STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS OF
	)	THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
Libby Corporation,	)	CASE NO.: 2013-CP–32-03548
	)	
Plaintiff,	)	
	)	**MASTER IN EQUITY'S**
vs.	)	**ORDER AND**
	)	**JUDGMENT OF**
Haiyan Lin,	)	**FORECLOSURE AND SALE**
	)	
Defendant.	)	
	)	

Pursuant to Rule 53, SCRCP, the above-entitled matter was referred to the undersigned to make appropriate findings of fact and conclusions of law with authority to enter a final judgment in the cause. Any appeal from this *Order* is to the Supreme Court of South Carolina.

PROCEDURAL HISTORY.

The Plaintiff, Libby Corporation, filed a *Notice of Pendency of Action*, *Summons* and *Complaint* for foreclosure in this matter with the Clerk of Court for Lexington County on October 11, 2013. Personal service of the pleadings was attempted by Henry B. "Buddy" Morgan of Henry B. Morgan Consulting, LLC on the Defendant, Haiyan Lin, between October 11, 2013 and November 21, 2013, but to no avail, as evidenced by the *Affidavit of Non-Service* filed on November 27, 2013. Mr. Morgan stated in his *Affidavit of Non-Service* that he attempted service on the Defendant at her last published address at 4600 Lamar Highway, Lamar South Carolina, that no residence or active business was located there, and that it was an abandoned cafe' and other small buildings with abandoned vehicles and heavy duty equipment on the site. In addition, Mr. Morgan stated in his affidavit that other possible addresses were developed, investigated,

and were discovered to be were vacant lots or abandoned houses. Finally, Mr. Morgan called the Defendant twice. On November 7, 2013, Mr. Morgan called and the Defendant said she was out of town and would call him when she returned. When no contact was made by the Defendant, Mr. Morgan called two weeks later on November 21, 2013, and the Defendant informed him that she was "homeless."

Upon receipt of the *Affidavit of Non-Service*, the Plaintiff filed a *Motion for Service by Publication* and an *Affidavit of Service by Publication* with the Clerk of Court for Lexington County on December 5, 2013. The Clerk of Court issued an *Order for Publication* on December 6, 2013, authorizing publication in the Lexington Chronicle. Service was published on January 9, 16, and 23, 2014, as evidenced by the *Affidavit of Publication* filed with the Court on February 5, 2014.

When Defendant did not timely file an answer to these pleadings, the Plaintiff filed an *Affidavit of Default*, an *Affidavit of Non Military Service*, and *Petition for Order of Reference* to the Master in Equity for Lexington County with the Clerk of Court on March 14, 2014. The *Order of Reference* was issued on April 4, 2014, and the case was referred to the Master In Equity.

A hearing was set in this matter for May 20, 2014. The *Notice of Hearing* was served upon the Defendant on May 5, 2014, as evidenced by the *Certificate of Service by Mail* at her last known addresses, including a post office box in Columbia, South Carolina, and filed with the Court on May 8, 2014. After commencement of the hearing and during the course of Plaintiff's foreclosure presentation to the Court, the Defendant appeared as a self represented litigant. The Defendant stated to the Court that she had not been properly served the *Notice of Pendency of Action*, *Summons* and *Complaint* for foreclosure in this matter, that all she had received was the *Notice of Hearing*, and that her due process rights had been violated. After due inquiry by the Court, the

Plaintiff was directed to immediately serve a copy of the *Notice of Pendency of Action*, *Summons* and *Complaint* on the Defendant while all were present in the courtroom. The Court instructed defendant that she had thirty (30) days in which to respond or retain an attorney to respond for her.

On June 19, 2014, the Defendant filed an *Answer* to the *Summons* and *Complaint.* The Defendant's *Answer* made the following seven arguments:

1. *Plaintiff has failed to serve the defendant 30 days right to cure letter before initiating the foreclosure action, as required under the note and mortgage.*

2. *The statement of account is incorrect and is not verified by a certified P.A.*

3. *The plaintiff has agreed to work with the defendant to allow her to make up the late payments with rental incomes from the property, and reinstate the regular payment schedule as soon as she got her life back.*

4. *The foreclosure action is a breach of trust of our mutual understandings.*

5. *It is unlawful to begin foreclosure without ADR mediations* [sic.]. *This action shall not be excepted from SC Supreme Court Administrative Order of May 2, 2011. Because: A. The property is an* [sic.] *owner occupied; B. The loan is a personal loan, not commercial; C. This action does constitute and individual mortgage foreclosure.*

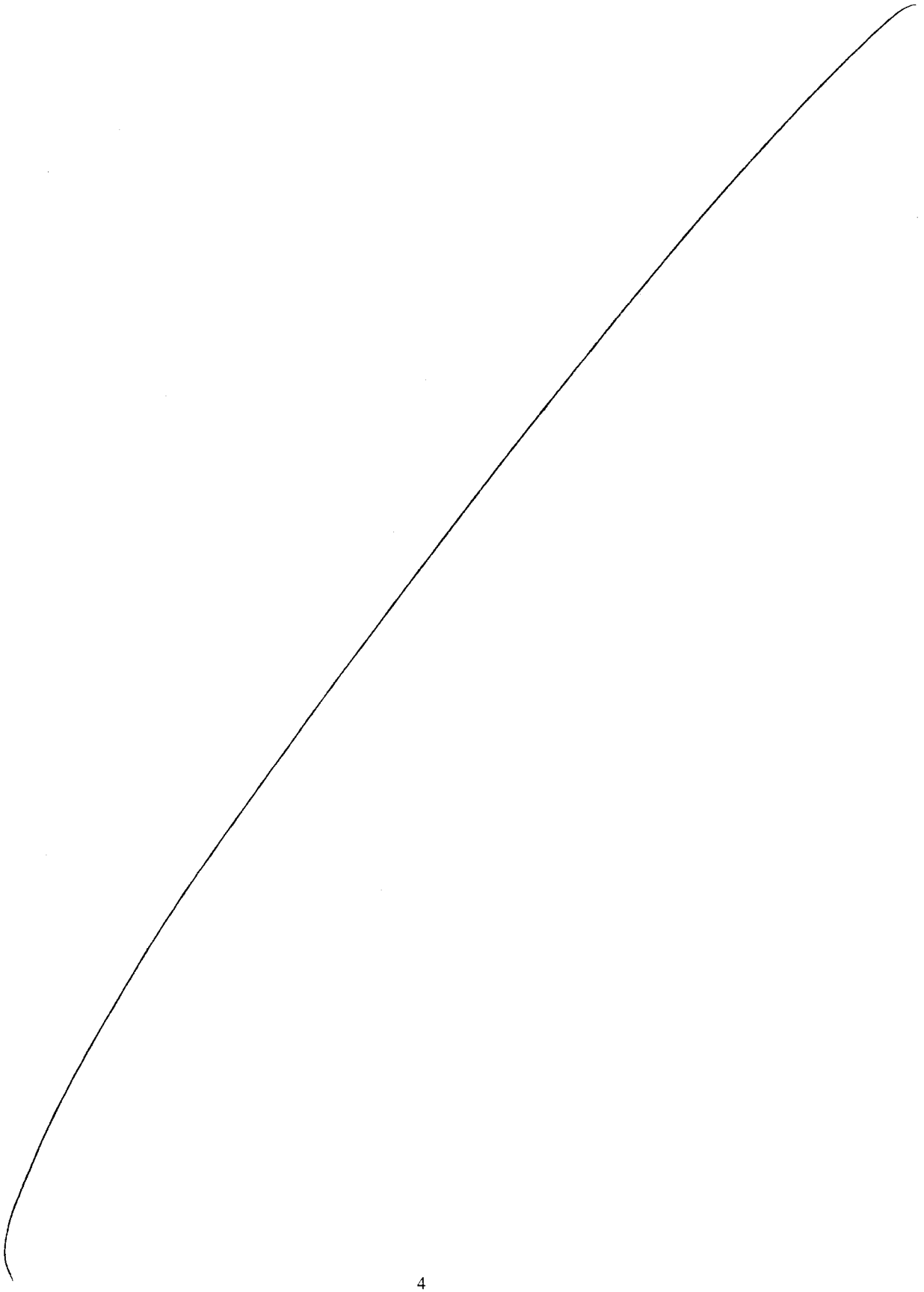
5.[sic.] *The defendant reserves her right of mediation and demands a mediation conference to be scheduled.*

6.[sic.] *The defendant defents* [sic.] *her rights of the equality on the property.*

7.[sic] *The plaintiff has no right to obtain a deficiency judgment on this case.*

The Defendant then moved to dismiss the foreclosure and requested an order from the Court for mediation. In response, the Plaintiff filed a *Reply* on July 25, 2014, denying each of the Defendant's allegations and further asserting: 1) Notice of Debt letters were sent to the Defendant on August 20, 2013 and September 4, 2013, addressed to the Defendant's last known addresses in Columbia, South Carolina, and Lamar, South Carolina; 2) a Statement of Account is not required to be verified by a

certified public accountant; 3) foreclosure actions are exempt for alternative dispute resolution per



Rule 3(b)(7) of the Court Annexed Alternative Dispute Resolution (ADR) Rules; 4) the property is a commercial property (ie. a warehouse), and not owner occupied as the Defendant is not residing on the property and does not claim it as her residence; 5) the loan was a commercial loan and was made for the purposes of purchasing commercial property; 6) that South Carolina Code §§ 15-39-720, 15-39-760, and 29-9-660 are the controlling statutes for right to, request of, waiver of, and judicial sales involving deficiency judgments, and reaffirmed and reasserted that its right to deficiency judgment was not waived and was specifically demanded in this matter.

A second hearing in this matter was set for August 12, 2014, and the *Notice of Hearing* was served upon the Defendant on July 24, 2014, at her last known addresses, including a post office box in Columbia, South Carolina, as evidenced by the *Certificate of Service* filed with the Court on July 29, 2014. The hearing was held as scheduled and noticed. All parties were in attendance and, again, the Defendant was a self represented litigant.

During the course of the hearing on the merits of the Plaintiff's case, the Defendant raised the eight issues as set forth in her *Answer.* The Court addressed each one of these issues prior to the Plaintiff placing its case on the record. The Court stated, in summary, the Plaintiff was entitled to ask for a deficiency judgment by statute; the Defendant would be allowed to argue her case; the Defendant was not entitled to mandatory mediation as the matter was a foreclosure action, and under the Administrative Dispute Resolution Rules foreclosures are exempt from mediation; defined what owner-occupied property and foreclosure intervention are as set forth in South Carolina Supreme Court Order of May 2, 2011; stated the *Complaint* does not have to be verified by a certified public accountant; and stated the Defendant would have the right to cross examine the Plaintiff on the issue of the notice of debt letter. The Defendant continued to assert and argue the propriety of the *Order of Reference.* The Court denied her arguments. The Plaintiff then

proceeded to present its case.

On cross examination of the Plaintiff's witnesses the Defendant objected to the Plaintiff's *Affidavit of Attorney's Fees.* The Court explained to the Defendant the process by which she could challenge and question the Plaintiff's *Affidavit of Attorney's Fee.* At the conclusion of the Plaintiff's case, the Defendant continued to argue the issue of service process and the fact she was originally served by publication. The Court denied this argument and repeatedly re-emphasized its decision that the service of process in the courtroom on May 20, 2014, and her subsequent filing of her *Answer,* cured this defect, and that nothing further would be heard on that point.

On further cross examination of the Plaintiff's witnesses by the Defendant, in her narrative to the Court, and in the brief cross examination by the Plaintiff on her narrative, the Defendant asserted that there was either an existing agreement between herself and the Plaintiff regarding the payments on the delinquent mortgage or there had been discussion toward such an agreement. In either case, the agreement or discussions toward an agreement all occurred before the filing of the foreclosure action by the Plaintiff. After numerous questions about the alleged agreement and possible forbearance on the part of the Plaintiff, as well as other issues as raised by the Defendant, the Court concluded the hearing and issued a detailed oral ruling requiring the parties to submit post trial briefs to answer six questions and issues as raised by the Defendant and set forth the time frames for submitting the briefs.

On August 20, 2014, the Defendant filed a *Notice of Hearing* on the Plaintiff's *Affidavit of Attorney's Fees.* The *Notice of Hearing Date* was issued by the Court on August 28, 2014, setting the hearing for October 23, 2014.

Per the oral Order of this Court, the *Transcript of the Hearing of August 12, 2014* was made available to the parties on September 11, 2014. By oral order of the Court the both parties had thirty days to file a Post Trial Memorandum to answer and address the six questions and issues which had been raised during the course of the hearing on August 12, 2014. The Plaintiff filed its *Post Trial Memorandum* on October 9, 2014, and served a copy of the same on the Defendant. The Defendant did not file a *Post Trial Memorandum* despite the Court's requirement at the hearing that she do so.

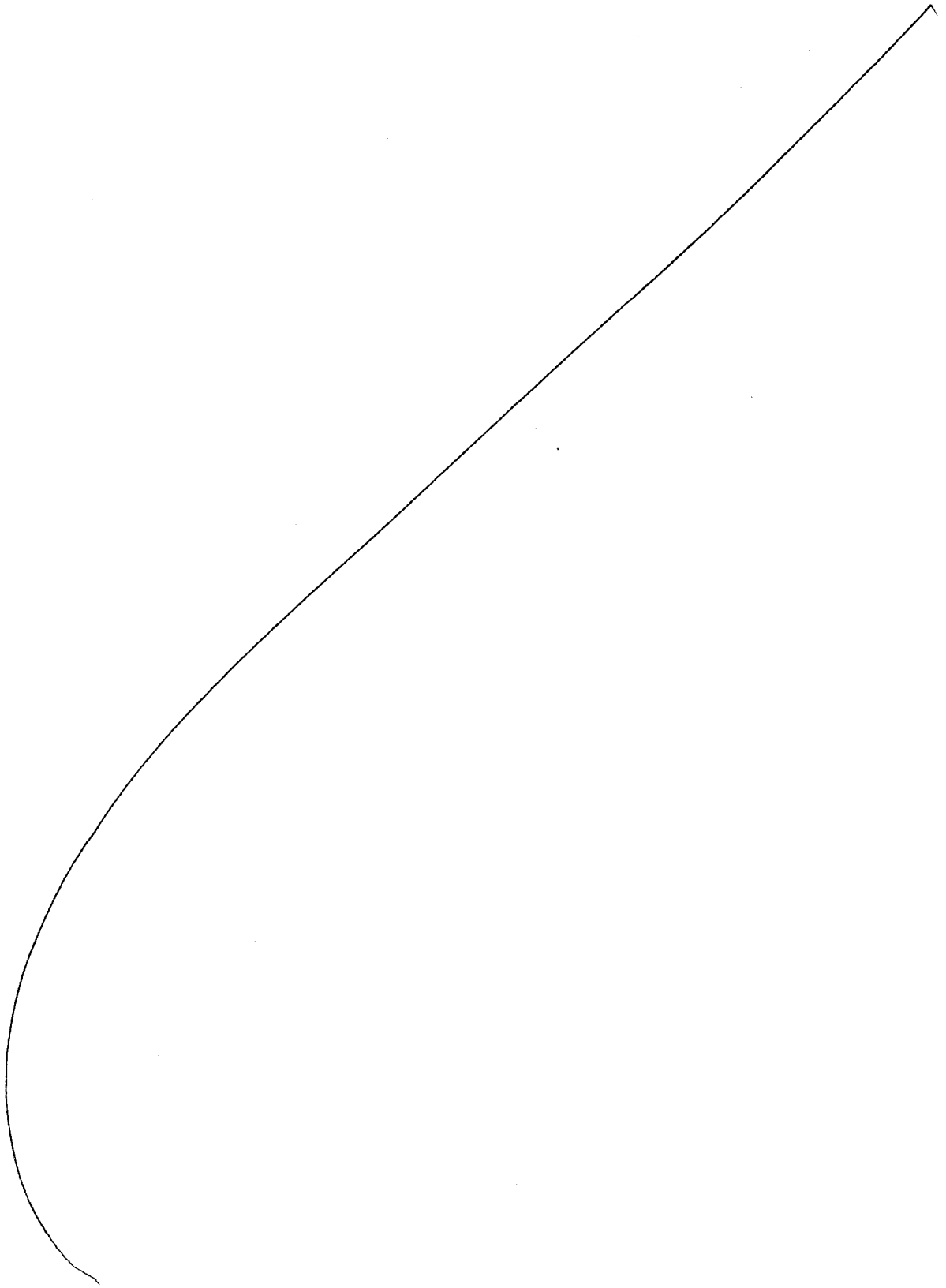
A third hearing in this matter, and the first on the issue of the Plaintiff's attorneys fees, was set by the Court for October 23, 2014. The hearing was held as scheduled and noticed, and all parties were in attendance and, again, the Defendant was a self represented litigant. Prior to the commencement of the hearing, however, the Defendant handed Plaintiff's counsel a "Motion for Rehearing" asserting that as the Court had ruled that she was no longer in default the *Order of Reference* should be stricken and "the hearing shall be back in circuit court not in master-in-equity". The Plaintiff objected to the "Motion for Rehearing" as counsel was served the motion just minutes before the convening of the hearing, and the sole purpose of the hearing as noticed was to address the Plaintiff's attorney's fees. Plaintiff's counsel also noted to the Court that the Defendant failed to submit a *Post Trial Memorandum* as required by the Court at the previous hearing on August 12, 2014. The Court noted counsel's objections and stated to the Defendant that the issue raised in her "Motion for Rehearing" was repeatedly addressed in detail at the hearing on August 12, 2014, and ruled upon at that time. Further, since he had not yet issued a written Order, there was no Order from which to appeal. Thus, her *Motion for Rehearing* was premature. The Court returned the original "Motion for Rehearing" to her without ruling upon its merits.

Of greater concern to the Court, however, was the fact that the Defendant had not provided a court reporter for the hearing after being directed to do so at the hearing on August 12, 2014, and in the *Notice of Hearing Date* issued by the Court on August 28, 2014. The Court stated to the Defendant that since the *Notice of Hearing* on the attorney's fees was her motion, she was required to provide a court reporter as the Lexington County Master in Equity Court did not have a court reporter on staff. Since no court reporter was present, a hearing on the attorney's fees could not be held and would have to be continued and rescheduled. The Court, again, instructed the Defendant to secure the services of court reporter for the next hearing, and reminded her that as this was her motion it was her responsibility to schedule the court reporter - not the Plaintiff's responsibility.

However, and in an effort to ensure that the hearing would be held as scheduled, the Court instructed Plaintiff's counsel to secure the services of a "back-up" court reporter who can be available to come to the Court on approximately thirty minutes notice or less in the event the Defendant fails to secure a court reporter. The Court informed the Defendant that if she failed to secure a court reporter and the Plaintiff's "back up" court reporter has to be called, the costs of the court reporting services and transcript will be added to the costs that have already been incurred by the Plaintiff to date.

The Defendant next stated to the Court she had not received a copy of the *Plaintiff's Post Trial Memorandum* which is why she had not filed her *Post Trial Memorandum*. The Court stated that it had been provided a *Certificate of Service* by Plaintiff's counsel indicating the Defendant had been indeed served the document in compliance with the Court's directive at the hearing on August 12, 2014. Plaintiff's counsel stated that he had forwarded the *Plaintiff's Post Trial Memorandum* to the address that the Defendant had stated on the record at the hearing on May 20, 2014. Plaintiff's

counsel cited from the *Transcript of the Hearing of May 20, 2014* wherein the Defendant stated to the Court that her address was "PO Box 1011, Columbia, South Carolina 29202." He was unaware



of any other address other than the one on Lamar Highway in Lamar, South Carolina, which the Defendant requested not be used for correspondence. The documents had been returned as being undeliverable. The Defendant indicated that she no longer used that post office box, she had obtained new post office box, and the new address was on all of her pleadings filed with the Court after the August 12, 2014 hearing. Plaintiff's counsel stated that he had not been formally notified of any change of address by the Defendant.

The Court inquired of Plaintiff's counsel if the *Plaintiff's Post Trial Memorandum* had been timely filed with the Clerk of Court for Lexington County. Plaintiff's counsel confirmed that the document had been timely filed and was on record. The Court then instructed that the Defendant to go to the Clerk of Court's office and obtain a copy of the *Plaintiff's Post Trial Memorandum.* The Court then ordered the Defendant to file her *Post Trial Memorandum* not later than 5:00pm, October 30, 2014, and to ensure that it is served on Plaintiff's counsel. The Court then directed Plaintiff's counsel to prepare and submit to the Court as Status Report from the hearing which would include a *Notice of Hearing* for November 12, 2014. The was done the same day and delivered to the Court, and served upon the Defendant on October 28, 2014, as evidenced by the *Certificate of Service* filed with the Court on October 31, 2014. In compliance with the Court's directive, the Defendant did file her *Post Trial Memorandum* on October 30, 2014.

On November 5, 2014, six days before the hearing, the Defendant served upon Plaintiff counsel's *Requests for Production & For Subpoenas.* The Plaintiff requested the itemized billing of the Plaintiff's counsel as well for subpoenas for E. Danny Scott, Plaintiff's counsel's law partner, and Ashley L. Gaskins and Terry H. Smith, both paralegals in Plaintiff counsel's law firm. In addition, she informed the Court that she could not obtain a court reporter "due to short schedule" and requested the Court to instruct Plaintiff's counsel to bring the back-up court

reporter. On November 7, 2014, Plaintiff's counsel filed a *Motion to Quash or Modify the Request for Subpoenas Issued to Attorney and Staff of Setzler & Scott, P.A.*, asserting the Defendant's request placed an undue burden on his law firm as it would effectively hamper the day-to-day operations of the practice by taking one attorney and approximately one-half of the legal staff out of the office on short notice for an undetermined period of time for a hearing of undetermined length. In addition, the Defendant had since the filing of her *Request for Hearing* on August 20, 2014, and first hearing in this matter on October 23, 2014, to make this request. Alternatively, if the Court determined the testimony of Mr. Scott, Ms. Gaskins, and Mrs. Smith be required to determine the reasonableness of the attorney's fees as presented to the court, then it was requested that the hearing be set as a day certain, and based upon the schedule and availability of the witnesses so as to minimize the impact to the day-to-day operations of the law firm.

On November 12, 2014, the fourth scheduled hearing, and second on the Defendant's objection to the Plaintiff's attorney's fees was convened. All parties were present. Prior to the hearing, the Court noted that the Defendant had, again, not provided a court reporter as requested. Plaintiff's counsel stated that it had provided the back-up court reporter as requested by the Court at the October 23, 2014 hearing and she was present in the courthouse, but wished to confirm the Court's directive that the costs of the court reporter would be charged to the Defendant as this was her motion and she failed to provide a court reporter. The Court confirmed this directive and the back-up court reporter was brought in for the hearing.

The Plaintiff's counsel made motion to deny the Defendant's production request as being untimely in that it was made with less than thirty days to respond and less than the ten days before the hearing. The Court granted the Plaintiff's motion. However, the Court denied the Plaintiff's *Motion to Quash* citing the Defendant right's to query the Plaintiff counsel's law partner and staff

as to what tasks they performed in the case for the Plaintiff, and Plaintiff's counsel could not testify on their behalf. The Court gave Plaintiff's counsel the option of either continuing the entire hearing to another date with the testimony of all witnesses requested by the Defendant scheduled at thirty minute increments, or to allow the Defendant to proceed with his testimony and set a future date for a hearing for the taking of the testimony of the other witnesses as requested by the Defendant. Plaintiff's counsel chose the latter option, and hearing proceeded with his testimony. At the conclusion of Plaintiff's counsel's nearly two hour testimony, the Defendant moved to file a post hearing memorandum, which was granted by the Court. The Defendant was given until November 21, 2014, to file such post hearing memorandum.

On November 21, 2014, the Defendant served and filed a *Post Hearing Memo*, in which she attempted to make five points to the Court: 1) Plaintiff's counsel made a material misrepresentation of the facts in the hearings of May 20, 2014 and August 12, 2014, with respect to her replying to the Notice of Debt letters; 2) Plaintiff's counsel intentionally failed to serve the Defendant in order to procure an *Order of Publication* and causing her to default in order procure the *Order of Reference* without her knowledge or consent; 3) Plaintiff's counsel is in violation of Rule 407 of the South Carolina Rules of Professional Conduct; 4) Plaintiff's counsel had not followed the terms of the mortgage or the South Carolina Rules Civil Procedure; and 5) Plaintiff's counsel failed to produce itemized work record. On December 2, 2014, Plaintiff's counsel filed a *Reply to the Defendant's Post Hearing Memorandum* and addressed these issues with the Court.

A fifth hearing, and the third hearing on the Defendant's objection to the Plaintiff's attorney's fees, was scheduled for January 9, 2015. A *Notice of Hearing* was served upon the Defendant on December 9, 2014, as evidenced by a *Certificate of Service* filed with this Court on the same date. All parties were present and, again, the Defendant was a self represented litigant. The Court again

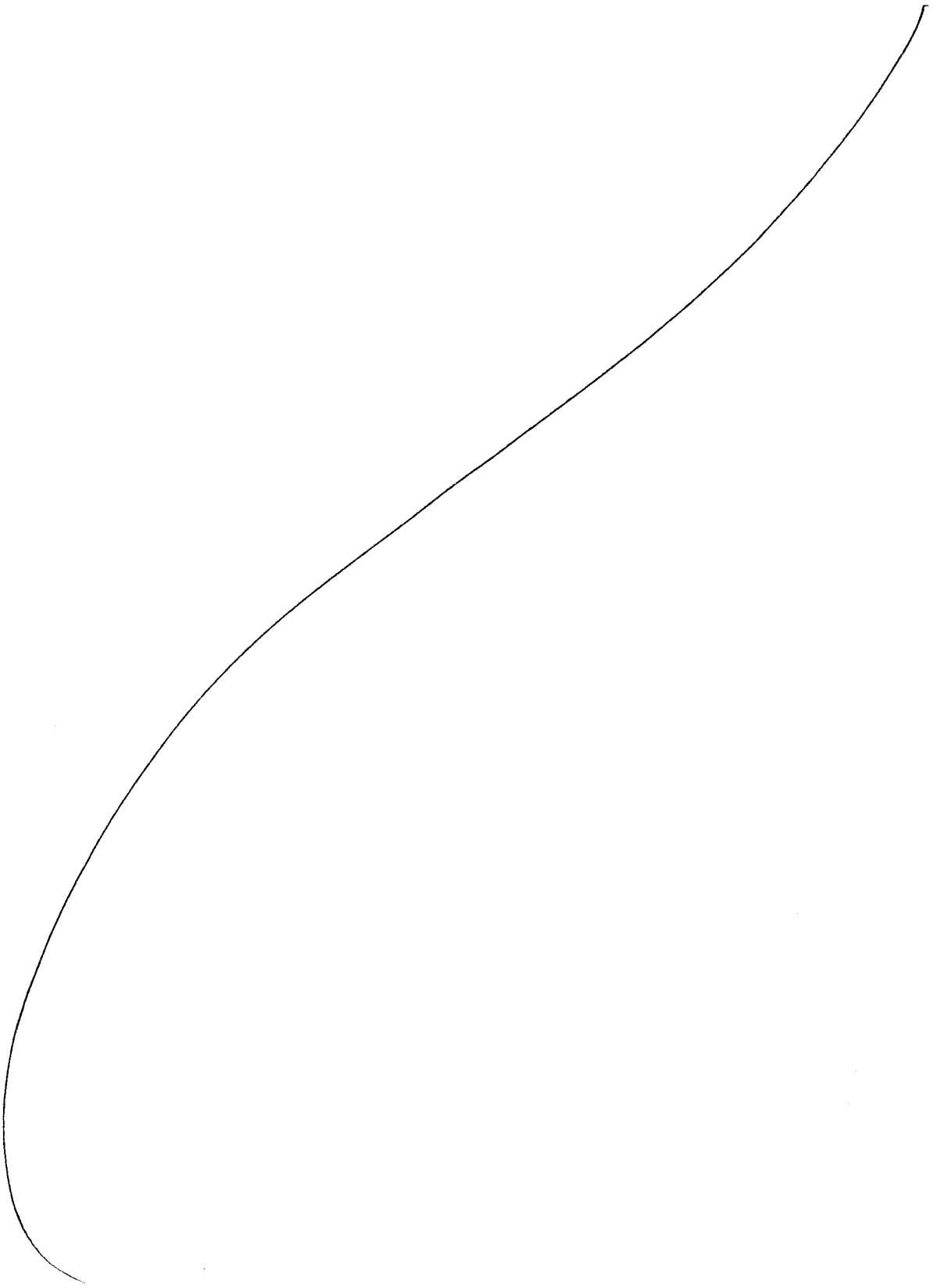
noted the Defendant did not provide the court reporter, requiring the Plaintiff to provide for such services. Present at this hearing were E. Danny Scott, senior partner in the Plaintiff counsel's law firm, and Terry H. Smith and Ashley L. Gaskins, both paralegals in the law firm. Prior to the hearing the Defendant objected to the fact that Plaintiff's counsel failed to produce itemized work record, and indicated in his *Reply to the Defendant's Post Hearing Memorandum* he had copies available. Plaintiff's counsel responded that the Defendant's initial request had been denied at the previous hearing as being untimely and the Plaintiff never formally renewed her request to Plaintiff's counsel for these documents. The Court denied the Plaintiff's objection, however, it directed Plaintiff's counsel to immediately provide the copies he had in his possession to the Defendant for this hearing. Plaintiff's counsel complied with this directive. The defendant had the documents to review as she questioned the various witnesses. The Defendant queried witnesses concerning their time on this case, and queried Plaintiff's counsel on his addition time since the previous hearing. This was final hearing in this case.

QUESTIONS AND ISSUES PRESENTED TO THE COURT AT THE AUGUST 12, 2014 HEARING.

As previously stated, at the merits hearing on August 12, 2014, the Defendant raised six questions and issues to the Court concerning various aspects of this case. This Court directed both parties to submit Post Trial Memorandums addressing these issues. The six questions and issues were as follows:

1. *What is the chronology of the Note, the Mortgage, and the Payment history of the Defendant;*
2. *What is the validity of the Order of Reference viewed in light of the fact that the referral was made before the Defendant was physically served with the Summons and Complaint in this case;*
3. *What does the Note address concerning the issue of acceleration;*
4. *What does the Chief Justice's Order of May 2, 2011, state with regard to the applicability*

of mediation and / or any other alternative dispute resolution alternatives that would be



relative to this case;

5. *What is the statutory and / or case law on the Defendant's assertion that there is a $3,000.00 cap on attorney's fees in foreclosure cases; and*

6. *What is the legal and equitable doctrine of "forbearance", and is the Plaintiff estopped from foreclosing on the Defendant and her property.*

FINDINGS OF FACT AND OPINIONS OF THE COURT ON THE QUESTIONS AND ISSUES AS PRESENTED ON AUGUST 12, 2014.

1. Chronology of the Note, The, Mortgage and the Payment History of the Defendant.

Based upon the evidence presented to this Court at the merits hearing on August 12, 2014, it appears that on January 5, 2007, the Defendant, for value received, executed and delivered to the Plaintiff a *Promissory Note* (hereinafter referred to as "*Note*") in the principal sum of One Hundred Fifty Thousand and 00/100ths ($150,000.00) Dollars, with an interest rate of nine percent (9%) per annum, to be paid in one hundred nineteen (119) monthly installments of One Thousand Two Hundred Six and 93/100ths ($1,206.93) Dollars commencing February 5, 2007, and continuing on the fifth (5th) day of each month thereafter with the one twentieth (120^{th}) and final payment of One Hundred Thirty-Four Thousand One Hundred Forty Five and 30/100ths ($134,145.30) Dollars being due on or before January 5, 2017. In order to further secure the payment of said *Note* and the debt evidenced thereby according to the terms and conditions thereon, the Defendant executed and delivered unto to the Plaintiff a certain *Mortgage* (hereinafter referred to as "*Mortgage* "), said *Mortgage* being dated January 5, 2007, whereby she mortgaged to the Plaintiff, its successors, and assigns, the subject real estate located at 140 Pond Drive, Red Bank, South Carolina, and that said *Mortgage* was thereafter recorded by the holder of the *Mortgage* in the Office of the Register of Deeds for Lexington County, State of South Carolina, on January 9, 2007, in Book 11673 at Page 324, and the Plaintiff is the owner and holder of said *Note* and *Mortgage*. It appears to the Court that

the *Mortgage* held by the Plaintiff constitutes a valid first lien against the premises and that no other parties, other than those so named, claim any interest in or upon the subject property to the knowledge of the Plaintiff and the Plaintiff is seeking foreclosure of the *Mortgage*.

Between February 22, 2007 and June 20, 2011, the Defendant timely made the monthly mortgage payment. Beginning in July, 2011, the Defendant started becoming delinquent in her payments, making late payments in the third quarter and completely missing all payments due in the fourth quarter of 2011. In 2012, the Defendant made timely payments for the first quarter and the first two months of the second quarter, but again became delinquent by thirty days for each month beginning in the last month of the second quarter, and all of the third quarter. No payments were received for the fourth quarter of 2012. No mortgage payments were received from the Defendant in 2013 or 2014. The last payment of any kind received from the Defendant was on October 4, 2012, in the amount of $1,206.93.

The *Mortgage* dictates that the mortgagors shall insure and keep insured against loss and damage by fire, the premises covered by said *Mortgage*. In the event of the failure of the mortgagors to insure and keep insured the said premises, the said mortgagee, its successors, or assigns may cause the same to be insured in its own name, and reimburse itself for the premium and expenses of such insurance under the whereupon the entire debt secured by the said *Mortgage* shall immediately become due and payable, if the mortgagee, or its successors or assigns, shall so elect.

Also the terms of the *Mortgage* require that the mortgagors shall promptly pay all taxes assessed and chargeable against said property, and in default thereof, and that the said mortgagee, its successors or assigns, may pay the same and reimburse itself under the said *Mortgage*, whereupon *Mortgage* shall become immediately due and payable if the mortgagee, or its successors or assigns,

shall so elect. Specifically, The *Mortgage* states, in part:

> 3. *Charges; Liens: Borrower shall pay all* ***taxes****, assessments, charges, fines, and impositions attributable to the Property which may attain priority over this Mortgage, and leasehold payments or ground rents, if any. Borrower shall pay them on time directly to the persons owed payment. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this paragraph. If borrower makes these payments directly, Borrower shall promptly furnish Lender receipts evidencing the payments.*

and

> 4. *Protection of Lender's Rights in the Property: If the Borrower fails to perform the covenants and agreements contained in this Mortgage or there is a legal proceeding that may significantly affect the Lender's rights in the property (such as a proceeding in bankruptcy, probate, condemnation, or forfeiture to enforce laws or regulations, or sale of property of taxes), then the Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the property. Lender's actions may include paying any sum secured by a lien which has priority overt this Mortgage appearing in court paying a reasonable attorney's fee* ***and / or paying any real property taxes due****. Although Lender may take action under this paragraph 4, Lender does not have to do so.*
>
> > *Any amounts disbursed by Lender under paragraph 4 shall become an additional debt of the Borrower secured by this Mortgage and bearing interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.*

(emphasis added).

The evidence clearly shows the Defendant failed to pay the 2009, 2010, 2011, and 2012 real estate property taxes as required under the *Mortgage*. The Plaintiff made these payments on two occasions after being notified by the Lexington County Treasurer that the properties had been sold for delinquent taxes and that, as the Mortgagor, they had a right of redemption. The 2013 real estate property taxes were paid after investigation to see is if such taxes were current. Discovering that they were delinquent, the Plaintiff paid those as well.

Based upon the testimony of James McBride Witherspoon, President of Libby Corporation, it appears the parties had been in various discussions between 2011 and 2013 regarding the undisputed fact the Defendant was behind in the mortgage payments. These discussions ranged from the Defendant working for the Plaintiff and using the income to bring the payments current, to the Defendant renting the property and using the income to bring the payments current, to her leaving mortgage payment checks with the Plaintiff to deposit upon her authorization when there was money in her checking account. None of these discussions resulted in the Defendant making any tangible effort to bring the *Mortgage* current. When the Plaintiff had work for her to perform, she was busy or could not come; when the Plaintiff agreed to allow the Defendant to rent the property - even to the point of assisting with cleaning up the property - the Defendant provided no key or access and failed to rent the property, and she instructed the Plaintiff not to deposit the checks she had left as there was no money in the bank. Mr. Witherspoon made it clear that while he was willing to work with the Defendant, it had been three years efforts that had not resolved the delinquency.

On August 20, 2013, the Plaintiff directed its counsel, Setzler & Scott, P.A. to issue *Notice of Debt* letters to the Plaintiff. Two letters were issued, each signed by E. Danny Scott, one certified mail and one regular first class mail, to two separate known addresses of the Defendant: 4600 Lamar Highway, Lamar, South Carolina 29069, and Post Office Box 1011 Columbia, South Carolina 29202. The letters, which were identical, set forth the amount then owed ($141,195.81), and set forth a ten day period to dispute the amounts owed.

As it was discovered that the letters did not comply with the with the legal requirements of the *Mortgage*, two new letters were sent on September 4, 2013, again each signed by E. Danny Scott, one certified mail and one regular first class mail, to the two separate

known addresses of the Defendant. The letters, which were identical, stated the Defendant was in default, setting forth the amount then owed ($143,313.75) plus daily interest ($35.33 per diem), stating that she had thirty days to bring the mortgage current or that full amount would be accelerated, that if arrangements were not made to pay the full amount the Plaintiff will begin foreclosure action, and that the *Note* and *Mortgage* allowed for the recovery of all attorney's fees and costs of collection. The certified letters of August 20, 2013 and September 4, 2013, sent to the post office box, were both signed for by the Defendant on October 3, 2013 and October 8, 2013 respectively. The letters sent to the Defendant's known physical address were returned.

By October 7, 2013, no response had been received from the Defendant by Plaintiff's counsel regarding this matter. On October 11, 2013, the Plaintiff filed the *Complaint* for foreclosure with the Clerk of Court for Lexington County. At the time of the filing, the payments due on the *Note* and *Mortgage* were in default as of October 7, 2013, and there was due and owing in the sum of $144,186.40 and late fees all bearing interest at the rate of 9.00% per annum ($35.33) per diem. Further, the Plaintiff also prayed for the costs and disbursement of this action, including attorney's fees and costs, as provided by said *Note* and *Mortgage*.

On October 18, 2013, Defendant sent a letter to the Plaintiff's counsel indicating that she disputed the debt and asked for verification of the same. This was the first written communication Plaintiff's counsel had from the Defendant in this case. The letter did not dispute the default, and did not state the parties had any form of an agreement or were negotiating an agreement in an effort to resolve the outstanding amounts owed. On November 14, 2013, Plaintiff's counsel responded to the Defendant's request and forwarded to her a payment history and the *Statement of Account* from the Complaint which had been filed on October 11, 2013.

Nothing further was heard from the Defendant until she appeared before the Court on May 20, 2014. Again, it appears to this Court that at no time between October 18, 2013 and May 20, 2014, did the Defendant contact Plaintiff's counsel to indicate the parties had any form of an agreement or were negotiating an agreement in an effort to resolve the outstanding amounts owed, and that any action to foreclose on the *Mortgage* would be improper.

The Court is informed that Plaintiff is aware of the Administrative Order of the Supreme Court of South Carolina, dated May 22, 2009, regarding the Home Affordable Modification Program (HMP). Plaintiff states that the subject property is commercial property owned by the Defendant and the mortgage loan is not owned, secured or guaranteed by Fannie Mae or Freddie Mac. In addition, Plaintiff is further aware of the Administrative Order of the Supreme Court of South Carolina, dated May 2, 2011, and states that the subject property is owned by the Defendant and the mortgage loan is a commercial loan and does not qualify as an "Owner Occupied Dwelling".

Finally, the Plaintiff specifically requested a personal or deficiency judgment should the proceeds from the sale of the property herein be insufficient to satisfy the *Mortgage* indebtedness, together with costs of collection and Court costs

Based upon the chronology of the *Note*, *Mortgage*, and payment history as set forth in the testimony and the *Plaintiff's Post Trial Memorandum*, this Court finds that the Plaintiff should have a judgment of foreclosure of the *Mortgage* and the mortgaged property should be ordered sold at public auction after due advertisement.

2. *What is the validity of the Order of Reference viewed in light of the fact that the Referral was made before the Defendant was physically served with the Summons and Complaint in this Case?*

The equity court is considered a division of the circuit court, and the master in equity, as judge of the equity court, is entitled to all benefits and subject to all requirements of the South Carolina Bar, and the rules of the Supreme Court in the same respect as circuit court and family court judges. See S.C. Code Ann. § 14-11-15 (Thompson-Reuters, 2014); see also Katzburg v. Katzburg, 410 S.C. 184, 189, 764 S.E.2d 3, 6 (Ct. App, 2014). A foreclosure action is an action in equity. See Wachovia Nat. Ass'n v. Blackburn, 407 S.C. 329, 441, 755 S.E.2d 437, 439 (2014). Actions to foreclose liens or obtain partition of real property shall be tried by the court and shall ordinarily be referred to a master pursuant to Rule 53. See S.C. R. Civ. P. 71(a). In an action where the parties consent, in a default case, or an action in foreclosure, some or all of the causes of action in a case may be referred to a master or a special referee by order of a circuit judge or the clerk of court, and once referred the master or the special referee shall exercise all power and authority which a circuit judge sitting without a jury would have in a singular matter. See S.C. R. Civ. P. 53(b) and (c). Pursuant to this rule, a master has no power or authority except that which is given to him by the order of reference and is given the power to conduct hearings in the same manner as the circuit court unless the order of reference specifies or limits the master's powers. See Wells Fargo Bank, N.A. v. Smith, No, 2012-UP-690, 2009-125666, 2012 WL 10987189 (Ct. App. 2012).

On March 21, 2014, the Plaintiff filed a *Petition for Order of Reference* with Clerk of Court for Lexington County, pursuant to Rule 53 of the South Carolina Rules of Civil Procedure. The *Order of Reference* was filed on April 4, 2014, and this matter was referred to the Lexington County Master in Equity. The *Order of Reference* states that Master in Equity is:

. . . to take testimony arising under the pleadings, to make his findings of fact and conclusions of law, with authority to enter a final judgment, in the case of appeal thereto be to the South Carolina Supreme Court.

During the course of the hearing on August 12, 2014, the Defendant objected to the referral to the Master in Equity's Court due to that fact she had been served by publication, had not answered the *Complaint* within thirty days and been found in default, and the *Petition* and *Order for Reference* had been made without her knowledge or consent. This Court denied the Defendant's objection to the referral and explained that Rule 53 and 71 of the South Carolina Rules of Civil Procedure allow for foreclosure matters to be referred to Master in Equity, and the Defendant was aware the case had been referred to the Master in Equity when she appeared at the prior hearing on May 20, 2014. The Defendant continued to assert that the *Order of Reference* should be void due to the fact that she was served by publication and had been found in default. The Court stated to the Defendant that the issue of service had been resolved at the May 20, 2014 hearing when she was served the *Summons* and *Complaint* in the courtroom, she had filed her *Answer*, and her *Answer* failed to raise any objection to the reference. Later in the hearing the Defendant, again, continued to argue this issue. The Court reaffirmed its denial of the motion stating to the Defendant the referral was not a surprise as she was aware of it at the May 20, 2014 hearing, that she had been served the *Summons* and *Complaint* and had filed an *Answer*, there was nothing raised in the *Complaint* which would be triable by a jury, and the circuit court rules and numerous cases all say that foreclosure matters are to be heard by Masters in Equity.

In Wachovia Bank of South Carolina, N.A. v. Player, 341 S.C. 424, 535 S.E.2d 128 (2000), the Supreme Court of South Carolina was presented a case with very similar facts regarding the reference to and authority of the master in equity when there was a question of service of process by publication. In this case, Wachovia Bank filed a foreclosure action against the Appellant, Jay Player,

and Institution Food House, Inc., who had failed to answer and defaulted. The case was referred to the master in equity with finality and authority to directly appeal to the Supreme Court. The master in equity issued a foreclosure order, which Player moved to set aside based upon Rule 60(b)(4) of the South Carolina Rules of Civil Procedure on the grounds the court lacked personal jurisdiction over him because service had been improper. Specifically, he stated that the substituted service by publication was improper as the process server did not exercise due diligence in attempting to locate him. The master in equity denied the motion and Player appealed. The Court Appeals ruled that the court lacked subject matter jurisdiction to consider the Rule 60(b)(4) motion and reversed the decision of the master in equity. See Wachovia Bank of South Carolina, N.A .v. Player, 334 S.C. 200, 512 S.E.2d 129 (Ct. App. 1999). The Supreme Court granted Wachovia Bank's *Writ of Certiorari*, reversed the holding of the Court of Appeals, addressed the merits of Player's appeal, and affirmed the master in equity's order.

The Supreme Court examined the order of reference which specifically stated that the master in equity was:

> *. . .to take testimony arising under the pleadings and to make findings of fact and conclusions of law with authority to enter a final judgment in the case. . .provided further that pursuant to S.C.Code [sic] Section 15-39-680 (1986), the Master-in-Equity is hereby authorized to conduct the public sale at any specified time."*

See Wachovia Bank, at 129; at 426-427. First, the Supreme Court stated that, contrary to the Court of Appeals interpretation of the order of reference, the master in equity did have authority to hear the Appellant's Rule 60(4)(b) motion as it had not exercised the full extent of the power he possessed. The Supreme Court held that the language of the in the order of reference authorizing the master in equity to enter a "final judgment" was not a limitation on his authority but rather was descriptive of the nature of his order. Further, it made common sense that the judge in whose court

the matter was pending to decide the merits of any Rule 60 motion. See id., at 129; at 427.

Second, the Supreme Court held that an order for service by publication may be issued pursuant to S.C. Code Ann. § 15-9-710 when an affidavit, satisfactory to the to the issuing officer, is made to stating that the defendant, a resident of the state, cannot, after exercise of due diligence, be found and that a cause of action exists against him. See § 15-9-710(3). When the issuing officer is satisfied by the affidavit, his decision to issue to order service by publication is final absent fraud or collusion. See Wachovia Bank, at 130; at 428-429. As the Appellant failed to prove any fraud or collusion in Wachovia's obtaining an order for service by publication and serving him by publication, his Rule 60(4)(b) motion was properly denied.

Finally, the Supreme Court addressed the suggestion that since the master in equity did not review the Appellant's due diligence claim his due process rights were violated. As the issue was never raised to the magistrate, it could not be raised on appeal. See id., at 130; at 429, see also Beaufort County v. Butler, 316 S.C 465, 451 S.E.2d 386 (1994).

In first appearing at the hearing on May 20, 2014, and being served the *Summons* and *Complaint*; then filing her *Answer* and not objecting to the reference to the Master in Equity; and then appearing at the hearing on August 12, 2014, and fully participating in the hearing, the Defendant has clearly made an appearance and subjected herself to the jurisdiction of this Court. Voluntary appearance by a defendant is equivalent to personal service. See S.C. R. Civ. P. 4(d). The Court of Appeals decisions in Stearns Bank National Association v. Glenwood Falls, L.P., 373 S.C. 331, 644 S.E.2d 793 (Ct. App. 2007) and Ex parte Cannon, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009) are instructive on this point. In Stearns Bank the Court of Appeals stated:

> *The term 'appearance' is used particularly to signify or designate the overt act by which one against whom suit has been commenced submits himself to the court's jurisdiction. 4 Am. Jr. Appearance §1 (1995). "An appearance may be expressly made by formal written or oral*

declaration, or record entry, or it may be implied from some act done with the intention of appearing or submitting to the court's jurisdiction." Id. No specific act constitutes an appearance, as "a defendant may choose to come into court with trumpets or quietly by the back door." See Stephens v. Ringling, 102 S.C. 333, 342, 86 S.E. 683, 685 (1915). Accordingly courts decide on a case by case basis whether a defendant's act demonstrates an inherent intent to submit to the court's jurisdiction.

See Stearns Bank, at 338; at 796. The Court of Appeals stated in Cannon:

Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance. See Stearns Bank National Association v. Glenwood Falls, L.P., 373 S.C. 331, 337 644 S.E.2d 793, 796 (Ct. App. 2007). "Voluntary appearance by [a] defendant is equivalent to personal service. . ." Rule 4(d), SCRCP. " a defendant may waive any complaints he may have regarding personal jurisdiction by failing to object to lack of personal jurisdiction and by appearing to defend his case." State v. Dudley, 354 S.C. 514, 542, 581 S.E.2d 171, 186 (Ct. App. 1983); see Cheraw Motor Sales Co. v. Rainwater, 125 S.C. 509, 513, 119 S.E 237, 239 (1923) ("the defendant filed his answer and tried his case on the affidavit in the attachment, and thereby waived his right to his motion [to dismiss proceedings because there was no summons and complaint served].").

See Cannon, at 656, at 822.

In short, the thrust of the Defendant's whole argument is that she was improperly served the *Summons* and *Complaint* as it was served by publication and not by personal service or by mail and, as such, the reference to the Master in Equity is void and the Court has no jurisdiction. As in Wachovia Bank, this Court was not stripped of its jurisdiction to hear this case merely because the *Order of Reference* was filed after default of the Defendant, who now has raised the issue concerning her service by publication. Further, the Defendant voluntarily appeared and was served the *Complaint* at the hearing on May 20, 2014 by direction of the Court; filed her *Answer*; and fully participated in the hearing on August 12, 2014, and all subsequent hearings. As such, she has submitted herself to the jurisdiction of this Court.

Based upon the statutes, South Carolina Rules of Civil Procedure, and applicable state case law, there is no effect on the *Order of Reference* despite the fact that the Defendant was originally served by publication and found in default. As shown in Wachovia Bank of South Carolina, N.A v. Player, 334 S.C. 200, 512 S.E.2d 129 (Ct. App. 1999), the Court was not stripped of its jurisdiction to hear this case merely because the *Order of Reference* was filed after default of the Defendant after service by publication, which was subsequently questioned by the Defendant. Further, the Defendant voluntarily appeared and was served the *Complaint* at the hearing on May 20, 2014, filed her *Answer* on June 19, 2014, and participated in the hearing on August 12, 2014, and all subsequent hearings. She has submitted herself to the jurisdiction of this Court;

3. *What does the Note and Mortgage address concerning the issue of Acceleration?*

The Defendant asserts in her *Answer* that the Plaintiff failed to serve her a 30 day right to cure letter prior to initiating the foreclosure action as required by the *Note* and *Mortgage* and improperly accelerated the mortgage payments. This issue was also addressed by the Court on several occasions during the course of the hearing on August 12, 2014, with the Defendant asserting that the letters sent to her did not comply with the terms of the *Note* and *Mortgage*.

With regard to acceleration of the debt for failure to make timely payment the *Note* states as follows:

> *I / we, hereby agree(s) that if I / we do not pay the full amount on the date is due, I / we will be in default. If I / we are in default, the Note Holder may send me written notice telling me that if I do not pay the overdue payment within thirty (30) days from the date the notice is delivered or mailed to me, then the Holder may require me to pay immediately the full amount of principal and interest which is due under this Note and said holder shall have the right to institute any proceedings upon this Note and any collateral given to secure the same for the purpose of collecting said principal and interest, with cost and expense, or of protecting any security connected therewith. Notice shall be effective if mailed to me at the address below, unless I notify the Note Holder in writing of a different address.*

The *Mortgage* states in part as follows:

17. Acceleration; Remedies: Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Mortgage (but not prior to acceleration under paragraph 8 unless applicable applies otherwise). The notice shall specify; (a) default; (b) the action required to cure the default; (c) a date, not 30 days from the date notice is given the Borrower, by which the default must be cured; and (d) that failure to cure on or before the date specified in the notice may result in acceleration of the sums secured by this Mortgage foreclosure by judicial proceeding and sale of the Property. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Mortgage without further demand and may foreclose this Mortgage by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph, including, but limited to, attorneys fees and costs of title evidence, all of which shall be additional sums secured by this Mortgage.

On August 20, 2013, two *Notice of Debt* letters were sent to the Plaintiff, signed by E. Danny Scott, by certified mail and regular first class mail, to two separate known addresses of the Defendant: 4600 Lamar Highway, Lamar, South Carolina 29069, and Post Office Box 1011, Columbia, South Carolina 29202. The letters, which were identical, set forth the amount then owed ($141,195.81), and set forth a ten (10) day period to dispute the amounts owed. After the letters were sent, it was noted that the letters did not comply with the legal requirements of paragraph 17 of the *Mortgage.* Upon this discovery, two new letters were sent to the Defendant on September 4, 2013, again signed by E. Danny Scott, by certified mail and regular first class mail, to the two separate known addresses of the Defendant. The terms of the *Mortgage* required the following to be in the letters:

(a) default;

(b) the action required to cure the default;

(c) a date, not 30 days from the date of the notice is given the Borrower, by which the default must be cured;

(d) that failure to cure on or before the date specified in the notice may result in acceleration of the sums secured by the this Mortgage foreclosure by judicial proceeding and sale of the Property;

(e) If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Mortgage without further demand and may foreclose this Mortgage by judicial proceeding;

(f) Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph, including, but limited to, attorneys fees and costs of title evidence, all of which shall be additional sums secured by this Mortgage.

The letters stated as follows:

> *This office has been retained by Libby Corporation to collect the outstanding balance of $143,313.75 in the above referenced matter. As of this date, you are in default under the terms of the Note and Mortgage. As a result, Libby Corporation is hereby making formal demand for payment of the aggregate outstanding balance of principal, accrued interest, and fees in the amount of $143,313.75 as of September 4, 2013, plus daily interest accruing at $35.33 (9% per annum) after September 4, 2013. You must bring this amount current within 30 days of the date of this letter, which would be 5:00 pm, Friday, October 4, 2013. Failure to bring this Mortgage current on or before October 4, 2013 date will result in the acceleration of the Note and Mortgage for the full amounts due and owing Libby Corporation.*
>
> *If you do not contact our offices in writing and arrange for payment of the sum demanded or make other arrangements satisfactory to Libby Corporation to repay the indebtedness and obligation on or before 5:00 pm on October 4, 2013, Libby Corporation will institute judicial foreclosure proceedings and move to sell the property. The Note and Mortgage provide that you agree to pay all costs of collection, including attorney's fees.*

The certified letter of September 4, 2013, sent to the post office box, was signed for by the Defendant on October 8, 2013.

The Defendant argues that it was a "Notice of Debt" letter and not a "Right to Cure" letter. The Plaintiff conceded that the title of the letter may not be correct, but the terms of the letter are clear and placed the Defendant on notice of default under paragraph 17 of the *Mortgage*.

Upon receipt of the letter of September 4, 2013, the Defendant could have asserted that she was not in default, and / or offered to discuss the outstanding balance and how to resolve the matter. There has been no evidence presented that she did so. As previously set forth, on October 18, 2013, Defendant sent a letter to the Plaintiff's counsel indicating that she disputed the debt and asked for

verification of the same. The letter did not dispute default on the *Mortgage*, or make any offers to resolve the outstanding balance. On November 14, 2013, Plaintiff's counsel responded to the Defendant's request and forwarded to her a payment history and the *Statement of Account* from the *Complaint* which had been filed on October 11, 2013. Nothing further was heard from the Defendant on the issue of the amount owed and no effort has been made to bring the *Mortgage* current.

Finally, at the merits hearing on August 12, 2014, the Defendant admitted that she was delinquent on the *Mortgage* for three years. The Plaintiff also showed the property taxes were not paid for 2009, 2010, 2011, and 2012 as required under the *Mortgage*, and the Plaintiff paid the taxes. Plaintiff also showed that, at the time of the hearing, the 2013 property taxes were outstanding and those taxes have now been paid by the Plaintiff. The Defendant cannot now claim she was unaware of her default and delinquency under the *Mortgage* when she has known that she has not made mortgage payments in three years or paid the property taxes for five years.

Based upon the evidence presented to this Court, the *Note* and the *Mortgage* set forth acceleration and Plaintiff's remedies for breach of any covenant or agreement. In addition, the Defendant testified that she was aware that she was in default on her mortgage payments to the Plaintiff for three years prior to this action being instituted, and the Plaintiff has presented evidence that she had not paid the real property taxes. The Plaintiff was within its right to accelerate the *Note* and *Mortgage*, and complied with the appropriate notice provisions to the Defendant.

4. What does the Chief Justice's Order of May 2, 2011, state with regard to the applicability of mediation and / or any other Alternative Dispute Resolution alternatives that would be relative to this Case?

On May 2, 2011, the Honorable Jean H. Toal, Chief Justice of the Supreme Court of South Carolina issued an *Administrative Order* concerning mortgage foreclosure actions in the state. This *Administrative Order* was issued as a result of United States Treasury Department's issuance of guidelines under the Home Affordable Mortgage Modification Program, the then continuing number of residential foreclosure actions being filed in the state, and the increasing difficulty of the court system to process foreclosure cases to conclusion when some cases still were in loss mitigation or other foreclosure intervention between the borrowers and the lenders. As a result of the issuance of the *Administrative Order*, foreclosure actions pending on May 9, 2011 were suspended until evidence could be shown that a notice of right to foreclosure intervention had been filed and served on the mortgagor / defendant, that the mortgagor / defendant did not qualify for or did not elect to participate such assistance within thirty days after service of the notice, and that the mortgagor / defendant was apprised of the right to file an answer to the foreclosure Complaint. Once such certification could be shown the case could be heard on the merits.

For foreclosure actions filed after May 9, 2011, the mortgagee's counsel had to certify to the court that a notice of right to foreclosure intervention had been filed and served on the mortgagor / defendant contemporaneously with the Summons and Complaint, that the mortgagor / defendant did not qualify for or did not elect to participate such assistance within thirty days after service of the notice, and that the mortgagor / defendant was apprised of the right to file an answer to the foreclosure complaint.

In answering this Court's key inquiry with regard to the *Administrative Order* and any applicability of mediation and / or any other alternative dispute resolution alternatives that would be relative to this or any other foreclosure case, it finds the *Administrative Order* does not address alternative dispute resolution other than the foreclosure intervention process itself. The only direct mention of alternative dispute resolution is found under "General Conditions" where the *Order* states the provisions of Rule 8 of the Court Annexed Alternative Dispute Resolution (ADR) Rules would apply to any documents, statements of evidence, as well as all discussions, disclosures, and negotiations occurring in any foreclosure intervention process. The *Order's* silence on mediation or other ADR would be consistent with Rule 3(b)(7) of the Court-Annexed ADR Rules which exempts mortgage foreclosure actions from ADR.

The *Administrative Order*, however, makes two very key definitions which are important in this case. First, the *Administrative Order* defines an "Owner-Occupied dwelling" as "mortgaged real property that is the principal residence of any mortgagor." The *Administrative Order* is only applicable to "all mortgage foreclosure proceedings concerning Owner-Occupied dwellings in this State." The property in this case is a warehouse, and pictures were introduced at the hearing to show it was a warehouse and the present condition of the property. The Defendant claimed that she was living on the property in a camper and that by virtue of her living in a camper next to the warehouse the property was "owner-occupied". This assertion radically distorts the definition of owner-occupancy and the overall intent of the *Administrative Order*. The *Administrative Order* was directed at residential foreclosures and the, at the time, rising tide of individuals and families losing their homes in foreclosure actions due to delinquency in making the mortgage payments. This problem was compounded with the inability to refinance loans due to negative equity as a result of the loss in real estate value caused by the economic crisis in 2008. The property in this matter is

zoned for "warehouse and storage" and is not residential property. Further, the Plaintiff did not take a mortgage on the camper, which is not a permanent fixture on the property and can be moved at any time by the Defendant, but rather on the real estate and warehouse. In short, there is no residence, as contemplated by the *Administrative Order*, involved in this matter and, as such, the *Administrative Order* does not apply.

Second, the *Administrative Order* defines "Foreclosure Intervention" to include "any policy, process or procedure employed by a Mortgagee for the purpose for the purpose of seeking a resolution of a foreclosure action by loan modification or other means of loss mitigation." When the *Administrative Order* was first issued there was a concern in the foreclosure bar that it required all lenders to establish foreclosure intervention polices. This concern was allayed in a letter from South Carolina Court Administration to two attorneys who raised this issue on June 7, 2011. In part the letter states:

> *In paragraph A(5), "foreclosure intervention" includes all policies and processes or procedures actually employed by the Mortgagee,* ***if any. The order does not impose a requirement to create policies, processes, or procedures or to use those of other lender-servicers, or of government agencies having no oversight or control of the loan in question. Procedures in this State for loans subject to HAMP oversight are dealt with by prior administrative orders.***

See Letter from Rosalyn W. Frierson, Director of South Carolina Court Administration, to Desa Ballard and Robert A. Muckenfuss, June 7, 2011 (emphasis added). Thus, if a lender did not already, as a matter of course, have in place a foreclosure intervention process, the *Administrative Order* did not require the lender to create such a process.

Further, the issue of offer of foreclosure intervention was discussed by the Court at the hearing, and representations were made by Plaintiff's counsel that the Plaintiff is a small closely held private corporation and does not offer any form of foreclosure intervention. It was also represented

that the loan was commercial in nature and was for purchase of commercial real estate. Even if one argues that the property is residential in any form, the Plaintiff does not offer any form of foreclosure intervention nor is required to offer foreclosure intervention.

Between the definitions of "Owner-Occupied dwelling" and "Foreclosure Intervention" together with the fact that the *Administrative Order* is directed solely at residential loans, the courts in this state directed that if a foreclosure is to be deemed exempt from the *Administrative Order* an affidavit must be submitted by counsel setting forth that either a) the property is not an "owner-occupied dwelling", b) the loan being foreclosed upon is a commercial loan, and / or c) the Plaintiff does not offer any form of foreclosure intervention. Such affidavit was filed with this Court as part of its pleadings stating that, in this case, all three exemptions were met.

The Chief Justice's *Administrative Order* of May 2, 2011, does not address applicability of alternative dispute resolution other than the foreclosure intervention process. This Court finds that evidence has been presented that the property is not owner-occupied, the loan is commercial in nature and not residential, the Plaintiff does not offer foreclosure intervention, and the *Administrative Order* has no requirement for any other form of alternative dispute resolution prior to proceeding to the foreclosure hearing. As such, the terms of the *Administrative Order* do not apply in this case.

5. *What is the statutory and / or case law on the Defendant's assertion that there is a $3,000.00 cap on attorney's fees in foreclosure cases?*

With respect to the recovery of attorney' fees the *Note* states as follows:

> *AND I / we further agree that if any part of the money due herein be not paid when due or if the Note be placed in the hands of an attorney for collection, or if this debt or any part thereof be collected by an attorney or legal proceedings of any kind,* ***a reasonable attorney's fee*** *besides all costs and expenses incident upon such collection shall be added to the amount due upon this Note, and be collectible as a part of thereof.*

(emphasis added). In addition, the *Mortgage* states as follows:

> *Lender shall be entitled to collect all expenses incurred in pursing the remedies provided in this paragraph,* ***including, but not limited to, reasonable attorney's fees*** *and cost of title evidence, all of which shall be additional sum secured by this Mortgage.*

(emphasis added). During the course of the merits hearing on August 12, 2014, Plaintiff's counsel presented evidence concerning the debt and the amounts owed to the Plaintiff, presented an *Affidavit of Attorney's Fees*, and questioned the Plaintiff concerning the same. The Defendant objected to the *Affidavit of Attorney's Fees*, at which time the Court explained to the Defendant the process by which she could challenge them. Finally, the Court had a question concerning the fee arrangement as to whether it was a flat rate or hourly case. During this exchange, the Defendant asserted "[t]he attorney fees set by the Supreme Court for a foreclosure, I understand is limited to $3,000." While both Plaintiff's counsel and the Court indicated they were unaware of any such order from the Supreme Court, the Court indicated that post trial research would be performed on this issue.

After researching this issue, the Court is unaware of any South Carolina Supreme Court Order on this issue, nor is it aware of any South Carolina statute or case which caps the attorney's fees in a foreclosure action at $3,000.00.

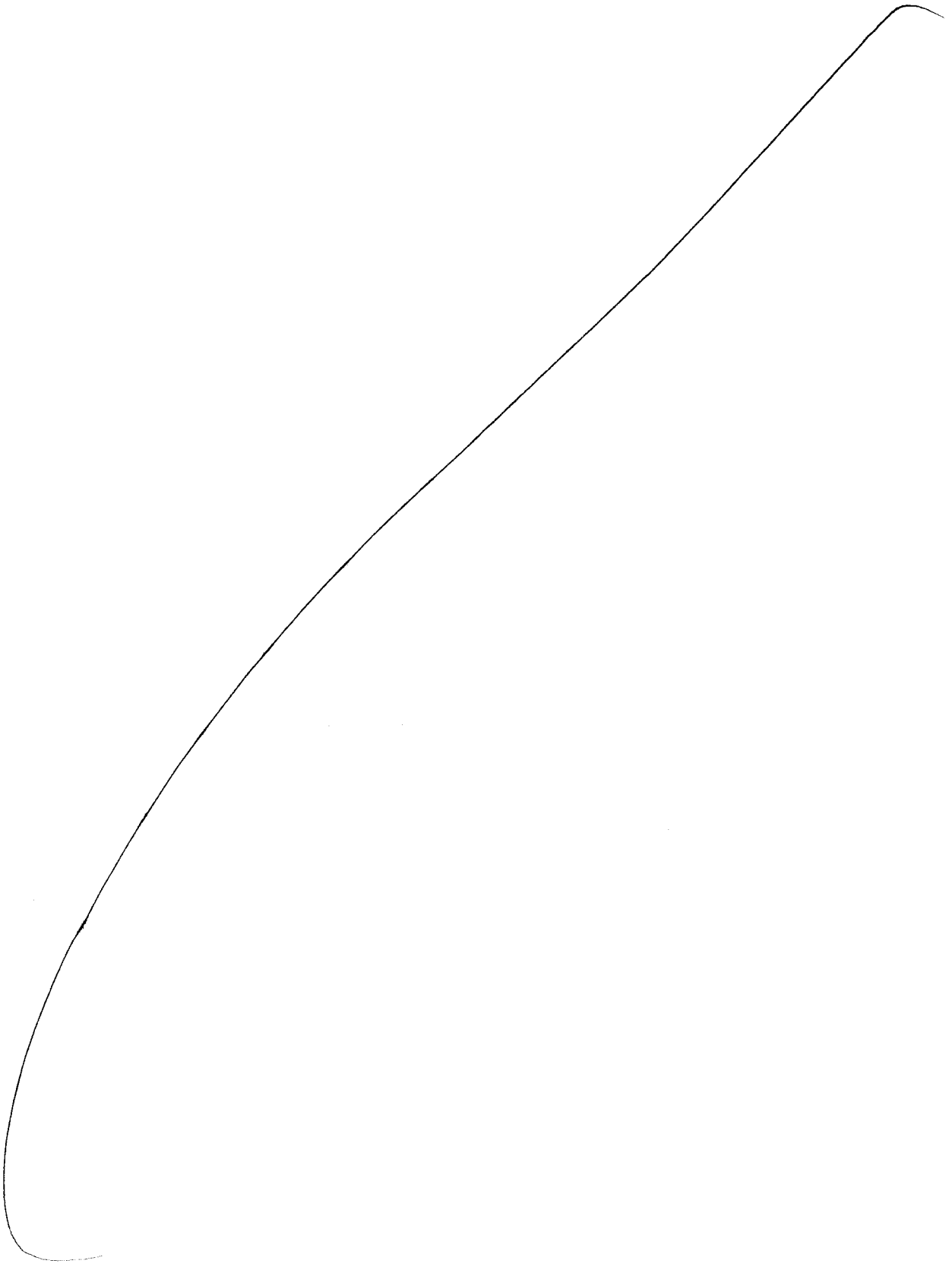
In a foreclosure action where attorney's fees are sought under a provision for reasonable attorney's fees on default on the mortgage, the court may determine the reasonableness of the fee. The factors to be considered by the court in determining attorney's fees are 1) the nature, extent, and difficulty of the legal services rendered; 2) the time and labor necessarily devoted to this case; 3) the professional standing of counsel; 4) the contingency of compensation; 5) the fees customarily charged in the locality for similar legal services; and 6) the beneficial results obtained. See Dedes v. Strickland, 307 S.C. 155, 414 S.E. 2d 134 (1992). These factors were set out in the Plaintiff's *Affidavit for Attorney's Fees* which, at the time of the merits hearing on August 12, 2014, were $6,331.56, and which the Plaintiff represented were

reasonable under the circumstances.

On August 20, 2014, the Defendant complied with the directive of the Court regarding her challenge of the attorney's fees and filed a *Notice of Hearing* on the Plaintiff's *Affidavit of Attorney's Fees.* This Court scheduled three hearings and two of these hearings, November 12, 2014 and January 9, 2015, were held and the Defendant had an opportunity to query Plaintiff's counsel and other attorneys and staff as to their work and billing on the case. In addition, the Court has examined the *Affidavit of Attorney's Fees and Costs*, *Amended of Attorney's Fees and Costs*, and *Third Amended Affidavit of Attorney's Fees and Costs*, and billing records as provided by Plaintiff's counsel. This Court notes that this case was filed October 7, 2013, has resulted in five hearings between 2014 and 2015, and has been very time and labor intensive for Plaintiff's counsel and his law firm.

I would note that by conservative estimate that since 2007 I have heard between 50-80 foreclosure hearings every month. I further note that I have reviewed similar numbers of attorney fee affidavits containing recitations of the six (6) factors relating to incurred fees, reasonable fees, and stated percentage fees in both uncontested and contested cases. After review of the *Affidavit of Attorney's Fees and Costs*, *Amended of Attorney's Fees and Costs*, and *Third Amended Affidavit of Attorney's Fees and Costs*, and billing records, hearing testimony in this matter, and examination of the factors to be considered in determining the attorney's fees as set forth in Dedes, the Court has determined that the sum of ***Sixteen Thousand Six Hundred Ninety-Three and 59/100ths ($16,693.59) Dollars*** is a reasonable fee to allow as attorney fees and costs for Plaintiff's attorney for services performed and anticipated to be performed until final adjudication of the within action, under the terms of the *Note* and *Mortgage*. Services anticipated to be performed until final adjudication contemplates completion of this matter within a reasonable

time and does not include exceptional circumstances delaying conclusion beyond the normal time.



6. *What is the legal and equitable doctrine of "Forbearance", and is the Plaintiff estopped from foreclosing on the Defendant and her Property?*

Finally, in her *Answer* of June 19, 2014, the Defendant asserted the Plaintiff had agreed to work with her to allow her to make up the late payments with rental incomes from the property, and reinstate the regular payment schedule "as soon as she got her life back." Further, during the hearing on August 12, 2014, the Defendant cross examined the Plaintiff's witnesses, testified in a narrative to the Court, and testified under cross examination by the Plaintiff that there either was an existing agreement between herself and the Plaintiff regarding the delinquent mortgage payments or there had been discussion toward an agreement. In either case, the agreement or discussions toward an agreement all occurred before the filing of the foreclosure action by the Plaintiff and the Defendant essentially asserted that the foreclosure action should be dismissed. This raised the issue of whether the Plaintiff should be estopped from proceeding with the foreclosure due to a possible agreement of forbearance with the Defendant.

Forbearance is defined as:

> *Refraining from doing something that one has a legal right to do. Giving of further time for repayment of obligation or agreement not to enforce claim at its due date. A delay in enforcing legal right. Act by which creditor waits for repayment of debt due him by debtor after it becomes due. . . . Within usary law, term signifies contractual obligation of lender to refrain, during given period of time, from requiring borrower or debtor to repay loan or debt due and payable.*

See Black's Law Dictionary 644 (6th ed. 1990).

The Court of Appeals addressed the issue of unclear and ambiguous forbearance agreements in Washington Mutual Bank, N.A. v. Hiott, No. 2006-UP-329, 2006 WL 7286775 (Ct. App. 2006). The Court of Appeals stated:

> *An agreement is the "union of two or more minds" in something done or to be done, a mutual assent to do something. Gaskins v. Blue Cross Blue Shield of S.C., 271 S.C. 101, 105, 245 S.E.2d 598, 600 (1978). Rules of contract construction exist to determine the*

parties intention, and the courts, in attempting to ascertain that intention, will seek to determine both the situation of the parties and their goals at the time they entered the contract. Lindsay v. Lindsay, 328 S.C 329, 337, 491 S.E.2d 583, 587-88 (Ct. App. 1997). "[A]n agreement that omits material terms may be determined to be unenforceable for indefiniteness." Id. At 337-38, 491 S.E.2d at 588.

In the case, the Appellant, Julie Hiott, alleged that the parties agreed to an oral forbearance agreement on her delinquent mortgage during a telephone conference, but the bank added additional terms in the written forbearance agreement when it was presented to her. The bank's notes from the conversation indicated that the preliminary forbearance agreement was for an immediate payment of $2,000.00 with the balance to be paid over a period nine months. The written agreement had an additional requirement that the Appellant provide evidence of sufficient income. The Appellant refused to execute the agreement because she had not agreed to the additional condition. In addressing this issue, the Court stated:

The evidence viewed in the light most favorable to Hiott would indicate that she and the Bank agreed to form an oral forbearance agreement on June 24, 2002, thereby negating any additional terms required by the Bank in its June 27, 2004 written forbearance agreement contract. However, it is patently unreasonable to infer that Bank would accept two thousand dollars in exchange for never foreclosing on Hiott's property regardless of future events. Further evidence that there was no meeting of the minds on this issue is provided by the written contract Bank sent to Hiott a mere three days after the June 24 telephone conversation. At best, it does not appears Hiott and Bank shared a meeting of the minds regarding the forbearance agreement.

Further, even were we to assume the June 24, 2002 telephone conversation constituted an oral agreement, this agreement would be unenforceable for indefiniteness. The agreement, as constituted through Hiott's argument and in the log, lack material terms such as duration and conditions of Bank's agreement not to foreclose. Bank reduced to writing these necessary material terms in the written contract it provided to Hiott. Hiott neither signed nor complied with this written contract. Because we find there was no enforceable forbearance agreement between Hiott and Bank, we find no error by the trial bench in directing a verdict against Hiott's claim for breach.

South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms

of the agreement. See Player v. Chandler, 299 S.C. 101, 105, 382 S.E2d 891, 893 (1989).

Finally, the Mortgage itself clearly states:

> *7. Waiver / Forbearance. Any forbearance by the Lender in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.*

As previously set forth in the chronology, Mr. Witherspoon, testified the parties had been in various discussions between 2011 - 2013 regarding the fact the Defendant was behind in the mortgage payments and various offers from the Defendant as to how she was willing to resolve delinquency. However, none of these discussions resulted in the Defendant making any tangible effort to bring the *Mortgage* current. Mr. Witherspoon made it clear that while he was willing to work with the Defendant, it had been three years trying to resolve the delinquency to no avail.

The most recent effort on the part of the Defendant was an offer to rent the property and use the rental income to make up the delinquent payments. The Defendant asserts in her *Answer:*

> *The plaintiff* ***has agreed*** *to work with the defendant to allow her to make up the late payments with rental incomes from the property, and reinstate the regular payment schedule as soon as she got her life back.*

(emphasis added). While the Defendant's *Answer* asserts there was an agreement between the parties, her testimony consistently states that the parties were working on an agreement. In addition, she has provided no material terms of any alleged agreement, most specifically a time frame for forbearance, nor has provided any evidence of a written agreement. All she has asserted is the parties allegedly agreed that the property would be rented and that the income would be used to bring current the delinquent mortgage payments.

In his testimony, however, Mr. Witherspoon paints a very different picture concerning the alleged agreement. He asserts that he and the Defendant met at the property to discuss a resolution, which included renting the property. The property would require clearing five to seven years of

weeds and overgrowth before it could be rented. He obtained a quote for the bushogging of the subject property in an effort to assist the Defendant. However, the Defendant provided him a key to the property that did not work and then, apparently, the Defendant did not want the property cleaned. According to Mr. Witherspoon, it appears no further effort was made on the part of the Defendant to clean the property and / or rent it. The Plaintiff originally agreed to wait a couple of months to allow the Defendant to get the payments caught up and was willing to and had worked with her. However, a "couple of months" turned into three years and no payments were forthcoming. The Plaintiff made no secret that, as a result of her failure to pay, a foreclosure action would be forthcoming.

In short, there is no persuasive evidence of an agreement between the parties in which the Plaintiff agreed to forebear filing an action for foreclosure due to the delinquent status of the Defendant's mortgage payments. Even if it could be argued there was an agreement, it is unclear and unenforceable for its indefiniteness as to its material terms. It appears that the Plaintiff had worked with the Defendant on this debt, but none of these efforts resulted in anything other than the Defendant failing to make any payment on the mortgage for the past three years and the Plaintiff having to regularly pay the real estate taxes to keep the subject property from being sold for taxes by the County of Lexington. Paragraph 7 of the *Mortgage* clearly states that any forbearance on the part of the Plaintiff in exercising any right or remedy under the *Mortgage* does no preclude or waive the right to exercise the right or remedy. The Plaintiff has waited three years on the Defendant to make payments or make arrangements to make payments on the delinquent *Mortgage*. Since no payments have been made or clear arrangements made to make payments, the Plaintiff is exercising its rights to foreclose and is not estopped from doing so.

DEBT

Evidence has been presented by the Plaintiff concerning the amount due and owing on the *Note*, with interest at the rate provided in the *Note*, and other costs and expenses of collection, including and attorneys fee, secured by the *Note* and *Mortgage*, is as follows:

Principal and Interest (as of October 17, 2013)	$144,186.40
Accrued interest (October 18, 2013 - January 9, 2015) (Per Diem $35.33)	$15,817.92
Late Fees (October 18, 2013 - January 9, 2014) ($60.35 per month)	$965.60
2009 - 2010 Property Taxes	$12,377.30
2011 - 2012 Property Taxes	$17,663.37
2013 Property Taxes	$5,979.60
Title Search	$196.00
Attorneys Fees and Costs	$16,693.59
TOTAL DEBT: secured by Note and Mortgage, including interest to date, exclusive of attorney's fees and costs.	**$213,879.78**

CONCLUSIONS OF LAW

Based upon all of the evidence presented to this Court concerning the debt, the six issues as raised to this Court by the Defendant, and the attorney's fees in this matter I, therefore, conclude and find as follows:

1. Based upon the chronology of the *Note*, *Mortgage*, and payment history as set forth in the testimony and the *Plaintiff's Post Trial Memorandum*, the Plaintiff Libby Corporation should have a judgment of foreclosure of the *Mortgage* and the Mortgaged property should be ordered sold at public auction after due advertisement;

2. There is no effect on the *Order of Reference* despite the fact that the Defendant was originally served by publication and found in default. As shown in Wachovia Bank of South Carolina, N.A v. Player, 334 S.C. 200, 512 S.E.2d 129 (Ct. App. 1999), the Court was not stripped of its jurisdiction to hear this case merely because the *Order of Reference* was filed after default of the Defendant after service by publication, which was subsequently questioned by the Defendant. Further, the Defendant voluntarily appeared and was served the *Complaint* at the hearing on May 20, 2014, filed her *Answer* on June 19, 2014, and participated in the hearing on August 12,

2014. She has submitted herself to the jurisdiction of this Court;

3. The *Note* and the *Mortgage* set forth acceleration and Plaintiff's remedies for breach of any covenant or agreement. The Plaintiff has complied with the appropriate notice. In addition, the Defendant testified that she was aware that she was in default on her mortgage payments to the Plaintiff for three years prior to this action being instituted;

4. The Chief Justice's *Administrative Order* of May 2, 2011, does not address applicability of alternative dispute resolution other than the foreclosure intervention process. However, the property is not owner-occupied, the loan is commercial in nature and not residential, the Plaintiff does not offer foreclosure intervention, and the *Administrative Order* has no requirement for any other form of alternative dispute resolution prior to proceeding to the foreclosure hearing. As such, the terms of the *Administrative Order* do not apply in this case;

5. The Plaintiff is unaware of any South Carolina Supreme Court Order on the issue of attorney's fees, nor is it aware of any South Carolina statute or case which caps the attorneys fees in a foreclosure action at $3,000.00. The *Mortgage* states that reasonable attorney's fees may be recovered by the Plaintiff in a foreclosure action. The six factors the Court is required to consider in awarding attorney's fees are set forth in Dedes v. Strickland, 307 S.C. 155, 414 S.E. 2d 134 (1992). The Court has determined that the sum of ***Sixteen Thousand Six Hundred Ninety-Three and 59/100ths ($16,693.59) Dollars*** is a reasonable fee to allow as attorney fees and costs for Plaintiff's attorney for services performed and anticipated to be performed until final adjudication of the within action, under the terms of the *Note,* and *Mortgage*; and

6. There is no evidence of an agreement between the parties in which the Plaintiff agreed to forebear filing an action for foreclosure. Since no payments have been made or arrangements made to make payments in the past three years, the Plaintiff is exercising its rights to foreclose and is not estopped from doing so.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

1. There is due to the Plaintiff on the obligation and Mortgage set forth in the *Complaint* the sum of ***Two Hundred Thirteen Thousand Eight Hundred Seventy-Nine and 78/100ths ($213,879.78) Dollars*** representing the total debt due to the Plaintiff as set out supra, together with interest at the per diem rate provided therein on the balance of principal from the date aforesaid to the date hereof.

2. The amount due in the preceding paragraph (the total debt as set forth and later accrued interest on the principal) shall constitute the total judgment debt due the Plaintiff and shall bear interest hereafter at the legal interest rate.

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

4. Interest for the period from the date of the hearing through the date of this judgment at above stated rate to be added to the above stated debt at the rate of $35.33 per diem, representing 9.00% per annum, as of the date of the hearing on the principle amount owing.

5. That on default of payment at or before the time herein indicated, the Mortgaged premises described in the *Complaint*, as hereinafter set forth, be sold by the undersigned Master in Equity, at public auction, at the Marc H. Westbrook Lexington County Judicial Center, County and State aforesaid, on March 2, 2015, at 11:00 a.m., on the following terms, that is to say:

   A. **FOR CASH:** The undersigned Master in Equity will require a deposit of 5% on the amount of the bid (in cash or equivalent) same to be applied on the purchase price only upon compliance with the bid, but in case of non-compliance within twenty (20) days same to be forfeited and applied to the costs and Plaintiff's debt. **Plaintiff seeks deficiency judment.**

   B. Interest on the bid shall be paid to the day of the compliance at the rate of $35.33 per diem.

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

D. Purchaser to pay for deed stamps and cost of recording the deed.

E. If Plaintiff is the successful bidder at the said sale, for a sum not exceeding the amount of the costs, expenses, and the indebtedness of Plaintiff in full, Plaintiff may pay to the undersigned Master in Equity only the amount of the costs and expenses, crediting the balance of the bid on Plaintiff's indebtedness.

F. That the undersigned Master in Equity will advertise the sale according to law, give notice of the time, and place of sale, and the terms thereof; and will execute to the Purchaser or Purchasers, a deed to the premises sold. The Plaintiff, or any other party to this action, may become a purchaser after the bidding is closed, and that is, upon such sale being made, the Purchaser or Purchasers, should fail to comply with the terms thereof within twenty (20) days of closing bids, then the undersigned Master in Equity may advertise the said premises for sale on the next, or some other subsequent sales day, at the risk of the highest bidder, and so from time to time thereafter until a full compliance shall be secured.

G. That the undersigned Master in Equity will apply the proceeds of sale as follows:

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

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

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

IT IS ORDERED, ADJUDGED AND DECREED that if the Defendant continues in possession of the property after a deed has been issued to the purchaser then the Sheriff of Lexington County is directed to eject and remove Defendant from the property sold, together with all personal property located thereon and out the successful bidder to whom the deed of conveyance has been issued or his assigns in full, quiet and peaceable possession of said premises without delay, and to keep said successful bidder or his assigns in such peaceable possession. If the person occupying the property after the deed has been issued to the purchaser is other the than the Defendant, the purchaser or his assigns shall serve the occupants with a Summons and Rule to Show Cause to determine why the occupant(s) should not be removed from the property.

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

IT IS FURTHER ORDERED that the Court lifts the stay imposed by Administrative Order of the Supreme Court of South Carolina, dated May 22, 2009, regarding the Home Affordable Modification Program (HMP).

IT IS FURTHER ORDERED that, pursuant to S.C. Code Ann. Section 30-9-31 (Supp.1987), the deed of conveyance made pursuant to this sale shall be indexed in the grantor index by the Clerk of Court in the name of the owner of record of subject property immediately prior to execution of the deed, as well as in the name of the undersigned Master in Equity, who executed such deed as grantor. The undersigned Master in Equity will retain jurisdiction to do all the necessary acts incident to this foreclosure including, but not limited to, the issuance of a Writ of Assistance and disposing of any surplus funds pursuant to Rule 71 (c) SCRCP.

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

All that certain piece, parcel or tract of of land with the improvements thereon, situate, lying and being in the Town of Red Bank, in the County of Lexington, State of South Carolina, being shown and designated as 2.91 acres on a plat prepared for C.J. Bonacum, Jr. by Arthur Weed dated November 17, 1991, and recorded in the Lexington County Register of Deeds Office in Record Book 248, at page 649, having such boundaries and measurements as referenced on said plat.

This being the same property conveyed to Haiyan Lin by deed of Libby Corporation dated January 5, 2007, and recorded on January 9, 2007, in Book 11673, Page 322.

TMS# 006500-05-117

Address: *140 Pond Drive*
(Parcel 2 (2.91 acres))
Red Bank, Lexington County, South Carolina

IT IS SO ORDERED.

S J O

James O. Spence
Master in Equity, Lexington County

Lexington, South Carolina

January 23, 2015