STATE OF SOUTH CAROLINA
In The Court of Appeals

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-20-03040

DEUTSCHE BANK NATIONAL TRUST COMPANY
as Trustee for J.P. Morgan Mortgage Acquisition Trust
2007-CH1, Asset Backed Pass Through Certificates,
Series 2007-CH1, ... Respondent,

vs.

CORA B. WILKS,
DAVID C. WILKS,
CHASE BANK, N.A., and
MIDLAND FUNDING, LLC,

of whom
CORA B. WILKS and
DAVID C. WILKS are . . . . . Appellants.

RECORD ON APPEAL

John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
(803) 324-8100
Attorney for Appellant

Michael J. Anzelmo
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 11070
Columbia, S.C. 29211-1070
(803) 799-2000
Attorneys for Respondent

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FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP4603040

PLAINTIFF(S)	DEFENDANT(S)
Deutsche Bank National Trust Company	Cora B Wilks David C Wilks Chase Bank USA NA Midland Funding LLC

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

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Other: _____
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

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

ORDER INFORMATION

ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

s/ S. Jackson Kimball — **Circuit Court Judge**

3063 — **Judge Code**

6/6/2013 — **Date**

RECEIVED
JUN 14 2013

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

For Clerk of Court Office Use Only

This judgment was entered on **June 12, 2013**, and a copy mailed first class or placed in the appropriate attorney's box on **June 12, 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

Michael J. Anzelmo PO Box 11070 Columbia, SC 29211
Benjamin Rush Smith III Meridian/17Th Floor 1320 Main Street Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

John Martin Foster PO Box 106 Rock Hill, SC 297316106
Wylie Westmoreland Clarkson PO Box 12369 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

David Hamilton

David Hamilton - Clerk of Court

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

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

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT

Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1,

Plaintiff,

vs.

Cora B. Wilks, David C. Wilks, Chase Bank USA, N.A., and Midland Funding, LLC,

Defendants.

Case No. 2012-CP-46-03040

Order Granting Plaintiff's Motion to Dismiss

This matter came before me on May 16, 2013, upon Plaintiff's motion pursuant to Rule 12(b)(6), SCRCP, to dismiss the counterclaim filed by Defendants Cora B. Wilks and David C. Wilks ("the Wilks") in this action. Michael J. Anzelmo appeared on behalf of Plaintiff. John Martin Foster appeared on behalf of the Wilks. Based on the record presented, I make the following findings and conclusions.

DISCUSSION

Plaintiff initiated this action to foreclose on the Wilks' mortgage executed on May 23, 2005, and recorded on June 1, 2005 at Book 7128, Page 288 in the York County Register of Deeds Office. The Wilks counterclaimed, and the counterclaim centered on allegations that the closing of that mortgage was not supervised by an attorney. They alleged that, as a result, Deutsche Bank was precluded from foreclosing pursuant to *Matrix Financial Services, Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011), and *BAC Home Loan Financing, LP v. Kinder*, 398 S.C. 619, 731 S.E.2d 547 (2012). Thereafter, Deutsche Bank filed the motion to dismiss the counterclaim pursuant to Rule 12(b)(6), SCRCP. Deutsche Bank asserts that the counterclaim failed to state a claim as a matter of law because the rule announced in *Matrix* had prospective application only.

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a claim, and must be granted if the claim does not set forth sufficient allegations entitling the party to relief. *Williams v. Condon*, 347 S.C. 227, 232–33, 553 S.E.2d 496, 499 (Ct. App. 2001). A motion to dismiss a counterclaim must be based solely on the allegations set forth in the counterclaim. *Chas. Cnty. Sch. Dist. V. Laidlaw Transit, Inc.*, 348 S.C. 420, 424, 559 S.E.2d 362, 364 (Ct. App. 2001). The question is whether, in the light most favorable to the complainant, and with every doubt resolved on his behalf, the counterclaim states any valid claim for relief. *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). The "motion must be granted if the facts and inferences reasonably deducible from them show that the [defendant] could not prevail on any theory of the case." *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 650–51, 492 S.E.2d 272, 274–75 (Ct. App. 1997).

I find and conclude that the counterclaim based on *Matrix* cannot survive as a matter of law. The Supreme Court's holding in Matrix has prospective application only from the date of the issuance of the opinion. The Court stated that the rule announced therein only applied ". . . to all filing dates after the issuance of this opinion." *Matrix*, 394 S.C. at 140, 714 S.E.2d at 535. The court issued the *Matrix* opinion on August 8, 2011. The prospective application of Matrix is confirmed in the *BAC v. Kinder* opinion. The Court stated:

> In *Matrix*, we reiterated that the closing of a loan without attorney supervision constitutes the unauthorized practice of law. Furthermore, we held that engaging in this unlawful behavior would preclude a lender from obtaining equitable relief. *Id.* at 140, 714 S.E.2d at 535. However, in a substitute opinion issued on rehearing, we explained that this holding would be prospective only, stating we would "apply this ruling to all filing dates after the issuance of this opinion," which was August 8, 2011. *Id.* To the extent some confusion apparently exists as to what filing date *Matrix* referred to, we clarify now that it is the date the document a party seeks to enforce was filed. *Kinder*, 398 S.C. at 624, 731 S.E.2d at 549-50.

The Court then applied that rule to the claims presented and allowed BAC's claims to proceed, stating "the mortgage was recorded on April 20, 2007, well before the issuance of *Matrix*. Thus, regardless of whether an attorney participated in the closing of [the mortgage], BAC would not be barred from recovery by the illegality." *Id.*

This case is governed by that holding. The mortgage in this case was recorded on June 1,

#2

2005, more than six years before the decision in *Matrix*. Accordingly, the Wilks' counterclaim cannot state a claim upon which relief can be granted, and fails as a matter of law. Therefore, I find and conclude that the counterclaim must be dismissed with prejudice.

AND IT IS SO ORDERED.

6/6/13

S. Jackson Kimball
Special Circuit Court Judge
York County

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass-Through Certificates, Series 2007-CH1,

Plaintiff,

v.

David C. Wilks; Cora B. Wilks; Chase Bank USA, N.A.; Midland Funding, LLC;

Defendant(s).

IN THE COURT OF COMMON PLEAS

DOCKET NO. 2011 CP 46 2015

COMPLAINT

(NON-JURY)

FORECLOSURE OF REAL ESTATE MORTGAGE
Deficiency Judgment Demanded

(012507-00174)

Plaintiff alleges:

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

2. Pursuant to S.C. Code Section 33-15-101, Plaintiff is a corporation or other legal entity doing business in the State of South Carolina.

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

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

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

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

7. Heretofore, on or about May 23, 2005, David C. Wilks and Cora B. Wilks made, executed and delivered a certain Fixed Rate Note ("Note") in the principal sum of $100,000.00, payable in monthly installments.

8. In order to secure the payment of the Note according to the terms and conditions thereof, David C. Wilks and Cora B. Wilks made, executed and delivered unto Chase Bank USA, N.A. a certain real estate mortgage ("Mortgage") covering the following described property and any and all improvements to the property, including but not limited to a mobile/manufactured home:

All that parcel of land in City of York, York County, State of South Carolina, as more fully described in Deed Book 6026 at Page 92, ID# 636-01-01-133, being known and designated as Lot 31, Bristol Park, filed in Plat Book A399 at Page 5.

This being the same property conveyed to David C. Wilks and Cora B. Wilks by deed of Bank One, National Association, as Trustee, dated January 16, 2004 and recorded February 4, 2004 in Book 6026 at Page 92 in the Office of the Clerk of Court for York County.

Property Address: 2053 Bristol Parkway
Rock Hill, SC 29732

TMS# 636-01-01-133

9. The Mortgage was signed, witnessed and probated May 23, 2005; thereafter the Mortgage was recorded in the Office of the RMC/ROD for York County on June 1, 2005, in Mortgage Book 7128 at Page 288. This Mortgage was subsequently assigned to the Plaintiff herein by assignment dated April 28, 2011 and recorded May 9, 2011 in Book 11973 at Page 43.

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

11. Any notice required by the terms of the Note and Mortgage or by state or federal laws has been given to the applicable Defendant(s).

12. After all payments received by the Plaintiff have been credited to the subject loan, the loan is in default and due for January 1, 2010, and the conditions of the Note and Mortgage have been broken. Plaintiff elects to and does declare the entire balance of said indebtedness due and payable, and that there is due on the Note and Mortgage as of January 1, 2010, the principal sum of $89,483.68, with interest from December 1, 2009, advances, late charges, and also for the costs and disbursements of this action, including attorney's fees.

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

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

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

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

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

A. Chase Bank USA, N.A., by virtue of a mortgage given by David C. Wilks and Cora B. Wilks in the amount of $25,000.00, dated May 23, 2005, and recorded June 1, 2005 in Book 7128 at Page 304

B. Midland Funding, LLC, by virtue of a judgment against David C. Wilks in the amount of $9,764.50, dated October 20, 2009 and recorded on March 18, 2010 in Judgment Roll No. 2010-CP-46-01156 This Mortgage was partially satisfied by that Partial Satisfaction of Judgment dated March 15, 2010 and recorded March 18, 2010.

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

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

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

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

(4) Appoint a Receiver to collect the rents, issues, profits or designated

sums from the mortgagor(s), and/or the grantee(s) of the mortgagor(s), and/or tenant(s) occupying or exercising control over the mortgaged premises and hold the same subject to the further order of this Court.

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

First, to the costs and expenses of the within action and sale;

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

Third, to the distribution of any surplus pursuant to Rule 71, of the South Carolina Rules of Civil Procedure;

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

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

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958)
Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
Eve Moredock Stacey (SC Bar #5300)
Robert P. Davis (SC Bar #74030)
John P. Fetner (SC Bar #77460)
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220 Executive Center Drive
Columbia, SC 29210

Cheryl H. Fisher (SC Bar #15213)
Jennifer W. Rubin (SC Bar #16727)
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Mary R. Powers (SC Bar #16534)
William S. Koehler (SC Bar #74935)
Kelsey K. Lipscomb (SC Bar #77519)
Andrew W. Montgomery (SC Bar #79893)
Post Office Box 100200 (29202)
(803) 744-4444

Columbia, South Carolina
May 18, 2011

NOTICE

1. As of May 13, 2011, you owe $104,865.75. Because of interest, late charges, attorney fees and other charges that vary from day to day, the amount due on the day you pay may be greater.

2. Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass-Through Certificates, Series 2007-CH1 is the Creditor to whom the debt is owed. Chase Home Finance is the servicing agent for the Creditor to whom the debt is owed.

   The debt described in this notice will be assumed to be valid by the Creditor's law firm unless you, the Consumer, within thirty (30) days after the receipt of this notice, dispute the validity of the debt or any portion thereof.

3. If you, the Consumer, notify the Creditor's law firm in writing within thirty (30) days of the receipt of this notice that the debt or any portion thereof is disputed, the Creditor's law firm will obtain verification of the debt, and a copy of the verification will be mailed to you, the Consumer, by the Creditor's law firm.

   If the Creditor named in this notice is different from the original Creditor, and if you, the Consumer, make a written request to the Creditor's law firm within the (30) days from the receipt of this notice, the name and address of the original Creditor will be mailed to you by the Creditor's law firm.

5. This notice should not be construed as a thirty (30) day grace period. If, in writing, you dispute the debt or any portion thereof or if you request the name and address of the original creditor within the thirty (30) day period that begins with your receipt of this notice, the law requires the Creditor's law firm to suspend its efforts (through litigation or otherwise) to collect the debt until the Creditor's law firm mails the requested information to you.

7. This notice pertains to your dealings with the Creditor's law firm as a debt collector. It does not affect your dealings with the court, and in particular it does not change the time at which you must answer the complaint. The summons attached to the complaint is a command from the court, not from the Creditor's law firm, and you must follow its instructions even if you dispute the validity or amount of the debt. The advice in this notice also does not affect the Creditor's law firm's relations with the court. The Creditor's law firm may file papers in any such suit according to the court's rules and the judge's instructions.

   This is an attempt to collect a debt, and any information obtained will be used for that purpose. The information provided in paragraphs 1 and 2 above has been provided to us by the Creditor or Servicer. At this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account. If you have previously received a discharge in bankruptcy, this notice is not and should not be construed as an attempt to collect a debt but only as an attempt to enforce a lien.

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass-Through Certificates, Series 2007-CH1,

Plaintiff,

v.

David C. Wilks; Cora B. Wilks; Chase Bank USA, N.A.; Midland Funding, LLC;

Defendant(s).

IN THE COURT OF COMMON PLEAS

DOCKET NO. 2011 CP 46 2015

NOTICE OF FORECLOSURE INTERVENTION
Deficiency Judgment Demanded

FILED - RECEIVED
2011 MAY 20 PM 12:08
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

(012507-00174)

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

To be considered for any available Foreclosure Intervention, you must communicate with and otherwise deal with the Plaintiff through its law firm, Rogers Townsend & Thomas, PC.

Rogers Townsend & Thomas, PC represents the Plaintiff in this action. Our law firm does not represent you. Under our ethical rules, we are prohibited from giving you any legal advice.

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

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF
Samuel C. Waters (SC Bar #5958)
Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
Eve Moredock Stacey (SC Bar #5300)
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William S. Koehler (SC Bar #74935)
Kelsey K. Lipscomb (SC Bar #77519)
Andrew W. Montgomery (SC Bar #79893)
Post Office Box 100200 (29202)
(803) 744-4444

Columbia, South Carolina
May 18, 2011

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass-Through Certificates, Series 2007-CH1,

Plaintiff,

v.

David C. Wilks; Cora B. Wilks; Chase Bank USA, N.A.; Midland Funding, LLC;

Defendant(s).

IN THE COURT OF COMMON PLEAS

DOCKET NO. 2011 CP 46 1015

LIS PENDENS
Deficiency Judgment Demanded

FILED-RECEIVED
2011 MAY 20 PM 12:08
DAVID HAMILTON
C.C.C.P.&GS
YORK COUNTY, SC

(012507-00174)

NOTICE IS HEREBY GIVEN THAT an action has been or will be commenced in this Court upon complaint of the above-named Plaintiff against the above-named Defendant(s) for the foreclosure of a certain mortgage of real estate given by David C. Wilks and Cora B. Wilks to Chase Bank USA, N.A. dated May 23, 2005, and recorded in the Office of the RMC/ROD for York County on June 1, 2005, in Mortgage Book 7128 at Page 288. This Mortgage was subsequently assigned to the Plaintiff herein by assignment dated April 28, 2011 and recorded May 9, 2011 in Book 11973 at Page 43.

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

All that parcel of land in City of York, York County, State of South Carolina, as more fully described in Deed Book 6026 at Page 92, ID# 636-01-01-133, being known and designated as Lot 31, Bristol Park, filed in Plat Book A399 at Page 5.

This being the same property conveyed to David C. Wilks and Cora B. Wilks by deed of Bank One, National Association, as Trustee, dated January 16, 2004 and recorded February 4, 2004 in Book 6026 at Page 92 in the Office of the Clerk of Court for York County.

Property Address: 2053 Bristol Parkway
Rock Hill, SC 29732

TMS# 636-01-01-133

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958)
Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
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Columbia, South Carolina
May 18, 2011

TATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)
)
utsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition)
ust 2007-CH1, Asset Backed Pass-Through Certificates, Series 2007-CH1,
Plaintiff(s))
)
vs.)
)
vid C. Wilks; Cora B. Wilks; Chase Bank USA, N.A.; Midland Funding, LLC;)
Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2011 CP 46 2015

Submitted By: Samuel C. Waters (SC Bar #5958), Cheryl H. Fisher (SC Bar #15213), Reginald P. Corley (SC Bar #69453), Jennifer W. Rubin (SC Bar #16727), Ellie C. Floyd (SC Bar #68635), Michael P. Morris (SC Bar #73560), Eve Moredock Stacey (SC Bar #5300), Mary R. Powers (SC Bar #16534), Robert P. Davis (SC Bar #74030), William S. Koehler (SC Bar# 74935), John P. Fetner (SC Bar #77460), Kelsey K. Lipscomb (SC Bar #77519), Vance L. Brabham, III (SC Bar #71250), Andrew W. Montgomery (SC Bar #79893)
Attorneys for the Plaintiff
012507-00174

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(803) 343-7013 - Fax
info@rtt-law.com

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

FILED - RECEIVED
2011 MAY 20 PM 12:05
DAVID HAMILTON
C.C.C.P.&GS
YORK COUNTY, SC

DOCKETING INFORMATION (*Check all that apply*)
***If Action is Judgment/Settlement do not complete*

- JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
- This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

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- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20___-CP-_____-_____

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- ☐ Other (299)

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- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex/Other
- ☐ Environmental (600)
- Automobile Arb. (610)
- Medical (620)
- ☐ Other (699)

- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of-State Deposition (650)
- ☐ Motion to Quash Subpoena in An Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: _____ Date: 5/18/2011

te: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina volous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code § 15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals;

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

012507-00174

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA YORK COUNTY	)	IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT
Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass-Through Certificates, Series 2007-CH1, Plaintiff	)	2011 CP 46 2015
vs.	)	CERTIFICATE OF EXEMPTION FROM ADR
David C. Wilks; Cora B. Wilks; Chase Bank USA, N.A.; Midland Funding, LLC; Defendant.	)	DOCKET NO.

I certify that this action is exempt from ADR because:

- ☐ this is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus of prohibition;
- ☐ this action is appellate in nature;
- ☐ this is a post-conviction relief matter;
- ☐ this is a contempt of court proceeding;
- ☐ this is forfeiture proceeding brought by the State;
- ☑ this is a case involving a mortgage foreclosure; or
- ☐ the parties submitted the case to voluntary mediation with a certified mediator prior to the filing of this action.

FILED-RECEIVED
2011 MAY 20 PM 12:08
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

Plaintiff/Attorney(s) for Plaintiff(s)

Samuel C. Waters (SC Bar #5958), Cheryl H. Fisher (SC Bar #15213), Reginald P. Corley (SC Bar #69453), Jennifer W. Rubin (SC Bar #16727), Ellie C. Floyd (SC Bar #68635), Michael P. Morris (SC Bar #73560), Eve Moredock Stacey (SC Bar #5300), Mary R. Powers (SC Bar #16534), Robert P. Davis (SC Bar #74030), William S. Koehler (SC Bar #74935), Benjamin J. Powell (SC Bar #77205), John P. Fetner (SC Bar #77460), Kelsey K. Lipscomb (SC Bar #77519), Vance L. Brabham, III (SC Bar #71250), Andrew W. Montgomery (SC Bar #79893)

Rogers Townsend & Thomas, PC
220 Executive Center Drive, Suite 109
Post Office Box 100200
Columbia, SC 29202
(803) 744-4444

Defendant/Attorney(s) for Defendant(s)

Date: May 18, 2011

012507-00174

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass-Through Certificates, Series 2007-CH1,

Plaintiff,

v.

David C. Wilks; Cora B. Wilks; Chase Bank USA, N.A.; Midland Funding, LLC;

Defendant(s).

IN THE COURT OF COMMON PLEAS

DOCKET NO. 2011 CP 46 2015

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

FILED-RECEIVED
2011 MAY 20 PM 12:08
DAVID HAMILTON
C.C.C. & G.S.
YORK COUNTY, SC

(012507-00174)

TO THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to appear and defend by answering the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer on the subscribers at their offices, 220 Executive Center Drive, Suite 109, Post Office Box 100200, Columbia, South Carolina 29202, within thirty (30) days after the service hereof, exclusive of the day of such service, except that the United States of America, if named, shall have sixty (60) days to answer after the service hereof, exclusive of the day of such service; and if you fail to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

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

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

YOU ARE FURTHER SUMMONED AND NOTIFIED to apply for the appointment of a guardian ad litem within thirty (30) days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass-Through Certificates, Series 2007-CH1.

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958)
Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
Eve Moredock Stacey (SC Bar #5300)
Robert P. Davis (SC Bar #74030)
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William S. Koehler (SC Bar #74935)
Kelsey K. Lipscomb (SC Bar #77519)
Andrew W. Montgomery (SC Bar #79893)
Post Office Box 100200 (29202)
(803) 744-4444

Columbia, South Carolina
May 18, 2011

STATE OF SOUTH CAROLINA	]	IN THE COURT OF COMMON PLEAS
	]	
COUNTY OF YORK	]	SIXTEENTH JUDICIAL CIRCUIT
	]	
DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1,	]	ANSWER AND COUNTERCLAIM
Plaintiff,	]	
vs.	]	
	]	C. A. No. 12-CP-46-03040
CORA B. WILKS, DAVID C. WILKS, CHASE BANK USA, N.A., and MIDLAND FUNDING, LLC,	]	
Defendants.	]	

Come now the Defendants CORA B. WILKS and DAVID C. WILKS (hereafter also 'the WILKS" and "the Defendants", except as otherwise indicated), and for their Responsive Pleading Answer herein would allege as follows (all references to Paragraphs being to the Complaint, except as otherwise indicated):

FOR A FIRST DEFENSE:

1. Each and every allegation of the Plaintiff's Complaint not admitted, denied or explained herein is denied and strict proof demanded therefor.
2. The Defendants admits that they are the mortgagors and principal Defendants named in this Foreclosure action.
3. As to the remaining allegations of the Complaint herein as to:

corporate identity of any parties,
the existence and terms of the mortgage and note sought to be foreclosed herein,
the existence of any breach on the part of the principal Defendants,
the expenditure of monies by the Plaintiff in order to preserve its rights,
the rights of Plaintiff as to recovery of any monies expended or the liability of the

principal Defendants for such monies,

the existence and priority of recorded liens senior and/or junior to that of the said Defendants, or any other matter alleged or referenced in the Complaint herein,

the said Defendants:

admit all matters herein which are of public record, and

allege that they are without sufficient information, knowledge or belief as to the remaining factual allegations to respond and therefore deny the same and demand strict proof thereof.

FOR A SECOND DEFENSE AND COUNTERCLAIM:

4. All allegations stated or referenced elsewhere in this pleading and relevant to this defense are hereby realleged by this reference to them.
5. Defendants CORA B. WILKS and DAVID C. WILKS are residents of York County, South Carolina and the owners of real property secured by a mortgage to the Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY as Trustee (hereafter "DEUTSCHE BANK").
6. On knowledge and information, Plaintiff DEUTSCHE BANK is a corporation licensed to do business under the laws of the State of South Carolina.
7. At the time of the Defendants WILKS' mortgage of their home, they were directed by the Plaintiff or its agents to appear at a local Bojangles to close the mortgage in question.
8. Three persons attended the closing of the mortgage in question: the two Defendants WILKS and one other person. Despite this fact, the recorded mortgage shows two witnesses.
9. On knowledge and information, the closing of a mortgage transaction must be overseen by a licensed attorney when the subject real property is within the State of South Carolina.
10. On knowledge and information, neither individual stated as a witness to the Bojangles closing was, on May 23, 2005, the date of execution of the said mortgage, an attorney licensed to practice law within the State of South Carolina. A copy of the mortgage in question is attached hereto and incorporated herein.
11. On knowledge and information, the only person with a name matching either witness to the said Mortgage and licensed to practice law within the period in question was one Matthew Edward Davis.

12. By Order of the Supreme Court dated February 4, 2005, Davis was suspended from the practice of law. By later Order of May 5, 2011, Davis was disbarred for, among other actions, "sign[ing] as a witness to the borrower's signatures, even though [he] did not know whether an attorney facilitated the closing and did not witness the borrowers execute the documents". *In the Matter of Matthew Edward Davis*, Opinion No. 27071, filed December 5, 2011, *Matter F*. A copy of this Opinion, of the Order of Suspension referenced above, and of the regularly kept records of the South Carolina Bar as to persons with names similar to those of the witnesses, are attached hereto and are incorporated herein.
13. On knowledge and information, the actions of the Plaintiff, by its authorized agents and employees, in closing the subject mortgage in a manner that constitutes the unauthorized practice of law, precludes it from obtaining the equitable relief afforded by a mortgage foreclosure action.

WHEREFORE the said Defendants WILKS pray:

A. That this Court inquire into and determine all matters set out in the Complaint herein, including, but not limited to, all questions relating to the seniority of recorded liens on the subject real property;

B. That the orders of the Court herein accord the said Defendants WILKS all protections normally accorded a mortgagor in the position of the said Defendants;

C. That, pursuant to the decision of the South Carolina Supreme Court in *Matrix Financial Serv. Corp.* v. *Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011) and *BAC Home Loan Financing, LP* v. *Kinder*, Appellate Case No. 2011-191086, No. 27146, filed July 25, 2012, this Court bar the Plaintiff from receiving equitable relief in this civil action;

D. That this Court award Defendants WILKS their costs herein;

E. That this Court include a prayer for any other relief to the Defendants WILKS which may be authorized under other causes of action; and

F. That this Court award or allow the Defendant such other and further relief as this Court may deem just and proper.

John Martin Foster
Attorney for CORA B. WILKS and
DAVID C. WILKS

The Guardian Building
223 East Main Street, Suite 520
Rock Hill, S. C. 29730

Post Office Box 106
Rock Hill, S. C. 29731-6106

803 324-8100
803 324-8109 Fax
jmfoster@comporium.net

Rock Hill, South Carolina

September 24, 2012

FILED FOR RECORD 06/01/2005
AT 11:38:46AM BOOK 07128 PAGE 00288
David Hamilton - Clerk of Court
York County Courthouse
Instrument Number: 000239149

Return To:

CHASE BANK USA, N.A.
10790 Rancho Bernardo Road
San Diego, CA 92127
ATTN: DOCUMENT CONTROL

Prepared By:
Karen Jones, Funder
504 VIRGINIA DRIVE FORT WASHINGTON, PA 19034

[Space Above This Line For Recording Data]

MORTGAGE

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated May 23, 2005
together with all Riders to this document.
(B) "Borrower" is
DAVID C WILKS AND CORA B WILKS

Borrower is the mortgagor under this Security Instrument.
(C) "Lender" is CHASE BANK USA, N.A.

Lender is a nationally chartered bank
organized and existing under the laws of UNITED STATES OF AMERICA

:272: WILKS CE997482GG

Lender's address is 200 White Clay Center Drive, Newark, DE 19711

Lender is the mortgagee under this Security Instrument.
(D) "Note" means the promissory note signed by Borrower and dated May 23, 2005
The Note states that Borrower owes Lender
ONE HUNDRED THOUSAND & 00/100 Dollars
(U.S. $ 100,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than June 1, 2025
(E) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."
(F) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.
(G) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

☐ Adjustable Rate Rider	☐ Condominium Rider	☐ Second Home Rider
☐ Balloon Rider	☐ Planned Unit Development Rider	☐ 1-4 Family Rider
☐ VA Rider	☐ Biweekly Payment Rider	☐ Other(s) [specify]

(H) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.
(I) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.
(J) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.
(K) "Escrow Items" means those items that are described in Section 3.
(L) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.
(M) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.
(N) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.
(O) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(F) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to Lender and Lender's successors and assigns, the following described property located in the

County of York :
[Type of Recording Jurisdiction] [Name of Recording Jurisdiction]

All that tract or parcel of land as shown on Schedule "A" attached hereto which is incorporated herein and made a part hereof.

Parcel ID Number: 636-01-01-133 which currently has the address of
2053 BRISTOL PKWY [Street]
ROCK HILL [City] , South Carolina 29732 [Zip Code]
("Property Address"):

TO HAVE AND TO HOLD this property unto Lender and Lender's successors and assigns, forever, together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

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

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this

:272: WILKS CE997482GG

Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of

Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable

attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

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(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

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12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

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

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to Section 22 of this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a

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notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

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

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. 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 Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence, all of which shall be additional sums secured by this Security Instrument.

23. Release. Upon payment of all sums secured by this Security Instrument, this Security Instrument shall become null and void. Lender shall release this Security Instrument. Borrower shall by any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. Homestead Waiver. Borrower waives all rights of homestead exemption in the Property to the extent allowed by Applicable Law.

25. Waiver of Appraisal Rights. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within 30 days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. TO THE EXTENT PERMITTED BY LAW, THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY. This waiver shall not apply so long as the Property is used as a dwelling place as defined in Section 12-37-250 of the South Carolina Code of Laws.

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

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Signed, sealed and delivered in the presence of:

J. Lynn Meetze

Matthew E. Davis

David C. Wilks (Seal)
DAVID C WILKS -Borrower

Cora B. Wilks (Seal)
CORA B WILKS -Borrower

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

STATE OF SOUTH CAROLINA,
County of York

Personally appeared before me J. Ragan Meetze and made oath that he/she saw the within named Borrower sign, seal, and as his/her/their act and deed, deliver the within written Mortgage; and that he/she with Matthew E. Davis witnessed the execution thereof.

J. Ragan Meetze

Sworn to before me this 23rd day of May 2005

My Commission Expires: 8-11-13

Matthew E. Davis

Notary Public for South Carolina Matthew E. Davis

EXHIBIT A

ALL THAT PARCEL OF LAND IN CITY OF YORK, YORK COUNTY, STATE OF SOUTH CAROLINA, AS MORE FULLY DESCRIBED IN DEED BOOK 6026, PAGE 92, ID# 636-01-01-133, BEING KNOWN AND DESIGNATED AS LOT 31, BRISTOL PARK, FILED IN PLAT BOOK A399, PAGE 5.

DAVID C. WILKS AND CORA B. WILKS BY FEE SIMPLE DEED FROM BANK ONE, NATIONAL ASSOCIATION, AS TRUSTEE AS SET FORTH IN BOOK 6026 PAGE 92 DATED 01/16/2004 AND RECORDED 02/04/2004, YORK COUNTY RECORDS, STATE OF SOUTH CAROLINA.

Lawyer Directory - 3 Match(es)

Name	Location	County
Meetze, Marcus Wesley	Greenville, SC	Greenville
Meetze, Michael Allen	Florence, SC	Florence
Meetze, William Vickery	Florence, SC	Florence

Member Directory

Member Profile

Name: Mr. Matthew Edward Davis
Company: Member has requested address info not be displayed
Address:
City, State Zip:
Phone:
Fax:

County:

SC Bar Admission:

Law School:

Graduating Year:

Website:

Membership Status: Disbarred

Discipline/Administrative Actions if Any

Date	Action	Details
12/05/2011	DISBARRED	http://www.sccourts.org/opinions /displayOpinion.cfm?caseNo=27071
03/06/2006	ADMINSUSP	http://www.sccourts.org/opinions/advSheets /no102006.pdf
02/04/2005	INTERIMSUS	http://www.sccourts.org/opinions /displayOrder.cfm?orderNo=123
01/09/2003	REINSTATED	http://www.sccourts.org/opinions /displayOrder.cfm?orderNo=25
10/28/2002	DEFINSUSP	http://www.sccourts.org/opinions /displayOpinion.cfm?caseNo=25549
01/24/2000	PUBLICREP	http://www.sccourts.org/opinions /displayOpinion.cfm?caseNo=25056

Member Directory

Member Profile

Name:	**Mr. Matthew Davis**
Company:	McGuire Woods, LLP
Address:	201 N. Tryon St, Ste. 3000
Address (cont):	
City, State Zip:	Charlotte, NC 28202
Phone:	(704) 373-8980
Fax:	
County:	Out Of State
SC Bar Admission:	9/19/2006
Law School:	University of Virginia School of Law
Graduating Year:	1998
Website:	
Membership Status:	Greater Than 3 Years

Discipline/Administrative Actions if Any

This person has no disciplinary actions.

The Supreme Court of South Carolina

In the Matter of Matthew E. Davis, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that Rita Bragg Cullum, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Ms. Cullum shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Ms. Cullum may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Rita Bragg Cullum, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Rita Bragg Cullum, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Ms. Cullum's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

s/Jean H. Toal
C.J.

FOR THE COURT

Columbia, South Carolina
February 4, 2005

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Matthew Edward Davis,
Respondent.

Opinion No. 27071
Heard September 22, 2011 - Filed December 5, 2011

DISBARRED

Disciplinary Counsel Lesley M. Coggiola and Deputy Disciplinary Counsel Barbara M. Seymour, both of Columbia, for Office of Disciplinary Council.

Matthew Edward Davis, of Gilbert, pro se, Respondent.

PER CURIAM: In this attorney discipline matter, the Office of Disciplinary Counsel (ODC) filed formal charges on allegations of misconduct against Matthew Edward Davis (Respondent) stemming from alleged violations of eight different Rules of Professional Conduct. Following a hearing, the Hearing Panel of the Commission on Lawyer Conduct (Panel) recommended Respondent be disbarred and ordered to pay the costs of these proceedings. The Panel also recommended that Respondent be ordered to pay restitution, reimbursement, and be required to complete the Legal Ethics and Practice Program Ethics School and Trust Account School, as a condition of reinstatement. Neither ODC nor Respondent took exception to the Panel's recommended sanctions. We agree with the Panel's findings, and adopt all of the recommended sanctions.

I. Factual/Procedural History

Matter A

Respondent has been convicted for numerous traffic offenses between 1998 and 2008, including twenty driver's license suspensions and fourteen violations for Driving Under Suspension (DUS).

Matter B

In 2004, Respondent closed four loans in which his client's construction company purchased real properties. Respondent withheld approximately $3,000 from the four closings to pay property taxes on his client's behalf. Because Respondent did not pay the taxes, this forced the client to pay these taxes from his own income to avoid a tax sale. Additionally, Respondent

used the withheld funds to pay a "consultant," unauthorized by the client, and who did not actually participate in the closing transactions. The closing's settlement statements, prepared by Respondent, erroneously reflected property tax payments that did not occur and did not accurately reflect the unauthorized payment to a consultant.

Matter C

Respondent accepted $350 from a client and agreed to perform title work, and to obtain a title insurance policy. Respondent used the client's funds to pay the premium to the title insurance company, but the client never received the policy. Respondent claims that a previous outstanding mortgage on the property prevented issuance of the policy, but admitted that he should not have used the client's money to pay the premium after the policy could not be obtained.

Matter D

In 1996, Respondent handled property transactions for a deceased woman's estate. Respondent accepted funds on behalf of the estate's heirs but one of the heirs could not be located. Respondent deposited $1,486.11 into a Certificate of Deposit (CD) account at BB&T on behalf of the missing heir. Respondent closed the CD account in May 2003 and deposited the funds into an investment account with Carolina First Bank (Carolina First)**[1]**. Respondent then withdrew the entire amount, an estimated $2,794.62, and transferred the funds to his friend, an investor in California. This transfer and subsequent investment led to the loss of all funds.

Matter E

In 2002, Respondent contracted with a title abstractor to perform work on behalf of Respondent's clients. Respondent failed to pay the title abstractor for the work she performed. The title abstractor sued Respondent for $25,090 and obtained a default judgment. Although Respondent disputes the total amount owed he did not appeal or contest the default judgment. The default judgment remains outstanding.

Matter F

This Court placed Respondent on interim suspension on February 4, 2005. ODC alleged that Respondent engaged in the unauthorized practice of law by continuing to represent clients, and assist others in the practice of law during his suspension.

Specifically, ODC alleged that in 2005 and 2006, Respondent's friend approached him with mortgages already bearing the borrower's signatures. Respondent then signed as a witness to the borrower's signatures, even though Respondent did not know whether an attorney facilitated the closing and did not witness the borrowers execute the documents. Respondent then notarized the attestation clause falsely stating that he witnessed the mortgage's execution.

In 2009, ODC alleges, a client retained Respondent to conduct a title search and render a title opinion in exchange for $100. Respondent failed to provide the title opinion in a timely manner, and blamed the delay on out-of-state "litigation." Respondent claims that he requested the $100 payment from the client to pay for copy expenses, and that he agreed to check the title only, not to provide a title opinion. However, in an email communication with the client, Respondent referred to himself as "esquire," and stated his intention to provide a "final opinion

of title."

Panel's Recommendation

The Panel found that Respondent committed misconduct with respect to all of the above matters. Therefore the Panel found Respondent violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (Diligence); Rule 1.15 (Safekeeping of Property); Rule 4.1 (Truthfulness in Statements to Others); Rule 4.4 (Respect for Rights of Third Persons); Rule 5.5 (Unauthorized Practice of Law); Rule 8.1(b) (Bar Admissions and Disciplinary Matters); Rule 8.4 (Conduct Involving Dishonesty); Rule 8.4(b) (Criminal Conduct); and Rule 8.4(d) (Conduct Involving Dishonesty). The Panel also determined the Respondent violated Rule 417 (Financial Recordkeeping), SCACR.

The Panel considered three aggravating circumstances: Respondent's prior disciplinary offenses**[2]**, the pattern of misconduct, and Respondent's lack of cooperation with ODC's investigation.**[3]**

Based on these findings the Panel recommended that this Court: (1) disbar Respondent from the practice of law; (2) order Respondent to pay restitution to his former clients and third parties harmed by his misconduct (3) order Respondent to reimburse the Lawyers' Fund for Client Protection for sums paid on his behalf; and (4) require Respondent to complete the Legal Ethics and Practice Program Ethics School and Trust Account School as a condition of reinstatement.

II. Discussion

The sole authority to discipline attorneys and decide appropriate sanctions rests with this Court. *In re Welch*, 355 S.C. 93, 96, 584 S.E.2d 369, 370 (2003); *In re Thompson*, 343 S.C. 1, 10-11, 539 S.E.2d 396, 401 (2000). We are not bound by the Panel's recommendation and may make our own findings of fact and conclusions of law. *In re Hazzard*, 377 S.C. 482, 488, 661 S.E.2d 102, 106 (2008). Nonetheless, the findings and conclusions of the Panel are entitled much respect and consideration. *Thompson*, 343 S.C. at 11, 539 S.E.2d at 401. Moreover, "[a] violation must be proven by clear and convincing evidence." *In re Greene*, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006); *see also* Rule 8, RLDE, Rule 413, SCAR ("Charges of misconduct or incapacity shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel.").

We agree with the Panel that Respondent committed misconduct with respect to all of the matters discussed above. Neither party takes exception to the Panel's findings. Accordingly, "the parties are deemed to have accepted the Panel's findings of fact, conclusions of law, and recommendations" as to these matters. *In re Prendergast*, 390 S.C. 395, 396 n.2, 702 S.E.2d 364, 365 n.2 (2010) (*citing* Rule 27(a), RLDE, Rule 413, SCACR, which states "The failure of a party to file a brief taking exceptions to the report constitutes acceptance of the findings of fact, conclusions of law, and recommendations.").

Thus we find Respondent violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (Diligence); Rule 1.15 (Safekeeping of Property); Rule 4.1 (Truthfulness in Statements to Others); Rule 4.4 (Respect for Rights of Third Persons); Rule 5.5 (Unauthorized Practice of Law); Rule 8.1(b) (Bar Admissions and Disciplinary Matters); Rule 8.4 (Conduct Involving Dishonesty); Rule 8.4(b) (Criminal Conduct); Rule 8.4(d) (Conduct Involving Dishonesty); and Rule 417 (Financial Recordkeeping) SCACR.

We conclude that Respondent's misconduct, coupled with his failure to provide any explanation, warrants disbarment from the practice of law. This Court has recognized that "the primary purpose of disbarment . . . is the removal of an unfit person from the profession for the protection of the courts and the public, not punishment of the offending attorney." *In re Pennington*, 393 S.C. 300, 304, 713 S.E.2d 261, 263 (2011) (*citing In re Burr*, 267 S.C. 419, 423, 228 S.E.2d 678, 680 (1976)). Moreover, a central purpose of the disciplinary process is to protect the public from unscrupulous and indifferent lawyers. *In re Hall*, 333 S.C. 247, 251, 509 S.E.2d 266, 268 (1998); *see also In re Sifly*, 279 S.C. 113, 115, 302 S.E.2d 858, 859 (1983) (*finding* disbarment appropriate for an attorney who failed to timely file an appeal on behalf of a client, failed to adequately represent a client in a trust fund matter resulting in significant monetary losses by the client, drew checks on his personal account that were not sufficiently funded, had a civil judgment entered against him, and failed to cooperate with disciplinary authorities or appear to contest the charges against him).

Respondent engaged in conduct which violated state law and the orders of this Court. He failed to adequately represent clients, sufficiently respect the rights of third parties, or satisfy adverse monetary judgments. Respondent is clearly not fit to practice law. We **disbar** Respondent. Within fifteen days of the filing date of this opinion, Respondent shall surrender his certificate of admission to practice law and shall file an affidavit with the Clerk of Court showing he has complied with Rule 30, RLDE, Rule 413, SCACR.

Pursuant to the Panel's recommendations, Respondent is ordered to pay restitution to his former clients and third parties harmed by his misconduct, reimburse the Lawyers' Fund for Client Protection for sums paid on his behalf, and complete the Legal Ethics and Practice Program Ethics School and Trust Account School as a condition of his reinstatement. Further, Respondent is ordered to pay the costs of the Panel proceedings within 60 days.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

---

[1] At the hearing, Respondent failed to provide documentation of any investment account at Carolina First or any deposits made into such an account.

[2] Respondent's disciplinary history includes a letter of caution in 1998 citing Rules 1.1 (Competence), 1.3 (Diligence), and 1.15 (Safekeeping Property) of the Rules of Professional Conduct, Rule 407, SCACR; a public reprimand in 2000 for failing to comply with Rule 417 (Financial Recordkeeping) SCACR, and for violations of Rules 1.1 (Competence), 1.3 (Diligence), 1.15 (Safekeeping Property) and 8.4(a) and (e) (Misconduct) of the Rules of Professional Conduct, Rule 407, SCACR; and a definite suspension for sixty days in 2002 for violating Rules 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 3.2 (Expediting Litigation), 5.5 (Unauthorized Practice Law), and 8.4(a) and (e) (Misconduct) of the Rules of Professional Conduct, Rule 407, SCACR.

[3] Throughout ODC's investigation into all of the matters described above, Respondent failed to comply with ODC's requests and subpoenas.

STATE OF SOUTH CAROLINA]
]
COUNTY OF YORK]

VERIFICATION

PERSONALLY appeared before me the undersigned, who, being duly sworn, deposes and says that she is the named Defendant in the foregoing civil action; that he or she has read the allegations of the preceding Answer and Counterclaim; and that the allegations of the Answer and Counterclaim are true of his or her own knowledge, except for those matters alleged therein on knowledge and information, and as to those, he believes them to be true.

Cora B. Wilks

CORA B. WILKS

SWORN to and subscribed before me
this day of September 24, 2012.

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission expires: 07/20/2019

STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1, Plaintiff, vs. CORA B. WILKS, DAVID C. WILKS, CHASE BANK USA, N.A., and MIDLAND FUNDING, LLC, Defendants.	CERTIFICATE OF SERVICE C. A. No. 12-CP-46-03040

The undersigned certifies that he has served the Answer and Counterclaim of CORA B. WILKS and DAVID C. WILKS dated September 24, 2012, on the following counsel or persons of record:

Andrew A. Powell
Rogers Townsend & Thomas, PC
Post Office Box 100200
Columbia, SC 29202

by causing one (1) copy of the same to be deposited in the United States mail, postage prepaid, on the date set out below, addressed to counsel or opposing party's respective last known address(es) as set out above, or, if no address in known, by leaving the same with the Clerk of Court, as indicated above, pursuant to Rule 5(b)(1), S.C.R.C.P.; or

by personally delivering one (1) copy of the same to the said attorney(s) of record at his, her or their office at the address(es) above, on the date set out below.

John Martin Foster
Attorney for CORA B. WILKS and DAVID C. WILKS

The Guardian Building
223 East Main Street, Suite 520
Rock Hill, S. C. 29730

Post Office Box 106
Rock Hill, S. C. 29731-6106

803 324-8100
803 324-8109 Fax
jmfoster@comporium.net

September 24, 2012

Rock Hill, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1,	)	Civil Action No. 12-CP-46-03040
Plaintiff,	)	**Motion to Dismiss**
vs.	)	
Cora B. Wilks, David C. Wilks, Chase Bank USA, N.A., and Midland Funding, LLC,	)	
Defendants.	)	

Plaintiff, Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1 ("Deutsche Bank"), by and through its undersigned counsel and pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, moves to dismiss Defendants Cora B. Wilks, David C. Wilks ("Defendants") counterclaim. The grounds for this Motion are as follows.

In the counterclaim, Defendants allege the Deutsche Bank's action in closing the Mortgage constitute the unauthorized practice of law. {Answer and Counterclaim p. 3, ¶ 13}. Defendants contend that, as a result, Deutsche Bank is precluded from obtaining equitable relief, including foreclosure, against Defendants pursuant to *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011), and *BAC Home Loan*

Financing, LP v. Kinder, cite. {{Answer and Counterclaim p. 3, ¶ 13 and Wherefore ¶ C}.

In *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011), the Supreme Court held, and has recently clarified, that the holding of *Matrix* has a prospective-only application. The Court held that a lender may not enjoy the benefit of equitable remedies when that lender failed to have an attorney supervise the loan process, but this rule only applies "to all filing dates after the issuance of this opinion." *Id.* at 140, 714 S.E.2d at 535. In this case, the Mortgage was recorded almost four years before the Supreme Court issued its decision. Accordingly, Defendants' counterclaim does not state a claim upon which relief can be granted and fails as a matter of law. Therefore, this Court should dismiss the counterclaim with prejudice.

This motion is based on the South Carolina Rules of Civil Procedure, the governing case law and authorities, and such other filings or memoranda that may be made in support of this motion.

{Signature Page Follows}

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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Attorneys for Deutsche Bank National Trust Company, as Trustee for JPMorgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1

Columbia, South Carolina
November 27, 2012

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Deutsche Bank National Trust Company, as Trustee for JPMorgan Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Motion to Dismiss

Counsel Served:

John Martin Foster
Post Office Box 106
Rock Hill, SC 29731

Jennifer B. Lee
Administrative Assistant

November 27, 2012

The Court: Deutsche Bank National Trust Company versus Cora B. Wilks, et al. Mr. Smith or Mr. Anzelmo. It's the plaintiff's motion to dismiss your counter-claim.

Mr. Foster: I don't think it's Mr. Anzelmo, sir. Oh, I'm sorry, I---

The Court: Well, let me put it this way: Who is here on behalf of Deutsche Bank in this case?

Mr. Foster: I got a call yesterday---

The Court: Hearing none-- Go ahead.

Mr. Foster: Let me say, sir, I got a call yesterday from Nelson Mullins.

The Court: Your name, sir?

Mr. Anzelmo: Michael Anzelmo.

The Court: Come on in, have a seat. You're up, your bat.

Mr. Anzelmo: Thank you, Your Honor. This is plaintiff's

The Court: Hold on, hold on.

(pause to retrieve file)

Okay, I'm ready.

Mr. Anzelmo: Thank you, Your Honor. This is plaintiff's motion to dismiss the allegation of defendants that we don't have the ability to foreclose the mortgage pursuant to Matrix and that line of cases. Matrix and BAC versus Linder is simply inapplicable to this situation as set forth in the Matrix and BAC cases. Matrix set forth the rule that a lender could not foreclose, as Your Honor is aware, if the loan was not closed by an attorney. However, the relief given in Matrix was prospective only. And if that wasn't clear---

The Court: That was Matrix Two, wasn't it?

Mr. Anzelmo: Yes sir. That was Matrix Two. It was the withdrawn and re-substituted opinion. That wasn't as clear. and BAC clarified the filing date issue in Matrix

saying that it is "the date the document the party seeks to enforce was filed." Anything after the Matrix date of August, 2011, obviously would be barred. This mortgage was recorded on June 1, 2005. Therefore Matrix and that line of cases did not apply even if the allegations in the complaint were true. Therefore, there's no cause of action alleged and it should be dismissed under 12B-6.

The Court: As I read the motion in the file, your motion is limited to whether or not the facts as they pertain to a cause of action - I'm looking at the counter-claim as I talk – hold on just a minute - was rather broadly alleged. What you're saying is that there's no cause of action to nullify or void the mortgage under Matrix because Matrix is prospective only.

Mr. Anzelmo: That's correct, Your Honor. The allegations, the caption of the counter-claim are quite broad, but if you get down to the essence of it, it is in fact that. If you look at paragraph 10, the closing was May 23, 2005; execution of the mortgage. The attorney who was licensed, may or may not have been actually licensed to practice law in South Carolina. And then in the wherefore provision they specifically say that (b) pursuant to Matrix, and (c) we have no ability to foreclose. That is the essence of our action. Those allegations do not set for a cause of action and the action and counter-claim should be struck.

The Court: Okay. Mr. Foster.

Mr. Foster: Thank you, Your Honor. If I may approach and hand up a copy of Wachovia Bank versus Coffey, that I will also hand counsel. I want to first of all, let me acknowledge that I believe that counsel acted in good faith in the law as in stated in Matrix and BAC. Matrix and BAC are Supreme Court cases. Prior to Matrix, the Court of Appeals had decided the case that I handed up. In this case, very briefly, a husband decided to sign a mortgage to a local bank on property owned by his wife. The Court of Appeals basically said

in this case that they are not to about enforce this mortgage for the same reason that they are not allowed to practice law, et cetera.

My argument, sir, is this: Nothing-- I acknowledged that because Matrix is a later case in a line of cases and because it is the Supreme Court, it may be viewed as implicitly overruling or limiting the case I've handed up, Wachovia versus Coffey. That is not to my knowledge stated any place in the line of cases that have come out of Matrix.

The Court: Say again, please.

Mr. Foster: It is not stated that Coffey had been overturned or superseded by that line of cases.

The Court: Yes sir.

Mr. Foster: I would argue that the facts also are rather more serious. Wachovia versus Coffey involves, as I recall, actions within the state of South Carolina. My recollection, and counsel can correct me, is that Matrix involved a case which was out of the state of South Carolina or at least was, shall we say, a gun in the glove of the state of South Carolina who, like most residents of the state went and got, if I may be allowed, Bubba's type of services and closed the loan.

The case which we have here, sir, which again, with respect to opposing counsel, is not part of this, is that we have a fellow closing loans who was suspended, and I believe I'm correct, in 2005, and then disbarred prior to the time this was done. I argue to the court that this is a bit more serious than just going out and just saying we didn't realize we had to have a lawyer. There are, of course, the other facts to be put in there, closing and et cetera.

But that is my argument, sir. We believe that there is a competing authority. We believe this situation is worse. We believe under the circumstances we have the right to invoke the same principles that the Court of Appeals found in this case, Wachovia versus Coffey, to preclude enforcement of a mortgage.

The Court: Bear with me just a minute and let me look through this case.

(pause)

The Court: Mr. Anzelmo.

Mr. Anzelmo: Your Honor, a couple of brief points. Defendants' counsel has insinuated that we were admitting that the closing actually was done without the supervision of an attorney. We're not admitting that, Your Honor. And you are aware that we have to address these allegations as if they were true in order to put the motion in the proper context. We obviously have not. There's no need for discovery at this point. And our point is, generally, even if they are true, Matrix barred that.

Wachovia versus Coffey does not create a separate or distinct line of cases from Matrix. It is a distinct factual issue. And in Matrix it's that situation that was presented here. The allegation is this: There was no closing supervised by an attorney. We subsequently-- They're trying to our ability to foreclose. That is exactly Matrix distinction, and BAC is not relevant here about the surplus funds. But it is squarely within the purview of Matrix in that the people announced therein, the rules are historic, the statutes are clear the more recent is going to control on the issue before the court.

So, as plead under Matrix and BAC for his allegations the court's review this is barred by Matrix to dismiss the counter-claim. Thank you, Your Honor.

The Court: Mr. Foster, I see little, if any, difference between Matrix and BAC and this, the Coffey case. So, the only question in my mind is-- I guess, let me say it this way: The only qualification is that Matrix would add an additional component or element to the test; namely, when did the closing occur. I believe that I must rule that it does add that additional requirement which doesn't really, it just limits – I guess that's the right word – the Coffey case.

So, I grant the motion on that basis as to the counter-claim. Any question about that? Did I say that right?

Mr. Anzelmo: From my point of view, yes, Your Honor.

Mr. Foster: Yes sir.

The Court: All right.

Mr. Anzelmo: Would you like me to submit a proposed order?

The Court: Yes sir, in word format.

Mr. Anzelmo: Thank you, sir.

STATE OF SOUTH CAROLINA
In The Court of Appeals

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-~~20~~-46-03040

DEUTSCHE BANK NATIONAL TRUST COMPANY
as Trustee for J.P. Morgan Mortgage Acquisition Trust
2007-CH1, Asset Backed Pass Through Certificates,
Series 2007-CH1, ... Respondent,

vs.

CORA B. WILKS,
DAVID C. WILKS,
CHASE BANK, N.A., and
MIDLAND FUNDING, LLC,

of whom
CORA B. WILKS and
DAVID C. WILKS are . . . . . Appellants.

NOTICE OF APPEAL

The above-named Appellants appeal the Order of the Honorable S. Jackson Kimball issued June 6, 2013 and received by Appellants by mailing on June 14, 2013.

July 15, 2013

John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
803 324-8100
Attorney for Appellants

Other Counsel of Record:

Michael J. Anzelmo
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803 252-5817

STATE OF SOUTH CAROLINA
In The Court of Appeals

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-46-03040

DEUTSCHE BANK NATIONAL TRUST COMPANY
as Trustee for J.P. Morgan Mortgage Acquisition Trust
2007-CH1, Asset Backed Pass Through Certificates,
Series 2007-CH1, ... Respondent,

vs.

CORA B. WILKS,
DAVID C. WILKS,
CHASE BANK, N.A., and
MIDLAND FUNDING, LLC,
of whom
CORA B. WILKS and
DAVID C. WILKS are . . . . . Appellants.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal dated July 15, 2013, on the following counsel or persons of record:

Michael J. Anzelmo
Benjamin Rush Smith, III
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Wylie Westmoreland Clarkson
Korn Law Firm, PA
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Columbia, S.C. 29211
803 252-5817

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out above, pursuant to Rule 262, S.C.A.C.R.

July 15, 2013

John Martin Foster
Post Office Box 106
Rock Hill, S. C. 29731-6106
803 324-8100
Attorney for Appellants

CRTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
(803) 324-8100
Attorney for Appellant

May 20, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-20-03040

DEUTSCHE BANK NATIONAL TRUST COMPANY
as Trustee for J.P. Morgan Mortgage Acquisition Trust
2007-CH1, Asset Backed Pass Through Certificates,
Series 2007-CH1, ... Respondent,

vs.

CORA B. WILKS,
DAVID C. WILKS,
CHASE BANK, N.A., and
MIDLAND FUNDING, LLC,

of whom
CORA B. WILKS and
DAVID C. WILKS are ..... Appellants.

PROOF OF SERVICE

I certify that I have served one (1) copy of the Record on Appeal, on the following party of record:

Michael J. Anzelmo
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 11070
Columbia, S.C. 29211-1070

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving

it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R.

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May 21st, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-20-03040

DEUTSCHE BANK NATIONAL TRUST COMPANY
as Trustee for J.P. Morgan Mortgage Acquisition Trust
2007-CH1, Asset Backed Pass Through Certificates,
Series 2007-CH1, ... Respondent,

vs.

CORA B. WILKS,
DAVID C. WILKS,
CHASE BANK, N.A., and
MIDLAND FUNDING, LLC,

of whom
CORA B. WILKS and
DAVID C. WILKS are . . . . . Appellants.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DOES EQUITY BAR ENFORCEMENT OF THE MORTGAGE OWING TO THE ACTIONS OF THE LENDER'S CLOSER?

STATEMENT OF THE CASE

On May 23, 2005, the Appellants WILKS executed a note and mortgage to Chase Bank USA, N.A. for $100,000.00, secured by their home. That note and mortgage are now held by Respondent as assignee. This action for foreclosure, for $89,483.68 plus allowable costs, was commenced on August 23, 2012. The Appellants filed their Answer and Counterclaim alleging, *inter alia*, that the execution was before a disbarred attorney, and in the presence of only one person as a witness. The Appellants' Counterclaim invoked the precedent of this State under which such actions are void and the foreclosing bank is barred from equitable relief.

The Respondent bank moved to dismiss the counterclaim, invoking the holding of *Matrix Financial Services Corp.* v. *Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011), as limiting such a defense to matters after that decision, which was rendered on August 8, 2011.

The Respondents motion was heard on May 16, 2013. The Honorable S. Jackson Kimball, as Master in Equity for York County, dismissed the Appellants' Counterclaim by Order dated June 6, 2013 and filed June 12, 2013. This appeal followed by mailing of July 15, 2013.

STATEMENT OF FACTS

On or about May 23, 2005, the two Appellants WILKS were told to come to a local Bojangles restaurant to sign their mortgage papers with Chase Bank for a refinance of their home at $100,000.00. They met there with one person. According to the mortgage, the witnesses to that document were "T. [illegible] Meetze" and "Matthew E. Davis".

No person with the name of "Meetze" is listed by the South Carolina Bar website as licensed to practice law in South Carolina.

The only person bearing a name comparable to that of "Matthew E. Davis" and having been licensed to practice law in South Carolina is one "Matthew Edward Davis". Mr. Davis was suspended from practice by Order of the Supreme Court dated February 4, 2005. By Order of

that Court dated May 5, 2011, Mr. Davis was disbarred for, among other actions, "sign[ing] as a witness to the borrower's signatures, even though [he] did not know whether an attorney facilitated the closing and did not witness the borrowers execute the documents."[1]

In response to the foreclosure action brought by the Respondent DEUTSCHE BANK NATIONAL TRUST COMPANY as assignee of Chase Bank, the Appellants WILKS raised the defenses set out in the precedent of this State under which such actions are void for unclean hands, and the foreclosing bank is barred from equitable relief.

The Respondent DEUTSCHE BANK moved to dismiss the counterclaim, invoking the holding of *Matrix Financial Services Corp.* v. *Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011), as limiting such a defense to matters after that decision, which was rendered on August 8, 2011.

DEUTSCHE BANK's motion was heard on May 16, 2013. In argument, counsel for Respondent disclaimed any admission of the Appellant's allegations, but acknowledged that the same must be treated as true for the purpose of a motion under Rule 12(b)(6), S.C.R.C.P. RECORD ON APPEAL, Transcript of Hearing, May 16, 2013, p.53, l.4 – 8.

The Honorable S. Jackson Kimball, as Master in Equity, dismissed the Appellants' Counterclaim by Order dated June 6, 2013 and filed June 12, 2013. This appeal followed by mailing of July 15, 2013.

ARGUMENTS

There is no argument as to the precedential background of this matter. In *Matrix Financial Services Corp.* v. *Frazer, supra*, the Supreme Court stated that the unauthorized practice of law (in that case, the closing of a mortgage transaction without supervision of an attorney), precluded the mortgage holder from the equitable relief of foreclosure. *Id.*, 394 S.C. ___, 714 S.E.2d 534-535. In the opinion issued on rehearing (and cited above), the Supreme Court applied this ruling to "all filing dates after the issuance of this opinion." *Id.*

In *BAC Home Loan Servicing, L.P.* v *Kinder*, 398 S.C. 619, 731 S.E.2d 547 (2012), the Supreme Court clarified the earlier case by holding that the reference in *Matrix* to "filing dates" referred to "the date a document a party seeks to enforce was filed." *Id.*, 398 S.C. 624, 731 S.E.2d 550.

The Appellants acknowledge that their mortgage was filed June 1, 2005, prior to the

1 *In the Matter of Matthew Edward Davis*, Opinion No. 27071, filed December 5, 2011, *Matter F.*

issuance and prospective application of *Matrix*, August 8, 2011.

The Appellants would point out that, in both the *Matrix* and *BAC Home Loan Servicing* cases, the deficiency detected was that of a failure to use an attorney. This is, of course, in accord with the long-standing rule of our jurisprudence:

> V . FIFTHLY, *ignorance* or *mistake* is another defect of will; when a man intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not the conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law. . . . . For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is as well the maxim of our own law, as it was of the Roman.
>
> [4 W. Blackstone, COMMENTARIES, *27 (1769); footnotes omitted.]

While the commentary above spoke to criminal responsibility, its application here is clear. The knowledge of the lending institutions in *Matrix* and *BAC Home Loan Servicing* are not discussed, because in light of the doctrine discussed above, their knowledge of South Carolina law must be presumed when they make mortgage loans in this State.

It is, however, not the case that equity takes no notice of the knowledge, or wilfulness, of the action complained of.

> The maxim that a person who comes into equity must come with clean hands necessarily gives wide range to the equity court's use of discretion . . . . [A]ny wilful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim.
>
> [7 AM.JUR.2D *Equity* § 129 (2002); footnotes omitted.]

The commentators of AMERICAN JURISPRUDENCE 2D go on to emphasize the point in question:

[T]he maxim does not apply to every unconscientious act or to all inequitable conduct. Equity does not demand that its suitors have led blameless lives, but does require them to have acted fairly and without fraud or deceit as to the controversy at issue. It has been said, moreover, that the maxim refers to wilful misconduct and not merely negligent misconduct.

[*Id.*, footnotes omitted.]

The same commentators note precedent holding that, even in cases with wrongdoing by both parties (*in pari delicto*, which is of course not present in this case), the equity Court will not balance the equities where the actions of one party have been wilful. 7 AM.JUR.2D *Equity* § 132, *citing United States EPA* v. *Environmental Waste Control, Inc.*, 917 F.2d 327 (7th Cir. 1990), *cert den*, 499 U.S. 975, 111 S.Ct. 1621, 113 L.Ed.2d 719 (1991).

In the cases entitled *Lane* v. *New York Life Ins. Co.*, 147 S.C. 333, 145 S.E. 196 (1928), the Supreme Court dealt with a wrongful attempt to cancel life insurance. This involved the Court in considering when equity will grant relief against a forfeiture. Quoting from Pomeroy's EQUITY JURISPRUDENCE, § 451, the *Lane* Court cited the following with approval:

"There are, as intimated above, special circumstances which will entitle a defaulting party to relief against a forfeiture in cases where otherwise it would not be granted. Although the agreement is not one measurable by a pecuniary compensation, still, if the party bound by it has been prevented from an exact fulfillment, so that a forfeiture is incurred, by *unavoidable accident*, by fraud, *by surprise*, or by *ignorance*, not *willful*, a court of equity will interpose and relieve him from the forfeiture so caused, upon his making compensation, if necessary, or doing everything else within his power." Under the editorial notes of this valuable work, this observation is made: "Many cases under this doctrine are those of covenants in leases but the doctrine, of course, extends to *all agreements*."

[*Id.*, 147 S.C. 376-377, 145 S.E. 210; italics added in original; notes to that effect omitted.]

It is axiomatic that if equity will aid a Defendant faced with forfeiture of a contract, so long and she may demonstrate a lack of wilfullness in her default, it must also condemn a

Plaintiff guilty of, or chargeable with, willfulness in its wrongdoing.

In this case, the Appellants have alleged and presented *prima facie* proof, that the mortgage transaction in question was closed by – or with the connivance of – disbarred counsel. In short, the Respondent's closers were not simply ignorant of the laws of this State, but; they committed a deliberate violation of those laws.[2] As such, the facts of this case are distinguishable from those of *Matrix* and *BAC Home Loan Servicing*.

Deliberate violation of the law debars the Respondent from equitable relief, and specifically from the relief of foreclosure.

CONCLUSION

This Court is charged with applying the rules of law and equity. Obviously, it must also consider the practical, or policy, effect of its ruling. The holdings of neither *Matrix* or *BAC Home Loan Servicing, supra,* are concerned with willful violation of the law. In this case, proof of such willful violation exists. In the absence of proof to the contrary, the Appellants are entitled to pursue their counterclaim to bar the Respondent's foreclosure as tainted with dirty hands.

Respectfully submitted,

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July 1, 2014

Rock Hill, South Carolina

2 RECORD ON APPEAL, Transcript of Hearing, May 16, 2013, p.53, l.4 – 8.

STATE OF SOUTH CAROLINA
In The Court of Appeals

S. Jackson Kimball, Special Circuit Court Judge

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MIDLAND FUNDING, LLC,

of whom
CORA B. WILKS and
DAVID C. WILKS are . . . . . Appellants.

CERTIFICATE OF COUNSEL

The undersigned certify that this Final Brief of Appellant complies with Rule 210(b), S.C.A.C.R.

July 1, 2014

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STATE OF SOUTH CAROLINA
In The Court of Appeals

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CORA B. WILKS and
DAVID C. WILKS are . . . . . Appellants.

PROOF OF SERVICE

I certify that, on the date below, I have served the Final Brief of Appellants on the following counsel of record:

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by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at

that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R.

July 2, 2014

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STATEMENT OF ISSUES ON APPEAL

1. The trial court correctly granted the Respondent's motion to dismiss the Appellants' counterclaim with prejudice because the closing occurred prior to the effective date of the Matrix decision, which only applies prospectively.

2. The Appellants failed to preserve their appellate arguments for review by this Court because they raise the specific arguments in their appellate brief for the first time on appeal.

3. If the arguments are preserved, the governing precedent from the South Carolina Supreme Court bars the Appellants' request for this Court to adopt a sweeping application of the doctrine of unclean hands because such a position is in direct contravention to South Carolina case law that is directly on point.

STATEMENT OF THE CASE

Plaintiff Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1 ("Deutsche Bank"), initiated this action on May 20, 2011, by filing a complaint seeking to foreclose on a mortgage given by Defendants Cora B. Wilks and David C. Wilks ("the Wilkses"). (Compl., R. at 6.) In response, the Wilkses filed an answer and counterclaim, seeking to avoid the foreclosure on the ground that a licensed attorney did not supervise the closing. (Answer & Counterclaim, R. at 19.)

Deutsche Bank filed a motion to dismiss the Wilkses' counterclaim on November 29, 2012. (Motion to Dismiss, R. at 49.) Following a hearing, the trial court granted the motion to dismiss by written order entered on June 12, 2013. (Order, R. at 2-5.) The Wilkses filed this appeal on July 15, 2013. (Notice of Appeal, R. at 58.)

FACTS

The Wilkses executed the mortgage and loan documents that are the subject of this action on May 23, 2005, for property located in Rock Hill, York County, South Carolina. (Compl. ¶ 7, R. at 7.) The mortgage was recorded in the Register of Deeds Office for York County on June 1, 2005. (Compl. ¶ 9, R. at 7.) The mortgage was subsequently assigned to Deutsche Bank on April 28, 2011, and recorded on May 9, 2011. (Id.)

Because they defaulted on the loan, Deutsche Bank filed a foreclosure action against the Wilkses. (Compl., R. at 6.) All notices required by the note and mortgage and by state and federal law were provided to the Wilkses. (Compl. ¶ 11, R. at 7.)

The Wilkses owed Deutsche Bank $89,483.68, which represents the principal sum owed since January 1, 2010, together with interest from December 1, 2009, advances, late charges, and the costs of the foreclosure action. (Compl. ¶ 12, R. at 7.) In their answer, the Wilkses admitted that they executed the mortgage and loan documents. (Answer & Counterclaim ¶¶ 2–3, 5, R. at 19, 20.)

The Wilkses filed a counterclaim against Deutsche Bank, seeking to bar it from receiving the equitable relief of foreclosure. (Answer & Counterclaim ¶¶ 4–13, R. at 20-21.) The Wilkses claimed that "the actions of [Deutsche Bank], by its authorized agents and employees, in closing the subject mortgage in a manner that constitutes the unauthorized practice of law, precludes it from obtaining the equitable relief afforded by a mortgage foreclosure action." (Answer & Counterclaim ¶ 13, R. at 21.) In their answer and counterclaim, the Wilkses cited to and relied upon the following two cases as supporting their counterclaim: Matrix Financial Services. Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011) ("Matrix"), and BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 731 S.E.2d 547 (2012) ("BAC"). (Answer & Counterclaim at ¶ C, R. at 21.)

Deutsche Bank moved to dismiss the Wilkses' counterclaim. (Motion to Dismiss, R. at 49.) Deutsche Bank argued that the holdings of Matrix and BAC expressly apply only prospectively[1] to mortgages recorded after August 8, 2011, and

[1] As set forth fully below, the South Carolina Supreme Court held that closing a real estate loan without the presence of a licensed South Carolina attorney constitutes the unauthorized practice of law, and thus, bars the lender from subsequently seeking equitable relief related to the loan. See Matrix Fin. Servs. Corp., 394 S.C. at 138–40, 714 S.E.2d at 534–35; BAC Home Loan Servicing, L.P., 398 S.C. at 624, 731 S.E.2d at 549–50. However, the Court specifically held that its holding only applies to cases in which the mortgage was recorded after the filing of the Matrix decision, which was August 8, 2011. See

therefore, the Wilkses' counterclaims fail as a matter of law (even when the allegations of the counterclaims are taken as true). (Motion to Dismiss at 2, R. at 50; Tr. of Hearing at 2–3, 5–6, R. at 53-54, 56-57.) Because the Wilkses' mortgage was recorded on June 1, 2005, Deutsche Bank argued that the Wilkses could not assert the holdings of Matrix and BAC as a bar to Deutsche Bank's foreclosure claim.

At the hearing on Deutsche Bank's motion to dismiss and in the subsequent written order, the trial court held that it agreed with Deutsche Bank and dismissed the Wilkses' counterclaim as a matter of law, in accordance with the controlling South Carolina law announced in Matrix and BAC. (Tr. of Hearing at 5–6, R. at 56-57; Order at 2–3, R. at 3-5.) On appeal, the Wilkses concede that "[t]here is no argument as to the precedential background of this case," citing Matrix and BAC, and they "acknowledge that their mortgage was filed June 1, 2005, prior to the issuance and prospective application of Matrix, August 8, 2011." (Brief of App. at 5.).

STANDARD OF REVIEW

When reviewing a trial court's dismissal of a claim for failure to state facts sufficient to constitute a cause of action under Rule 12(b)(6), SCRCP, "the appellate court applies the same standard of review as the trial court." Logan v. Cherokee Landscaping & Grading Co., 389 S.C. 611, 617, 698 S.E.2d 879, 882 (Ct. App. 2010) (citing Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 112, 659 S.E.2d 158, 161 (2008)). "'The question for the court is whether in the light most favorable to the [claimant], and with every doubt resolved in his behalf, the allegations set forth on

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Matrix Fin. Servs. Corp., 394 S.C. at 140, 714 S.E.2d at 535; BAC Home Loan Servicing, L.P., 398 S.C. at 624, 731 S.E.2d at 550.

the face of the [pleading] state any valid claim for relief.'" Id. (quoting Sloan Constr. Co., 377 S.C. at 112–13, 659 S.E.2d at 161).

ARGUMENT

I. This Court should affirm the trial court's order and reject the Wilkses' appellate argument because they failed to preserve their argument for appellate review.

The Wilkses argue on appeal that "[d]eliberate violation of the law debars the Respondent from equitable relief, and specifically from the relief of foreclosure." (Brief of Appellants at 8.) The Wilkses failed to make this argument to the trial court. Therefore, the Wilkses failed to preserve it for appellate review. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal . . . ."). This Court should affirm.

At the hearing on Deutsche Bank's motion to dismiss, the Wilkses argued that this Court's 2010 decision in Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), supported denial of Deutsche Bank's motion to dismiss their counterclaim. (Tr. of Hearing at 3–4, R. at 54-55.) In Coffey, Wachovia closed a home equity loan without the supervision of an attorney and later instituted foreclosure proceedings. Coffey, 389 S.C. at 76, 698 S.E.2d at 248. The Court of Appeals held that Wachovia, having committed the unauthorized practice of law in closing the loan without attorney supervision, came to the court with unclean hands, and thus, was barred from seeking equitable relief. Id.

The next year, in Matrix, the South Carolina Supreme Court reiterated this Court's holding in Coffey, and noted the following:

> Enforcing this requirement [of attorneys at real estate closings] will come as no surprise to any lender. Lenders cannot ignore established laws of this state and yet expect this Court to overlook their unlawful disregard. We take this opportunity to definitively state that a lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law.

Matrix Fin. Servs. Corp., 394 S.C. at 140, 714 S.E.2d at 535 (citing Coffey, 389 S.C. at 76, 698 S.E.2d at 248, and Buyers Serv. Co., 292 S.C. at 431–33, 357 S.E.2d at 18–19). However, the Supreme Court expressly held, "We apply this ruling to all filing dates after the issuance of this opinion." Id.

A year after Matrix, the South Carolina Supreme Court made another clarification to the law by explaining that the relevant filing date, for purposes of prospectively applying the Matrix holding, "is the date the document a party seeks to enforce was filed." BAC Home Loan Servicing, L.P., 398 S.C. at 624, 731 S.E.2d at 550. Thus, the South Carolina Supreme Court has left no doubt that in order for a borrower to assert the defense of failure to close the loan with the presence of a licensed attorney, the loan must involve a mortgage that was filed/recorded after August 8, 2011, the filing date for Matrix.

At the hearing before the trial court, the Wilkses argued that, although Coffey predated Matrix and BAC, those later cases did not expressly overrule Coffey, and thus, the court was not bound by the prospective only application announced in Matrix. (Tr. of Hearing at 3–4, R. at 54-55.) Yet, counsel for the Wilkses acknowledged at the hearing "that because Matrix is a later case in a line of cases and because it is the Supreme Court, it may be viewed as implicitly overruling or limiting [Coffey]." (Tr.

of Hearing at 4, R. at 55.) Importantly, the Wilkses failed to argue that the Matrix and BAC rule did not apply because the lender closed the loan with disbarred counsel.[2]

The trial court considered and denied the Wilkses' above arguments, noting as follows at the hearing:

> . . . I see little, if any, difference between Matrix and BAC and this, the Coffey case. . . . The only qualification is that Matrix would add an additional component or element to the test; namely, when did the closing occur. I believe that I must rule that it does add that additional requirement which . . . just limits . . . the Coffey case.

(Tr. of Hearing at 5, R. at 56.) In its written order, the trial court held that this case is governed by the holdings announced in Matrix and BAC, which required dismissal of the Wilkses' counterclaims. (Order at 2, R. at 3.) The trial court certainly did not rule on any argument that the Matrix and BAC rule did not apply because the lender closed the loan with disbarred counsel.

For the first time in this case, the Wilkses now argue on appeal that Matrix and BAC do not apply because Deutsche Bank committed a willful violation of the law because "the mortgage transaction in question was closed by—or with the connivance

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[2] The Wilkses also sought to distinguish Matrix by arguing at the hearing that the facts of their case "are rather more serious" and that the Coffey case "involves . . . actions within the state of South Carolina;" whereas, Matrix involved an out of state case. (Id.) Such an argument certainly does not raise the issue that the Wilkses now argued on appeal. Our preservation rules require the party to be sufficiently specific in raising the issue in order to bring into focus the precise nature of the alleged error. See, e.g., Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733. The Wilkses failed to do so. They made no argument related to disbarment as a distinguishing ground for Matrix and BAC before the trial court.

In any event, this argument lacks merit because Matrix did not involve an out of state closing, but instead, involved a mortgage loan closing for property located in Greenville, South Carolina. The only out of state component of the Matrix case was that the Frazers, the borrowers, moved to South Carolina from California, and a California resident had obtained a default judgment against them in a case filed prior to their move to South Carolina. Thus, the closings at issue in Coffey, Matrix, BAC, and the Wilkses' case all occurred in South Carolina. See BAC Home Loan Serv., L.P., 398 S.C. at 621, 731 S.E.2d at 548 (Aiken County); Matrix Fin. Servs. Corp., 394 S.C. at 136, 714 S.E.2d at 533 (Greenville County); Coffey, 389 S.C. at 71, 698 S.E.2d at 245–46 (Beaufort County).

of—disbarred counsel." (Id. at 7.) The Wilkses cite to treatise material and one 1928 case as supporting their new argument that "[i]t is axiomatic that if equity will aid a Defendant faced with forfeiture of a contract, so long and [sic] she may demonstrate a lack of wilfullness [sic] in her default, it must also condemn a Plaintiff guilty of, or chargeable with, willfulness in its wrongdoing." (Id.)

Thus, rather than arguing that this Court should follow Coffey, as the Wilkses argued below, they now argue that this Court should reverse because the alleged willful nature of Deutsche Bank's conduct renders Matrix and BAC inapplicable. The trial court never heard or ruled upon this new argument; therefore, the Wilkses failed to preserve it for appellate review. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.").

Accordingly, this Court should refuse to consider the Wilkses' appellate arguments because they are not preserved. This Court should affirm the trial court's order dismissing the Wilkses' counterclaim with prejudice.

II. This Court should affirm the trial court's order dismissing the counterclaim because the Wilkses failed to state any claim for which relief can be granted as a matter of law.

Even if this Court finds that the Wilkses' appellate argument is preserved, the trial court still properly granted Deutsche Bank's motion to dismiss the counterclaim.

Although the Wilkses claim that Deutsche Bank closed their loan without the presence of a licensed South Carolina attorney, the trial court correctly concluded that South Carolina law does not allow the Wilkses to avoid foreclosure on this basis because they closed their loan prior to the effective date of the law that allows such claims. Thus, assuming the Wilkses' allegations to be true for purposes of a motion to dismiss, the Wilkses still fail to state a claim upon which relief can be granted as matter of law. This Court should affirm.

In Matrix, the South Carolina Supreme Court held that "[a]ll real estate and mortgage loan closings must be supervised by an attorney" and that "closing a loan without the supervision of an attorney constitutes the unauthorized practice of law." Matrix Fin. Servs. Corp., 394 S.C. at 138–39, 714 S.E.2d at 534 (citing Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2003), and State v. Buyers Serv. Co., 292 S.C. 426, 430–34, 357 S.E.2d 15, 17–19 (1987)). The court in Matrix went on to note that a lender that closes a loan without the supervision of a licensed attorney is barred from subsequently seeking equitable relief as to that loan. Id. at 139, 714 S.E.2d at 534 (citing Coffey, 389 S.C. at 76, 698 S.E.2d at 248). However, the Supreme Court made clear in Matrix that it only "appl[ies] this ruling to all filing dates after the issuance of this opinion." Id. at 140, 714 S.E.2d at 535.

To alleviate confusion in the interpretation of which filing date the Matrix court intended, the South Carolina Supreme Court subsequently clarified its ruling in the BAC case. There, the court explained:

> In Matrix we reiterated that the closing of a loan without attorney supervision constitutes the unauthorized practice of law. Furthermore, we held that engaging in this unlawful behavior would preclude a lender from

> obtaining equitable relief. However, in a substitute opinion issued on rehearing, we explained that this holding would be prospective only, stating we would "apply this ruling to all filing dates after the issuance of this opinion," which was August 8, 2011. To the extent some confusion apparently exists as to what filing date Matrix referred to, we clarify now that ***it is the date the document a party seeks to enforce was filed***.

BAC Home Loan Servicing, L.P. , 398 S.C. at 624, 731 S.E.2d at 549–50 (internal citations omitted) (emphasis added). In BAC, the court noted that the mortgage at issue "was recorded . . . well before the issuance of Matrix. Thus, regardless of whether an attorney participated in the closing of Mortgage 2, BAC would not be barred from recovery by the illegality." Id. at 624, 731 S.E.2d at 550.

In the present appeal, the trial court properly noted that the Wilkses' mortgage (that they admit executing) "was recorded on June 1, 2005, more than six years before the decision in Matrix." (Order at 2–3, R. at 3-5.) Accordingly, the trial court aptly held that "the [Wilkses'] counterclaim cannot state a claim upon which relief can be granted, and fails as a matter of law." (Id. at 3, R. at 4.) Because the trial court correctly interpreted and applied the governing law as set forth in Matrix and BAC, this Court should affirm the trial court's order granting Deutsche Bank's motion to dismiss the Wilkses' counterclaim with prejudice.

III. Alternatively this Court should affirm because the Wilkses appellate argument, even if preserved, fails as a matter of law.

Even if this Court finds that the Wilkses' appellate argument is preserved, their argument still fails to advance any basis for reversing the trial court's correct ruling. As noted above, the Wilkses do not challenge the holdings of Matrix and BAC in this appeal. Instead, the Wilkses seek to avoid application of that controlling precedent,

which is directly on point with the facts of this case, by arguing for a broader application of "'[t]he maxim that a person who comes into equity must come with clean hands.'" (Brief of App. at 6 (quoting 7 AM. JUR. 2D Equity § 129 (2002)). The Wilkses rely on portions of the treatise material which state that "'the maxim [of unclean hands] refers to willful misconduct and not merely negligent misconduct.'" (Id.)

The Wilkses then seek to distinguish the facts of Matrix and BAC with the facts of their case by arguing that in those cases the lender closed the loan without an attorney present; whereas in this case, the lender closed the loan with "disbarred counsel." (Brief of App. at 7.) The Wilkses argue that in Matrix and BAC, the lenders were "ignorant of the laws of this State," unlike the present case, where the lender allegedly "committed a deliberate violation of those laws." (Id.) The Wilkses argument avails them nothing for several reasons.

First, this Court should reject the Wilkses' request for a sweeping application of the doctrine of unclean hands where the South Carolina Supreme Court has already addressed the application of that principle to the facts of this case. In Matrix and BAC, the Supreme Court specifically addressed the doctrine of unclean hands and its application in the context of a loan closed without the presence of a licensed South Carolina attorney. See Matrix Fin. Servs. Corp., 394 S.C. at 138–39, 714 S.E.2d at 534 (explaining that Matrix closed the refinance loan "without the supervision of a licensed attorney" and addressing appellant's argument that "Matrix is not entitled to an equitable remedy because it closed the refinance loan unlawfully, and thus has unclean hands"); BAC Home Loan Serv., L.P., 398 S.C. at 621, 731 S.E.2d at 548

(reaffirming the Matrix holding that closing a loan without attorney supervision is "unlawful behavior [that] would preclude a lender from obtaining equitable relief," as long as the mortgage was recorded after the filing of Matrix). Thus, the Wilkses improperly ask this Court to apply the doctrine of unclean hands in direct contravention to the holdings of Matrix and BAC, which are controlling authority in this case.

Second, the Wilkses allege that the Matthew Davis who was disbarred is the same Matthew Davis who signed as a witness to the loan closing, although he may not have attended the closing.[3] The Wilkes incorrectly argued at the hearing before the trial court and to this Court that Mr. Davis was disbarred at the time of the closing. (Tr. of Hearing at 4 (counsel for the Wilkes arguing that "we have a fellow closing loans who was suspended, and I believe I'm correct, in 2005, and then disbarred prior to the time this was done"), R. at 55; Brief of Appellant at 7 (arguing that "Appellants have alleged and presented *prima facie* proof, that the mortgage transaction in question was closed by . . . disbarred counsel").)

[3] The Wilkses do not allege in their answer which of the two witnesses, Mr. Davis or Mr./Mrs. Meetze, attended the closing. They only allege that one other person joined them at the closing, but do not specify who. (Answer & Counterclaim ¶ 8, R. at 20.) In the counterclaim, the Wilkses asserted that they attended the closing of their loan at the local Bojangles and were joined by "one other person," although the mortgage contains the signatures of two witnesses. (Answer & Counterclaim ¶¶ 7-8, R. at 20.) The Wilkses do not allege the identity of the person who attended the closing with them. (Id.) The two witness signatures appear to be those of a Mr. or Mrs. Meetze (the first name is not legible) and a Matthew E. Davis. (Mortgage at 14–15, R. at 36-37.) The Wilkses allege that neither witness was "an attorney licensed to practice law within the State of South Carolina." (Answer & Counterclaim ¶ 10, R. at 20.) The Wilkses allege that the Matthew E. Davis who signed the mortgage as a witness is the attorney Matthew Edward Davis, who previously practiced law at McGuire Woods LLP in Charlotte, North Carolina and was admitted to practice in South Carolina in 2006. (Answer & Counterclaim ¶ 11 & Ex. to Answer, R. at 20.) The Wilkses further allege that this same Mr. Davis was suspended from the practice of law in South Carolina on February 4, 2005, and disbarred on May 5, 2011. (Answer & Counterclaim ¶ 12 (citing In the Matter of Matthew E. Davis, Order (entered Feb. 4, 2005) (ruling that "respondent's license to practice law in this state is suspended until further order of the Court"); and In the Matter of Matthew Edward Davis, Op. No. 27071 (filed Dec. 5, 2011) (disbarring respondent from the practice of law), R. at 20-21.) The order disbarring Mr. Davis identifies him as from Gilbert, South Carolina. See In the Matter of Matthew Edward Davis, Op. No. 27071 at 1.

However, this is manifestly false. Matthew Davis was not disbarred until December 5, 2011, and the Wilks closed their loan on May 23, 2005. See In the Matter of Matthew Edward Davis, Op. No. 27071. (filed Dec. 5, 2011) (disbarring respondent from the practice of law), see also Mortgage, R. at 25. Assuming, *arguendo*, that the same Mr. Davis closed the Wilkses' loan, Mr. Davis had been suspended, not disbarred, from the practice of law, at the time of the closing. See In the Matter of Matthew E. Davis, Order (entered Feb. 4, 2005) (ruling that "respondent's license to practice law in this state is suspended until further order of the Court").

Accordingly, if this Court considers the Wilkses' appellate arguments, this Court should reject their arguments, finding them unsupported, and affirm the trial court's order dismissing the Wilkses' counterclaim with prejudice.

CONCLUSION

For the foregoing reasons, Deutsche Bank respectfully requests that this Court affirm the trial court's grant of its motion to dismiss the Wilkses' counterclaim in this case.

{Signature Page Follows}

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By: _____

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Columbia, South Carolina

June 23, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-46-03040
Appellate Case No. 2013-001524

Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1, ... Respondent,

v.

Cora B. Wilks, David C. Wilks, Chase Bank USA, N.A., and Midland Funding, LLC, ... Defendants,

Of whom Cora B. Wilks and David C. Wilks are ..... Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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By: _____

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Columbia, South Carolina

June ____, 2014

THE STATE OF SOUTH CAROLINA
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v.

Cora B. Wilks, David C. Wilks, Chase Bank USA, N.A., and Midland Funding, LLC, ... Defendants.

Of whom Cora B. Wilks and David C. Wilks are ..... Appellants

---

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Deutsche Bank National Trust Company, as Trustee for JPMorgan Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: FINAL BRIEF OF RESPONDENT

Counsel Served:

John Martin Foster
Post Office Box 106
Rock Hill, SC 29731

Jennifer B. Lee
Administrative Assistant

June 23, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1, Respondent,

v.

Cora B. Wilks, David C. Wilks, Chase Bank USA, N.A., and Midland Funding, LLC, Defendants,

Of Whom Cora B. Wilks and David C. Wilks are Appellants.

Appellate Case No. 2013-001524

Appeal From York County
S. Jackson Kimball, III, Special Circuit Court Judge

Unpublished Opinion No. 2015-UP-110
Submitted January 1, 2015 – Filed March 4, 2015

AFFIRMED

John Martin Foster, of Rock Hill, for Appellants.

Benjamin Rush Smith, III, and Michael J. Anzelmo, both of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review."); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (holding when the trial court fails to rule on an issue properly before it, a party must file a Rule 59(e), SCRCP, motion to preserve the issue for appellate review).[1]

AFFIRMED.[2]

HUFF, SHORT, and KONDUROS, JJ., concur.

---

[1] We also find Appellants' argument fails on the merits. *See Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009) ("On appeal from the dismissal of a case pursuant to Rule 12(b)(6),[SCRCP,] an appellate court applies the same standard of review as the trial court."); *id.* ("That standard requires the [c]ourt to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." (internal quotation marks omitted)); *Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 140, 714 S.E.2d 532, 535 (2011) ("[A] lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law."); *id.* ("We apply this ruling to all filing dates after the issuance of this opinion.").

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-46-03040
Opinion No. 2013-001524

DEUTSCHE BANK NATIONAL TRUST COMPANY
as Trustee for J.P. Morgan Mortgage Acquisition Trust
2007-CH1, Asset Backed Pass Through Certificates
Series 2007-CH1, ...Respondent,

v.

CORA B. WILKS,
DAVID C. WILKS,
CHASE BANK, N.A., and
MIDLAND FUNDING, LLC,,

of whom:

CORA B. WILKS and
DAVID C. WILKS are .....Appellants.

PETITION FOR REHEARING

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Attorney for Petitioners

Other Counsel of Record:

Michael J. Anzelmo
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The Appellant Petitioners petition for a rehearing of the matter above under Rules 221(a) and 240, S.C.A.C.R.

This Petition is based upon those certain points, factual and legal, which the Petitioners believe the Court to have overlooked or misapprehended, as set out in the accompanying Memorandum, a copy of which is attached hereto and incorporated herein.

March 17, 2015

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Attorney for Petitioners

Other Counsel of Record:

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

S. Jackson Kimball, Special Circuit Court Judge

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CORA B. WILKS,
DAVID C. WILKS,
CHASE BANK, N.A., and
MIDLAND FUNDING, LLC,,

of whom:

CORA B. WILKS and
DAVID C. WILKS are .....Appellants.

CERTIFICATE OF SERVICE

I certify that I have served the **Petition for Rehearing** and its accompanying **Memorandum** on the following counsel or persons:

Michael J. Anzelmo
Benjamin Rush Smith, III
Nelson Mullins Riley & Scarborough, LLP
Attorneys for Respondent
Post Office Box 11070
Columbia, S.C. 29211

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at

that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R.

March 17, 2015

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

S. Jackson Kimball, Special Circuit Court Judge

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DEUTSCHE BANK NATIONAL TRUST COMPANY
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CHASE BANK, N.A., and
MIDLAND FUNDING, LLC,,

of whom:

CORA B. WILKS and
DAVID C. WILKS are .....Appellants.

MEMORANDUM OF PETITIONERS
ON PETITION FOR REHEARING

The Court filed its Opinion herein on March 4, 2015. The Petitioners herein submit herewith their Memorandum on the petition for a rehearing of this matter under Rules 221(a) and 240, S.C.A.C.R.

Rule 221(a), S.C.A.C.R. states, in relevant part:

> A petition for rehearing . . . shall state with particularity the points supposed to have been overlooked or misapprehended by the court.

By this Memorandum, the Petitioners set out those points of the said Opinion herein which they believe to fall within the ambit of Rule 221(a).

FIRST GROUND:

The Petitioner-Appellants raised, by their verified Answer and Counterclaim the issue of the closing attorney at their mortgage loan having been previously suspended by the South Carolina Supreme Court. [RECORD ON APPEAL, p.20-22; Exhibits, p.22-47.] By its Motion to Dismiss this defense and Counterclaim, the Respondent cited the holding of our Supreme Court in *Matrix Financial Services Corp.* v. *Frazier*, 294 S.C. 134, 714 S.E.2d 532 (2011), which would limit such equitable relief to those mortgages filed after the issuance of that opinion, *i.e.*, in 2011. The Petitioners' mortgage was filed in 2005. The Circuit Court agreed, citing *Matrix, supra,* and *BAC Home Servicing, L.P.* v. *Kindler,* 398 S.C. 619, 731 S.E.2d 547 (2012) as confirming only a prospective application of equitable relief. [RECORD ON APPEAL, p. 4-5.] This appeal followed.

At the motion hearing [RECORD ON APPEAL, p.55, l.11-25], and in Appellants' Brief, they argued that the seriousness of the Respondents' violation of the procedures mandated by South Carolina created a distinction between their facts and those dealt with in *Matrix* and *BAC*.

This Court dismisses the argument of the Appellants and finds that the Appellants have raised an argument that has not been ruled on by the trial court. The Petitioners assume this finding to refer to their attempts, cited above, to distinguish *Matrix* and *BAC*.

Petitioners do not understand the Court to have cited the precedent on preservation of issues properly. The Court below clearly dealt with the issue at hand, citing the language of *Kindler* stating:

> " . . . Thus, regardless of whether an attorney participated in the closing of [the mortgage], BAC would not be barred from recovery by the illegality." *Id.*
>
> This case is governed by that holding.
>
> [RECORD ON APPEAL, p. 4.]

The Petitioners argue that the issue at hand was properly raised, dealt with by the Circuit Court, and preserved for this Court's review. They further understand, and argue, that it is one matter for an appellant to overlook a lower Court's failure to deal with an issue; it is another matter entirely to state that the lower Court has failed to deal with an argument <u>for</u> the appellant's position on that issue.

The issue at hand was properly preserved. This Court should deal with that issue squarely

in any decision rendered on this matter.

SECOND GROUND:

The Petitioners have set forth their argument in full by their Brief herein. The cases on which the lower Court relied dealt with apparent ignorance of our law, or inadvertent violation, by lenders. The use of an attorney suspended from practice to close the mortgage loan rises to the level of a willful violation. Willful violation of law raises an issue in equitable jurisprudence which should preclude the Respondent Bank from its relief. At the least, its existence entitles the Petitioners to a full consideration of the issues raised by such behavior.

March 17, 2015

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MAY 22 2015
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THE STATE OF SOUTH CAROLINA
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APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-46-03040
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Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1, ... Respondent,

v.

Cora B. Wilks, David C. Wilks, Chase Bank USA, N.A., and Midland Funding, LLC, ... Defendants,

Of whom Cora B. Wilks and David C. Wilks are ..... Appellants.

Respondent's Return to Appellants' Petition for Rehearing

Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules, Respondent Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1 ("Deutsche Bank"), files this Return to Appellants' Petition for Rehearing of the Panel's unanimous, unpublished opinion of Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1 v. Cora B. Wilks, David C. Wilks, et al., Op. No. 2015-UP-110 (S.C. Ct. App. filed March 4, 2015) (Shearouse

Adv. Sh. No. 9 at 18) ("the Opinion"). The petition should be denied because Appellants' fail to raise any issue that the Panel overlooked or misapprehended in rendering the Opinion. To the contrary, the Panel addressed the argument advanced by Appellants and found it to be unpreserved for appellate review, and, even if preserved, the Panel found the Appellants' argument failed on the merits.

In the petition, Appellants' claim the Panel overlooked the fact that Appellants properly preserved their appellate argument for review. See Petition p. 2. This argument lacks merit. This Court properly addressed Appellants' argument and found the argument unpreserved. See Opinion p. 1.

This appeal addressed the trial court's grant of Deutsche Bank's motion to dismiss the Appellants' counterclaim. {Order; R. 2-5}. Before the trial court Deutsche Bank argued that Matrix Financial Services v. Frazer, 394 S.C. 134, 714 S.E. 532 (2011), barred the Appellants' counterclaim. {Id.}. Appellants' sole argument before the trial court was that Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), supported denial of Deutsche Bank's motion to dismiss their counterclaim. {Tr. of Hearing at 3-4, R. at 54-55}.[1] Importantly, Appellants failed to argue that the Matrix rule did not apply because the lender closed the loan with disbarred counsel. {Id.}.

The trial court rejected Appellants' argument and held Matrix controlled the Appellants' counterclaims. {Order at 2, R. at 3}. The trial court did not rule on any

[1] Despite this argument, counsel for the Wilkses acknowledged at the hearing "that because Matrix is a later case in a line of cases and because it is the Supreme Court, it may be viewed as implicitly overruling or limiting [Coffey]." {Tr. of Hearing at 4, R. at 55}.

argument that the Matrix rule did not apply because the lender closed the loan with disbarred counsel. {Id.}.

On appeal, Appellants shifted gears and solely argued that Matrix did not apply because Deutsche Bank committed a willful violation of the law because "the mortgage transaction in question was closed by—or with the connivance of—disbarred counsel." {Appellants' Br. at p. 7}. The trial court never heard or ruled upon this new argument. Appellants did not file any Rule 59, SCRCP, motion. Therefore, Appellants failed to preserve it for appellate review. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) (holding that (1) "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court" and (2) when the trial court does not rule on an issue, the party must file a Rule 59(e), SCRCP, motion in order to preserve the issue for appellate review). The Panel considered Appellants' appellate argument and found it unpreserved. The Panel expressly and correctly ruled as such. See Opinion p. 1. Therefore, the Panel should deny the petition for rehearing.

Appellants also maintain the Panel erred in ruling on the merits of their argument. See Petition p. 3. That argument lacks merit. In addition to the ruling on the preservation issue, the Panel also considered and rejected Appellants' argument on the merits. See Opinion p. 1, n. 1 ("We also find Appellants' argument fails on the merits" and cited Matrix). The Panel correctly ruled.

In Matrix, the South Carolina Supreme Court held that "[a]ll real estate and mortgage loan closings must be supervised by an attorney" and that "closing a loan without the supervision of an attorney constitutes the unauthorized practice of law."

Matrix Fin. Servs. Corp., 394 S.C. at 138-39, 714 S.E.2d at 534. The Matrix rule only applied "to all filing dates after the issuance of this opinion," which was August 8, 2011. Id. at 140, 714 S.E.2d at 535. That filing date is "the date the document a party seeks to enforce was filed." BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 624, 731 S.E.2d 547, 549-50 (2012).

In the present appeal, Appellants "acknowledge[d] that their mortgage was filed June 1, 2005, prior to the issuance and prospective application of Matrix, August 8, 2011." {Appellants Br. at 5}. Thus, the Panel correctly rejected Appellants' argument and properly affirmed the trial court's application of Matrix.

Conclusion

Based on the foregoing, the Panel did not overlook or misapprehend any argument advanced by Appellants. The petition of rehearing should be denied.

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Columbia, South Carolina

March 23, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

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v.

Cora B. Wilks, David C. Wilks, Chase Bank USA, N.A., and Midland Funding, LLC, ... Defendants.

Of whom Cora B. Wilks and David C. Wilks are ..... Appellants

---

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Deutsche Bank National Trust Company, as Trustee for JPMorgan Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Respondent's Return to Appellants' Petition for Rehearing

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Jennifer B. Lee
Administrative Assistant

March 23, 2015

The South Carolina Court of Appeals

Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1, Respondent,

v.

Cora B. Wilks, David C. Wilks, Chase Bank USA, N.A., and Midland Funding, LLC, Defendants,

Of Whom Cora B. Wilks and David C. Wilks are Appellants.

Appellate Case No. 2013-001524

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff J.

Paul A. Short, Jr. J.

J.

Columbia, South Carolina

FILED
April 24, 2015

cc: John Martin Foster, Esquire
Michael J. Anzelmo, Esquire
Benjamin Rush Smith, III, Esquire
The Honorable S. Jackson Kimball, III