STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

CASE NO · 11-CP-10-2946

Brent E Bentrim,

[x] Plaintiff,

v.

Wells Fargo Bank, N.A ,

[ ] Defendant

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

check box above indicating submitting party

Name, S C Bar no and address of plaintiff=s attorney	Name, S C Bar no and address of defendant=s attorney
Robert B Varnado, Esquire Brown & Varnado LLC P O Box 1127 Mt Pleasant, SC 29465 telephone (843) 737-7300 fax (843) 654-5109 e-mail rvarnado@brown-varnado com	S Sterling Laney, III, Esquire Jana Baker, Esquire John C Hawk IV, Esquire Womble Caryle Sandridge & Rice, LLP P O Box 999 Charleston, SC 29402 (843) 720-4635 jabaker@wcsr com

[X] MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
[ ] FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
[ ] PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion Notice of Motion and Motion to Reconsider Section 1 of the Order of October 28, 2014
Estimated Time Needed 30 min Court Reporter Needed yes

SECTION II: Motion/Order Type

[X] Written motion attached
[ ] Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order

Signature of Attorney for Plaintiff — **November 13, 2014** Date submitted

SECTION III: Motion Fee

[X] PAID B AMOUNT $25 00
[ ] EXEMPT (check reason)
[ ] Rule to Show Cause in Child or Spousal Support
[ ] Domestic Abuse or Abuse and Neglect
[ ] Indigent Status [ ] State Agency v Indigent Party
[ ] Sexually Violent Predator Act Post-Conviction Relief
[ ] Motion for Stay in Bankruptcy
[ ] Motion for Publication [ ] Motion for Execution (Rule 69, SCRCP)
[ ] Proposed order submitted at request of the court, or, reduced to writing from motion made in open court per judge=s instructions
Name of Court Reporter _____
[ ] Other _____

JUDGE=S SECTION

[ ] Motion Fee to be paid upon filing of the attached order
[ ] Other _____

JUDGE
CODE _____ Date _____

CLERK=S VERIFICATION

Collected by _____ DATE FILED
(print name)
[ ] MOTION FEE COLLECTED _____
[ ] CONTESTED B AMOUNT DUE _____

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2011-CP-10-2946
	)	
	)	
BRENT E. BENTRIM,	)	
	)	
Plaintiff,	)	
	)	**NOTICE OF MOTION AND MOTION**
v.	)	**TO RECONSIDER SECTION 1**
	)	**OF THE ORDER OF OCTOBER 28, 2014**
WELLS FARGO BANK, N.A.,	)	
	)	
Defendant.	)	
	)	
	)	

TO: CHARLES M. BAKER III, ESQUIRE, S. STERLING LANEY III, ESQUIRE and JOHN C. HAWK IV, ESQUIRE, ATTORNEYS FOR DEFENDANT:

PLEASE TAKE NOTICE that the above-named Plaintiff, Brent E. Bentrim ("Plaintiff" or "Bentrim"), by and through his undersigned attorneys and pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, will move before the Honorable Mikell R. Scarborough, Charleston County Master in Equity, at such time, date and place as counsel may be heard, for an order to reconsider and/or alter or amend Section 1 of the Court's Order of October 28, 2014 ("Order"), attached herewith as Exhibit "A," for which the undersigned received written notice of the entry of the same on November 5, 2014, on the following grounds:

Bentrim asks the Court to reconsider its finding *'that Wells Fargo is the holder of the Note as a matter of law and a holder in due course of the Note as a matter of law ' Further, even if Wells Fargo was not the holder, it would still qualify as a "person entitled to enforce" as defined in S C Code Ann §36-3-301 '*

This finding arose out of Bentrim's previous motion to alter or amend the Discovery Order of May 14, 2014 in which the Court had held (in Section 5 thereof). "*Wells Fargo holds the original Note, and the Note is made payable to its predecessor in interest, First Union Nation*

Bank" Plaintiff submits that Court's disposition of the prior motion to alter or amend has resulted in a substantial alteration of the May 14, 2014 Discovery Order, and thus the instant Rule 59(e) is not duplicative or successive, nor does it argue the same issues. *Elam v South Carolina Dep't of Trans.*, 361 S.C. 9, 602 S.E.2d 772 (2005).

This second motion to reconsider is primarily based on the fact that the Court has used the motion to reconsider the May 14, 2014 Discovery Order, to make a *de facto* summary judgment and/or declatory judgment which impacts all causes of actions Bentrim brings forth in his complaint, and, taken to its logical extreme, determines that Bentrim has no defenses in regards to the Note resulting in an order for foreclosure

Further, the order fails to address the issues before the Court in the Plaintiff's first-party claims – was Wachovia Bank, NA or Wells Fargo Bank, NA entitled to enforce the Note before bringing actions in 2007 and 2009 and if not, what is its liability for the fraud, etc. The Order instead presents a bias that anyone can bring a foreclosure action – even with the aid fraudulent actions and intent– and have no liability if at some point it can produce an original note.

The Plaintiff has already proven, and the Defendant has admitted, through its records and sworn statements, neither it nor its predecessor, Wachovia Bank, NA, had an enforceable interest in Bentrim's Note prior to filing its 2007, 2009 and current counterclaim.

The Court seems stuck with the presence of the original promissory note (which to date has not been entered into evidence as the Note the Defendant seeks to enforce) with admitted signature by Bentrim and Bentrim's admission he did in fact receive a loan on March 21, 2002 Through this Motion, the Plaintiff will, through the use of the South Carolina Code of Laws, and the evidence on the record in this matter, to show the salient issues of the case have been proven requiring the Court to revisit all former discovery orders and dismiss the counterclaim with

prejudice

What Law Governs?

In order to determine if the Master could as a matter of law, find the Defendant is the holder and a holder in due course, or alternatively has any enforceable interest, the Court must first address what law governs the Note?

In cases where the Promissory Note is a negotiable instrument, Article 3 of the South Carolina Uniform Commercial Code "UCC" provides rules governing the obligations of the parties on the note and the enforcement of those obligations This has been affirmed by Appellate Court in *Swindler v Swindler*. There is no dispute that the Note in question is a Negotiable Promissory Note.

UCC Article 3 codifies the obligations of the parties in regards to the instrument and most critically addresses who can enforce the instrument and how such enforcement is transferred. Article 3 does not specifically address the assignment of ownership of an instrument and instead focuses on how enforcement rights are obtained and transferred.[1]

The next central conflict presented is making a determination of the 'person entitled to enforce' the Note that Bentrim, the maker, signed. The Plaintiff must make this determination because Article 3 codifies:

i. the maker's obligation on the note is to pay the amount of the note to the person entitled to enforce the note,

ii. the maker's payment to the person entitled to enforce the note results in discharge of the maker's obligation, and

[1] Article 9 of the UCC

iii. the maker's failure to pay, when due, the amount of the note to the person entitled to enforce the note constitutes dishonor of the note.[2]

Section 3-308(a) provides a cause of action to enforce liability on a Note can generally only be successful against someone who has signed the instrument. Bentrim admits he is the issuer and maker of the Note, therefore we must move to Subsection (b):

"If the validity of signatures is admitted or proved and there is compliance with Subsection (a), a plaintiff producing the instrument is entitled to payment if the plaintiff proves entitlement to enforce the instrument under Section 36-3-301, unless the defendant proves a defense or claim in recoupment. If a defense or claim in recoupment is proved, the right to payment of the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course which are not subject to the defense or claim."

Article 3 of the UCC forbids the foreclosure on the mortgage unless the creditor possesses a properly transferred promissory note. The reasoning is clear and once again codified in Article 3 that under the basic rule of negotiable instruments that once a promissory note is given for an underlying obligation like a mortgage, the underlying obligation is merged into the note and suspended while the Note is outstanding.

Because of this merger rule, the underlying cause of action is not available as a separate cause of action until the Note is dishonored. SC §36-3-310(b) codifies:

> (b) Unless otherwise agreed and except as provided in subsection (a), if a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to

[2] Important here to recognize that WB, NA was unable to prove Bentrim failed to pay when due before claiming the Note in default, regardless of if it had rights

the amount of the instrument were taken, and the following rules apply:

* * *

(2) In the case of a note, suspension of the obligation continues until dishonor of the note or until it is paid. Payment of the note results in discharge of the obligation to the extent of the payment.

Based on the Lost Note Affidavit filed on April 3, 2012, there is no dispute that Wells Fargo was not in possession of the Note at the time it claims the Plaintiff failed to cure. Although the reality is no right to cure was provided, and instead an incomplete and patently false acceleration demand was made on September 27, 2011. Lacking possession of the Note results in no enforcement rights.

The Defendant argues, citing *MidFirst Bank*, that the Court should ignore the "Lost" in its Lost Note Affidavit, because its predecessor, Wachovia Bank, NA had constructive possession of the Note through its former counsel, Brock and Scott at the time of demand

On April 3, 2012, the Defendant produced a Lost Note Affidavit (WF 219-222) signed by Bank Officer Tracy M Thomas as well as a "copy" (WF 223-226) of the Note certified as a "true, correct and substantial copy of the lost or destroyed Note" (See LNA, WF 220 paragraph 8). No other documents or records were attached to the Affidavit. Affiant Thomas further "states that Wells Fargo Bank, NA as successor by merger to Wachovia Bank, NA, successor by merger to First Union National Bank has not pledged, assigned, transferred, hypothecated or otherwise disposed of the Note." (WF 220 paragraph 5). Thomas further testified that she had personal knowledge that Bentrim was the present holder and owner of the Note (see WF 220

paragraph 6.C).

The original promissory Note was purported found and returned to Wells Fargo's vault on February 27, 2012, (see Thomas Deposition 119:14) some 6 weeks prior to providing Bentrim WF 219-227, and such discovery was not provided until February 2013!

However, prior to filing its first Amended Answer and Counterclaim, Wells Fargo produced an ACLS History Card Report (WF 159-218) on November 8, 2011. On November 29, 2006 an entry is clearly marked "Loan Sold to Pool." Ms. Thomas attaches no further records to explain the "sale" and admits (See Thomas Deposition page 72: 6-23) never even looking at Wachovia Bank NA's servicing records contained in ACLS.

It is clear that based on 'Foreclosure Attorney Procedure Manual' that Attorney Jana Baker created and forwarded the affidavit for Ms. Thomas to sign. (Foreclosure Manual, Page 15). Thomas is a robosigner and can only verify the bold typeface in Section 3 of her affidavit.

There are additional factual problems. The Note attached to the LNA (WF 223-226) is certified as a "true, correct and substantial copy of the lost or destroyed Note" materially differs from the Note which Wells Fargo relies on now - as it does not have the two barcodes on it Ms. Thomas claims in her testimony (104: 9-16) that when the Note first arrived in the vault in 2002, a barcode was placed upon it and then was imaged into a system call CLPR. Prior to January 2013, no barcoded note was ever presented in any previous litigation.

Further, the copy of the Note produced by Brock & Scott attorney Suzanne Brown (who Wells Fargo claims was supposed to have possession of the Note) bears no barcode. Most critically, the Defendant has produced no vault records showing any movement of the Note prior to when it was sent to Womble Carlyle.

Until the note is dishonored, there can be no default on the mortgage. Under SC §36-3-

502(a)(3) 'a promissory note is dishonored when the maker does not pay it when it first becomes payable.' However, as previously discussed, the obligations on the promissory note itself is owed only to a 'person entitled to enforce,' and only that person can show that the debt was not paid when due creating 'dishonor.' Both the Official Comments to §§36-3-502 and 36-3-310 make it clear that a dishonor can only occur if the person who wishes to sue is someone in possession of the instrument. It is important to point out Bentrim has denied the existence of default in both the 2009 complaint and the current counterclaim.

Official Comment 3 to §3-310 explains: "If the check or note is dishonored, the [other party] may sue on either the dishonored instrument or [the underlying contract] if [that person is in] possession of the dishonored instrument and is the person entitled to enforce it" (emphasis added) Under Article 3, the person demanding payment must establish signatures of a Note in its possession and then prove its rights of enforcement

Even if the Court believes 'holder' is defined merely as a person in possession of the original note with signatures admitted, then the Court must dismiss the Counterclaim and strike all affirmative defenses. The Defendant under such a theory had no enforcement rights until February 2013!

"A threshold inquiry for any court is the determination of justiciability, i.e., whether the litigation presents an active case in controversy. 'No justiciable controversy is presented unless the [defendant] has standing to maintain the action '" *Lennon v South Carolina Coastal Council*, 330 S.C , 414, 415, 498 S E 2d 906, 906 (Ct App. 1998) (citations omitted). "Standing refers to 'a party's right to make a legal claim or seek judicial enforcement of a duty or right.' 'Standing is...that concept of justiciability that is concerned as to whether a particular person may raise legal arguments or claims '" *Powell ex rel Kelly v Bank of Am*, 379 S.C 437, 444, 665, S E.2d

237,241 (Ct. App. 2008) (citations omitted) Rule 17 of the South Carolina Rules of Procedure requires cases be brought by the real party in interest.

The Defendant attempts to establish itself as a real party in interest as a Servicer, citing "there is a general view, which has been accepted in this jurisdiction and others, that a loan servicer is a 'party in interest' and has standing by virtue of its pecuniary interest in collecting payments under the terms of the note and mortgage." *Bank of America v Draper*, 405 S.C. 214, 221, 746 S.E.2d 478, 481 (Ct. App. 2013).

In order for a "servicer" to bring or maintain a cause of action as a real party in interest, it must be "person who possesses the right to enforce the claim and who has a significant interest in the litigation." *See In Re Neals*, 459 B R 612, 618 (Bankr D.S C. 2011). All case cited in *Bank of America v Draper* support the notion, the servicer must have a contractual obligation (*In re Woodberry*, 383 B.R) to service a loan, something the Defendant denies exists.

The Defendant next attempts to claim that because the Plaintiff is suing them, he must recognize its authority as a 'servicer.' This argument fails also Bentrim is suing the Defendant for Mortgage Servicing *Fraud* – for failing to maintain accurate records and falsifying court documents among other items Unfortunately for the Defendant, lacking possession is fatal to any rights of enforcement, rendering it incapable of being a real party in interest

"[S}tanding is to be determined as of the commencement of suit." *Lujan v Defenders of Wildlife*, 504 U S 555, 570-71 n.5 (1992); *accord Young v People's Bank*, 163 S.C. 57, 161 S.E. 324, 329 (1931)("Plaintiff's right to any recovery depended on its right at the inception of the lawsuit, and the non-existence of a cause of action when the suit was started is a fatal defect, which cannot be cured by the accrual of a cause of action pending suit."). Pursuant to 55 Am. Jur 2d Mortgages § 584 (2009), "a plaintiff has no foundation in law or fact to foreclose upon a

mortgage in which the Plaintiff has no legal or equitable interest." Article of the UCC governs the sale of promissory notes and codifies in § 9-318(a) "A debtor that has sold promissory note does not retain a legal or equitable interest in the collateral sold "

The Plaintiff request the Court reconsider its first Motion to Alter and Amend the discovery order to change 'holds' to 'in possession as of February 2013 ' Alternatively if the Motion to Alter and Amend has now become a Declaratory Judgment finding, or a ruling on Summary Judgment, then Plaintiff requests that the Court that dismiss the Counterclaim to Enforce the Note and Mortgage based on its belief 'possession' equates to 'holder' and the Defendant was not in possession of the Note on Sept 27, 2011.

At this junction, the Plaintiff has proven, using applicable South Carolina law, that a determination of the Defendant's current enforceable interest in the Note and Mortgage, if any is moot as it is established that enforcement rights must be determined at the time of demand on a Negotiable Instrument for it to be dishonored. However, since the Plaintiff is alleging and has largely proven, that the Defendant committed mortgage servicing fraud by claiming an enforcement right in his Note and Mortgage as a holder through the use of falsified documents and court filings, causing considerable emotional stress and financial liability, we must define holder and establish why Wells Fargo Bank, NA is not and cannot ever be a 'holder.' The Plaintiff will further establish that after November 29, 2006, Wachovia Bank, NA was not the 'holder.'

The 'person entitled to enforce the note' (PETE) is not synonymous with its 'owner.' In fact the Official Comments stress that "[t]he right to enforce an instrument and ownership of the instrument are two different concepts." Article 3 does not specifically address the assignment of ownership of an instrument and instead focuses on how enforcement rights are obtained and

transferred [3] Assignments are contracts and, as a general matter, are regulated by the common law of contracts, wholly unrelated to Article 3.

'"Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 36-3-309 or 36-3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.' SC 36-3-301

Under Section 36-3-301, we also learn that 'holder' is not and umbrella term under which all owners and or persons entitled to enforce a negotiable instrument fall. It is a specific type of PETE with specific rights. Further – holder is in no way to be defined as in possession of an original note.

A 'holder' is defined as "person in possession of an instrument issued, endorsed to him or to his order or to bearer or in blank " S C. Code Ann. § 36-1-201(20) The Plaintiff has proven through the evidence on the record, that Wells Fargo could not be the holder on September 27, 2011 because it lacked possession and will now prove lacking any endorsement, it can never achieve such status.

All copies the Note produced thus far is proof positive that Wells Fargo cannot be the 'holder.' The Note is issued to 'First Union National Bank or order,' and lacks any endorsement by First Union.

The only manner in which a third party can obtain 'holder' status is through negotiation. Negotiation is defined as "a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder." S.C.

[3] Article 9 of the UCC

Code Ann. 36-3-201 (a)

Because the Note is payable to an identifiable person (as opposed to a bearer instrument) an endorsement by First Union was required under S.C. Code Ann. 36-3-201(b) to endorse it order for Negotiation to occur.

In its memorandum, Wells Fargo argues the applicability of 12 USCA § 215 -- which basically says that when banks merge, property rights shall be transferred to the successor bank. The Plaintiff agrees Both 12 USCA § 215 and Section 36-3-203 transfer rights through succession. This statute has no bearing on a 'holder' analysis for two reasons: One – The note is a negotiable instrument, and is thus governed by Article Three. *Swindler v Swindler*, 355 S C. 245, 584 S E 2d 438, 440-441 (2003), (finding that Article Three governs a negotiable instrument), see *also Midfirst Bank, SSB, v C.W Haynes & Co , Inc.*, 893 F.Supp. 1304, 1312 n. 3 (D.S.C 1994) ("Article Three of the UCC controls transfers of negotiable instruments, and the mortgage notes are clearly negotiable."). In other words, Article 3 trumps 12 USCA § 215 in determining holder status

Two - as discussed above, the UCC specifically contemplates transfers – such as allowed under 12 USCA§ 215 – result in the transferee becoming a "non holder in possession" who must prove the transaction in order to enjoy enforcement rights. S C Code Ann. § 36-301(ii); Section 3-203 Official Comment. Stated another way, there is nothing in 12 USCA § 215 that conflicts in the slightest with Article 3.

The Defendant was sued by the Attorney General of South Carolina for, among other things, the unfair and deceptive nature under the South Carolina Consumer Protection Code asserting 'holder' in debt collection and foreclosure complaints when it was not. The Defendant settled with the state for nearly $30 million by entering into a Consent Order to avoid criminal

prosecution. (*See* April 4, 2012 Consent order in United States v. Bank of America, et al)

Under Section 3-308 (b), a holder makes a prima facie case and is entitled to recover in the absence of further evidence. This procedural advantage associated with the production of an instrument is only available to a holder. An uneducated homeowner or Court may take the term holder at face value, and after consenting or in this case, finding such, render a decision based on a false pleading or a party lacking standing. Such judgments as a matter of law are void.

Wells Fargo agreed it would not make assertions in foreclosure proceedings that it had not already established a documented trail of proof. It further agreed to monitor its attorneys for compliance To a large degree this consent falls in line with Article 3 requiring the party to have an enforceable interest at the time of demand; however, its claim of holder shows blatant non compliance with the order. Essentially, Wells Fargo cannot say its pleading and false allegations were innocent mistakes.

Therefore, the Court is required as a matter of law to reverse its finding that Wells Fargo is currently a 'holder,' and based on the evidence presented and already outlined above, find that 'Wachovia Bank, NA was not a holder after November 29, 2006.'

We must now turn to the final issue at hand, regarding the single last manner a person in a person producing an instrument might be entitled to enforce it and question whether Wells Fargo has met the burden of proof to establish itself as a non-holder in possession of the instrument who has the rights of a holder. S.C. Code Ann. § 36-3-301 (ii).

For all intents and purposes, this issue is moot in regards to the current counterclaim – the fact that, even if the Court was to conclude the TMS Service Corp. meets the burden of proof under Article 3, Wells Fargo still plead another set of facts, withheld key evidence and falsified

documents in an attempt to establish possession as a holder via a merger with Wachovia Bank, NA. Moreover, the Note currently in Wells Fargo's attorneys' possession has never been entered into the record; their pleadings attempt to enforce a different Note, which has never been produced

In regards to Bentrim's compliant, the only manner in which to defend itself against his claim of conversion is to establish an ongoing enforcement right was granted by the true owner and holder of his note after November 29, 2006 and that party was properly paid. The reality is the Defendant has not come remotely close to meeting its burden under Article 3 in establishing all transfers of the Note after November 29, 2006 resulting in its possession.

A person who produces an instrument but does not qualify as a holder must prove he or she has the rights of a holder before that person is entitled to enforce the instrument. 3-308(b), 3-301(ii). "That person must prove a transfer giving that person such rights under Section 3-203(b) or that such rights were obtained by subrogation or succession" 3-308, Comment 2.

Section 36-3-203 (a) provides that "[A]n instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving the person receiving delivery the rights to enforce the instrument." The intent is clear it is concerned with "giving to the person receiving delivery of the instrument the right to enforce the instrument." Section 36-3-203(b) states the legal consequence of the transfer providing "[t]ransfer of an instrument. .vest the transferee any rights of the transferor to enforce the instrument...."

The evidence on the record from the Lost Note Affidavit is that Defendant lost an unstamped Note and that the Note had never been transferred, sold, etc. In its pleadings, Defendant is trying to enforce an unstamped Note, as a holder, via successor by merger to WB, NA. This argument fails because it is uncontroverted that Wells' Fargo's predecessor sold the

Bentrim Note on November 29-December 1, 2006. Thus, Wachovia Bank, NA, was not the owner or holder at the time of the merger on March 20, 2010 (See WF 2299, 2300, 2301, 2302, 2303 and Clifton Bodiford Affidavit). The affidavit of Wells Fargo bank officer Matthew Wakefield substantiates this conclusion – he avers that a 100% beneficial interest in the Note was sold to TMS /Service Corp on November 29, 2006 (which, it should be noted, directly conflicts with the discovery responses of Wells Fargo, the LNA of bank officer Tracy Thomas; and the unequivocal and emphatic representations of Wells Fargo's counsel at both the February 10, 2014 and April 28, 2014 hearings that no sale took place)

Wells Fargo next attempts to persuade the Court it obtained the Note as a part of a transfer through an acquisition of TMS/Service Corp. The big problem is Defendant has produced no evidence nor any testimony to support the new assertion by Defendant's counsel that Note was ever transferred to TMS or that TMS owned the Note and Mortgage with enforcement rights after November 29, 2006. The documents in Exhibit A to this Memorandum would in fact undercut this argument and prove a trust owned by investors via securitization was the owner of the Note as of December 1, 2006. (Kita Affidavit) To a certain degree this outcome could be anticipated as Wakefield is a Vice President who performs accounting on securitized trusts, presumably for Wachovia Bank, NA as the trustee of the trust No records of TMS Service Corp have been provided or admitted

There is no evidence that TMS/Service Corp was acquired by Wells Fargo Bank, NA, but such a claim is meritless as TMS/Service Corp did not own or hold the Note after December 1, 2006. Further there is no evidence on the record in regards to any transfer in which Wells Fargo Bank, NA has enforcement rights. As discussed above, the UCC specifically contemplates transfers – such as allowed under 12 USCA§ 215 – result in the transferee becoming a "non

holder in possession" who must prove the transaction in order to enjoy enforcement rights. S.C. Code Ann § 36-301(11); Section 3-203 Official Comment. "Prove" with respect to a fact means the burden of establishing the fact. 36-3-103 (13) "Burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence. 36-1-201(8).

Under Section 36-1-201(31), the Plaintiff has established that the Court can make no assumption of fact in regards to Wells Fargo's obtaining a transfer of the Note through any predecessor by presenting evidence that would support its non-existence. Based on the pleadings, Defendant is trying to enforce an unstamped Note, as a holder, via successor by merger to WB, NA.

The Court must reverse its finding that would still qualify as a "person entitled to enforce" as defined in S.C. Code Ann. §36-3-301.' Further because Wells Fargo is unable to prove enforcement rights in September 27 2011, the Court should dismiss the counterclaim and strike all affirmative defenses.

Additionally, because Wells Fargo cannot be a holder nor can qualify as a PETE under Section 36-3-301, it cannot qualify as a holder in due course. Since Wells Fargo cannot ever qualify as a holder in due course, the Court is required to dismiss its counterclaim with prejudice. A payee such as First Union National Bank, like any other holder, can qualify as a holder in due course by simply satisfying the elements codified in 36-3-302(a). However, because Bentrim, the maker, is the sole obligor on the instrument, 'the holder in due course status is irrelevant in determining rights between the Obligor (maker) and the Obligee (payee) with respect to the instrument" See Section 36-3-302, Comment 4.

Unless others were parties to the loan closing, First Union National Bank is subject to all

defenses an obligor has on an instrument. A holder in due course, other than in relation with the Obligor and Obligee, takes an instrument free from claims on it as well as personal defenses of the Obligor.

This finding by the Court goes against concepts of commercial reasonableness and fair dealing. It in essence is a finding that Bentrim cannot sustain his complaint against Wells Fargo for any actions of its predecessor, Wachovia Bank, NA. Thus, the Court has ruled, lacking any legal basis and in contravention of the summary judgment standard, that the foreclosure should go through (as Bentrim has no defenses) ***and*** that Bentrim's first-party claims must fail even though the Defendant cannot show holder status at the inception of the 2007 and 2009 suits that form the basis of his claims.

Section 36-3-302 (a) states the elements necessary to qualify as a holder in due course. Those elements can be summarized as follows:

1. One must first qualify as a ***holder*** of a negotiable instrument.
2. The authenticity of the instrument cannot be called into question Section 36-3-302(a)(1)
3. The holder must take the instrument
    a. For value
    b. In good faith
    c. Without notice the instrument is overdue, been dishonored, that there is another claim to ownership or that any party has a defense or claim in recoupment, and
4. The instrument cannot be taken under any special circumstances that would preclude the holder from asserting the rights of a holder in due course.

A holder in due course is essentially a bona fide purchaser for value. Under the

circumstances presented, there can be no reasonable or legal analysis which could lead the Court to rule Wells Fargo is a holder in due course.

First, while it appears that the Court defines a holder as a person in possession of a Note and assumes the possession was obtained via a transfer from a successor in interest, Section 36-3-302 (c) precludes anyone taking an instrument as a successor in interest from obtaining holder in due course status. Therefore even if Wells Fargo Bank, NA acquired the Note via succession from a party other than Wachovia Bank, NA, it cannot be a holder in due course.

More salient is that fact that Wells Fargo Bank, NA is the successor in interest to the original payee, First Union National Bank, it cannot 'wash away' its liabilities through the reacquisition of the note. It is prohibited from ever being a holder in due course See 36-3-203, Comment 2

Without being a holder, Wells Fargo Bank, NA cannot be a holder in due course More particular since Wells Fargo Bank, NA acquired the original payee, First Union National Bank, it cannot even as a holder sustain a holder in due course status.

The Court must reverse its finding that Wells Fargo Bank, NA is a holder in due course. Because Wells Fargo cannot be a holder in due course, under 36-3-305 (c), Bentrim is not obligated to pay anyone who cannot establish themselves as a holder in due course

Instead of presenting facts and evidence, the Defendant in this case has relied upon misrepresentations and falsified documents to include Tracy Thomas' Lost Note Affidavit. The Defendant should not be allowed to proceed without admitting that Ms. Thomas affidavit was fraudulent, therefore further admitting to having no enforceable interest in the Plaintiff's loan after November 2006. Wells Fargo must essentially stipulate to all causes of actions brought

forth by the Plaintiff to ever have an enforceable interest in his note.

Because it has not, Bentrim invokes the ultimate defense and under 36-3-305 (c) tis not require to pay on a Note proven lost if the party attempting to enforce is not a holder in due course.

Thomas' deposition claims the note was lost while in possession of Wachovia Bank, NA without a transfer, sale or assignment. Counsel for Defendant, however, claims that TMS Service Corp, a third party, is how the Note was transferred. Under evidence on the record, the Note was not 'found,' it was obtained from a party other than the one who lost it

In the event that the Obligor can prove one party lost the note and another is claiming it rights of enforcement, the party seeking to enforce the Note must be a holder in due course.

Plaintiff submits that to the extent the Court made this de facto ruling for summary judgment based on a 2006 Order, it should reconsider the same because that 2006 order is void: Defendant's predecessor obtained a judgment by default without submitting an affidavit, verified complaint or other sworn testimony. S.C. Code Ann. § 37-5-114 (2) provides that "[a] default judgment may not be entered in the action in favor of the creditor unless the complaint is verified by the creditor or sworn testimony, by affidavit or otherwise, is adduced showing that the creditor is entitled to the relief demanded " Since Defendant's predecessor failed to meet this obligation, nothing from the 2005 foreclosure case or the 2006 order should be admissible or form the basis of this Court's ruling. A void judgment is one from its inception, is a complete nullity and without legal effect and must be distinguished from one that is merely 'voidable.' A judgment is void if a court acts without personal jurisdiction *Thomas & Howard Co v. TW Graham & Co.*, 318 SC 286, 291, 457 SE2d 340, 343 (1995).

Many of Wells Fargo's grounds for summary judgment are predicated on the idea that

there is no proof of certain final conclusions of law for the various causes of action – despite the fact that the no meaningful discovery depositions have been taken. Only in the last several weeks has Wells Fargo identified the two fact witnesses they were ordered to produce in the March 5 Discovery Order. Only days before this order did Wells Fargo concede that it had sold a 100% interest in the loan. Plaintiff contends that Wells Fargo has not completed its document production obligations flowing from the March 5 Discovery Order. Many of the grounds for summary judgment based on lack of evidence – rather than arguments of law – are thus premature until the close of discovery and it would be unfair to grant the extraordinary relief of summary judgment at this time for lack of proof while document discovery is incomplete and no Wells Fargo witnesses have been deposed. *Baughman v Am Tel & Tel Co*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)("summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery")

CONCLUSION

For the above reasons, Plaintiff respectfully requests that this Court reconsider and/or alter or amend Section 4 of the Order.

BROWN & VARNADO LLC

By: _____

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11.14, 2014
Mt. Pleasant, South Carolina

CERTIFICATE OF SERVICE

T This is to certify that the undersigned has on this date served the attached ***Notice of Motion and Motion to Reconsider Section 1 of the Order of October 28, 2014*** in the above-captioned action via hand delivery to the attorney for the Defendant as follows.

Charles M. Baker III, Esquire
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John C. Hawk IV, Esquire
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_____
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February 2, 2015

VIA FACSIMILE AND US MAIL

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

Re: ***Brent E. Bentrim v. Wells Fargo Bank, N.A.***
Appellate Case No 2014-002590

Dear Ms Kitchings

Thank you for your letter of January 22, 2015 The current appeal arises out of Section 1 of the October 28, 2014 Order of the Honorable Mikel R Scarborough, Charleston County Master in Equity ("Order"), which Appellant received November 5, 2014

Appellant filed two (2) motions to reconsider the Order

1 Notice of Motion and Motion to Reconsider Section 4 of the Order of October 28, 2014, filed and served November 13, 2014("11 13 14 Motion to Reconsider") , and

2 Notice of Motion and Motion to Reconsider Section 1 of the Order of October 28, 2014, filed and served November 14, 2014 ("11 14 14 Motion to Reconsider") [attached]

As you will note, the 11 14 14 Motion directly touches on the instant appeal and is a *successive* motion to reconsider [i e , a motion to reconsider on a prior motion to reconsider]

Thus, insofar as the deadline to appeal Section 1 of the Order fell on or before December 3, 2014 [pursuant to Rule 203, SCACR] and the trial court did not rule on the 11 14 14 Motion to Reconsider prior to that deadline, Appellant proceeded with the appeal at bar

The trial court conducted a hearing on January 16, 2015. At that hearing, Appellant respectfully argued to Judge Scarborough, *inter alia*, that jurisdiction over the issues raised in the 11 14.14 Motion was now entirely vested in the Court of Appeals

Following the January 16 hearing, Judge Scarborough issued orders on the 11 13 14 Motion and other matters, but not the 11 14 14 Motion to Reconsider

I hope that this answers your question

Thank you and with kind regards, I remain

Very truly yours,

BROWN AND VARNADO LLC

Robert B Varnado

RBV/mb

cc Charles J Baker III, Esquire *(via email and U S Mail)*
S Sterling LaneyIII, Esquire *(via email and U S Mail)*
John C Hawk IV, Esquire *(via email and U S Mail)*
The Honorable Mikell R Scarborough *(via email and U S Mail)*