, et al.,

Defendants.

COURT OF COMMON PLEAS

2012-CP-32-2816

TRANSCRIPT OF RECORD

April 17th, 2014
Lexington, South Carolina

BEFORE:

THE HONORABLE R. KEITH KELLY, JUDGE; and a jury.

APPEARANCES:

CHARLES S. GWYNNE, ESQ.
JASON D. WYMAN, ESQ.
Attorneys for the Plaintiff

ANDREW S. RADEKER, ESQ.
Attorney for the Defendants

AMINAH R. HARDY, CM
Official Court Reporter

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tabbies

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P5	544 Foreclosure complaint	5	5
P6	Foreclosure master-in-equity deed	5	5
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P8	Plat B1 & B2	5	5
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D7	Email dated 1/9/12	5	5

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1 OPENING STATEMENT

2 BY MR. RADEKER

3 Good morning. A mortgage lender cannot break the
4 terms of its own loan contract with the mortgage borrower.
5 Nor can a mortgage lender, like any other business, engage
6 in unfair and deceptive practices in the conduct of its
7 business. And if a mortgage lender does either one of
8 those things, it's liable for the harms and losses that it
9 causes. Let's talk about what the evidence will show in
10 this case. I'm Drew Radeker. I represent Bryon Dolan and
11 Lisa Dolan here. And we're here today on their
12 counterclaims, as the judge told you in this foreclosure
13 case that FV-I -- their full name is FV-I in trust for
14 Morgan Stanley Capital Mortgage Holdings, LLC -- has
15 brought against them.

16 Now, to understand this case, y'all are going to have
17 to learn about -- if you don't already know -- something
18 about the way that banking and particularly mortgage
19 banking is done today and in the modern world. It's not
20 like it once was. You may remember the banking
21 relationships from the movie It's a Wonderful Life where
22 you go have face-to-face contact with your banker.
23 Everybody sits down, they understand what is going on,
24 they know that they can rely on what's told to them by the
25 people at the bank. We're in a different world now.

1 We're in Wall Street's banking world. And in Wall
2 Street's banking world, very often mortgage loans are
3 owned by company like FV-I who don't have any face-to-face
4 contact with their borrowers at all. They operate through
5 other companies, which are called servicers, mortgage
6 servicers.

7 Now, what's a mortgage servicer? A mortgage servicer
8 is for a mortgage loan kind of like what a property
9 manager agent is for someone who, say, owns an apartment
10 building. Just as a property management agent collects
11 the rent, deals with having to evict people who don't pay,
12 deals with the day-to-day interactions with the tenants, a
13 mortgage servicer collects payments on the loan, sends out
14 all the correspondence concerning the loan, they manage
15 any foreclosure action brought on a mortgage loan, and
16 they do the communication with the borrower on the loan.

17 Now, FV-I, acting through its servicers, which are
18 two companies, Saxon Mortgage Services and then it
19 switched over to another company called Specialized Loan
20 Servicing. They broke the mortgage contract that they
21 have with the Dolans and they engaged in unfair and
22 deceptive trade practices in their interactions with them.
23 Now, this case largely concerns a lump sum payment of
24 \$65,250 that was made to Saxon Mortgage Service acting as
25 servicer for FV-I on September 30th, 2011.

1 Now, you're going to see evidence in this case, both
2 testimony and documentary evidence, that will show you
3 that that amount was what necessary and a little bit more
4 to bring the loan that was subject to this case current.
5 You see, the Dolans were in foreclosure at the time. Not
6 this foreclosure case, in another one. Mr. Dolan had been
7 in the building industry. Both he and his wife were hit
8 hard by the recession, and they got to a point where they
9 had exhausted their savings and they weren't able to
10 service the debt on the mortgage loan, and they'll
11 acknowledge that at the time. But they brought it
12 current. And FV-I, acting through its mortgage servicers
13 did the things that a mortgage would do if a loan was
14 brought current. They had the foreclosure action
15 dismissed. You'll see evidence indicating that they said,
16 "Kill the foreclosure case." But when Mr. Dolan goes to
17 make a payment, after they tell him finally where to send
18 payment to, they switch over to another servicer, payment
19 gets sent back to him, and another foreclosure action is
20 begun.

21 Now, you'll see evidence in the case that shows that
22 that foreclosure action wasn't begun because of any
23 default in payments. You'll see the records from the
24 servicer, from Saxon Mortgage Services who was the
25 servicer at the time that train got started out of the

1 station that gives the reason for returning that payment,
2 not because payment amount isn't sufficient, not because
3 it's insufficient to bring the loan current, but other.
4 See notes. You'll see a foreclosure review sheet that
5 sends "Send this to foreclosure. Says reason for
6 foreclosure, other. See notes." Not default in payment.
7 That's why we're here. And you might wonder why it is
8 that this company would do one of two things -- because
9 only one of two things can happen here, which is either
10 deceive the Dolans into believing that amount was
11 necessary to bring the loan current when it wasn't, or a
12 have that amount be necessary to bring the loan current
13 and treat it like it wasn't. Why would they do that?

14 Well, you see, the amount of this loan was \$721,000.
15 That's the principal debt. And it was brought current
16 because of the way the loan was structured that would be
17 the amount that was left. It was interest-only for a
18 period. And it was a nice house. Before the recession
19 the Dolans were making good money. It's a house on the
20 lake, and it's worth a lot of money. And you'll see in
21 FV-I servicer's own records how they valued this house at
22 \$950,000. And they said maybe if we get it through
23 foreclosure we'll discount \$100,000 off that for getting
24 it sold quickly and make it \$850,000 of what we'll bring
25 in. That's a tidy profit. Wall Street is about profit.

1 So there's motive to do this.

2 Now, you may hear from the other side about a
3 November 22, 2011, docket. We're not afraid of it; we'll
4 show it to you ourselves. They'll say, "This doesn't say
5 this \$65,250 amount is sufficient to bring this loan
6 current," and it doesn't. But it doesn't not say that
7 either. It just doesn't talk about what's necessary to
8 bring the loan current. I'll tell you that's a red
9 herring. What the amount was to bring the loan current
10 was what it was. You'll hear that it was represented that
11 this payment would be sufficient to do that. So you may
12 hear from them, well, they're in foreclosure. They're
13 just making this up because they're desperate. You won't
14 have to take my word for it. You can just look at the
15 documents, and listen to the testimony. Even just from
16 the documents, you can see again and again, telltale
17 signs, telltale signs that show they treated this as
18 though it was brought current. Telltale signs created by
19 the other side in this case. People who certainly don't
20 have any motive to help us make up some story. The
21 documents will show you it's true. It will back it up.

22 So at the end of this trial, you'll be asked to
23 render a verdict. Now, "verdict" is just a word that
24 means to speak the truth. And we'll ask you to speak the
25 truth. You'll have to apply the burden of proof. Judge

1 will tell you about what is it. This is not a criminal
2 case where the burden of proof is beyond a reasonable
3 doubt. If you imagine a set of scales in a criminal case,
4 the scales got to go like this in order for the state to
5 win, to go beyond a beyond a reasonable doubt. This is a
6 civil case. And if you find that the evidence tips even
7 just slightly in favor of the Dolans, then it means your
8 verdict must be for the Dolans.

9 And what should your verdict be? Judge will tell
10 your you verdict should be in an amount sufficient to
11 compensate the Dolans for the losses they suffered because
12 of FV-I's unlawful conduct. That amount and just that
13 amount to put things where they would be if FV-I had done
14 what the law requires them to do. That's the verdict
15 we'll ask you to render at the end of this case. You see,
16 when a mortgage loan company doesn't treat somebody who
17 brought their loan current as though they've done that,
18 what it does is it creates a bunch of extra debt. They
19 rack up interest and fees. Here you'll hear that a little
20 over \$168,000 in that amount today. And it -- people are
21 out the money they paid to bring the loan current and
22 they're no better off, facing foreclosure and loss of
23 their home. That's where the Dolans are now. FV-I will
24 try to tell you it's not like that, but evidence will show
25 you. The telltale signs time and time again, the evidence

1 tips in favor of the Dolans. Thank you.

2 THE COURT: Yes, sir.

3 MR. GWYNNE: Thank you, Your Honor. May it please
4 the Court?

5 THE COURT: Yes, sir.

6 OPENING STATEMENT

7 BY MR. GWYNNE

8 Good morning, everybody. My name is Charlie
9 Gwynne, and I'm an attorney with the law firm of Rogers,
10 Townsend & Thompson in Columbia, and my firm represents
11 the plaintiff in this case. And with me at counsel table
12 is Attorney Jason Wyman from my firm and Ms. Loretta Poch
13 who is from -- is a representative here on behalf of the
14 plaintiff in this case. And I want to thank you for being
15 here today and serving as jurors. This case involves an
16 agreement from September 2011 that was signed by my client
17 and the Dolans. My client has been sued by the Dolans
18 alleging we breached that agreement. We've been sued for
19 breach of contract and we've been sued for unfair trade
20 practices.

21 The evidence today will show you two things. It will
22 show you the terms of this agreement were clear,
23 straightforward, unambiguous. And second thing is that
24 the evidence will show my client complied with all of the
25 terms of the agreement. Or to put it a different way:

1 The Dolans will produce no evidence to you my client
2 breached that agreement.

3 Now, before I start talking about the agreement, I
4 think it's important to get a general idea of the
5 background of this case and why we're here. The evidence
6 will show that my client is the current owner of a note
7 and a mortgage that was taken out in 2005 by the
8 defendants for their lake house on Lake Murray. It's
9 right on the water. The principal balance was \$721,000.
10 The evidence will show that the Dolans have not made a
11 timely mortgage payment on that loan since November 2008.
12 The evidence will further show in 2009, my client filed a
13 foreclosure action because of Mr. Dolan has not made
14 timely mortgage payments. That 2009 foreclosure went all
15 the way to a foreclosure judgment, meaning the court
16 ordered that the property could be sold to pay the debt.
17 However, prior to the sale of the property, this agreement
18 came about. This agreement came about in September of
19 2011.

20 The evidence will show my client had no obligation to
21 enter this agreement. The evidence will show my client
22 entered into the agreement to help the Dolans avoid
23 foreclosure. Let's talk about the agreement. You're
24 going to see it today. There's four main terms of the
25 agreement. First, the agreement allows the Dolans, if

1 they pay my client \$65,250, my client agrees to release a
2 small section of their property, 1,043 square feet
3 exactly, in exchange for that money. And the reason why
4 we did that will become clear during the trial. The
5 evidence will show that my client received the money. My
6 client received the money, we applied it to the loan per
7 the terms of the loan documents. And that's the note and
8 the mortgage tell you how to apply proceeds that you
9 receive from them.

10 The evidence will show in exchange for that \$65,250,
11 my client recorded a partial release, releasing the 1,043
12 square foot of land from the mortgage. The second term of
13 the agreement allowed the Dolans three months, roughly
14 three months to try and sell their property. The evidence
15 will show that my client dismissed the 2009 foreclosure
16 action in which we had a judgment so they could try to
17 sell their property. Nobody is going to buy their
18 property if there's a foreclosure judgment on it. The
19 third term of the agreement gave my client sole discretion
20 to extend that time period by two months. The contract is
21 very clear. The agreement is very clear. It was my
22 client's sole discretion to extend that time period for
23 two months if the Dolans paid \$3,000 a month. The
24 evidence will show that at no time did my client agree to
25 that extension. In fact, the evidence will show at no

1 time were the Dolans close to selling their property
2 during that time.

3 The final term of the agreement relevant to this case
4 is that the Dolans would be allowed during this time
5 period to apply for what's known as a loan modification.
6 A loan modification would have allowed the Dolans to avoid
7 foreclosure. It's another option to avoid foreclosure.
8 Now, unfortunately, the Dolans were not able to sell the
9 property, so in 2012 this action gets filed. Another
10 foreclosure action gets filed. In response to that --
11 filing that foreclosure action, the Dolans asserted
12 several counterclaims, and that's why we're here. Your
13 duty today is only to deal with the two counterclaims, one
14 to deal with breach of contract, one for unfair trade
15 practices.

16 And something I forgot to mention that's obviously
17 very important. When my client received the \$65,250 and
18 applied it to the loan, it did not bring it current. At
19 no time did my client tell Mr. Dolan it would bring it
20 current. You'll see the contract. It says it will be
21 applied to the loan. You'll hear the evidence that at the
22 time that money was received by my client, the total debt
23 to bring the account current was over \$100,000.

24 Please keep in mind today that the burden is on the
25 Dolans today to prove their two claims. The problem is

1 that the Dolans do not have any evidence to prove their
2 claim. This is not a complicated case when you look at
3 the facts. You're going to get hit with a lot of numbers,
4 dates today. I just ask you to look at the contract.
5 It's not very long. It's about two pages long. The
6 contract, the agreement speaks for itself when you read
7 it. I ask that you find for my client and dismiss the
8 borrowers' two counterclaims, the Dolans' two
9 counterclaims. Thank you very much for being here today.

10 THE COURT: Thank you, sir.

11 MR. RADEKER: Thank you, Your Honor. We'd call Bryon
12 Dolan to the stand.

13 THE COURT: Mr. Dolan, come forward and be sworn
14 please.

15 BRYON DOLAN, after having first being duly sworn,
16 testified under oath as follows:

17 THE COURT: Sir, if you would tell us your full name
18 and spell your last name for the court reporter.

19 THE WITNESS: My name is Jack Bryon Dolan. Last name
20 is D-O-L-A-N.

21 THE COURT: Thank you.

22 Yes, sir.

23 DIRECT EXAMINATION

24 BY MR. RADEKER

25 Q. Mr. Dolan, when were you born?

1 case, what's known as their case-in-chief, which means
2 that's the only evidence they intend to put up. Before we
3 hear from FV-I, there's matters that would be necessary
4 for me to take up outside your presence. I don't
5 anticipate this being very long whatsoever, but
6 nonetheless, it would be improper for you to be here. So
7 with that, Madame Forelady, I'm going to ask you take the
8 jury to jury room. We'll probably be a good ten minutes
9 or thereabouts. Do not begin to deliberate. The case is
10 not over. With that, we excuse you from the courtroom.

11 (The jury left the courtroom at 2:29 p.m.)

12 THE COURT: All right. Motions?

13 MR. RADEKER: I was just going to say Mr. Dolan asked
14 if he could use the restroom if you don't have any problem
15 with that. We don't need him here to argue the motions.

16 THE COURT: That would be fine. Yes, sir.

17 MR. WYMAN: Move for a motion for directed verdict on
18 both causes of action, Your Honor. What would you like me
19 to address first? I think the UTA claim probably easier
20 to address. I don't see any evidence that's been
21 presented to satisfied the public interest requirement
22 showing repetition. This appears to be very similar to
23 the Robertson versus First Union National Bank, case with
24 a private wrong -- an alleged private wrong between two
25 parties and that's just not sufficient to satisfy the

1 requirements of the Unfair Trade Practices Act.

2 THE COURT: I read the same case. Let me hear from
3 you, Counsel.

4 MR. RADEKER: All right. Thank you, Your Honor. I'd
5 say what we've got here is more than a private wrong.
6 This conduct is capable of repetition. Further, our court
7 has said many times that how you show potential for
8 repetition or even how you show impact on public interest
9 is not limited to any particular method. One could show
10 impact on the public interest even without showing
11 potential for repetition.

12 But here certainly these companies did servicing for
13 banks, Morgan Stanley. They have a chance to repeat such
14 behavior or behavior like it in the future. And simply to
15 misrepresent to someone what the amount is to bring the
16 loan current is repeatable behavior. All one has to
17 demonstrate in order to satisfy the public interest
18 prong -- which I understand is the only prong they're
19 arguing we haven't satisfied -- is potential for
20 repetition. It's capable of being repeated.

21 THE COURT: I don't think that's his argument at all,
22 but I'll be happy to hear more. Go ahead. I'll hear more
23 from you, I don't think that's what he said.

24 MR. WYMAN: Your Honor, that's not what I'm saying.

25 MR. RADEKER: All right. Well, Your Honor if simply

1 because there were a breach contract there could be no
2 Unfair Trade Practices Act, we can tell that's not true
3 because we can look at cases that are decided between
4 parties where there was a breach of contract, and the
5 court allowed Unfair Trade Practices Act cause of action,
6 such as the Wright versus Craft case and Singleton versus
7 Stokes Mazda case, I think, case that decided in
8 memorandum. Were the law that simply because it's a
9 contractual relationship between the parties means you can
10 never have Unfair Trade Practice Act cause of action, the
11 Act would be gutted. Totally meaningless.

12 That's not the law. Those cases focus on the
13 typical, isolated nature of a breach of contract. They
14 don't stand for the proposition that simply because
15 there's a contract between the parties, there can't be an
16 Unfair Trade Practices Act cause of action.

17 THE COURT: Yes, sir.

18 MR. WYMAN: Your Honor, I agree with his previous
19 representation of the case law, but that was not my
20 intention as far as my only argument. This is a unique
21 set of facts. He's presented absolutely no evidence to
22 satisfy that this is -- has been -- occurred in the past
23 or there has the potential to be occurring in the future.
24 Simply because there are loans serviced in South Carolina
25 by different lenders, that does not lead to a viable cause

1 of action for the Unfair Trade Practices Act. And as Your
2 Honor said, the Robertson versus First Union case is on
3 point. This is a conduct which only affects the parties
4 of the transaction here. This is between the plaintiff
5 and the defendants, Dolans, and that just does not give
6 rise to a Unfair Trade Practices Act claim, and we should
7 be awarded a directed verdict because there's only one
8 reasonable inference.

9 THE COURT: The Court, at this stage of the
10 proceedings, is concerned only with a scintilla of
11 evidence at the directed verdict stage and must look at --
12 the Court must look at the motion in the favor -- in the
13 light most favorable to the nonmoving party. However,
14 there does have to be a scintilla of evidence, and this
15 Court has heard nothing that would rise to a scintilla of
16 evidence in this matter so that directed verdict motion is
17 granted. Next cause of action?

18 MR. WYMAN: Thank you, Your Honor. And as to the
19 breach of contract, Your Honor, we would argue they have
20 failed to present -- there's only one reasonable inference
21 from the evidence that's been presented thus far, that my
22 client did not breach the contract at issue. Mr. Gwynne
23 through the cross-examination of Mr. Dolan point by point
24 by point through that September 2011 agreement, and he
25 stated that he complied with all terms of that agreement

1 JUROR: No, sir.

2 THE COURT: Okay. At this time where we are in the
3 proceedings is the case has now ended as far as the
4 evidence goes. I'm going to ask you to pay close
5 attention to the closing statement of the lawyers, after
6 which I'm going to charge you the law, after which I'll
7 ask you to retire to your jury room while we gather up all
8 of these exhibits. I tell you ahead of time that all
9 these exhibits that have been marked belong to you, the
10 jury, for your consideration. Once all those are
11 accounted for, they're coming back to you and you then may
12 begin your deliberations. Pay attention to the lawyers,
13 please.

14 Gentlemen?

15 CLOSING ARGUMENT

16 BY MR. RADEKER

17 Thank you, Your Honor. When y'all go back there in
18 that jury room, you're going to have three jobs. First
19 job, you're going to have to go over the evidence in this
20 case and reach a determination for yourself about what it
21 is you think is going on in the case. But keep that open,
22 keep that flexible because the next job is to discuss with
23 each other why you feel the way you feel about the case
24 and what the result ought to be. And the third job is
25 y'all are going to have to come to a decision, a unanimous

1 decision in this case. And this is going back to a breach
2 of contract came.

3 Now, did FV-I breach a contract with the Dolans?
4 Yes. Let's talk about why. In opening, I told you about
5 the telltale signs that you're going to see. Well, we saw
6 them. FV-I and their servicers, they didn't treat this
7 loan right after this payment was made the way you would
8 treat a loan that was still delinquent. Let's look at
9 some things. FV-I gets the money September 30, 2011.
10 This will go back there for you. "We received the wire
11 this morning." Look at their own internal notes.
12 October 1st, -- October 10th, rather. I'm sorry. Ten
13 days later. "Kill and bill FC. Money has been received."
14 Next entry, "Shut down foreclosure process due to loss
15 mitigation activity," and it's there again in case someone
16 forgot to do it.

17 FV-I made a lot of this October 12th letter sent
18 out two days after this notice was made saying, "end the
19 foreclosure, shut it down." What does it say? It says,
20 "Here's the amount we must receive no later than
21 October 14th, 2011 to stop collection
22 procedures/proceedings." Now, Mr. Dolans testified --
23 said, Well, worked at some places sometimes. Stuff
24 doesn't get credited immediately. And I'll tell you if
25 you look at these notes, you see that it doesn't get

1 credited automatically. What the notes say is somebody
2 had to give directions on how to apply the payments,
3 because they give those directions in the notes.

4 And lo and behold, this stopping foreclosure
5 proceedings, it happened because they moved -- here's them
6 moving saying I want the court to enter this order with
7 this, an order that releases the foreclosure portion of
8 the judgment and closes the case. And what does it say?
9 The note and mortgage of the defendant are -- that's the
10 Dolans -- are hereby reinstated.

11 Now, banks don't dismiss foreclosure actions when
12 people haven't brought the loans current. They don't have
13 any reason to. They have no incentive to. And it's
14 entirely consistent with what it is that Kevin Flannigan
15 told Mr. Dolan about what the amount to bring this loan
16 current was. Now, you heard from Loretta Poch and she
17 said, "Well, that's not right." But respectfully to
18 Ms. Poch, I would submit this: She doesn't really know
19 anything about what happened. All she can look at are
20 records, someone else's records, not even her own
21 company's records. And she told you if those records are
22 wrong, everything she knows about this is also wrong. So
23 what she has to say, take it with the appropriate amount
24 of grains of salt.

25 And once they switch servicers, this loan continued

1 to be treated as though it had been brought current.
2 January 18th, 2012. First letter from Specialized Loan
3 Servicing, payment amount not 56 some odd thousand
4 dollars. \$1877.62. One payment. Here's your same
5 payment. And look at the reasons why it went to
6 foreclosure. We know what the motive might be. Motive
7 might be this property on the lake is worth some money,
8 about \$950,000 -- \$850,000. If you give \$100,000 discount
9 for selling it fast like a bank would do, liquidating it
10 out of foreclosure on a loan that would be \$721,000 if
11 it's brought current.

12 Let's look at the instructions to begin foreclosure.
13 When did it happen? November 30th, 2011. No time at all
14 after this thing was dismissed. The notes, payment date
15 of October 3rd as you can see, the payments aren't
16 credited automatically. They got them on the 30th,
17 didn't do anything with them for a couple days. The
18 valuation -- and here's the reason. Other. See notes.
19 Not failure to make payments. Not they're behind. Other.
20 See notes. Now, I'm not in the banking industry, but I
21 can tell you that probably failure to make the payments is
22 overwhelmingly the most common reason why someone says
23 send a loan to foreclosure. And I bet you if that had
24 been the reason, they would have written that on
25 nonpayment. Not what we've got. Other. See notes.

1 Do -- we have a breach of contract for another
2 reason? We would be here even if there weren't this other
3 breach of contract. Sure, we would. Mr. Dolan testified
4 Saxon extended the deadline. Mr. Farmer at Saxon, acting
5 on behalf of the plaintiff, told Bryon Dolan, "This is
6 where to send in the first of your \$3,000 payments." Sent
7 it in, they sent it back. There's definitely a breach of
8 contract in this case. When they say send in the payment,
9 they've extended the deadline. The discretion is to
10 extend the deadline, not whether to accept each payment.
11 When they said do the thing that you must do when we
12 extend the deadline, they extended it.

13 Look at what happens when they send it back. Is it
14 because the payment amount is not correct? No. Is it
15 because there's been a default on a repayment plan
16 agreement? No. Is it because the funds are insufficient
17 to liquidate the account? No. What's the reason? Other.
18 Return due to status of loan, whatever that is.

19 So we've got a breach of contract here. The standard
20 by which you'll weigh this evidence as we talked about the
21 opening statement is just a preponderance of the evidence.
22 Does the evidence tilt even more slightly in one party
23 favor than another on this question. Here it all is. It
24 tilts in favor of the Dolans.

25 Take a look at this. Here is where Kevin Flannigan

1 talks about the amount that's due Saxon and he says, "The
2 revised amount due Saxon," and this is what we revised it
3 to be. This is what we agreed to take. \$65,250. Once we
4 get this, we'll file the release of property. Why would
5 he say that if it weren't true?

6 This is the verdict form that will go back with you
7 to the jury room. You must agree unanimously on the
8 verdict. You have to come to a decision together. Once
9 you completed this form, Madame Forelady should sign it.
10 Did the Dolans prove by a preponderance of the evidence
11 that FV-I, Inc. breached the contract? Yes. Now, if you
12 answer yes, got to give an amount of damages. That amount
13 is up to y'all. We'll talk to you about how you might
14 calculate it, some various figures.

15 \$30,000. That's what somebody is willing to pay for
16 that part of the yard out there. The Dolans don't own
17 that anymore. Didn't any get benefit out of this deal.
18 They don't have that. So maybe it's that. \$65,250.
19 That's the amount of money that went to Saxon. No benefit
20 to the Dolans from that. Still facing foreclosure today.
21 Because after we have this trial, there's going to be
22 another one on the plaintiff's foreclosure claim. That
23 will be heard by a judge. That judge is going to be bound
24 by what this jury determines as to the issues that are
25 before you all today. Maybe there's another way to figure

1 it. Ms. Poch testified that the plaintiff has paid taxes
2 and some insurance on the property. Mr. Dolan testified
3 he'd gladly repay that if FV-I would just honor its
4 agreement under the contract, so what is this corporate
5 advances? Who knows. But maybe it's taxes and insurance.

6 Total reinstatement \$167,893. That's what's on this
7 from them a week ago today. Here's the math on that.
8 \$167,893.92 minus \$33,421.93 leaves \$134,471, essentially
9 interest that has accrued on this loan since these people
10 quit allowing Mr. Dolan to make payments and sent it back
11 to him. I think what we've got here is something where
12 FV-I is using one servicer and then they transfer over to
13 another servicer, and this other servicer says, "We don't
14 know anything about this," and that's what's led these
15 people to be where they are now.

16 But y'all can make it right. All the law requires of
17 you is if there is a breach of contract is put the parties
18 in the position they would be in if FV-I had performed
19 under the contract. Where would they be? They wouldn't
20 be in foreclosure. They would be current on this. It
21 would apply all this money correctly. And I'll tell you,
22 if Kevin Flannigan gave this man the wrong figure, he's
23 stuck the plaintiff with that figure. He said this is the
24 revised amount due.

25 You know, when I grew up my parents used to say to me

1 a man's word is his bond. Now corporations, they want to
2 be treated like people. The real question is: Are we
3 going to really treat them like people? Hold them the
4 their word just like any of us would be held to ours.
5 Thank you.

6 MR. GWYNNE: Thank you, Your Honor may it please the
7 Court.

8 THE COURT: Yes, sir.

9 CLOSING ARGUMENT

10 BY MR. GWYNNE

11 Good afternoon, ladies and gentlemen. Once again,
12 I'm Charlie Gwynne on behalf of the plaintiff. I just
13 want to first thank you for being here. It's been a long
14 day. We're nearing toward the end of it.

15 I said in the opening this was not a complicated
16 case. You just heard from the Dolans' attorney. He had
17 to piece his story together with 10 or 12 documents. The
18 only document I really need to look at it is this one
19 right here that you'll have back there in the jury room.
20 I promise you I will not read this again to you, but this
21 is a one and a half page document that is unambiguous and
22 states what the term of this deal are. Very briefly,
23 paragraph 2 states -- talking about the money being
24 received by Saxon to release the small portion of land.

25 First of all, my client agrees there was a contact.

1 This was it. The evidence presented to you today shows
2 that my client received that money and applied it to the
3 loan per the terms of the loan agreement. If you remember
4 I went through this document word for word, point by point
5 with Mr. Dolan, and at the end of every paragraph I said,
6 "Did all the parties comply with it?" and he said yes.

7 Mr. Dolan's versions of events today do not make
8 sense. They're not logical. Why would Saxon require
9 Mr. Dolan to sell his property if he was current? Why
10 would Saxon require Mr. Dolan or even offer Mr. Dolan to
11 enter into a loan modification if he was current on his
12 loan? You also saw an e-mail from Kevin Flannigan dated
13 less than two weeks later which sends him a reinstatement
14 quote of \$35,000. According to the reply e-mail seven
15 minutes later, Mr. Dolan acknowledges the agreement,
16 acknowledges the figures, and says he'll take a look at it
17 and says he's trying to sell his property. I read a
18 deposition if you remember where he told me in August of
19 2013 that he hit the roof or hit the floor when he saw
20 that figure. I don't think the e-mail supports that story
21 or supports the story he told in court today.

22 One thing that the Dolans have tried to insinuate is
23 that somehow my client was gaining an advantage by
24 entering into this agreement due to the valuation of their
25 property or something like that. That's not what the

1 evidence has shown. The evidence has shown that they were
2 already in -- they had a foreclosure judgment against them
3 when the agreement was entered into. And after this
4 agreement was signed, the foreclosure action was dismissed
5 in November about a month and a half later. You can't
6 sell a property that has a foreclosure judgment. This
7 wasn't charity by my client. It was a simply a deal that
8 worked out between Mr. Dolan and my client to avoid
9 foreclosure.

10 This agreement has two options to avoid foreclosure:
11 A short sale of the property or a loan modification. This
12 isn't charity. This isn't some conspiracy in order to
13 sell the house at a certain amount. I submit to you that
14 lenders do not force people to sell houses that are
15 current. Lenders do not force people to get modification
16 to get a higher interest rate like Mr. Dolan said. That's
17 not what lenders do.

18 You've heard from Ms. Poch. She has gone through the
19 payment history with you. The payment shows that on
20 September 30th, 2011, Saxon received the money and
21 immediately applied it to the loan, but did not bring it
22 current. The Dolans cannot dispute that. The payment
23 history, which is Exhibit 12, Plaintiff's Exhibit 12
24 clearly shows that. Another term of this agreement that's
25 in dispute by the Dolans is this idea of this extension.

1 As I said before, I read this agreement with you. I don't
2 know about you, but when the term -- the two words "sole
3 discretion" are used, that's pretty straightforward. It's
4 Saxon's sole discretion to have extended that time frame.
5 Now, a logical reading of the contract means if you're
6 close to selling your house, we may consider extending the
7 offer. That's a logical reading of that contract.

8 There has been no evidence presented to you other
9 than Mr. Dolan's statements that either FV-I or Saxon or
10 SLS agreed to that extension. The only evidence is that
11 Mr. Dolan attempted to unilaterally send in money in order
12 to have that extension. There's simply no evidence that
13 the plaintiff, my client agreed to that extension. What
14 this document pretty much boils down to is it's a release
15 agreement. This was benefiting all the parties.
16 Mr. Dolan wanted his neighboring property that he lost in
17 a foreclosure to sell at a higher amount. That makes
18 sense. If the property next to you sells for more, that's
19 almost always going to increase your property.

20 So this is simply a release document. He agreed. He
21 wasn't forced to sell this 1043 square piece of land. He
22 agreed to it, Saxon agreed to take a certain amount of
23 money in order to give the release. That's all this
24 document is, and in exchange, they allow him to avoid
25 foreclosure. Avoiding foreclosure works for all the

1 parties, including the bank. If they can get a short
2 sale, they'll take that any day over foreclosure. If they
3 can get a loan modification and get the loan performing
4 again, they will do that.

5 Opposing counsel said in his closing that, "Banks do
6 not dismiss foreclosures unless the loan is current."
7 There's no evidence of that. That's only his statement,
8 and I'm here to tell you that's not true. Foreclosure
9 actions are dismissed all the time for various reasons.
10 The evidence that the 2009 foreclosure action was
11 dismissed to me -- the fact that the 2009 foreclosure
12 action was dismissed does not mean loan was current. And
13 to find another reason, you simply have to look at this
14 document. It was to allow the Dolans to try to sell their
15 property. Nobody is going to buy a property in
16 foreclosure, that has a foreclosure judgment against it.

17 The judge is going to instruct you on the law in a
18 minute, but I submit to you the Dolans have not proved
19 their case. They have not provided you with evidence to
20 prove that my client breached the contract. There's three
21 main elements to breach of contract: One, there has to be
22 a valid contract. That's not in dispute. We all agree
23 the September 2011 document is a contract. The second
24 element is breach. One of the parties has to breach the
25 terms of the agreement, which basically means break a term

1 and I submit to you there's been no evidence that my
2 client breached the agreement. As I said, Mr. Dolan said
3 we complied with all of it. And finally, in order to be
4 successful on a breach of contract claim, the Dolans would
5 need to assert or prove they've been damaged in some way.

6 The Dolans have not proven any damages. They agreed
7 to sell this piece of property the 1,043 feet of land.
8 They agreed to do it. The testimony that you've heard has
9 shown that Mr. Dolan and Ms. Dolan have been living in
10 this 5400 square foot house on Lake Murray since
11 November 2008, and they've not made a mortgage payment, a
12 timely mortgage payment since then. I ask again that you
13 find for my client and dismiss the Dolans' claims against
14 my client. Thank you again for your time today.

15 THE COURT: Yes, sir.

16 MR. RADEKER: Thank you.

17 CLOSING ARGUMENT

18 BY MR. RADEKER

19 What a bank is going to do is what's in the bank's
20 interests. That's what banks do in the modern world. And
21 because a bank is going to do what's in the bank's
22 interest -- nothing wrong with self-interest -- but
23 there's something wrong with breaking a contract. They're
24 going to not say things like this or get a judge to order
25 things like this if those things are not true. Bank has

1 no motivation to get an order to say the note and mortgage
2 of the defendant are hereby reinstated if that is not the
3 case. None at all. What's not logical is for this whole
4 foreclosure case to have been dismissed if this payment
5 wasn't supposed to bring the loan current. Because it
6 actually brought it current by agreement.

7 Now, who did we not hear from in this case? We did
8 not hear from Kevin Flannigan. Why didn't we hear from
9 him? If he something different to say than what Mr. Dolan
10 had to say about what happened, I submit to you they would
11 have brought him here to testify. They did not do it. I
12 think they're scared of what his testimony would be if he
13 were to answer honestly. We didn't hear from Andrew
14 Farmer. Didn't bring him down here to say this telephone
15 call did not happen. Chose not to try to contradict
16 Mr. Dolan about that because they don't have anything to
17 contradict him with.

18 No payments since 2008. Well, \$65,250 is quite a
19 mortgage payment in my book. We just ask that you keep
20 that in mind when you retire to the jury room. What's
21 illogical would be for all of these things that are in
22 these documents to have been said, written, if this loan
23 had not been reinstated. Thank you.

24 THE COURT: Thank you, gentlemen.
25

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January 20, 2015

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JAN 22 2015

SC Court of Appeals

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

RE: FV-I, Inc. in trust for Morgan Stanley Mortgage Capital Holdings LLC v. Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank, Wells Fargo Bank, N.A., Branch Banking and Trust Company
Appellate Case # 2014-001384
Our file: 511792.00355

Dear Ms. Kitchings:

Enclosed are the original and seven (7) copies of the Respondent's Motion to Lift Stay Under Rule 42(b), SCRCP and Memorandum of Law, along with a Proof of Service. Please return a filed copy of the document to me in the enclosed self-addressed, postage pre-paid envelope provided for your convenience. Also included is my firm's check for \$25 representing the filing fee.

By copy of this letter, I am serving a copy of the Respondent's Motion to Lift Stay Under Rule 42(b), SCRCP and Memorandum of Law and Proof of Service on all parties to this appeal.

Thank you for your assistance in this matter.

With kind personal regards, I am

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Charles", is written over a horizontal line.

Charles S. Gwynne Jr.

/dm

Enclosures as stated

cc:

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