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THE STATE OF SOUTH CAROLINA
In The Supreme Court

JUL 16 2015

S.C. Supreme Court

APPEAL FROM DORCHESTER COUNTY
The Honorable Diane Schafer Goodstein, Circuit Court Judge

Case No. 2011-CP-18-1013
Appellate Case No. 2013-002066

Bank of New York Mellon, as Successor Trustee under
NovaStar Mortgage Funding Trust, Series 2004-1 Respondent,

v.

Rachei R. Lindsay, Jeffrey Wayner, Tammy Wayner, Tiffany
Spann-Wilder, Esq., The Steinberg Law Firm and United
State of America acting by and through its agency, the Internal
Revenue Service, Defendants,

Of Whom Rachel R. Lindsay is the Petitioner

Rachel R. Lindsay Petitioner,

v.

Saxon Mortgage Services, Inc. Respondent.

APPENDIX

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Attorneys for Petitioner Rachel R. Lindsay

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Attorneys for Respondent

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2011-CP-18-1013

The Bank of New York Mellon, as Successor Trustee
under NovaStar Mortgage Funding Trust, Series 2004-1,.... Appellant,

v.

Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner,
Tiffany Spann-Wilder, Esq., The Steinberg Law Firm,
and United States of America acting by and through its
agency, the Internal Revenue Service,..... Defendants,

Rachel R. Lindsay..... Respondent

v.

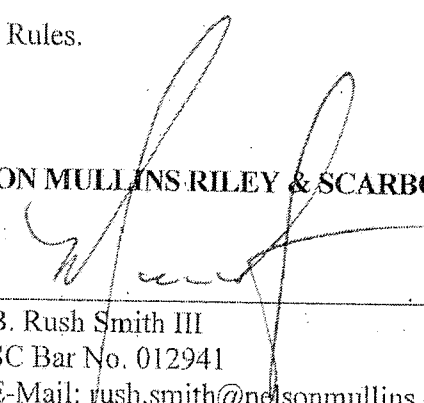
Saxon Mortgage Services, Inc. Appellant.

NOTICE OF APPEAL

Pursuant to Rule 203 of the South Carolina Appellate Court Rules, The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 and Saxon Mortgage Services, Inc., N.A. (jointly, the "Appellants") hereby timely appeal from the following Orders of the Honorable Diane S. Goodstein: Order denying Appellants' Joint Motion for Non-Jury Trial in the Equity Court and to Strike the Jury Demand of Defendant/Third-Party Plaintiff Rachel Lindsay entered August 14, 2013 (the "First Order") and Order denying Appellants' Motion to Alter or Amend the Order

Denying Appellants' Joint Motion for Non-Jury Trial in the Equity Court and to Strike the Jury Demand of Defendant/Third-Party Plaintiff Rachel Lindsay entered on August 22, 2013 (the "Second Order"). The orders are attached hereto as Exhibits A-B.

Appellants received written notice of the First Order on August 14, 2013 and timely filed a motion to Alter or Amend Judgment pursuant to Rule 59(e) on August 15, 2013 (attached as Exhibit C). Appellants received written notice of the Second Order on August 23, 2013. Thus, this appeal is timely served and filed pursuant to Rule 203(b)(1) of the South Carolina Appellate Court Rules.


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Attorneys for Appellants

Charleston, South Carolina

September 9, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Case No. 2011-CP-18-1013

Appellate Case No. 2013-002066

Bank of New York Mellon, as Successor Trustee under
NovaStar Mortgage Funding Trust, Series 2004-1 Appellant,

v.

Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner, Tiffany
Spann-Wilder, Esq., The Steinberg Law Firm and United
States of America acting by and through its agency, the
Internal Revenue Service, Defendants,

Of Whom Rachel R. Lindsay is the Respondent.

Rachel R. Lindsay Respondent,

v.

Saxon Mortgage Services, Inc. Appellant.

RECORD ON APPEAL
Volume 1 of 1

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*Attorney for Respondent Rachel R.
Lindsay*

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STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust 2004-1,

PLAINTIFF,

vs.

Rachel R. Lindsay; Jeffrey Wayner; Tammy
Wayner; Tiffany R. Spann-Wilder, Esq.; The
Steinberg Law Firm; United States of America
acting by and through its agency, the Internal
Revenue Service; and South Carolina
Department of Revenue,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS

(NON-JURY MORTGAGE FORECLOSURE)

C/A NO: 08-CP-18-2543

ORDER AND JUDGMENT OF
FORECLOSURE AND SALE
(DEFICIENCY WAIVED)

FILED
2009 JAN 14 AM 8:40
DORCHESTER COUNTY

TO: Beverly J. Finkel
Thomas A. Shook
Susan S. White
Joseph T. Merli
Andrew M. Wilson
FINKEL LAW FIRM LLC
Attorneys for the Plaintiff

ANSWERING DEFENDANTS:

Lee E. Berlinsky, Assistant U.S. Attorney
Attorney for Defendant
United States of America acting by and through
its agency, the Internal Revenue Service

Ronald W. Urban, Chief Counsel for Litigation
Attorney for Defendant
South Carolina Department of Revenue

Pursuant to Rule 53 SCRPC, the above-entitled matter was referred. Any appeal from any order or judgment issued by the master or special referee shall be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.

Pursuant to the said Order of Reference, a hearing was held and was attended by counsel. The testimony was taken, which is reported herewith. From the testimony and evidence, I find, conclude and order as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Lis Pendens was filed on October 8, 2008.
2. The Summons and Complaint were filed on October 8, 2008.
3. Service was made upon the Defendant(s) named in this Report as is shown by the proof(s) of service filed herein.
4. The Defendant(s) Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner, Tiffany R. Spann-Wilder, Esquire and The Steinberg Law Firm are in default as shown by Affidavit(s) on file herein.
5. Lee E. Berlinsky, Assistant U.S. Attorney, Attorney for Defendant United States of America acting by and through its agency, the Internal Revenue Service, served Answer(s) on the Plaintiff, which is on file herein.
6. Ronald W. Urban, Chief Counsel for Litigation, Attorney for Defendant South Carolina Department of Revenue, served Answer(s) on the Plaintiff, which is on file herein.
7. All of the defendants herein and/or all attorneys of record were notified of the time, date and place of the hearing in this matter.
8. According to the Affidavit filed herein, the Defendant(s) Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner and Tiffany R. Spann-Wilder, Esquire are not in the Military Service of the United States of America, as contemplated under the Servicemembers Civil Relief Act (2003), and any amendments thereto.
9. For value received, Rachel R. Lindsay made, executed and delivered a Note dated February 13, 2004, promising thereby to pay to the order of Universal Mortgage Consulting, LLC, the sum of \$140,250.00, with interest at an adjustable rate pursuant to the terms of the Note. Other terms and conditions are stated in the Note, which is of record herein.
10. To better secure the payment of the Note described above, the said Rachel R. Lindsay made, executed and delivered to Mortgage Electronic Registration Systems, Inc. as nominee for Universal Mortgage Consulting, LLC, a Mortgage in writing, dated February 13, 2004, covering real property in Dorchester County, which is the same as that described in the Complaint. The Mortgage was filed on February 26, 2004, and is of record in the Office of the Register of Deeds for Dorchester County in Book 4015 at Page 266.
11. This Mortgage constitutes a first mortgage lien on the subject property.
12. By Assignment of Mortgage recorded December 12, 2008, in Book 6888 at Page 123, in the Office of the Register of Deeds for Dorchester County, Mortgage Electronic Registration Systems, Inc. as nominee for Universal Mortgage Consulting, LLC assigned the subject Note and Mortgage to The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust 2004-1, the present lienholder and Plaintiff herein.

13. The titleholder of record in and to the subject property as of the filing of the Lis Pendens in this action is Rachel R. Lindsay.

14. Payment due on the Note has not been made as provided for therein, and Plaintiff, as the holder thereof, has elected to require immediate payment of the entire amount due thereon and has placed the Note and Mortgage in the hands of an attorney for collection.

15. Counsel for Plaintiff filed an affidavit as to attorney's fees and costs in this case, which was not contested, and, therefore, I find as fact herein. Having considered the nature, extent and difficulty of the services rendered, the time involved in reviewing the various documents, performing the title search, preparing the pleadings, attending hearings and argument, the professional standing of counsel, the fee customarily charged for similar services, and the beneficial results obtained for Plaintiff, I find that the sum of \$5,000.00 is a reasonable fee to allow under the terms of the Note and Mortgage as attorney's fees for Plaintiff's attorney for services performed and anticipated to be performed until final adjudication of the action.

16. The amount due and owing on the Note, with interest at the rate provided in the Note, and other costs and expenses of collection, including an attorney's fee, secured by Note and Mortgage, is as follows:

Principal due as of March 1, 2008	\$139,255.39
Interest from February 1, 2008 to January 8, 2009 at 8.0%	\$ 10,015.07
Escrow adjustments	\$ 2,708.59
Escrow credit	\$ (146.45)
Corporate advance	\$ 68.00
Late charges	\$ 609.15
Costs of collection prior to hearing	\$ 1,177.00
Attorney's fee	\$ 5,000.00
TOTAL DEBT secured by Note and Mortgage, including interest to date shown	\$158,686.75

Interest for the period from January 8, 2009 as shown above at the stated rate of 8.0% shall be added to the Principal Balance shown above through the date this Judgment is filed. After the date of judgment, interest at the rate of 8.0% on the total judgment debt should be added to such judgment debt to comprise the amount of Plaintiff's debt secured by the Mortgage.

17. Plaintiff does not demand a deficiency judgment in the event the sale of the real estate herein does not yield a sum sufficient to satisfy all indebtedness due unto Plaintiff, including costs and Attorney's fees.

18. The following Defendant(s) claims, or may claim a lien upon or interest in the subject property as follows:

- (a) Jeffrey Wayner and Tammy Wayner, by virtue of a judgment against Rachel Lindsay and P & L Property Management, filed November 25, 2002, Civil Action Number 2002-CP-18-1877, in the amount of \$1,443.06;
- (b) Tiffany R. Spann-Wilder, Esq. and The Steinberg Law Firm, by virtue of a judgment against Rachel Lindsay and P & L Property Management, filed November 25, 2002, Civil Action Number 2002-CP-18-1877, in the amount of \$1,500.00;

The above-referenced judgments no longer constitute liens against the subject property.

- (c) United States of America acting by and through its agency, the Internal Revenue Service, by virtue of a Notice of Federal Tax Lien against Rachel R. Lindsay, recorded October 4, 2004, Tax Lien Number 193092504 in book 15 at page 419, in the amount of \$7,668.55;
- (d) South Carolina Department of Revenue by virtue of the following State Tax Liens against Rachel Lindsay:
 - i. dated November 16, 2005, and recorded November 30, 2005, Tax Lien Number 3-50662637-4; in book 80 at page 366, in the amount of \$5,854.49;
 - ii. dated April 16, 2007, and recorded April 23, 2007 as Tax Lien Number 3-50800032-9; in book 87 at page 592, in the amount of \$1,790.36.

The interests or liens of the above defendants, if any, are junior and subordinate to the Plaintiff's first mortgage lien

IT IS THEREFORE ORDERED:

1. There is due to Plaintiff on the obligation and Mortgage set forth in the Complaint the sum of \$158,686.75, representing the "Total Debt" due Plaintiff as set forth in the Findings of Fact, *supra*, together with interest at the rate provided therein from the date aforesaid to the date hereof.
2. The amount due in the preceding paragraph (the "Total Debt" as set forth in the Findings of Fact, *supra*, and later accrued interest) shall constitute the total judgment debt due the Plaintiff and shall bear interest hereafter at the rate of 8.0%.
3. Based on the allegations in the Complaint, the default of the defendants Jeffrey Wayner and Tammy Wayner, and the evidence presented, I hereby order the judgment against Rachel Lindsay and P & L Property Management, filed November 25, 2002, Civil Action Number 2002-CP-18-1877, in the amount of \$1,443.06, no longer constitute liens against the subject property.

4. Based on the allegations in the Complaint, the default of the defendants Tiffany R. Spann-Wilder, Esquire and The Steinberg Law Firm and the evidence presented, I hereby order the judgment against Rachel Lindsay and P & L Property Management, filed November 25, 2002, Civil Action Number 2002-CP-18-1877, in the amount of \$1,500.00 no longer constitute liens against the subject property.

5. The Defendant(s) liable for the aforesaid Mortgage debt shall, on or before the date of sale of the property hereinafter described, pay to Plaintiff, or Plaintiff's attorney, the amount of Plaintiff's debt as aforesaid, together with the costs and disbursements of this action. If such debt is paid in full, then the foreclosure sale shall be cancelled.

6. On default of payment at or before the time herein indicated, the mortgaged premises described in the Complaint, as hereinafter set forth, shall be sold by the Master in Equity, or his agent under the direction of the Master in Equity, at public auction, at the Dorchester County Courthouse, St. George, South Carolina, on some convenient sales day hereafter (and should the regular day of judicial sales fall on a legal holiday, then and in such event, the sales day shall be on Tuesday next succeeding such holiday), on the following terms, that is to say:

- A. **FOR CASH:** The Master in Equity will require a deposit of 5% on the amount of the bid (in cash or equivalent), same to be applied on the purchase price only upon compliance with the bid, but in case of non-compliance within 20 days, the deposit may be forfeited without further hearing and applied to the costs and Plaintiff's debt.
- B. Interest on the balance of the bid shall be paid to the day of compliance at the rate of 8.0%.
- C. The sale shall be subject to taxes and assessments, existing easements and easements and restrictions of record, and the Right of Redemption of the United States of America to redeem the subject property 120 days following the date of the Foreclosure Sale.
- D. This Mortgage constitutes a first priority lien on the subject property.
- E. Purchaser to pay for deed preparation and costs of recording the Deed, and transfer taxes.

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

8. The Master in Equity will, by advertisement according to law, give notice of the time, date, place of sale, and the terms thereof, which Notice of Sale is incorporated herein by reference; and will execute to the Purchaser, or Purchasers, a deed to the premises sold. Plaintiff, or any other party to this action, may become a purchaser at such sale, and that if, upon such sale being made, the Purchaser, or Purchasers, should fail to comply with the terms thereof within 20 days after date of sale, then the Master in Equity may advertise the said premises for sale on the next, or some other subsequent sales day, at the risk of the highest bidder, and so from time to time thereafter until a full compliance shall be secured.

9. Should Plaintiff, Plaintiff's attorney, or Plaintiff's agent fail to appear on the day of sale, the property shall not be sold, and in that event any such sale shall be null and void and of no force and effect. The property shall be re-advertised and sold at some convenient sales day thereafter when Plaintiff, Plaintiff's attorney, or Plaintiff's agent is present.

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

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

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

NEXT: Any surplus funds will be held pending further order of the Court.

11. **IT IS FURTHER ORDERED** that in the event the successful bidder is other than the Defendant(s) in possession herein, upon full compliance with the bid, the Sheriff of Dorchester County is ordered and directed to eject and remove from the premises the occupants of the property sold, together with all personal property located thereon, and put the successful bidder or his assigns in full, quiet and peaceable possession of said premises without delay, and to keep said successful bidder or his assigns in such peaceable possession.

12. **IT IS FURTHER ORDERED** that, in the event the successful bidder is other than the Defendant(s) in possession herein and the occupant(s) have voluntarily vacated the premises or have been ejected from the premises leaving furnishings, fixtures and items not subject to Plaintiff's Mortgage in said premises, upon full compliance with the bid, Purchaser is authorized to remove therefrom all furnishings, fixtures and items not subject to the lien of Plaintiff's mortgage, which personal property, being deemed abandoned, shall be removed by Purchaser or its agents from the subject property by placing said personal property on the public street or highway or by any other means.

13. **IT IS FURTHER ORDERED** that, in addition to all parties deemed by law to have received constructive notice of the action herein, the Defendant(s) named herein and all persons whomsoever claiming under said defendant(s), be forever barred and foreclosed of all right, title, interest and equity of redemption in the said mortgaged premises so sold, or any part thereof, except as to the right of redemption afforded the United States of America, as set out herein.

14. **IT IS FURTHER ORDERED** that the Deed of conveyances made pursuant to said sale shall contain the names of only the first named Plaintiff and the first named Defendant and the Defendant(s) who was/were the titleholder(s) of the mortgaged property at the time of filing of the notice of pendency of the within action, and the name of the grantee, and the Register of Deeds is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said Deed.

15. **IT IS FURTHER ORDERED** that the Master in Equity will retain jurisdiction to do all necessary acts incident to this foreclosure including, but not limited to, issuing a Writ of Assistance and hearing any issues involving appraisal proceedings under Section 29-3-680 *et seq.*, South Carolina Code of Laws (1976), as amended.

16. Plaintiff does not warrant its title search to purchasers at foreclosure sale or other third parties, who should have their own title search performed on the subject property.

17. The Master in Equity shall direct the Register of Deeds to release of record the Mortgage lien being foreclosed, all subordinate liens and all prior liens ordered satisfied herein, after the Order Confirming Sale and Disbursements has been executed and filed. Plaintiff's Mortgage lien is described as follows:

That certain Mortgage given by Rachel R. Lindsay to Mortgage Electronic Registration Systems, Inc. as nominee for Universal Mortgage Consulting, LLC dated February 13, 2004 and recorded in the Office of the Register of Deeds for Dorchester County on February 26, 2004 in Book 4015 at Page 266.

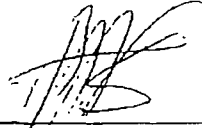
18. The following is a description of the premises herein ordered to be sold:

All that certain piece, parcel or lot of land, together with all buildings and improvements thereon, situate, lying and being in the County of Dorchester, State of South Carolina, and known and designated as Lot 16, Block 13, King's Grant on the Ashley, as shown on a plat of Section Two of King's Grant on the Ashley by C. Robert Jennings, RLS dated November 1972, and recorded in Plat Book 20, at Page 72, in the RMC Office for Dorchester County.

TMS Number: 1710601016.000

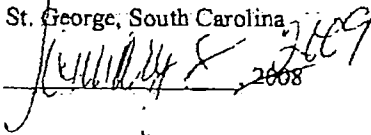
PROPERTY ADDRESS: 503 Fairington Dr., Summerville, SC

This being the same property conveyed to Rachel R. Lindsay by deed of Raymond G. Perdue, dated November 22, 2001 and recorded in the Office of the Register of Deeds for Dorchester County on December 3, 2001 in Deed Book 2907 at Page 22.



Patrick R. Watts
Master in Equity for Dorchester County

St. George, South Carolina


2008

51560.F22262R

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust 2004-1,

PLAINTIFF,

vs.

Rachel R. Lindsay; Jeffrey Wayner; Tammy
Wayner; Tiffany R. Spann-Wilder, Esq.; The
Steinberg Law Firm; United States of America
acting by and through its agency, the Internal
Revenue Service; and South Carolina
Department of Revenue,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS
C/A NO: 08-CP-18-2543

(NON-JURY MORTGAGE FORECLOSURE)

ORDER VACATING JUDGMENT
AND
DISMISSING ACTION

FILED
JAN 14 AM 10:25
CLERK OF COURT
DORCHESTER COUNTY

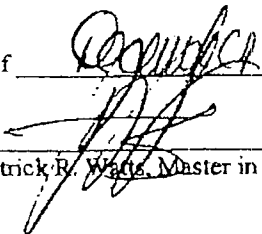
This matter comes before the Court on the plaintiff's motion for an order dismissing the within action pursuant to Rule 41(a)(2), SCRCP, on the grounds that the mortgagor(s) have settled the matter. As a result, the plaintiff asks that the judgment previously entered in this action be vacated. Now, therefore, for good cause shown, it is hereby

ORDERED that the judgment entered January 14, 2009 is hereby vacated. It is further

ORDERED that the within action be dismissed.

It is

ORDERED this 31st day of December, 2009.

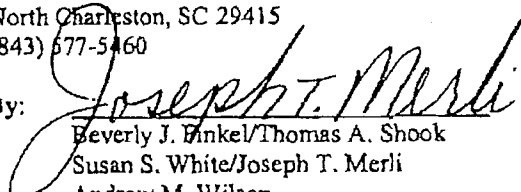

Patrick R. Wade, Master in Equity, Dorchester County

St. George, South Carolina

WE SO MOVE:

FINKEL LAW FIRM LLC
P.O. Box 71727
North Charleston, SC 29415
(843) 577-5460

By:


Beverly J. Finkel/Thomas A. Shook
Susan S. White/Joseph T. Merli
Andrew M. Wilson
Attorneys for Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

☒ The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust 2004-1,

PLAINTIFF,

vs.

☐ Rachel R. Lindsay; Jeffrey Wayner; Tammy Wayner; Tiffany R. Spann-Wilder, Esq.; The Steinberg Law Firm; United States of America acting by and through its agency, the Internal Revenue Service; and South Carolina Department of Revenue,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS
C/A NO: 08-CP-18-2543

(NON-JURY MORTGAGE FORECLOSURE)

2010 JAN 14 AM 10:25
CLERK OF COURT
DORCHESTER COUNTY

check box above indicating submitting party	
name, S.C. Bar number and address of plaintiff's attorney	name, S.C. Bar number and address of defendant's attorney
☐ Beverly J. Finkel SC Bar #: 9794 ☐ Thomas A. Shook SC Bar #: 68340 ☐ Susan S. White SC Bar #: 5453 ☐ Joseph T. Merli SC Bar #: 3943 ☐ Andrew M. Wilson SC Bar #: 72553 FINKEL LAW FIRM LLC PO Box 71727 N. Charleston, SC 29415 telephone: (843) 577-5460 fax: (843) 725-0015 e-mail: bfinkel@finkellaw.com	☐ ☐ ☐ ☐ ☐ telephone: fax: e-mail:
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete Sections II and III)	
SECTION I: Hearing Information	
Nature of Motion: Order of Dismissal	
Estimated Time Needed:	Court Reporter Needed: ☐ YES ☒ NO
SECTION II: Motion Type	
☐ Written Motion attached ☒ Form Motion I hereby move for relief as set forth in the attached proposed order. Signature of Attorney: <i>Joseph T. Merli</i> Date Submitted: <i>Dec 1, 2009</i>	
SECTION III: Motion Type	
☒ PAID B AMOUNT: \$26.00 ☐ EXEMPT: (check reason)	☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☒ Other:
JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order ☐ Other: _____ JUDGE: _____ CODE: _____ DATE: _____	
CLERK'S VERIFICATION	
Collected by: _____ (print name)	DATE FILED: _____
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED B AMOUNT DUE: _____	

ROA_00010

App. 15

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF DORCHESTER

CERTIFIED CASE NO: 2009CP1801311

IN THE COURT OF COMMON PLEAS

2010 JUN - 1 PM 12: 21

Bank Of New York Mellon vs. Rachel R Lindsay

CLERK OF COURT
DORCHESTER COUNTY

2010 JUN - 1 PM 12: 21
DORCHESTER COUNTY
CLERK OF COURT

CHECK ONE:

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

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

Dated at St. George, South Carolina, this 1st day of June, 2010.

Court Reporter:

Cheryl Graham
Cheryl Graham, Clerk of Court, By; Carolyn Ayer,
Deputy

This judgment was entered on the 1st day of June, 2010, and a copy mailed first class this 1st day of June, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

M Kevin McCarrell Attorney At Law P. O.
Box 87 Greenville, SC 29602

Lee Ellis Berlinsky U.S. Attorney's Office 151
Meeting St., Ste. 200 Charleston, SC 29402
Brian Morris Knowles Knowles Law Firm PC
P.O. Box 50201 Summerville, SC 29485

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CPFORM4M

ROA_00011

App. 16

6/4/10
BCW

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

) IN THE COURT OF COMMON PLEAS
) FOR THE FIRST JUDICIAL CIRCUIT
) 2009-CP-18-1311

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust, Series 2004-1,

Plaintiff,

vs.

Rachel R. Lindsay; Jeffrey Wayner; Tammy
Wayner; Tiffany Spann-Wilder, Esq.; The
Steinberg Law Firm; and United States of
America acting by and through its agency,
the Internal Revenue Service,

Defendants.

Rachel R. Lindsay,

Third-Party Plaintiff,

vs.

Saxon Mortgage Services, Inc.,

Third-Party Defendant.

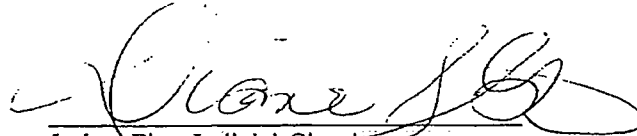
Cheryl
CLERK OF COURT
DORCHESTER COUNTY
CONSENT ORDER
(Pursuant to Rule 40(j))
2010 JUN - 1 PM 12:22
CERTIFIED

THIS CASE COMES before the Court upon the consent of the parties. Counsel for Plaintiff and Third-Party Defendant and counsel for the Defendant/Third-Party Plaintiff Rachel R. Lindsay desire to remove the case from the active docket pursuant to Rule 40(j), and counsel for the Defendant United States of America acting by and through its agency, the Internal Revenue Service consents. Accordingly, the case is hereby stricken without prejudice pursuant to Rule 40(j). The statute of limitations will be tolled as to all claims provided that a motion is made to restore the case to the docket within one year from the date of this order.

The parties expressly agree that if the claims are restored upon motion made within one year of the date hereof the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date the claims are restored.

IT IS SO ORDERED.

5-28, 2010


Judge, First Judicial Circuit

In Re: The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 vs. Rachel R. Lindsay; et. al. and Rachel R. Lindsay vs. Saxon Mortgage Services, Inc.
C.A. No. 2009-CP-18-1311

ATTORNEYS' CONSENT TO RULE 40(i) ORDER

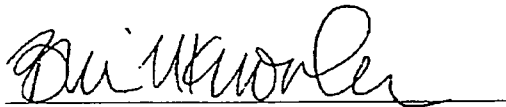


M. Kevin McCarrell, S.C. Bar #76255
SMITH MOORE LEATHERWOOD LLP
300 East McBee Avenue, Suite 500,
PO Box 87
Greenville, SC 29602-0087
(864) 242-6440; (864) 240-2474 (fax)
kevin.mccarrell@smithmoorelaw.com

Attorney for The Bank of New York Mellon as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 and Saxon Mortgage Services, Inc.

In Re: The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 vs. Rachel R. Lindsay; et. al. and Rachel R. Lindsay vs. Saxon Mortgage Services, Inc.
C.A. No. 2009-CP-18-1311

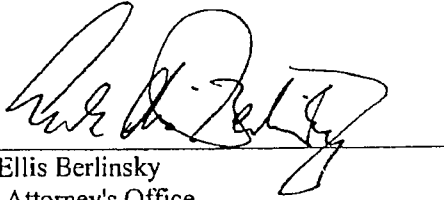
ATTORNEYS' CONSENT TO RULE 40(j) ORDER



Brian M. Knowles
Knowles Law Firm, PC
PO Box 50201
Summerville, SC 29485
T: (843) 810-7596
F: (843) 747-1118
Bknowles.lawfirm@gmail.com
Attorney for Rachel R. Lindsay

In Re: The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 vs. Rachel R. Lindsay; et. al. and Rachel R. Lindsay vs. Saxon Mortgage Services, Inc.
C.A. No. 2009-CP-18-1311

ATTORNEYS' CONSENT TO RULE 40(i) ORDER



Lee Ellis Berlinsky
U.S. Attorney's Office
151 Meeting St., Ste. 200
Charleston, SC 29401
Ph: (843) 727-4381; Fax: (843) 727-4443
Lee.berlinsky@usdoj.gov
Attorney for United States of America
acting by and through its agency, the Internal Revenue Service

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

The Bank of NY Mellon,

☐ Plaintiff

v.

Rachel R. Lindsay, Et Al.

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CERTIFIED COPY

2011 MAY 20 PM 2:39

2011-CP-18-1013

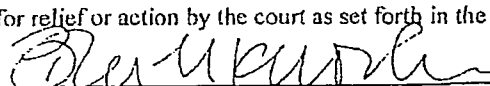
CASE NO.

2009-CP-18-1311

MOTION AND ORDER INFORMATION

FORM AND COVER SHEET

Cheryl H. Nelson
CLERK OF COURT
DORCHESTER COUNTY

Plaintiff's Attorney: M. Kevin Mccarrell, Bar No. Address: P.O. Box 87, Greenville, SC 29602-0087 phone: fax: e-mail: other:		Defendant's Attorney: Brian M. Knowles, Esquire, Bar No. 73108 Address: 107 W. 7 th N. St., Summerville, SC 29483 phone: 843-810-7596 fax: 843-871-6420 e-mail: bknowles.lawfirm@gmail.com other:	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO			
SECTION II: Motion/Order Type			
☐ Written motion attached ☒ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for ☐ Plaintiff / ☒ Defendant		May 16, 2011 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE _____ CODE: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____		Date Filed: _____	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

SCCA/233 (11-03)

ROA_00018

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
2009-CP-18-1311

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust, Series 2004-I,)

PLAINTIFF.)

vs.)

Rachel R. Lindsay; Jeffrey Wayner; Tammy
Wayner; Tiffany Spann-Wilder, Esq.; The
Steinberg Law Firm; and United States of
America acting by and through its agency, the
Internal Revenue Service,)

DEFENDANT(S).)

RACHEL R. LINDSAY,)

Third-Party Plaintiff,)

vs.)

SAXON MORTGAGE SERVICES,
INC.,)

Third-Party Defendant.)

2011-CP-18-1013

JOINT CONSENT MOTION TO
RESTORE AND PROPOSED ORDER

CLERK OF COUNTY
DEPT. OF PROBATION & PAROLE
2011 MAY 20 PM 2:39
CERTIFIED COPY

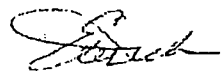
COMES NOW BEFORE ME Attorney Brian M. Knowles, counsel for the Defendant/ Third-Party Plaintiff Rachel R. Lindsay, with the consent of Plaintiff's and Third-Party Defendant's counsel, and counsel for the Defendant United State of America acting by and through its agency, the Internal Revenue Service, moving for an order to restore this matter to the trial roster. Previously and by way of that certain Consent Order (Pursuant to Rule 40(j)) filed on June 1, 2010, the parties agreed to 40(j) this matter.

IT IS THEREFORE HEREBY ORDERED this above-captioned matter is hereby restored to the trial roster, and pursuant to that certain Scheduling Order submitted contemporaneously herewith,

[Handwritten signature]

the trial of this matter shall not be before October 15, 2011.

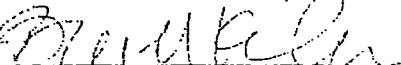
AND IT IS SO ORDERED!


The Honorable E. W. Dickson
Common Pleas Judge, First Judicial Circuit

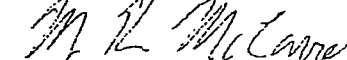
St. George, South Carolina
May 17, 2011

WE SO MOVE AND CONSENT:

KNOWLES LAW FIRM, PC


Brian M. Knowles
P.O. Box 50201
Summerville, SC 29485

SMITH MOORE LEATHERWOOD LLP


M. Kevin McCarrell
P.O. Box 87
Greenville, SC 29602-0087

U.S. ATTORNEY'S OFFICE

Lee E. Berlinsky
151 Meeting St., Ste. 200
Charleston, SC 29401

223
30

the trial of this matter shall not be before October 15, 2011.

AND IT IS SO ORDERED!

The Honorable _____
Common Pleas Judge, First Judicial Circuit

St. George, South Carolina
May ____, 2011

WE SO MOVE AND CONSENT:

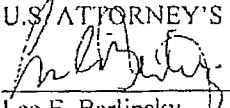
KNOWLES LAW FIRM, PC

Brian M. Knowles
P.O. Box 50201
Summerville, SC 29485

SMITH MOORE LEATHERWOOD LLP

M. Kevin McCarrell
P.O. Box 87
Greenville, SC 29602-0087

U.S. ATTORNEY'S OFFICE



Lee E. Berlinsky
151 Meeting St., Ste. 200
Charleston, SC 29401

302


FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP1801013

Bank Of New York Mellon Rachel R Lindsay 2013 AUG 14 PM 3:02 Rachel R Lindsay America United States Of

Internal Revenue Service

CLERK OF COURT
DORCHESTER COUNTY

PLAINTIFF(S)

DEFENDANT(S)

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;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Edgar Dickson
Circuit Court Judge

2153
Judge Code

8/14/2013
Date

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

ROA_00022

App. 27

For Clerk of Court Office Use Only

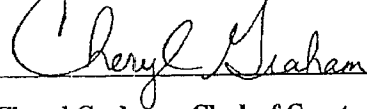
This judgment was entered on 8/14/2013, and a copy mailed first class or placed in the appropriate attorney's box on 8/14/2013, to attorneys of record or to parties (when appearing pro se) as follows:

H. Michael Bowers/Laura Johnson Evans 25 Calhoun
Street Ste. 250 Charleston, SC 29401
Benjamin Rush Smith III Meridian/17Th Floor 1320 Main
Street Columbia, SC 29201
Dow Ambrose Davidson/Merritt Gordon Abney 151
Meeting St., Ste. 600 Charleston, SC 29401

Matthew J. Modica 151 Meeting St., Ste. 200 Charleston,
SC 29401
G. Thomas Hill 6209 Savannah Hwy. Ravenel, SC 29470

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Court Reporter

Cheryl Graham - Clerk of Court

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

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

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

The Bank of New York Mellon, as
Successor Trustee under NovaStar
Mortgage Funding Trust, Series 2004-1,

Plaintiff,

vs.

Rachel R. Lindsay, Jeffrey Wayner,
Tammy Wayner, Tiffany Spann-Wilder,
Esq., The Steinberg Law Firm, and
United States of America acting by and
through its agency, the Internal Revenue
Service,

Defendants.

Civil Action No. 2011-CP-18-1013

ORDER

Rachel R. Lindsay,

Third-Party Plaintiff,

vs.

Saxon Mortgage Services, Inc.,

Third-Party Defendant.

CERTIFIED
2013 AUG 14 PM 3:03
CLERK OF COURT
DORCHESTER COUNTY

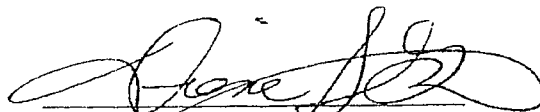
This matter came before the Court on joint Motions for a Non-Jury Trial in the Equity Court and to Strike the Jury Demand of the plaintiff The Bank of New York Mellon ("Plaintiff") and Third-Party Defendant Saxon Mortgage Services, Inc. ("Saxon" and jointly with Plaintiff, "Movants"). Defendant/Third-Party Plaintiff Rachel Lindsay ("Lindsay") filed a Memorandum of Law in Response to the Plaintiff and Third Party Defendant's Motion to Deny the Defendant/Third Party Plaintiff the Right to a Jury Trial. The Court heard oral argument on May 24, 2013. Present at the hearing were G. Thomas Hill, Esq., representing Lindsay, and Merritt G. Abney, Esq., representing Movants. Both parties stated their respective positions on the record.

Based upon the motions, supporting documentation, and arguments made, the Court finds as follows:

1. The Plaintiff filed a foreclosure action against the Defendant "Lindsay".
2. The Defendant "Lindsay" filed an Answer and Counterclaim in response to the Plaintiff's Complaint, together with a Third Party Complaint against Third Party Defendant "Saxon Mortgage".
3. The Answer, Counterclaim and Third Party Complaint asserted the causes of action of Breach of Contract, Negligence, Fraud, Negligent Misrepresentation, Promissory Estoppel, Violation of the South Carolina Unfair Trade Practices Act, Quantum Meruit, Intentional Infliction of Emotional Distress, Invasion of Privacy, Defamation/Libel Per Se, Intentional Interference with Existing Contracts, Intentional Interference with Prospective Economic Advantage, Declaratory Judgment for Compliance with Homeowner Affordability and Stability Plan, and Declaratory Judgment ordering correction of credit reports.
4. That Defendant/Third Party Plaintiff has asserted compulsory counterclaims of a legal nature in said Answer, Counterclaim and Third Party Complaint.
5. Based upon the above, the Court finds that Defendant/Third Party Plaintiff "Lindsay" has asserted sufficient compulsory counterclaims of a legal nature which affords "Lindsay" the right to a trial by a jury of her peers.

IT IS THEREFORE ORDERED that the Movants' Motion for a Non-Jury Trial in the Equity Court and to Strike the Jury Demand is DENIED.

AND IT IS SO ORDERED.



Diane Schafer Goodstein
Circuit Court Judge
First Judicial Circuit

St. George, South Carolina

7-30, 2013

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP1801013

Bank Of New York Mellon

Rachel R Lindsay

AUG 22

Rachel R Lindsay
America United States
Of

Internal Revenue Service

PLAINTIFF(S)

DEFENDANT(S)

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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Diane S. Goodstein
Circuit Court Judge

2112
Judge Code

8/22/2013
Date

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

ROA_00026

App. 31

For Clerk of Court Office Use Only

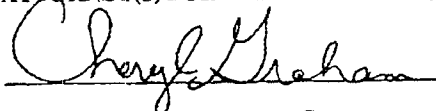
This judgment was entered on 8/22/2013, and a copy mailed first class or placed in the appropriate attorney's box on 8/22/2013, to attorneys of record or to parties (when appearing pro se) as follows:

Benjamin Rush Smith III Meridian/17Th Floor 1320 Main
Street Columbia, SC 29201
Dow Ambrose Davidson 151 Meeting Street Suite 600
Charleston, SC 294012239
Merritt Gordon Abney 151 Meeting St., Ste. 600
Charleston, SC 29401

Matthew J. Modica 151 Meeting St., Ste. 200 Charleston,
SC 29401
G. Thomas Hill 6209 Savannah Hwy. Ravenel, SC 29470

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Court Reporter

Cheryl Graham - Clerk of Court

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

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

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

The Bank of New York Mellon, as
Successor Trustee under NovaStar
Mortgage Funding Trust, Series 2004-1,
Plaintiff,

vs.

Rachel R. Lindsay, Jeffrey Wayner,
Tammy Wayner, Tiffany Spann-Wilder,
Esq., The Steinberg Law Firm, and United
States of America acting by and through its
agency, the Internal Revenue Service,
Defendants.

Rachel R. Lindsay,
Third-Party Plaintiff,

vs.

Saxon Mortgage Services, Inc.,
Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Civil Action No. 2011-CP-18-1013

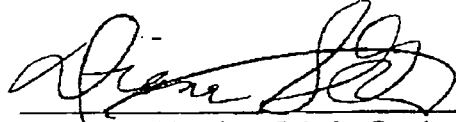
**ORDER DENYING MOTION
TO ALTER OR AMEND**

CLERK
2013 AUG 22 AM 9:55
DO
CLERK

This matter is before the Court by way of the Appellant's Motion to Alter or Amend brought forth pursuant to South Carolina Civil Procedure Rule 59. This Court has had the opportunity to review the Appellant's Motion and has determined that oral argument would not assist the Court in ruling on this Motion. Because the Appellant's Motion does not raise any novel issues for the Court's consideration, the Appellant's Motion to Alter or Amend is denied.

AND IT IS SO ORDERED.

August 19, 2013


The Honorable Diane Schafer Goodstein
First Judicial Circuit

11560 F22262R

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust 2004-1,

PLAINTIFF,

vs.

Rachel R. Lindsay; Jeffrey Wayner; Tammy
Wayner; Tiffany R. Spann-Wilder, Esq.; The
Steinberg Law Firm; United States of America
acting by and through its agency, the Internal
Revenue Service; and South Carolina
Department of Revenue,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS
C/A NO: 2008-CP-18-2543

LIS PENDENS

(NON-JURY MORTGAGE FORECLOSURE)

2008 OCT -8 PM 1:12

NOTICE IS HEREBY GIVEN that an action has been commenced and is now pending in this court upon Complaint of the above-named Plaintiff against the above-named Defendant(s) for foreclosure of a certain mortgage of real estate given by Rachel R. Lindsay to Mortgage Electronic Registration Systems, Inc. as nominee for Universal Mortgage Consulting, LLC in the amount of \$140,250.00, dated February 13, 2004, and recorded in the Office of the Register of Deeds for Dorchester County in Book 4015 at Page 266 on February 26, 2004.

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

All that certain piece, parcel or lot of land, together with all buildings and improvements thereon, situate, lying and being in the County of Dorchester, State of South Carolina, and known and designated as Lot 16, Block 13, King's Grant on the Ashley, as shown on a plat of Section Two of King's Grant on the Ashley by C. Robert Jennings, RLS dated November 1972, and recorded in Plat Book 20, at Page 72, in the RMC Office for Dorchester County.

TMS#: 1710601016.000

Property Address: 503 Fairington Dr., Summerville, SC

FINKEL LAW FIRM LLC
Post Office Box 71727
North Charleston, South Carolina 29415
(843) 577-5460

By:

Beverly J. Finkel/Thomas A. Shook -
Susan S. White/Joseph T. Merli/
Andrew M. Wilson
Attorneys for Plaintiff

October 7, 2008

ROA_00029

App. 34

51560 F22162R

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust 2004-1,

PLAINTIFF,

vs.

Rachel R. Lindsay; Jeffrey Wayner; Tammy
Wayner; Tiffany R. Spann-Wilder, Esq.; The
Steinberg Law Firm; United States of
America acting by and through its agency,
the Internal Revenue Service; and South
Carolina Department of Revenue,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS

C/A NO: 2008-CP-18-2543

SUMMONS AND NOTICES

(NON-JURY MORTGAGE FORECLOSURE)

2008 OCT -8 PM 1:13

TO THE ABOVE NAMED DEFENDANT(S):

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, or to otherwise appear and defend, and to serve a copy of your Answer to said Complaint upon the subscribers at their office, 3955 Faber Place, Suite 200, P.O. Box 71727, North Charleston, South Carolina, 29415, or to otherwise appear and defend the action pursuant to applicable court rules, within thirty (30) days after 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 such service; and if you fail to answer the Complaint or otherwise appear and defend within the time aforesaid, the Plaintiff in this action will apply to the Court for relief demanded therein, and judgment by default will be rendered against you for the relief demanded in the Complaint.

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) RESIDE(S), 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 the Plaintiff.

YOU WILL ALSO TAKE NOTICE that pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure, as amended effective September 1, 2002, the Plaintiff will move for a general Order of Reference to the Master in Equity for Dorchester County, which Order shall, pursuant to Rule 53(b) of the

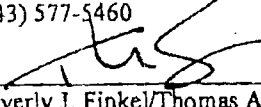
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SCRCP, specifically provide that the said Master in Equity is authorized and empowered to enter a final judgment in this action.

FINKEL LAW FIRM LLC
P.O. Box 71727
North Charleston, S.C. 29415
(843) 577-5460

#2
TB

By:


Beverly J. Finkel/Thomas A. Shook -
Susan S. White/Joseph T. Merli/
Andrew M. Wilson
Attorneys for Plaintiff

October 7, 2008

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust 2004-1,

PLAINTIFF,

vs.

Rachel R. Lindsay; Jeffrey Wayner; Tammy
Wayner; Tiffany R. Spann-Wilder, Esq.; The
Steinberg Law Firm; United States of America
acting by and through its agency, the Internal
Revenue Service; and South Carolina
Department of Revenue,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS
C/A NO: 2008-CP-18-2543

COMPLAINT

(NON-JURY MORTGAGE FORECLOSURE)

2008 OCT -8 PM 1:13
CLERK OF COURT
JUDICIAL BRANCH

The Plaintiff alleges as follows:

1. The Plaintiff is a corporation or other legal entity doing business in the State of South Carolina.
2. The Plaintiff is the owner and holder of the note and mortgage covering real property, which is the subject of the foreclosure action herein, located in the County of Dorchester, State of South Carolina.
3. The defendant(s) named herein may have an interest in the property that is the subject of this action.
4. Any defendant(s) described herein as Judgment Creditor(s) have by filing judgment(s) designated the attorney(s) entering the judgment(s) as their agent for service of process pursuant to the provisions of §15-35-840 of the South Carolina Code of Laws (1976 as amended).
5. Upon information and belief, the defendants Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner, Tiffany R. Spann-Wilder, Esq. are not in the military service of the United States of America pursuant to the provisions of the Servicemembers Civil Relief Act (2003).
6. On or about February 13, 2004, for value received, Rachel R. Lindsay executed and delivered to Universal Mortgage Consulting, LLC a certain promissory note in the sum of \$140,250.00, together with interest thereon at an adjustable rate pursuant to the terms of the note.
7. To secure the payment of the said note and debt, secured thereby, and in accordance with the terms and conditions thereof, on February 13, 2004, Rachel R. Lindsay executed and delivered to

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Mortgage Electronic Registration Systems, Inc. as nominee for Universal Mortgage Consulting, LLC, its successors and assigns, a mortgage covering the following described property:

All that certain piece, parcel or lot of land, together with all buildings and improvements thereon, situate, lying and being in the County of Dorchester, State of South Carolina, and known and designated as Lot 16, Block 13, King's Grant on the Ashley, as shown on a plat of Section Two of King's Grant on the Ashley by C. Robert Jennings, RLS dated November 1972, and recorded in Plat Book 20, at Page 72, in the RMC Office for Dorchester County.

TMS #: 1710601016.000

Property Address: 503 Fairington Dr., Summerville, SC

8. Thereafter the mortgage was recorded in the Office of the Register of Deeds for Dorchester County in book 4015 at page 266 on February 26, 2004.
9. The mortgage constitutes a first mortgage lien on the subject property.
10. Subsequently, the subject note and mortgage were assigned or otherwise transferred to The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust 2004-1, the present lienholder and Plaintiff herein.
11. Pursuant to the terms of the mortgage, any sums paid by the plaintiff for inspecting and securing the subject property, for fire and other hazard insurance, taxes and assessments for the mortgaged premises, and any costs of collection, including reasonable attorney's fees, are secured by the mortgage.
12. According to the terms of said mortgage, and as additional security, Rachel R. Lindsay assigned all rents, issues and profits of the mortgaged premises from and after any default thereunder, and should legal proceedings be instituted pursuant to said mortgage, the mortgagee, its successors and assigns, was given the right to have a Receiver appointed of the rents, issues and profits, who, after deducting all charges and expenses attending such proceedings, and the execution of his trust as a Receiver, shall apply the residue of the rents, issues and profits, towards the debt secured by said mortgage.
13. The monthly payments due on said note and mortgage are in default since March 1, 2008, although demand for payment thereof has been made and the plaintiff, as the holder of the said note and mortgage, after providing all required notices, elects to, and does declare the entire balance of said indebtedness due and payable, and that there is due on said note and mortgage as of March 1, 2008, the sum of \$139,255.39, together with interest at an adjustable rate pursuant to the terms of the note, from February 1, 2008, and also for the costs and disbursements of this action, including attorney's fees.

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14. Pursuant to Sections 37-3-105, South Carolina Code of Laws (1976 as amended), the mortgage lien, which is the subject of this action, is a first lien on real estate and is not a 'consumer loan' for the purposes of the South Carolina Consumer Protection Code. Any notice of right to cure has been given as required.

15. The Plaintiff does not demand a deficiency judgment in the event the sale of the real estate herein does not yield a sum sufficient to satisfy all indebtedness due unto the plaintiff, including costs and attorney's fees.

16. The following defendants claim, or may claim a lien upon or interest in the subject property as follows:

- (a) Jeffrey Wayner and Tammy Wayner, by virtue of a judgment against Rachel Lindsay and P & L Property Management, filed November 25, 2002, Civil Action Number 2002-CP-18-1877, in the amount of \$1,443.06;
- (b) Tiffany R. Spann-Wilder, Esq. and The Steinberg Law Firm, by virtue of a judgment against Rachel Lindsay and P & L Property Management, filed November 25, 2002, Civil Action Number 2002-CP-18-1877, in the amount of \$1,500.00;

The above-referenced judgments no longer constitute liens against the subject property.

- (c) United States of America acting by and through its agency, the Internal Revenue Service, by virtue of a Notice of Federal Tax Lien against Rachel R. Lindsay, recorded October 4, 2004, Tax Lien Number 193092504 in book 15 at page 419, in the amount of \$7,668.55;
- (d) South Carolina Department of Revenue by virtue of the following State Tax Liens against Rachel Lindsay:
 - i. dated November 16, 2005, and recorded November 30, 2005, Tax Lien Number 3-50662637-4; in book 80 at page 366, in the amount of \$5,854.49;
 - ii. dated April 16, 2007, and recorded April 23, 2007 as Tax Lien Number 3-50800032-9; in book 87 at page 592, in the amount of \$1,790.36.

The interests or liens of the above defendants, if any, are junior and subordinate to the Plaintiff's first mortgage lien

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

1. The amount due upon the said note and mortgage held by Plaintiff be ascertained and determined under the direction of this Court, together with attorney's fees and the costs of this action.

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2. The said Plaintiff's Mortgage be declared a first mortgage lien and that the said Plaintiff have judgment of foreclosure for the amount so found to be due and owing thereon, together with any taxes or insurance premiums which may be due, with a reasonable sum as attorney's fees and for the costs of this action.

3. The judgment recorded in Civil Action Number 2002-CP-18-1877, held by defendants Jeffrey Wayner and Tammy Wayner, be declared that it does not constitute a lien against the subject property

4. The judgment recorded in Civil Action Number 2002-CP-18-1877, held by defendants Tiffany R. Spann-Wilder, Esq. and The Steinberg Law Firm, be declared that it does not constitute a lien against the subject property

5. The mortgaged premises be sold under the direction of this Court, the equity of redemption be barred, and that the proceeds of sale be applied 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 the attorney's fees as aforesaid, and

Third, the surplus, if any be distributed according to law.

6. An Order be entered directing and empowering the Sheriff of Dorchester County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the property hereinabove described should the same become necessary.

7. An Order be entered for the ejectment of the defendants in possession herein and all persons claiming thereunder and the removal therefrom of all furnishings, fixtures and items not subject to the lien of the plaintiff's mortgage, which personal property if not removed shall be deemed abandoned and shall be removed by the plaintiff or its agents from the subject property by placing said property on the public street or highway or by any other means.

8. An Order be entered granting the appointment of a Receiver to secure and supervise the rental of the property sought to be foreclosed with authority to take possession thereof and collect rents, issues and profits thereon during the pendency of this action and to hold the same as further security for Plaintiff's debt.

9. An Order be entered for reimbursement of all costs for inspecting and securing the property incurred by the plaintiff as a result of the delinquency.

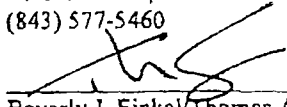
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10. An Order be entered for such other and further relief as may be just and proper.

FINKEL LAW FIRM LLC
P.O. Box 71727
N. Charleston, SC 29415
(843) 577-5460

H5
TB

By:


Beverly J. Finkel/Thomas A. Shook/ -
Susan S. White/Joseph T. Merli/
Andrew M. Wilson
Attorneys for Plaintiff

October 7, 2008

51560 F222628

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust 2004-1,

PLAINTIFF,

vs.

Rachel R. Lindsay, *et al.*,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2008-CP-183543

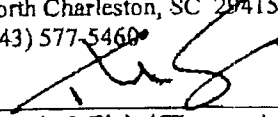
**CERTIFICATE OF
EXEMPTION/WITHDRAWAL FROM
ARBITRATION AND MEDIATION**

2008 OCT -8 PM 1:13

I CERTIFY THAT THIS ACTION IS EXEMPT FROM ARBITRATION BECAUSE:

- ☐ Monetary relief requested in this case exceeds \$25,000;
- ☐ This is a class action;
- ☐ There is a substantial claim for injunction or declaratory relief requested in this case;
- ☒ This case involves (check one or more of the following):
 - ☐ Title to real estate;
 - ☐ Wills, trusts and decedents' estates;
 - ☒ Mortgage foreclosure;
 - ☐ Partition;
- ☐ This is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
- ☐ Monetary relief requested in this case is unspecified but exceeds \$25,000;
- ☐ This case is a companion or related to similar actions pending in other courts with which the action might be consolidated but for lack of jurisdiction or venue;
- ☐ This action is appellate in nature;
- ☐ This is a post-conviction relief matter;
- ☐ This is a forfeiture proceeding brought by the State; or
- ☐ This is a contempt of Court proceeding.

FINKEL LAW FIRM LLC
P.O. Box 71727
North Charleston, SC 29415
(843) 577-5460

By: 

Beverly J. Finkel/Thomas A. Shook -
Susan S. White/Joseph T. Merli/
Andrew M. Wilson
Attorneys for Plaintiff

October 7, 2008



FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville, Hampton,
Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

**SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN
ALTERNATE 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 on 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 the 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.

**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.**

**NOTICE REQUIRED BY THE FAIR DEBT
COLLECTION PRACTICES ACT, (THE 'ACT')
15 U.S.C. SECTION 1601, AS AMENDED**

1. As of October 21, 2008, you owe \$149,151.05. Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection. For further information, write or call as directed in Paragraph 6 of this Notice.
2. The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust 2004-1 is the Creditor to whom the debt is owed.
3. The debt described in this Notice will be assumed to be valid by the Creditor's law firm unless you, the Debtor, within thirty (30) days after receipt of this notice, dispute, in writing, the validity of the debt or some portion thereof.
4. If you, the Debtor, notify the Creditor's law firm in writing, thirty (30) days from 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 the Debtor by the Creditor's law firm.
5. If the Creditor named in the attached letter is not the original Creditor, and if you make a written request to the Creditor's law firm thirty (30) days, the name and address of the original Creditor will be mailed to you by the Creditor's law firm.
6. Written requests should be addressed to Finkel Law Firm LLC, Post Office Box 71727, N. Charleston, SC 29415, or call (843) 577-5460.
7. This notice should not be construed as a thirty (30) day grace period. Creditor may pursue collection efforts immediately and not wait thirty (30) days.

**THIS IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED
WILL BE USED FOR THAT PURPOSE**

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust 2004-1,

PLAINTIFF,

vs.

Rachel R. Lindsay, *et al.*,

DEFENDANT(S).

Submitted By: ☐ Beverly J. Finkel SC Bar #: 9794
☒ Thomas A. Sbook SC Bar #: 68340
☐ Susan S. White SC Bar #: 5453
☐ Joseph T. Merli SC Bar #: 3943
☐ Andrew M. Wilson SC Bar #: 72553
Address: P.O. Box 71727 Telephone #: (843) 577-5460
N. Charleston, SC 29415 Fax #: (843) 725-0015
Other:
Email: BFinkel@finkelaw.com

Note: 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 required 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 defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check one box below)

- ☐ JURY TRIAL demanded in complaint
☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR (certificate attached).

NATURE OF ACTION
(Check one box below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	Tort-Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) ☐ Notice/File Med Mal (230) ☐ Other (299)	Tort-Personal Injury ☐ Assault/Stander/Libel (300) ☐ Conversion (310) ☒ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☒ Eminent Domain (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Other (799)	Administrative Law/Relief ☐ Reinstatement Driver's License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture - Position (840) ☐ Forfeiture - Consent Order (850) ☐ Other (899)	Appeals ☐ Arbitration (900) ☐ Magistrate - Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Administrative Law Judge (980) ☐ Public Service Commission (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex/Other ☐ Environmental (600) ☐ Automobile Acc. (610) ☐ Medical (620) ☐ Other (699)			
☐ Pharmaceuticals (630) ☒ Unfair Trade Practices (640) ☐ Out of State Depositions (650) ☐ Sexual Predator (610)			

** Check only if Summons & Complaint to follow in 30 days

Submitting Party Signature: _____

Date: October 7, 2008

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq. SCCA / 234 (4/08)

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust 2004-1,

PLAINTIFF,

vs.

Rachel R. Lindsay; Jeffrey Wayner; Tammy
Wayner; Tiffany R. Spann-Wilder, Esq.; The
Steinberg Law Firm; United States of America
acting by and through its agency, the Internal
Revenue Service; and South Carolina
Department of Revenue,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS
C/A NO: 08-CP-18-2543

(NON-JURY MORTGAGE FORECLOSURE)

STIPULATION OF DISMISSAL OF
FORECLOSURE ACTION AND
CANCELLATION OF LIS PENDENS

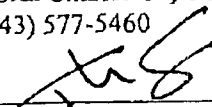
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2009 APR -2 AM 10:13
CLERK OF COURT
DORCHESTER COUNTY

The within matter having been settled, the undersigned attorneys for the Plaintiff and for the
Answering Defendant, United States of America acting by and through its agency, the Internal Revenue
Service; and South Carolina Department of Revenue, and Rachel R. Lindsay being all parties who have
appeared in the above entitled action, hereby stipulate that the above entitled foreclosure action against
the Defendants herein is hereby dismissed without prejudice.

The Clerk of Court of Common Pleas for Dorchester County, South Carolina, is hereby requested
to enter this stipulation of Dismissal on the records of the Court and to cancel the Lis Pendens filed in this
matter on October 8, 2008.

FINKEL LAW FIRM LLC
P.O. Box 71727
North Charleston, SC 29415
(843) 577-5460

By:


Beverly J. Finkel/Thomas A. Shook
Susan S. White/Joseph T. Merli
Andrew M. Wilson
Attorneys for Plaintiff

March 20, 2009

51560.F22263A

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust 2004-1,

PLAINTIFF,

vs.

Rachel R. Lindsay; Jeffrey Wayner; Tammy
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IN THE COURT OF COMMON PLEAS
C/A NO: 08-CP-18-2543

(NON-JURY MORTGAGE FORECLOSURE)

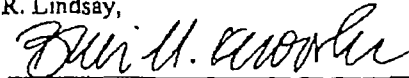
STIPULATION OF DISMISSAL
DISMISSING FORECLOSURE
ACTION AND CANCELLATION
OF LIS PENDENS

FILED-RECORDED
2009 APR -2 AM 10:13
CLERK OF COURT
DORCHESTER COUNTY

WE CONSENT:

Rachel R. Lindsay,

BY:



BRIAN M. KNOWLES

P.O. Box 50201

Summerville, SC 29485

Attorney for Defendant, Rachel R. Lindsay,

MAR 23 2009

51560.F22262R

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust 2004-1,

PLAINTIFF,

vs.

Rachel R. Lindsay; Jeffrey Wayner; Tammy
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DEFENDANTS

IN THE COURT OF COMMON PLEAS
C/A NO: 08-CP-18-2543

(NON-JURY MORTGAGE FORECLOSURE)

STIPULATION OF DISMISSAL
DISMISSING FORECLOSURE
ACTION AND CANCELLATION
OF LIS PENDENS

FILED-RECORDED
2009 APR -2 AM 10:13
CLERK OF COURT
NORCHESER COUNTY

WE CONSENT:

South Carolina Department of Revenue,

BY:



Ronald W. Urban, Esquire

Chief Counsel for Litigation

P.O. Box b12265

Columbia, SC 29211

Attorneys for Defendant, South Carolina Department of Revenue

51166F22262R.7

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust 2004-1,

PLAINTIFF,

vs.

Rachel R. Lindsay; Jeffrey Wayner; Tammy
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DEFENDANTS

IN THE COURT OF COMMON PLEAS
C/A NO: 08-CP-18-2543

(NON-JURY MORTGAGE FORECLOSURE)

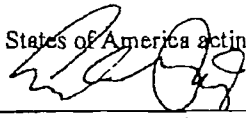
STIPULATION OF DISMISSAL
DISMISSING FORECLOSURE
ACTION AND CANCELLATION
OF LIS PENDENS

FILED-RECORDED
2009 APR -2 AM 10:13
CLERK OF COURT
DORCHESTER COUNTY

WE CONSENT:

The United States of America acting by and through its agency, the Internal Revenue Service,

BY:


~~J. Douglas Barnett~~, LEE E. BERLIN
Assistant U. S Attorney
1441 Main Street, Suite 500
Columbia, SC 29201

51560 F22162R

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

☒ The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust 2004-1,

PLAINTIFF,

vs.

☐ Rachel R. Lindsay; Jeffrey Wayner; Tammy Wayner; Tiffany R. Spann-Wilder, Esq.; The Steinberg Law Firm; United States of America acting by and through its agency, the Internal Revenue Service; and South Carolina Department of Revenue, et. al.,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS
C/A NO: 08-CP-18-2543

(NON-JURY MORTGAGE FORECLOSURE)

2009 APR - 2 AM 10:13
CLERK OF COURT
DORCHESTER COUNTY, SC

check box above indicating submitting party name, S.C. Bar number and address of plaintiff's attorney ☐ Beverly J. Finkel SC Bar #: 9794 ☒ Thomas A. Shook SC Bar #: 68340 ☐ Susan S. White SC Bar #: 5453 ☐ Joseph T. Merli SC Bar #: 3943 ☐ Andrew M. Wilson SC Bar #: 72553 FINKEL LAW FIRM LLC PO Box 71727 N. Charleston, SC 29415 telephone: (843) 577-5460 fax: (843) 725-0015 e-mail: bfinkel@finkellaw.com		name, S.C. Bar number and address of defendant's attorney telephone: fax: e-mail:
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete Sections II and III)		
SECTION I: Hearing Information Nature of Motion: Stipulation of Dismissal Estimated Time Needed: _____ Court Reporter Needed: ☐ YES ☒ NO		
SECTION II: Motion Type ☐ Written Motion attached ☒ Form Motion: I hereby move for relief or action by the court as set forth in the attached proposed order. Signature of Attorney: _____ Date Submitted: <u>3/20</u>		
SECTION III: Motion Type ☒ PAID - AMOUNT: \$1.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☒ Other:		
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order ☐ Other: _____ JUDGE: _____ CODE: _____ DATE: _____		
CLERK'S VERIFICATION Collected by: _____ (print name) ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____		

ROA_00045

App. 50

51560F22262RR

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust, Series 2004-1,

PLAINTIFF,

vs.

Rachel R. Lindsay; Jeffrey Wayner; Tammy
Wayner; Tiffany Spann-Wilder, Esq.; The
Steinberg Law Firm; and United States of
America acting by and through its agency, the
Internal Revenue Service,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS

C/A NO: 2009-CP-18-1311

LIS PENDENS

(NON-JURY MORTGAGE FORECLOSURE)

CERTIFIED COPY
2009 MAY 13 PM 1:47
Clerk of Court
DORCHESTER COUNTY

NOTICE IS HEREBY GIVEN that an action has been commenced and is now pending in this court upon Complaint of the above-named Plaintiff against the above-named Defendant(s) for foreclosure of a certain mortgage of real estate given by Rachel R. Lindsay to Mortgage Electronic Registration Systems, Inc. as nominee for Universal Mortgage Consulting, LLC in the amount of \$140,250.00, dated February 13, 2004, and recorded in the Office of the Register of Deeds for Dorchester County in Book 4015 at Page 266 on February 26, 2004.

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

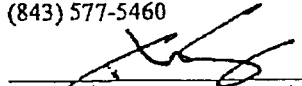
All that certain piece, parcel or lot of land, together with all buildings and improvements thereon, situate, lying and being in the County of Dorchester, State of South Carolina, and known and designated as Lot 16, Block 13, King's Grant on the Ashley, as shown on a plat of Section Two of King's Grant on the Ashley by C. Robert Jennings, RLS dated November 1972, and recorded in Plat Book 20, at Page 72, in the RMC Office for Dorchester County.

TMS#: 171 06 01 016 000

Property Address: 503 Fairington Dr., Summerville, SC

FINKEL LAW FIRM LLC
Post Office Box 71727
North Charleston, South Carolina 29415
(843) 577-5460

By:


Beverly J. Finkel/Thomas A. Shook-
Susan S. White/Joseph T. Merli
Andrew M. Wilson
Attorneys for Plaintiff

May 11, 2009

ROA_00046

App. 51

51560.F22262RR

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust, Series 2004-1,

PLAINTIFF,

VS.

Rachel R. Lindsay; Jeffrey Wayner; Tammy
Wayner; Tiffany Spann-Wilder, Esq.; The
Steinberg Law Firm; and United States of
America acting by and through its agency,
the Internal Revenue Service,

DEFENDANT(S).

TO THE ABOVE NAMED DEFENDANT(S):

IN THE COURT OF COMMON PLEAS
C/A NO: 2009-CP-18-1311

SUMMONS AND NOTICES

(NON-JURY MORTGAGE FORECLOSURE)

CERTIFIED COPY
2009 MAY 13 PM 1:17
Clerk of Court
DORCHESTER COUNTY

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, or to otherwise appear and defend, and to serve a copy of your Answer to said Complaint upon the subscribers at their office, 3955 Faber Place, Suite 200, P.O. Box 71727, North Charleston, South Carolina, 29415, or to otherwise appear and defend the action pursuant to applicable court rules, within thirty (30) days after 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 such service; and if you fail to answer the Complaint or otherwise appear and defend within the time aforesaid, the Plaintiff in this action will apply to the Court for relief demanded therein, and judgment by default will be rendered against you for the relief demanded in the Complaint.

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) RESIDE(S), 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 the Plaintiff.

YOU WILL ALSO TAKE NOTICE that pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure, as amended effective September 1, 2002, the Plaintiff will move for a general Order of Reference to the Master in Equity for Dorchester County, which Order shall, pursuant to Rule 53(b) of the

#1/1

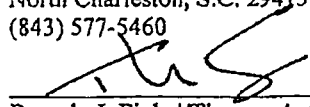
5

SCRCP, specifically provide that the said Master in Equity is authorized and empowered to enter a final judgment in this action.

FINKEL LAW FIRM LLC
P.O. Box 71727
North Charleston, S.C. 29415
(843) 577-5460

#2 / TS

By:


Beverly J. Finkel/Thomas A. Shook -
Susan S. White/Joseph T. Merli
Andrew M. Wilson
Attorneys for Plaintiff

May 11, 2009

6

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust, Series 2004-1,

PLAINTIFF,

vs.

Rachel R. Lindsay; Jeffrey Wayner; Tammy
Wayner; Tiffany Spann-Wilder, Esq.; The
Steinberg Law Firm; and United States of
America acting by and through its agency, the
Internal Revenue Service,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS

C/A NO: 2009-CP-18-1311

COMPLAINT

(NON-JURY MORTGAGE FORECLOSURE)

CERTIFIED COPY
2009 MAY 13 PM 1:17
Clerk of Court
DORCHESTER COUNTY

The Plaintiff alleges as follows:

1. The Plaintiff is a corporation or other legal entity doing business in the State of South Carolina.
2. The Plaintiff is the owner and holder of the note and mortgage covering real property, which is the subject of the foreclosure action herein, located in the County of Dorchester, State of South Carolina.
3. The defendant(s) named herein may have an interest in the property that is the subject of this action.
4. Any defendant(s) described herein as Judgment Creditor(s) have by filing judgment(s) designated the attorney(s) entering the judgment(s) as their agent for service of process pursuant to the provisions of §15-35-840 of the South Carolina Code of Laws (1976 as amended).
5. Upon information and belief, the defendant(s) Rachel R. Lindsay is not in the military service of the United States of America pursuant to the provisions of the Servicemembers Civil Relief Act (2003).
6. On or about February 13, 2004, for value received, Rachel R. Lindsay executed and delivered to Universal Mortgage Consulting, LLC a certain promissory note in the sum of \$140,250.00, together with interest thereon at an adjustable rate pursuant to the terms of the note.
7. To secure the payment of the said note and debt, secured thereby, and in accordance with the terms and conditions thereof, on February 13, 2004, Rachel R. Lindsay executed and delivered to Mortgage Electronic Registration Systems, Inc. as nominee for Universal Mortgage Consulting, LLC, its successors and assigns, a mortgage covering the following described property:

4/13

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All that certain piece, parcel or lot of land, together with all buildings and improvements thereon, situate, lying and being in the County of Dorchester, State of South Carolina, and known and designated as Lot 16, Block 13, King's Grant on the Ashley, as shown on a plat of Section Two of King's Grant on the Ashley by C. Robert Jennings, RLS dated November 1972, and recorded in Plat Book 20, at Page 72, in the RMC Office for Dorchester County.

TMS #: 171 06 01 016 000

Property Address: 503 Fairington Dr., Summerville, SC

8. Thereafter the mortgage was recorded in the Office of the Register of Deeds for Dorchester County in book 4015 at page 266 on February 26, 2004.
9. The mortgage constitutes a first mortgage lien on the subject property.
10. By Assignment of Mortgage dated October 10, 2008, and recorded December 12, 2008, in Book 6888 at Page 123, in the Office of the Register of Deeds for Dorchester County, Mortgage Electronic Registration Systems, Inc. as nominee for Universal Mortgage Consulting, LLC assigned the subject note and mortgage to The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust 2004-1, the present lienholder and Plaintiff herein.
11. Pursuant to the terms of the mortgage, any sums paid by the plaintiff for inspecting and securing the subject property, for fire and other hazard insurance, taxes and assessments for the mortgaged premises, and any costs of collection, including reasonable attorney's fees, are secured by the mortgage.
12. According to the terms of said mortgage, and as additional security, Rachel R. Lindsay assigned all rents, issues and profits of the mortgaged premises from and after any default thereunder, and should legal proceedings be instituted pursuant to said mortgage, the mortgagee, its successors and assigns, was given the right to have a Receiver appointed of the rents, issues and profits, who, after deducting all charges and expenses attending such proceedings, and the execution of his trust as a Receiver, shall apply the residue of the rents, issues and profits, towards the debt secured by said mortgage.
13. The monthly payments due on said note and mortgage are in default since March 1, 2008, although demand for payment thereof has been made and the plaintiff, as the holder of the said note and mortgage, after providing all required notices, elects to, and does declare the entire balance of said indebtedness due and payable, and that there is due on said note and mortgage as of March 1, 2008, the sum of \$139,255.39, together with interest at an adjustable rate pursuant to the terms of the note, from February 1, 2009, and also for the costs and disbursements of this action, including attorney's fees.
14. Pursuant to Sections 37-3-105, South Carolina Code of Laws (1976 as amended), the mortgage lien, which is the subject of this action, is a first lien on real estate and is not a 'consumer loan'

#2/B

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for the purposes of the South Carolina Consumer Protection Code. *Any* notice of right to cure has been given as required.

15. The Plaintiff does not demand a deficiency judgment in the event the sale of the real estate herein does not yield a sum sufficient to satisfy all indebtedness due unto the plaintiff, including costs and attorney's fees.

16. The following defendants claim, or may claim a lien upon or interest in the subject property as follows:

- (a) Jeffrey Wayner and Tammy Wayner, by virtue of a judgment against Rachel Lindsay and P & L Property Management, filed November 25, 2002, Civil Action Number 2002-CP-18-1877, in the amount of \$2,943.00;
- (b) Tiffany R. Spann-Wilder, Esq. and The Steinberg Law Firm, by virtue of a judgment against Rachel Lindsay and P & L Property Management, filed November 25, 2002, Civil Action Number 2002-CP-18-1877, in the amount of \$1,500.00;

The above-referenced judgments no longer constitute liens against the subject property.

- (c) United States of America acting by and through its agency, the Internal Revenue Service, by virtue of a Notice of Federal Tax Lien against Rachel R. Lindsay, recorded October 4, 2004, Tax Lien Number 193092504 in book 15 at page 419, in the amount of \$7,668.55.

The interest or lien of the above defendant, if any, is junior and subordinate to the Plaintiff's first mortgage lien

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

1. The amount due upon the said note and mortgage held by Plaintiff be ascertained and determined under the direction of this Court, together with attorney's fees and the costs of this action.
2. The said Plaintiff's Mortgage be declared a first mortgage lien and that the said Plaintiff have judgment of foreclosure for the amount so found to be due and owing thereon, together with any taxes or insurance premiums which may be due, with a reasonable sum as attorney's fees and for the costs of this action.
3. The judgment recorded in Judgment Roll Number: 2002-CP-18-1877, held by Defendant Jeffrey Wayner, be declared paid and satisfied but not satisfied of record, and that it does not constitute a lien against the subject property
4. The judgment recorded in Civil Action Number 2002-CP-18-1877, held by defendants Tiffany R. Spann-Wilder, Esq. and The Steinberg Law Firm, be declared that it does not constitute a lien against the subject property.

#3/
13

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5. The mortgaged premises be sold under the direction of this Court, the equity of redemption be barred, and that the proceeds of sale be applied 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 the attorney's fees as aforesaid, and

Third, the surplus, if any be distributed according to law.

6. An Order be entered directing and empowering the Sheriff of Dorchester County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the property hereinabove described should the same become necessary.

7. An Order be entered for the ejectment of the defendants in possession herein and all persons claiming thereunder and the removal therefrom of all furnishings, fixtures and items not subject to the lien of the plaintiff's mortgage, which personal property if not removed shall be deemed abandoned and shall be removed by the plaintiff or its agents from the subject property by placing said property on the public street or highway or by any other means.

8. An Order be entered granting the appointment of a Receiver to secure and supervise the rental of the property sought to be foreclosed with authority to take possession thereof and collect rents, issues and profits thereon during the pendency of this action and to hold the same as further security for Plaintiff's debt.

9. An Order be entered for reimbursement of all costs for inspecting and securing the property incurred by the plaintiff as a result of the delinquency.

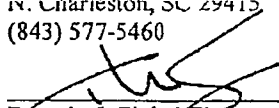
10. An Order be entered for such other and further relief as may be just and proper.

FINKEL LAW FIRM LLC

P.O. Box 71727

N. Charleston, SC 29415

(843) 577-5460

By: 

Beverly J. Finkel/Thomas A. Shook/

Susan S. White/Joseph T. Merli/

Andrew M. Wilson

Attorneys for Plaintiff

#4
13

May 11, 2009

10

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust, Series 2004-1,

PLAINTIFF,

vs.

Rachel R. Lindsay, *et al.*,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2009-CP-18-1311

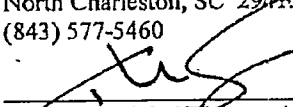
**CERTIFICATE OF
EXEMPTION/WITHDRAWAL FROM
ARBITRATION AND MEDIATION**

CERTIFIED COPY
 2009 MAY 13 PM 1:17
 Clerk of Court
 DORCHESTER COUNTY

I CERTIFY THAT THIS ACTION IS EXEMPT FROM ARBITRATION BECAUSE:

- ☐ Monetary relief requested in this case exceeds \$25,000;
- ☐ This is a class action;
- ☐ There is a substantial claim for injunction or declaratory relief requested in this case;
- ☒ This case involves (check one or more of the following):
 - ☐ Title to real estate;
 - ☐ Wills, trusts and decedents' estates;
 - ☒ Mortgage foreclosure;
 - ☐ Partition;
- ☐ This is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
- ☐ Monetary relief requested in this case is unspecified but exceeds \$25,000;
- ☐ This case is a companion or related to similar actions pending in other courts with which the action might be consolidated but for lack of jurisdiction or venue;
- ☐ This action is appellate in nature;
- ☐ This is a post-conviction relief matter;
- ☐ This is a forfeiture proceeding brought by the State; or
- ☐ This is a contempt of Court proceeding.

FINKEL LAW FIRM LLC
P.O. Box 71727
North Charleston, SC 29415
(843) 577-5460

By: 

Beverly J. Finkel/Thomas A. Shook -
Susan S. White/Joseph T. Merli
Andrew M. Wilson
Attorneys for Plaintiff

May 11, 2009

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust, Series 2004-1,

PLAINTIFF,

vs.

Rachel R. Lindsay, et al.,

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2009-CP-18-1311

CERTIFIED COPY
2009 MAY 13 PM 1:17
Clerk of Court
DORCHESTER COUNTY

DEFENDANT(S).

Submitted By: ☐ Beverly J. Finkel SC Bar #: 9794
☒ Thomas A. Shook SC Bar #: 68340
☐ Susan S. White SC Bar #: 5453
☐ Joseph T. Merli SC Bar #: 3943
☐ Andrew M. Wilson SC Bar #: 72553
Address: P.O. Box 71727 Telephone #: (843) 577-5460
N. Charleston, SC 29415 Fax #: (843) 725-0015
Other:
Email: Bfinkel@finkellaw.com

Note: 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 required 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 defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check one box below)

*If Action is Judgment/Settlement do not complete

- ☐ 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 on box below)

☐ Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	☐ Tort-Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) ☐ Notice/File Med Mal (230) ☐ Other (299)	☐ Tort-Personal Injury ☐ Assault/Slander/Label (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	☐ Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☒ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
☐ Inmate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	☐ Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Other (799)	☐ Administrative Law/Relief ☐ Reinstate Driver's License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Foreclosure - Petition (840) ☐ Forfeiture - Consent Order (850) ☐ Other (899)	☐ Appeals ☐ Arbitration (900) ☐ Magistrate - Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Administrative Law Judge (980) ☐ 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 Depositions (650) ☐ Sexual Predator (510)		

Submitting Party Signature: _____

Date: May 11, 2009

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.
 SCCA / 234 (3/09)

FOR MANDATED ADR COUNTIES ONLY
Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN
ALTERNATE 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 on 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. Case are exempt from the 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.

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.

**NOTICE REQUIRED BY THE FAIR DEBT
COLLECTION PRACTICES ACT, (THE 'ACT')
15 U.S.C. SECTION 1601, AS AMENDED**

1. As of June 5, 2009, you owe \$158,526.03. Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection. For further information, write or call as directed in Paragraph 6 of this Notice.
2. The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 is the Creditor to whom the debt is owed.
3. The debt described in this Notice will be assumed to be valid by the Creditor's law firm unless you, the Debtor, within thirty (30) days after receipt of this notice, dispute, in writing, the validity of the debt or some portion thereof.
4. If you, the Debtor, notify the Creditor's law firm in writing, thirty (30) days from 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 the Debtor by the Creditor's law firm.
5. If the Creditor named in the attached letter is not the original Creditor, and if you make a written request to the Creditor's law firm thirty (30) days, the name and address of the original Creditor will be mailed to you by the Creditor's law firm.
6. Written requests should be addressed to Finkel Law Firm LLC, Post Office Box 71727, N. Charleston, SC 29415, or call (843) 577-5460.
7. This notice should not be construed as a thirty (30) day grace period. Creditor may pursue collection efforts immediately and not wait thirty (30) days.

**THIS IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED
WILL BE USED FOR THAT PURPOSE**

11

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
2009-CP-18-1311

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust, Series 2004-1,

PLAINTIFF.

vs.

Rachel R. Lindsay; Jeffrey Wayner; Tammy
Wayner; Tiffany Spann-Wilder, Esq.; The
Steinberg Law Firm; and United States of
America acting by and through its agency, the
Internal Revenue Service,

DEFENDANT(S).

RACHEL R. LINDSAY,

Third-Party Plaintiff,

vs.

SAXON MORTGAGE SERVICES,
INC.,

Third-Party Defendant.

ANSWER, COUNTERCLAIM, AND
THIRD-PARTY COMPLAINT OF
DEFENDANT RACHEL R. LINDSAY

JURY TRIAL DEMANDED

CERTIFIED COPY
2009 JUN 16 PM 4:47
CLERK OF DISTRICT
COURT
DORCHESTER COUNTY

COMES NOW the Defendant RACHEL R. LINDSAY for her Answer to the Complaint of Plaintiff, denying each and every allegation of the Plaintiff's Complaint not hereinafter specifically admitted, qualified, or explained, demanding strict proof thereof. Specifically reserving and without waiving all objections, defenses, and rights responds to the Plaintiff's Complaint as follows:

1. The Defendant, on information and belief, admits the allegations contained in Paragraphs 1 and 2.
2. The Defendant denies the allegation contained in Paragraph 3, in that Rachel R. Lindsay is the fee simple owner of the subject matter property via deed and would allege that no other Defendant has an interest in the subject matter property; therefore, the Defendant demands strict proof thereof.
3. The Defendant, on information and belief, admits the allegations contained in Paragraphs 4, 5, 6, 7, 8, 9, and 10.
4. The Defendant is without sufficient information to either admit or deny the allegations contained in Paragraphs 11 and 12 of the Plaintiff's Complaint and therefore denies the same demanding strict proof thereof.
5. The Defendant denies the allegations contained in Paragraph 13, demanding strict proof thereof.
6. The Defendant is without sufficient information to either admit or deny the allegation contained in Paragraph 14 of the Plaintiff's Complaint and therefore denies the same demanding strict proof thereof.
7. The allegations contained in Paragraph 15 of the Plaintiff's Complaint, requires no legal response.
8. The Defendant denies the allegation contained in Paragraph 16 of the Plaintiff's Complaint, as a Satisfaction of Judgment filed in recent months in the Dorchester County Clerk of Court Office reflects that these named Defendants would not and are not claiming a lien upon the subject matter property; therefore, the Defendant demands strict proof thereof.

FURTHER ANSWERING SAID COMPLAINT AND AS A
MOTION THERETO,
THE DEFENDANT ALLEGES AND SAYS:

FOR A FIRST MOTION
(Motion to Dismiss 12(b)(6))

9. The Plaintiff has failed to state facts sufficient to constitute a cause of action against the Defendant.

FURTHER ANSWERING SAID COMPLAINT AND AS
FURTHER AFFIRMATIVE DEFENSES THERETO,
THIS DEFENDANT ALLEGES AND SAYS:

FOR A FIRST AFFIRMATIVE DEFENSE
(Laches)

10. The Defendant pleads the doctrine of laches as a complete bar to the Plaintiff's claims.

FOR A SECOND AFFIRMATIVE DEFENSE
(Waiver)

11. The Defendant pleads the doctrine of waiver as a complete bar to the Plaintiff's claims.

FOR A THIRD AFFIRMATIVE DEFENSE
(Estoppel)

12. That by the Plaintiff's actions, it is estopped and/or has waived any rights it has against the Defendant.

FOR A FIFTH AFFIRMATIVE DEFENSE
(Mitigation of Damages)

13. The Plaintiff has failed to exercise reasonable diligence in mitigating the damages it claims to have suffered at the hands of the Defendant.

FOR A SIXTH AFFIRMATIVE DEFENSE

(Comparative Negligence)

14. Upon information and belief, the injuries, damages, and/or losses (if any, which the Defendant strictly denies) sustained by Plaintiff was directly and proximately caused by and contributed to by Plaintiff's own negligence and comparative fault, and therefore its recovery (if any, which the Defendant strictly denies) should be diminished, reduced, offset, or barred in accordance with the principles of comparative fault.

FOR A SEVENTH AFFIRMATIVE DEFENSE
(Negligence of Others)

15. That the Defendant would allege and show that any injury and damage, if any, was proximately caused by the intervening and superseding acts of negligence, willfulness and gross negligence of parties and/or non-parties other than this Defendant.

FOR A EIGHTH AFFIRMATIVE DEFENSE
(Actions of others not within the employ or control caused damages)

16. The Defendant would show upon information and belief that any damages or injuries, if any, are due to acts and/or omissions not within the employ or control of the Defendant and therefore the Plaintiff cannot recover from the Defendant in any sum whatsoever.

FOR A NINTH AFFIRMATIVE DEFENSE
(Sole Negligence)

17. That whatever injuries or damages incurred by the Plaintiff, if any, were due to, caused by and were the direct and proximate result of the sole negligence, recklessness, willfulness, and wantonness of the Plaintiff.

FOR A TENTH AFFIRMATIVE DEFENSE
(Incorrect Accounting)

18. Defendant would show that if any sums are owed to Plaintiff, which is denied, then the

amount owed is other than as stated in the Complaint; consequently, this Court should make a complete accounting of all sums allegedly due under the instruments referenced in the Complaint.

FOR AN ELEVENTH AFFIRMATIVE DEFENSE
(Accord and Satisfaction)

19. The Defendant would show that the Complaint is barred by the doctrine of accord and satisfaction.

ALLEGATIONS COMMON TO COUNTER-CLAIMS & THIRD-PARTY COMPLAINT

THIRD-PARTY DEFENDANT

20. Upon information and belief, Third-Party Defendant Saxon Mortgage Services, Inc. is a foreign corporation, which regularly conducts business in the State of South Carolina.

JURISDICTION/VENUE

21. The causes of action and counter-claims arose in the Plaintiff and Third-Party Defendant's conducting of business with Defendant/Third-Party Plaintiff in Dorchester County within the jurisdiction of this Court pursuant to the applicable subparts of South Carolina Code § 15-7-30 and § 36-2-803.

22. The Dorchester County Court of Common Pleas, First Judicial Circuit, is the proper venue for this matter.

COMMON FACTS

23. Saxon Mortgage Services, Inc., Third-Party Defendant, acts as the servicer for the mortgage loan of the Plaintiff, being the subject matter of this action.

24. At all times herein mentioned, said Third-Party Defendant acted as agents or apparent agents of the Plaintiff; all acts of said Third-Party Defendant were within the scope of their authority or agency, and/or were ratified by the Plaintiff, including the doctrine of *respondeat superior*.

25. On or about the early spring or summer of 2008, Defendant/Third-Party Plaintiff provided payment to the Plaintiff via Third-Party Defendant in the amount of approximately \$6,557.04 to be applied to prior late payments.

26. At any time has either Third-Party Defendant or the Plaintiff in this matter applied this payment to Defendant/Third-Party Plaintiff's account.

27. The above-mentioned payment cleared Defendant/Third-Party Plaintiff's bank on or about June 19, 2008.

28. On or about the Fall of 2008 in case number 2008-CP-18-2543, the Plaintiff in this instant action brought a foreclosure suit against the same parties as in this matter, which resulted in a judgment against the Defendant/Third-Party Plaintiff.

29. Defendant/Third-Party Plaintiff would allege and state that she did not receive notice or service of the Summons and Complaint or notices of hearing(s) in this prior case.

30. Upon Defendant/Third-Party Plaintiff's retention of present counsel, Third-Party Defendant acknowledged the aforementioned payment had not been properly applied and agreed to apply this previously made payment to Defendant/Third-Party Plaintiff's account in or around the first months of 2009.

31. Plaintiff dismissed the prior foreclosure action by Stipulation of Dismissal of Foreclosure Action and Cancellation of Lis Pendens dated March 20, 2009 and filed on April 2, 2009.

32. Defendant/Third-Party Plaintiff along with present counsel spoke on numerous instances via

telephone and e-mail regarding correction of Defendant/Third-Party Plaintiff's account.

33. Third-Party Defendant supervisor and employee, Sharon Cotton, indicated via numerous e-mails that this payment would be applied to Defendant/Third-Party Plaintiff's account.

34. Upon information and belief, the Plaintiff and Third-Party Defendant have failed to properly apply payments to Defendant/Third-Party Plaintiff's account.

35. Defendant/Third-Party Plaintiff has made additional monthly payments to Plaintiff via Third-Party Defendant.

36. Third-Party Defendant and Plaintiff have failed to apply these additional monthly loan payments to Defendant/Third-Party Plaintiff's account.

37. Plaintiff and Third-Party Defendant have refused to modify Defendant/Third-Party Plaintiff's loan after numerous discussions and requests for the same.

38. Third-Party Defendant and Plaintiff have reported negative/late payments and foreclosure on now two instances upon Defendant/Third-Party Plaintiff's credit report.

39. Defendant/Third-Party Plaintiff has suffered a myriad of damages, attorney fees, costs, expenses, emotional distress, damage to her credit report, and other harm due to the improper actions/inactions of the Plaintiff and Third-Party Defendant.

**FOR A FURTHER AFFIRMATIVE DEFENSE, COUNTER-CLAIM, AND FIRST
CAUSE OF ACTION UNDER THIRD-PARTY COMPLAINT
AGAINST PLAINTIFF THE BANK OF NEW YORK MELLON, AS SUCCESSOR
TRUSTEE UNDER NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2004-1 AND
SAXON MORTGAGE SERVICES, INC.
(Breach of Contract – Plaintiff and Third-Party Defendant)**

40. Defendant/Third-Party Plaintiff realleges and incorporates herein by reference the allegations set forth above.

41. As evidenced by the referenced Promissory Note in Plaintiff's Complaint, Plaintiff entered into a written agreement with the Defendant/Third-Party Plaintiff.

42. The Plaintiff accepted the offer of the Defendant/Third-Party Plaintiff to make monthly payments at a variable rate for a fixed term.

43. A Promissory Note is recognized as a contract under South Carolina law.

44. Plaintiff and Third-Party Defendants have breached this agreement/contract by failing to abide by the Promissory Note's terms and other applicable regulations, including but not limited to failing to apply Defendant/Third-Party Plaintiff's monthly payments to Defendant/Third-Party Plaintiff's account and crediting Defendant/Third-Party Plaintiff with the same.

45. As a result of the Plaintiff's breach of the Agreement, the Defendant/Third-Party Plaintiff has suffered damages.

46. The Defendant/Third-Party Plaintiff is entitled to actual, consequential, compensatory, and punitive damages, attorney fees, and court costs and expenses from the Plaintiff and Third-Party Defendant due to the Plaintiff and Third-Party Defendant's breach of contract.

**FOR A FURTHER AFFIRMATIVE DEFENSE AND COUNTER-CLAIM
(Negligence - Plaintiff)**

47. Defendant/Third-Party Plaintiff realleges and incorporates herein by reference the allegations set forth above.

48. Plaintiff owed a duty to ensure that Third-Party Defendant properly applies and credits debtors' payments to debtors' accounts, including Defendant/Third-Party Plaintiff.

49. Furthermore, Plaintiff owed a duty not to negatively report late payments of Defendant/Third-Party Plaintiff, when Defendant/Third-Party Plaintiff had properly and accurately made payments

owed for the same.

50. Plaintiff breached these duties by failing to ensure that Third-Party Defendant complied with its service to the Defendant/Third-Party Plaintiff.

51. The Plaintiff's breach of these duties was the proximate cause of the Defendant/Third-Party Plaintiff's damages.

52. The Defendant/Third-Party Plaintiff's damages were foreseeable as a result of the Plaintiff's wrongful instances of conduct.

53. The Defendant/Third-Party Plaintiff is entitled to recovery of damages, including but not limited to actual, compensatory, consequential, nominal, and punitive damages, attorney's fees, and court costs and expenses from the Plaintiff due to the Plaintiff's negligence.

**FOR A FURTHER AFFIRMATIVE DEFENSE, COUNTER-CLAIM, AND A SECOND
CAUSE OF ACTION
(Negligence -- Third-Party Defendant)**

54. Defendant/Third-Party Plaintiff realleges and incorporates herein by reference the allegations set forth above.

55. Third-Party Defendant owed a duty to ensure that it properly applies and credits debtors' payments to debtors' accounts, including Defendant/Third-Party Plaintiff.

56. Furthermore, Third-Party Defendant owed a duty not to negatively report late payments of Defendant/Third-Party Plaintiff, when Defendant/Third-Party Plaintiff had properly and accurately made payments owed.

57. Third-Party Defendant breached these duties by failing to ensure that Third-Party Defendant complied with its service to the Defendant/Third-Party Plaintiff, by failing to apply and credit Defendant/Third-Party Plaintiff's payments and by negatively reporting late payments of

Defendant/Third-Party Plaintiff to the credit bureaus.

58. The Third-Party Defendant's breach of these duties was the proximate cause of the Defendant/Third-Party Plaintiff's damages.

59. The Defendant/Third-Party Plaintiff's damages were foreseeable as a result of the Third-Party Defendant's wrongful instances of conduct.

60. The Defendant/Third-Party Plaintiff is entitled to recovery of damages, including but not limited to actual, compensatory, consequential, nominal, and punitive damages, attorney fees, and court costs and expenses from the Third-Party Defendant due to the Third-Party Defendant's negligence.

**FOR A FURTHER AFFIRMATIVE DEFENSE, COUNTER-CLAIM, AND A THIRD
CAUSE OF ACTION**

(Fraud/Fraud in the Inducement – Plaintiff and Third-Party Defendant)

61. Defendant/Third-Party Plaintiff realleges and incorporates herein by reference the allegations set forth above.

62. Plaintiff and Third-Party Defendant employees represented to the Defendant/Third-Party Plaintiff that the Defendant/Third-Party Plaintiff's loan payment in the amount of \$6,557.04 would be properly applied to Defendant/Third-Party Plaintiff's account.

63. Plaintiff and Third-Party Defendant falsely induced the Defendant/Third-Party Plaintiff to continue making monthly loan payments and that the Plaintiff and Third-Party Defendant's failure to apply the aforementioned payment would be corrected.

64. The Plaintiff and Third-Party Defendant's representation to Defendant/Third-Party Plaintiff was material in obtaining the continued monthly loan payment to the Plaintiff and Third-Party Defendant.

65. The Plaintiff and Third-Party Defendant either possessed actual knowledge and/or intent that it would not correct the unapplied loan payment and/or the Plaintiff and Third-Party Defendant had a reckless disregard for its obligations to do so for the Defendant/Third-Party Plaintiff.

66. The Plaintiff and Third-Party Defendant intended that the representation would in part cause the Defendant/Third-Party Plaintiff to continue to make payments to the Plaintiff and Third-Party Defendant.

67. The Defendant/Third-Party Plaintiff had no knowledge of the falsity of the Plaintiff and Third-Party Defendant's representation.

68. The Defendant/Third-Party Plaintiff relied on the accurateness and truthfulness of the Plaintiff and Third-Party Defendant's explicit representation to correct the unapplied funds to the Defendant/Third-Party Plaintiff's account.

69. The Defendant/Third-Party Plaintiff had a right to rely on the Plaintiff and Third-Party Defendant's explicit representation.

70. The Plaintiff and Third-Party Defendant's failure to abide by its obligations to the Defendant/Third-Party Plaintiff was the proximate cause of the Defendant/Third-Party Plaintiff's damages.

71. The Defendant/Third-Party Plaintiff is entitled to recovery of damages, including but not limited to actual, compensatory, consequential, nominal, and punitive damages, attorney fees, and court costs and expenses from the Plaintiff and Third-Party Defendant due to the Plaintiff and Third-Party Defendant's fraudulent act(s) and inducement.

**FOR A FURTHER AFFIRMATIVE DEFENSE, COUNTER-CLAIM, AND A FOURTH
CAUSE OF ACTION
(Negligent Misrepresentation – Plaintiff and Third-Party Defendant)**

72. Defendant/Third-Party Plaintiff realleges and incorporates herein by reference the allegations set forth above.

73. Plaintiff and Third-Party Defendant made a false representation to Defendant/Third-Party Plaintiff by agreeing to properly apply payments made pursuant to the Promissory Note and other applicable regulations.

74. Plaintiff and Third-Party Defendant had a pecuniary interest in making this statement, as Plaintiff and Third-Party Defendant had no intention of adhering to the terms of the Promissory Note and other applicable regulations or acted with recklessness and total disregard for its representation to do so.

75. The Plaintiff and Third-Party Defendant owed a duty of care to communicate its genuine intent in abiding by the terms of the Promissory Note and other applicable regulations.

76. The Plaintiff and Third-Party Defendant breached this aforementioned duty by falsely agreeing to apply the payments of the Defendant/Third-Party Plaintiff, when the Plaintiff and Third-Party Defendant's true intention was not to do so, and the Plaintiff and Third-Party Defendant's failure to do the same was a failure to exercise due care.

77. The Defendant/Third-Party Plaintiff justifiably relied upon the Plaintiff and Third-Party Defendant's representation continued to make payments related to the same.

78. The Plaintiff and Third-Party Defendant failed to abide by the terms of the Promissory Note and other applicable regulations.

79. The Defendant/Third-Party Plaintiff suffered a pecuniary loss as a result of this reliance.

80. The Defendant/Third-Party Plaintiff is entitled to recovery of damages, including but not limited to actual, compensatory, consequential, nominal, and punitive damages, attorney fees, and court costs and expenses from the Plaintiff and Third-Party Defendants due to the Plaintiff and Third-Party Defendant's negligent misrepresentation.

**FOR A FURTHER AFFIRMATIVE DEFENSE, COUNTER-CLAIM, AND A FIFTH
CAUSE OF ACTION
(Promissory Estoppel – Plaintiff and Third-Party Defendant)**

81. Defendant/Third-Party Plaintiff realleges and incorporates herein by reference the allegations set forth above.

82. Plaintiff and Third-Party Defendant agreed to properly apply Defendant/Third-Party Plaintiff's aforementioned payment.

83. The Defendant/Third-Party Plaintiff reasonably relied upon the Plaintiff and Third-Party Defendant's representations to do the same.

84. As a result of the Plaintiff and Third-Party Defendant's refusal to adhere to its obligation and promise to correctly and properly apply Defendant/Third-Party Plaintiff's aforementioned payment, Defendant/Third-Party Plaintiff has suffered damages.

85. The Defendant/Third-Party Plaintiff is entitled to recovery of damages, including but not limited to actual, compensatory, consequential, nominal, and punitive damages, attorney fees, and court costs and expenses from the Plaintiff and Third-Party Defendant due to the damages sustained by the Defendant/Third-Party Plaintiff's reliance upon the Plaintiff and Third-Party Defendant's representations.

**FOR A FURTHER AFFIRMATIVE DEFENSE, COUNTER-CLAIM, AND A SIXTH
CAUSE OF ACTION
(South Carolina Unfair Trade Practices Act -- Plaintiff and Third-Party Defendant)**

86. Defendant/Third-Party Plaintiff realleges and incorporates herein by reference the allegations set forth above.

87. The conducting of "trade or commerce" in the State of South Carolina is defined by South Carolina Code § 39-5-10, *et seq.*

88. The Plaintiff and Third-Party Defendant's above-described willful unfair and deceptive acts and practices in the conduct of trade or commerce resulted in a violation of the South Carolina Unfair Trade Practices Act Section 39-5-10, *et seq.*, as these acts occurred during an act of business affecting trade and commerce in the State of South Carolina and is against public policy, immoral, unethical, and/or oppressive.

89. The Plaintiff and Third-Party Defendant's above-described actions/inactions were willful violations of the South Carolina Unfair Trade Practices Act.

90. The Defendant/Third-Party Plaintiff suffered damages, attorney fees, and court costs and expenses as a result of these violations.

91. Furthermore, the Plaintiff and Third-Party Defendant's actions are not in the public interest and arguably directly and/or indirectly impact the public interest.

92. The possibility that these willful acts may in the future be repeated by Plaintiff and Third-Party Defendant with other South Carolina businesses and/or individuals is an impact upon the public interest, which must be protected.

93. The Plaintiff and Third-Party Defendants willful actions/inactions are immoral, unethical, and/or oppressive.

94. The Defendant/Third-Party Plaintiff is entitled to recovery of damages, including but not limited to actual, treble, compensatory, consequential, and nominal damages, attorney fees, and court costs and expenses from the Plaintiff and Third-Party Defendant due to the Plaintiff and Third-Party Defendant's acts in violation of the South Carolina Unfair Trade Practices Act.

**FOR A FURTHER AFFIRMATIVE DEFENSE, COUNTER-CLAIM, AND SEVENTH
CAUSE OF ACTION**

(Quantum Meruit/Unjust Enrichment – Plaintiff and Third-Party Defendant)

95. Defendant/Third-Party Plaintiff realleges and incorporates herein by reference the allegations set forth above.

96. The Defendant/Third-Party Plaintiff's monthly loan payments to the Plaintiff and Third-Party Defendant without the reciprocal return of the Plaintiff and Third-Party Defendants adherence to its obligations under the aforementioned Promissory Note and other applicable regulations was a benefit retained by the Plaintiff and Third-Party Defendant, resulting in the Plaintiff and Third-Party Defendant's unjust enrichment.

97. The Plaintiff and Third-Party Defendant have actual knowledge of the monetary benefit retained, unjustly enriching the Plaintiff and Third-Party Defendant.

98. As a matter of equity, the Plaintiff and Third-Party Defendant's retention of this monetary benefit is inequitable without the Plaintiff and Third-Party Defendant's adherence to the Promissory Note and other applicable regulations.

99. The Defendant/Third-Party Plaintiff is entitled to recovery of damages, including but not limited to actual, compensatory, consequential, nominal, and punitive damages, attorney fees, and court costs and expenses from the Plaintiff and Third-Party Defendant due the Plaintiff and Third-Party Defendant's unjust enrichment.

**FOR A FURTHER AFFIRMATIVE DEFENSE, COUNTER-CLAIM, AND EIGHTH
CAUSE OF ACTION
(Intentional Infliction of Emotional Distress/Outrage – Plaintiff and Third-Party
Defendant)**

100. Defendant/Third-Party Plaintiff realleges and incorporates herein by reference the allegations set forth above.

101. At all times during the incident alleged herein, Plaintiff and Third-Party Defendant acted intentionally or recklessly or was certain or substantially certain that distress would arise out of the Plaintiff and Third-Party Defendant's conduct.

102. Defendant/Third-Party Plaintiff avers that Plaintiff and Third-Party Defendant's conduct was extreme and outrageous, beyond all possible bounds of decency and utterly intolerable in a civilized community.

103. Defendant/Third-Party Plaintiff avers that she has become greatly distressed and concerned for her well-being and shelter, and that the actions of the Plaintiff and Third-Party Defendant were the cause of Defendant/Third-Party Plaintiff's distress.

104. The emotional distress sustained by Defendant/Third-Party Plaintiff is severe and of a nature that no reasonable person, could be expected to endure the treatment created and conducted by the Plaintiff and Third-Party Defendant.

105. As a result of the Plaintiff and Third-Party Defendant's extreme and outrageous conduct, Defendant/Third-Party Plaintiff was, is, and, with a high degree of likelihood, will continue to be emotionally distressed due to the intentional and unlawful foreclosure actions.

106. The Defendant/Third-Party Plaintiff is entitled to recovery of damages, including but not limited to actual, compensatory, consequential, nominal, and punitive damages, attorney fees, and

court costs and expenses from the Plaintiff and Third-Party Defendant due the Plaintiff and Third-Party Defendant's intentional infliction of emotional distress/outrage.

**FOR A FURTHER AFFIRMATIVE DEFENSE, COUNTER-CLAIM, AND A NINTH
CAUSE OF ACTION**

(Invasion of Privacy/Intrusion Upon Solitude – Plaintiff and Third-Party Defendant)

107. Defendant/Third-Party Plaintiff realleges and incorporates herein by reference the allegations set forth above.

108. Defendant/Third-Party Plaintiff alleges that the Plaintiff and Third-Party Defendant published false statements to the general members of the public via newspaper publications/notices and public filings of this instant action and the prior aforementioned foreclosure action stating that Defendant/Third-Party Plaintiff does not pay her mortgage and was and is in foreclosure.

109. The Defendant/Third-Party Plaintiff has a normal expectation that by making her monthly loan mortgage payments that her home and financial matters would be free from intrusion by the Plaintiff and Third-Party Defendant.

110. The Plaintiff and Third-Party Defendant's intentional invasion of privacy with public disclosure demonstrates a blatant and shocking disregard of the rights of the Defendant/Third-Party Plaintiff, and the Plaintiff and Third-Party Defendant's wrongful acts resulted in humiliation and mental injury to the Defendant/Third-Party Plaintiff.

111. The Defendant/Third-Party Plaintiff is entitled to recovery of damages, including but not limited to actual, compensatory, consequential, nominal, and punitive damages, attorney fees, and court costs and expenses from the Plaintiff and Third-Party Defendant due the Plaintiff and Third-Party Defendant's invasion of privacy/intrusion upon solitude.

**FOR FURTHER AFFIRMATIVE DEFENSE, COUNTER-CLAIM, AND A TENTH
CAUSE OF ACTION
(Defamation/Libel *Per Se* – Plaintiff and Third-Party Defendant)**

112. Defendant/Third-Party Plaintiff realleges and incorporates herein by reference the allegations set forth above.

113. Plaintiff and Third-Party Defendant invaded Defendant/Third-Party Plaintiff's interest in her good reputation by filing this present baseless foreclosure action and previously filing the aforementioned additional prior foreclosure action.

114. A foreclosure action implicitly and explicitly harms the foreclosed party's standing within the general public, including with other creditors and future creditors.

115. The Plaintiff and Third-Party Defendant's two filed foreclosure actions are in written form and published at the Dorchester County Clerk of Court and through newspaper publications of notices.

116. The aforementioned published documents are available for the general public to access and view.

117. The aforementioned published documents and the Plaintiff and Third-Party Defendant's false negative late payments to the Defendant/Third-Party Plaintiff's credit bureaus constitute publication to members of the general public, in particular third-party businesses.

118. The published foreclosure documents reduce the Defendant/Third-Party Plaintiff's character and reputation to the public and disgraces Defendant/Third-Party Plaintiff.

119. The Plaintiff and Third-Party Defendant publication of the foreclosure documents were done in such a reckless manner, which shows a conscious indifference to the Defendant/Third-Party Plaintiff's rights.

120. The Plaintiff and Third-Party Defendant would have had serious doubts as to the validity of the filing of the foreclosure actions prior to the filing and resulting publication of the same.

121. Due to the Plaintiff and Third-Party Defendant's acts of defamation, Defendant/Third-Party Plaintiff has suffered injury to reputation, mental suffering, hurt feelings, as well as a decrease in the ability to obtain credit, and damage to her business.

122. The Defendant/Third-Party Plaintiff is entitled to recovery of damages, including but not limited to actual, compensatory, consequential, nominal, and punitive damages, attorney fees, and court costs and expenses from the Plaintiff and Third-Party Defendant due the Plaintiff and Third-Party Defendant's defamation/libel *per se*.

**FOR A FURTHER AFFIRMATIVE DEFENSE, COUNTER-CLAIM, AND A
ELEVENTH CAUSE OF ACTION
(Intentional Interference with Existing Contracts)**

123. Defendant/Third-Party Plaintiff realleges and incorporates herein by reference the allegations set forth above.

124. Defendant/Third-Party Plaintiff holds a credit card with a third-party business, pursuant to a credit agreement/contract for the same.

125. Plaintiff and Third-Party Defendant are aware of Plaintiff's existing credit lines as shown on credit reports reflecting the same.

126. Plaintiff and Third-Party Defendant's filing of this present action and the prior aforementioned foreclosure action and reporting foreclosure and false late payments to the credit bureaus reflects these parties intent to procure damage to Defendant/Third-Party Plaintiff's credit, including but not limited to interference with existing credit cards and credit agreements/contracts for the same.

127. Justification for the Plaintiff and Third-Party Defendant's intentional interference with the Defendant/Third-Party Plaintiff's existing credit agreements/contracts does not exist.

128. Defendant/Third-Party Plaintiff has suffered damages as a result of the Plaintiff and Third-Party Defendant's intentional interference with Defendant/Third-Party Plaintiff's credit agreements/contracts, including but not limited to reduction of credit agreement(s)/contract(s).

129. The Defendant/Third-Party Plaintiff is entitled to recovery of damages, including but not limited to actual, compensatory, consequential, nominal, and punitive damages, attorney fees, and court costs and expenses from the Plaintiff and Third-Party Defendant due the Plaintiff and Third-Party Defendant's intentional interference with Defendant/Third-Party Plaintiff's credit agreements/contracts.

**FOR A FURTHER AFFIRMATIVE DEFENSE, COUNTER-CLAIM, AND A TWELFTH
CAUSE OF ACTION
(Intentional Interference with Prospective Contractual Relations)**

130. Defendant/Third-Party Plaintiff realleges and incorporates herein by reference the allegations set forth above.

131. Plaintiff and Third-Party Defendant are aware of Plaintiff's existing credit lines as shown on credit reports reflecting the same.

132. Plaintiff and Third-Party Defendant's filing of this present action and the prior aforementioned foreclosure action and reporting foreclosure and false late payments to the credit bureaus reflects these parties intent to procure damage to Defendant/Third-Party Plaintiff's potential future credit, including but not limited to interference with future credit cards and lines of credit with credit agreements/contracts for the same.

133. Plaintiff and Third-Party Defendant's act with intent by filing a foreclosure to cause damage to the foreclosed party's credit, which creates a great hindrance in the foreclosed party to obtain

future credit.

134. Plaintiff and Third-Party Defendant's filing of the two foreclosure lawsuits were filed pursuant to improper methods and for improper purposes, including but not limited to attempt to improperly procure the Defendant/Third-Party Plaintiff's home and damage Defendant/Third-Party Plaintiff's credit.

135. Defendant/Third-Party Plaintiff has suffered damages as a result of the Plaintiff and Third-Party Defendant's intentional interference with Defendant/Third-Party Plaintiff's future credit agreements/contracts, including but not limited to the inability to obtain additional and future credit agreements/contracts.

136. The Defendant/Third-Party Plaintiff is entitled to recovery of damages, including but not limited to actual, compensatory, consequential, nominal, and punitive damages, attorney fees, and court costs and expenses from the Plaintiff and Third-Party Defendant due the Plaintiff and Third-Party Defendant's intentional interference with prospective contractual relations.

**FOR A FURTHER AFFIRMATIVE DEFENSE, COUNTER-CLAIM, AND A
THIRTEENTH CAUSE OF ACTION
(Declaratory Judgment for Compliance with Homeowner Affordability and Stability Plan
and United States Treasury Supplemental Directive 09-01, April 6, 2009 – Plaintiff and
Third-Party Defendant)**

137. Defendant/Third-Party Plaintiff realleges and incorporates herein by reference the allegations set forth above.

138. Plaintiff and Third-Party Defendant have failed to adhere to or take into consideration the strong recommendation of the Homeowner Affordability and Stability Plan and United States Treasury Supplemental Directive 09-01.

139. The aforementioned Plan and Supplemental Directive strongly encourages participation from

the private mortgage lienholder market to consider modification, even if the mortgage is not a Fannie Mae or Freddie Mac backed loan.

140. Defendant/Third-Party Plaintiff seeks that this Honorable Court order that the Plaintiff and Third-Party Defendant be compelled to modify Defendant/Third-Party Plaintiff's loan pursuant to the aforementioned Plan, Supplemental Directive, and any and all other applicable guidance for the same.

**FOR A FURTHER AFFIRMATIVE DEFENSE, COUNTER-CLAIM, AND A
FOURTEENTH CAUSE OF ACTION
(Declaratory Judgment ordering correction of credit reports – Plaintiff and Third-Party
Defendant)**

141. Defendant/Third-Party Plaintiff realleges and incorporates herein by reference the allegations set forth above.

142. Defendant/Third-Party Plaintiff has suffered incorrect negative reports upon all three of her credit bureau reports, as a result of the Plaintiff and Third-Party Defendant's improper reporting actions.

143. Defendant/Third-Party Plaintiff has incurred certain credit lines/cards to be reduced by a third-party due to the two foreclosure cases and payment history upon her credit reports.

144. The Defendant/Third-Party Plaintiff would respectfully request that this Honorable Court order the Plaintiff and Third-Party Defendant to correct any and all reporting made to any and all of the credit bureaus, including removal of all mentioning of foreclosure(s) and negative/late reporting.

WHEREFORE having answered the Plaintiff's Complaint, the Defendant/Third-Party Plaintiff Rachel R. Lindsay demanding a trial by jury, prays for the following:

A. An order of this Court dismissing the Complaint of the Plaintiff with prejudice and entering a judgment in favor of the Defendant;

- B. Awarding the Defendant reasonable costs and attorney's fees;
- C. Assessing all costs of this action to the Plaintiff;
- D. On the Counter-Claims against the Plaintiff, award the Defendant/Third-Party Plaintiff Lindsay any and all appropriate damages;
- E. In the alternative, that this Court find the Plaintiff and Third-Party Defendants were unjustly enriched as a matter of equity and place the Parties in the position they were in prior to the damage suffered by the Defendant/Third-Party Plaintiff Lindsay;
- F. On the Third-Party Complaint against Saxon Mortgage Services, Inc., award the Defendant/Third-Party Plaintiff any and all appropriate damages;
- G. In the alternative, that this Court find the Plaintiff and Third-Party Defendant were unjustly enriched as a matter of equity and place the Parties in the position they were in prior to the damage suffered by the Defendant/Third-Party Plaintiff Lindsay;
- H. And for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

KNOWLES LAW FIRM, PC



BRIAN M. KNOWLES

P.O. Box 50201

Summerville, SC 29485

T: (843) 810-7596

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Summerville, South Carolina

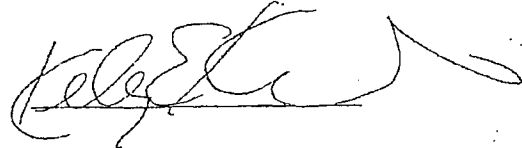
June 12, 2009

Attorney for the Defendant/Third-Party Plaintiff
Rachel R. Lindsay

CERTIFICATE OF SERVICE

I, Kelly E. Knowles, on behalf of Knowles Law Firm, PC, hereby certify that I have on June 12, 2009, served a copy of the foregoing document upon the Plaintiff by facsimile (843-725-0015) and via U.S. Mail with proper postage affixed by to the following address:

Thomas A. Shook, Esquire
Finkel Law Firm, LLC
P.O. Box 71727
North Charleston, SC 29415



KNOWLES LAW FIRM, PC

BRIAN M. KNOWLES, ATTORNEY AT LAW*
107 W. 7th N. ST., SUMMERVILLE, SC 29483
P.O. BOX 50201, SUMMERVILLE, SC 29485
T: (843) 810-7596
F: (843) 747-1118
bknowles.lawfirm@gmail.com
<http://knowleslawfirm.wordpress.com>
*(Licensed in SC and Washington, DC)

June 18, 2009

Saxon Mortgage Services, Inc.
c/o Corporation Service Co
1703 Laurel Street
Columbia, SC 29201

VIA US CERTIFIED MAIL 7008 1830.0001 7518 4162
RETURN RECEIPT REQUESTED
RESTRICTED DELIVERY

RE: The Bank of New York v. Rachel R. Lindsay, et al.; Rachel R. Lindsay, Third-Party
Plaintiff v. Saxon Mortgage Services, Inc., Third-Party Defendant
Civil Action #: 2009-CP-18-1311

Dear Registered Agent:

Enclosed for service on Saxon Mortgage Services, Inc., you will find a filed copy of the filed Summons on Third-Party Complaint, Answer, Counterclaim, and Third-Party Complaint of Defendant Rachel R. Lindsay, along with a Certificate of Service in the above-captioned matter.

If you have any questions and/or concerns, do not hesitate to contact me.

All the best,



Brian M. Knowles

Encl.

cc: Thomas A. Shook, Esquire ✓
Rachel R. Lindsay

KNOWLES LAW FIRM, PC

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*(Licensed in SC and Washington, DC)

June 18, 2009

Saxon Mortgage Services, Inc.
c/o South Carolina Secretary of State
ATTN: Bonnie Linder
Edgar Brown Bldg.
1205 Pendleton Street, Ste. 525
Columbia, SC 29201

VIA US CERTIFIED MAIL 7008 1830 0001 7518 4148
RETURN RECEIPT REQUESTED
RESTRICTED DELIVERY

RE: The Bank of New York v. Rachel R. Lindsay, et al.; Rachel R. Lindsay, Third-Party Plaintiff v. Saxon Mortgage Services, Inc., Third-Party Defendant
Civil Action #: 2009-CP-18-1311

Dear Bonnie:

Enclosed for service pursuant to South Carolina Code § 15-9-245 upon Saxon Mortgage Services, Inc., you will find two copies of the filed Summons on Third-Party Complaint, Answer, Counterclaim, and Third-Party Complaint of Defendant Rachel R. Lindsay, along with a Certificate of Service in the above-captioned matter. In addition, I have enclosed the service fee of \$10.00. Saxon Mortgage Services, Inc. last known address is 4708 Mercantile Drive North, Fort Worth, Texas 76137.

Please know that in addition that I have served this Defendant via Saxon Mortgage, Inc.; however, this may not be the same entity as Saxon Mortgage Services, Inc.

If you have any questions and/or concerns, do not hesitate to contact me.

All the best,



Brian M. Knowles

Encl.

cc: Thomas A. Shook, Esquire ✓
Rachel R. Lindsay

KNOWLES LAW FIRM, PC

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*(Licensed in SC and Washington, DC)

June 18, 2009

The Honorable Cheryl Graham
Dorchester County Clerk of Court
101 Ridge Street
St. George, SC 29477

RE: The Bank of New York v. Rachel R. Lindsay, et al.; Rachel R. Lindsay, Third-Party
Plaintiff v. Saxon Mortgage Services, Inc., Third-Party Defendant
Civil Action #: 2009-CP-18-1311

Dear Cheryl:

Enclosed, you will find the original and one copy of the Certificate of Service on the Third-Party Defendant related to service of the Answer, Counter-Claim and Third-Party Complaint of Defendant Rachel R. Lindsay, along with the Summons on Third-Party Complaint in the above-captioned matter.

Please file this document and return the filed copy to me in the enclosed, prepaid envelope.

If you have any questions and/or concerns, do not hesitate to contact me.

All the best,



Brian M. Knowles

Encl.

cc: Thomas A. Shook, Esquire ✓
Rachel R. Lindsay
Saxon Mortgage Services, Inc.

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
2009-CP-18-1311

The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding
Trust, Series 2004-1,)

PLAINTIFF.)

vs.)

Rachel R. Lindsay; Jeffrey Wayner; Tammy
Wayner; Tiffany Spann-Wilder, Esq.; The
Steinberg Law Firm; and United States of
America acting by and through its agency, the
Internal Revenue Service,)

DEFENDANT(S).)

CERTIFICATE OF SERVICE

RACHEL R. LINDSAY,)

Third-Party Plaintiff,)

vs.)

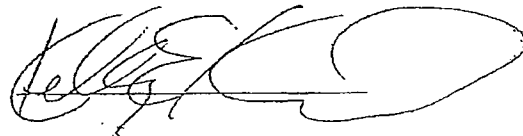
SAXON MORTGAGE SERVICES,
INC.,)

Third-Party Defendant.)

I, Kelly E. Knowles, on behalf of Knowles Law Firm, PC, hereby certify that I have on June 18, 2009, served a copy of the Summons on Third-Party Complaint, Answer, Counterclaim, and Third-Party Complaint of Defendant Rachel R. Lindsay, along with a copy of the Certificate of Service for the same upon the below listed Third-Party Defendant by U.S. Certified Mail, Return Receipt Requested, Restricted Delivery with proper postage affixed thereon, to the following addresses:

Saxon Mortgage Services, Inc. 7008 1830 0001 7518 4162
c/o Corporation Service Co
1703 Laurel Street
Columbia, SC 29201

Saxon Mortgage Services, Inc. 7008 1830 0001 7518 4148
c/o South Carolina Secretary of State
ATTN: Bonnie Linder
Edgar Brown Bldg.
1205 Pendleton Street, Ste. 525
Columbia, SC 29201

A handwritten signature in black ink, appearing to be "K. Linder", written over a horizontal line.

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
The Bank of New York Mellon, as
Successor Trustee under NovaStar
Mortgage funding Trust, Series 2004-1,

Plaintiff,

-vs-

Rachel R. Lindsay; Jeffery Wayner;
Tammy Wayner; Tiffany Spann-Wilder,
Esq.; The Steinberg Law Firm; and United
States of America, Acting by and through
its agency, The Internal Revenue Service

Defendants.

Rachel R. Lindsay,

Third-Party Plaintiff,

-vs-

Saxon Mortgage Services, Inc.

Third-Party Defendant

IN THE COURT OF COMMON PLEAS

C.A. NO. 2009-CP-18-1311

**SAXON MORTGAGE SERVICES, INC.'S
ANSWER TO RACHEL R. LINDSAY'S
THIRD-PARTY COMPLAINT**

CERTIFIED COPY
2009 JUL 27 AM 11:19
CLERK OF COURT
DORCHESTER COUNTY

Third-Party Defendant, Saxon Mortgage Services, Inc. ("Saxon"), Answering the Third-Party Complaint of Defendant Rachel R. Lindsay ("Lindsay"), respectfully alleges that:

FOR A FIRST DEFENSE

1. Each and every allegation of the Third-Party Complaint not specifically admitted herein is denied.

2. The allegations of Paragraphs 1 through 19 comprising Lindsay's First through Eleventh Defenses do not require a response from Saxon. To the extent a response is required, those allegations are denied to the extent they contradict or dispute the allegations of the Complaint.

3. Saxon admits the allegations of Paragraph 20, 21, 22, 23, and 24.

4. Saxon lacks sufficient information to form a belief as to the allegations of Paragraphs 25 and therefore, denies the same and requests proof thereof.

5. As to the allegations of Paragraph 26, Saxon asserts that no response is required. To the extent that a response is required, such allegations are denied.

6. Saxon lacks sufficient information to form a belief as to the allegations of Paragraph 27 and therefore, denies the same and requests proof thereof.

7. As to the allegations of Paragraph 28, the pleadings speak for themselves and no response is required.

8. Saxon lacks sufficient information to form a belief as to the allegations of Paragraphs 29 and 30, and therefore, denies the same and requests proof thereof.

9. As to the allegations of Paragraph 31, the pleadings speak for themselves and no response is required.

10. Saxon lacks sufficient information to form a belief as to the allegations of Paragraphs 32 and 33, and therefore, denies the same and requests proof thereof.

11. Saxon lacks sufficient information to form a belief as to the allegations of Paragraph 34, and therefore, denies the same and requests proof thereof.

12. The allegations of Paragraphs 35 through 37 are denied.

13. The allegations of Paragraph 38 are admitted.

14. The allegations of Paragraph 39 are denied.

15. The allegations of Paragraph 40 are denied, except to the extent specifically admitted or modified above.

16. The allegations of Paragraphs 41 and 42 are denied, as worded.

17. The allegations of Paragraph 43 are a statement of law not requiring a response. To the extent such allegations contradict the allegations contained herein and/or in the Complaint, such allegations are denied.

18. The allegations of Paragraphs 44 through 46 are denied.

19. The allegations of Paragraph 47 are denied, except to the extent specifically admitted or modified above.

20. The allegations of Paragraphs 48 through 53 contain allegations not specific to Saxon, and therefore do not require a response. To the extent such allegations contradict the allegations contained herein and/or in the Complaint, such allegations are denied.

21. The allegations of Paragraph 54 are denied, except to the extent specifically admitted or modified above.

22. The allegations of Paragraphs 55 through 60 are denied.

23. The allegations of Paragraph 61 are denied, except to the extent specifically admitted or modified above.

24. Saxon lacks sufficient information to form a belief as to the allegations of Paragraph 62 and therefore; denies the same and requests proof thereof.

25. The allegations of Paragraphs 63 through 71 are denied.

26. The allegations of Paragraph 72 are denied, except to the extent specifically admitted or modified above.

27. The allegations of Paragraphs 73 through 80 are denied.

28. The allegations of Paragraph 81 are denied, except to the extent specifically admitted or modified above.

29. Saxon lacks sufficient information to form a belief as to the allegations of Paragraph 82 and therefore, denies the same and requests proof thereof.

30. The allegations of Paragraphs 83 through 85 are denied.

31. The allegations of Paragraph 86 are denied, except to the extent specifically admitted or modified above.

32. The allegations of Paragraph 87 are a statement of law not requiring a response. To the extent such allegations contradict the allegations contained herein and/or in the Complaint, such allegations are denied.

33. The allegations of Paragraphs 88 through 94 are denied.

34. The allegations of Paragraph 95 are denied, except to the extent specifically admitted or modified above.

35. The allegations of Paragraphs 96 through 99 are denied.

36. The allegations of Paragraph 100 are denied, except to the extent specifically admitted or modified above.

37. The allegations of Paragraphs 101 through 106 are denied.

38. The allegations of Paragraph 107 are denied, except to the extent specifically admitted or modified above.

39. The allegations of Paragraphs 108 through 111 are denied.

40. The allegations of Paragraph 112 are denied, except to the extent specifically admitted or modified above.

41. The allegations of Paragraphs 113 through 122 are denied.

42. The allegations of Paragraph 123 are denied, except to the extent specifically admitted or modified above.

43. Saxon lacks sufficient information to form a belief as to the allegations of Paragraph 124 and therefore, denies the same and requests proof thereof.

44. The allegations of Paragraphs 125 through 129 are denied.

45. The allegations of Paragraph 130 are denied, except to the extent specifically admitted or modified above.

46. The allegations of Paragraphs 131 through 136 are denied.

47. The allegations of Paragraph 137 are denied, except to the extent specifically admitted or modified above.

48. The allegations of Paragraphs 138 are denied.

49. Saxon asserts that the terms of the Homeowner Affordability and Stability Plan and United States Treasury Supplemental Directive 09-01 speak for themselves, and therefore no response is require to the allegations of Paragraph 139. To the extent such allegations contradict the allegations contained herein and/or in the Complaint, such allegations are denied.

50. The allegations of Paragraph 140 are denied.

51. The allegations of Paragraph 141 are denied, except to the extent specifically admitted or modified above.

52. The allegations of Paragraphs 142 through 144 are denied.

53. Saxon denies the allegations of Lindsay's Prayer for Relief.

FOR A SECOND DEFENSE
(SCRCP 12(b)(6))

54. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

55. Defendant Lindsay fails to state a claim upon which relief can be granted upon her Third-Party Complaint pursuant to S.C. Rule of Civil Procedure 12(b)(6).

FOR A THIRD DEFENSE
(Unclean Hands)

56. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

57. Defendant Lindsay is barred from recovering on her Third-Party Complaint pursuant to the doctrine of unclean hands.

FOR A FOURTH DEFENSE
(Economic Loss Rule)

58. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

59. Lindsay should be denied any relief on her Third-Party Complaint under tort theories because of the contractual relationship of the parties and the fact that Lindsay has only suffered economic losses, not personal injury or property damage to other property

FOR A FIFTH DEFENSE
(Mitigation of Damages)

60. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

61. Lindsay should be denied any relief on her Third-Party Complaint or any such relief should be reduced since Defendant has failed to mitigate his damages

FOR A SIXTH DEFENSE
(Material Breach of Contract)

62. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

63. Defendant should be denied relief on her Third-Party Complaint based on Defendant's material breach of contract entitling the holder of the documents to accelerate the balance due on the promissory note.

FOR A SEVENTH DEFENSE
(Comparative Negligence)

64. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

65. The damages complained of by Lindsay, which are specifically denied and admitted solely for the purposes of this defense, are the sole, direct and proximate result of Lindsay's own negligence, carelessness, recklessness, willfulness and wantonness. Such negligence, carelessness, recklessness, willfulness and wantonness on the part of Lindsay acted as a 50% or greater proximate cause of Lindsay's damages, if any, and this defense of comparative negligence is pled as a complete and total defense of the claims of Lindsay.

66. Even if Saxon was negligent, which is expressly denied but admitted solely for the purposes of this defense, and if such conduct on the part of Saxon operated as a 50% or greater proximate cause of Lindsay's damages, Saxon is entitled to a determination as to Lindsay's negligence, carelessness, recklessness, willfulness and wantonness which contributed to its damages and a reduction of any amount awarded to Lindsay in an amount equal to that percentage of Lindsay's negligence, carelessness, recklessness, willfulness and wantonness.

FOR AN EIGHTH DEFENSE
(Punitive Damages Unconstitutional – S.C. Constitution)

67. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

68. Any award of punitive damages against Saxon will violate the rights guaranteed by the Constitution of the State of South Carolina for the following reasons:

- a. Any award of punitive damages violates the prohibition against excessive fines found in Article I, § 15 of the Constitution of the State of South Carolina;
- a. Any award of punitive damages violates the guarantee of due process found in Article I, § 3, of the Constitution of the State of South Carolina because of the lack of objective guidelines upon which a jury might base its award; and, further, that such guidelines as do exist are arbitrary and void for vagueness.

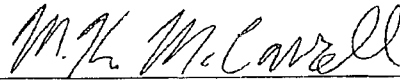
FOR A NINTH DEFENSE
(Punitive Damages Unconstitutional - U.S. Constitution)

69. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

70. Any award of punitive damages against Saxon will violate rights guaranteed by the Constitution of the United States for the following reasons:

- a. Any award of punitive damages violates the prohibition against excessive fines found in the Eighth Amendment to the Constitution of the United States as applied to the states by way of the due process clause of the Fourteenth Amendment of the Constitution of the United States.
- b. Any award of punitive damages violates the guarantee of due process found in the Fourteenth Amendment to the Constitution of the United States because of the lack of objective guidelines on which a jury might base its award and further that such guidelines as do exist are arbitrary and void for vagueness.

WHEREFORE, having Answered the Third-Party Complaint of Rachel R. Lindsay, Saxon respectfully prays that the Third-Party Complaint be dismissed with prejudice, and that Saxon be granted such other and further relief as the Court may deem just and proper.



M. Kevin McCarrell, S.C. Bar #76255
SMITH MOORE LEATHERWOOD LLP
300 East McBee Avenue, Suite 500, PO Box 87
Greenville, South Carolina 29602
(864) 242-6440; (864) 240-2474 (fax)
kevin.mccarrell@smithmoorelaw.com
ATTORNEYS FOR PLAINTIFF

July 24, 2009

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
The Bank of New York Mellon, as
Successor Trustee under NovaStar
Mortgage funding Trust, Series 2004-1,

Plaintiff,

-vs-

Rachel R. Lindsay; Jeffery Wayner;
Tammy Wayner; Tiffany Spann-Wilder,
Esq.; The Steinberg Law Firm; and United
States of America, Acting by and through
its agency, The Internal Revenue Service

Defendants.

Rachel R. Lindsay,

Third-Party Plaintiff,

-vs-

Saxon Mortgage Services, Inc.

Third-Party Defendant

IN THE COURT OF COMMON PLEAS

C.A. NO. 2009-CP-18-1311

CERTIFICATE OF SERVICE

This is to certify that I have, this 24th day of July, 2009, served copies of **Saxon Mortgage Services, Inc.'s Answer to Rachel R. Lindsay's Third-Party Complaint** in the above-captioned action by enclosing same in an envelope with postage thereon prepaid and depositing same in the United States mail, addressed to the following:

Brian M. Knowles
Knowles Law firm, PC
PO Box 50201
Summerville, SC 29485

Lee E. Berlinsky
Assistant U. S. Attorney
151 Meeting Street, Suite 200
Charleston, SC 29401


Assistant to
M. Kevin McCarrell, S.C. Bar #76255
SMITH MOORE LEATHERWOOD LLP
300 East McBee Avenue, Suite 500, PO Box 87
Greenville, South Carolina 29602
(864) 242-6440; (864) 240-2474 (fax)
kevin.mccarrell@smithmoorelaw.com
ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
The Bank of New York Mellon, as
Successor Trustee under NovaStar
Mortgage funding Trust, Series 2004-1,

Plaintiff,

-vs-

Rachel R. Lindsay; Jeffery Wayner;
Tammy Wayner; Tiffany Spann-Wilder,
Esq.; The Steinberg Law Firm; and United
States of America, Acting by and through
its agency, The Internal Revenue Service

Defendants.

Rachel R. Lindsay,

Third-Party Plaintiff,

-vs-

Saxon Mortgage Services, Inc.

Third-Party Defendant

IN THE COURT OF COMMON PLEAS

C.A. NO. 2009-CP-18-1311

**PLAINTIFF'S REPLY TO
DEFENDANT RACHEL R. LINDSAY'S
ANSWER AND COUNTERCLAIMS**

CERTIFIED
2009 JUL 27 AM 11:11
CLERK OF COUNTY
DORCHESTER

Plaintiff, The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage funding Trust, Series 2004-1 ("Bank"), replying to the Answer and Counterclaim of Defendant Rachel R. Lindsay ("Lindsay"), respectfully alleges that:

FOR A FIRST REPLY

1. The allegations of the Complaint are reiterated and confirmed as if herein incorporated.

FOR A SECOND REPLY

2. The allegations of the preceding defense are incorporated herein by reference.
3. Each and every allegation of the Answer and Counterclaim not specifically admitted herein is denied.
4. The allegations of Paragraphs 1 through 19 comprising Lindsay's First through Eleventh Defenses do not require a response from Bank. To the extent a response is required, those allegations are denied to the extent they contradict or dispute the allegations of the Complaint.
5. Bank admits the allegations of Paragraph 20, 21, 22, 23, and 24.
6. Bank lacks sufficient information to form a belief as to the allegations of Paragraphs 25 and therefore, denies the same and requests proof thereof.
7. As to the allegations of Paragraph 26, Bank asserts that no response is required. To the extent that a response is required, such allegations are denied.
8. Bank lacks sufficient information to form a belief as to the allegations of Paragraph 27 and therefore, denies the same and requests proof thereof.
9. As to the allegations of Paragraph 28 the pleadings speak for themselves and no response is required.
10. Bank lacks sufficient information to form a belief as to the allegations of Paragraphs 29 and 30, and therefore, denies the same and requests proof thereof.
11. As to the allegations of Paragraph 31 the pleadings speak for themselves and no response is required.
12. Bank lacks sufficient information to form a belief as to the allegations of Paragraphs 32 and 33, and therefore, denies the same and requests proof thereof.

13. Bank lacks sufficient information to form a belief as to the allegations of Paragraph 34, and therefore, denies the same and requests proof thereof.

14. The allegations of Paragraphs 35 through 37 are denied.

15. The allegations of Paragraph 38 are admitted.

16. The allegations of Paragraph 39 are denied.

17. The allegations of Paragraph 40 are denied, except to the extent specifically admitted or modified above.

18. The allegations of Paragraphs 41 and 42 are denied, as worded.

19. The allegations of Paragraph 43 are a statement of law not requiring a response. To the extent such allegations contradict the allegations contained herein and/or in the Complaint, such allegations are denied.

20. The allegations of Paragraphs 44 through 46 are denied.

21. The allegations of Paragraph 47 are denied, except to the extent specifically admitted or modified above.

22. The allegations of Paragraphs 48 through 53 are denied.

23. The allegations of Paragraph 54 are denied, except to the extent specifically admitted or modified above.

24. The allegations of Paragraphs 55 through 60 contain allegations not specific to Bank, and therefore do not require a response. To the extent such allegations contradict the allegations contained herein and/or in the Complaint, such allegations are denied.

25. The allegations of Paragraph 61 are denied, except to the extent specifically admitted or modified above.

26. Bank lacks sufficient information to form a belief as to the allegations of Paragraph 62 and therefore, denies the same and requests proof thereof.

27. The allegations of Paragraphs 63 through 71 are denied.

28. The allegations of Paragraph 72 are denied, except to the extent specifically admitted or modified above.

29. The allegations of Paragraphs 73 through 80 are denied.

30. The allegations of Paragraph 81 are denied, except to the extent specifically admitted or modified above.

31. Bank lacks sufficient information to form a belief as to the allegations of Paragraph 82 and therefore, denies the same and requests proof thereof.

32. The allegations of Paragraphs 83 through 85 are denied.

33. The allegations of Paragraph 86 are denied, except to the extent specifically admitted or modified above.

34. The allegations of Paragraph 87 are a statement of law not requiring a response. To the extent such allegations contradict the allegations contained herein and/or in the Complaint, such allegations are denied.

35. The allegations of Paragraphs 88 through 94 are denied.

36. The allegations of Paragraph 95 are denied, except to the extent specifically admitted or modified above.

37. The allegations of Paragraphs 96 through 99 are denied.

38. The allegations of Paragraph 100 are denied, except to the extent specifically admitted or modified above.

39. The allegations of Paragraphs 101 through 106 are denied.

40. The allegations of Paragraph 107 are denied, except to the extent specifically admitted or modified above.

41. The allegations of Paragraphs 108 through 111 are denied.

42. The allegations of Paragraph 112 are denied, except to the extent specifically admitted or modified above.

43. The allegations of Paragraphs 113 through 122 are denied.

44. The allegations of Paragraph 123 are denied, except to the extent specifically admitted or modified above.

45. Bank lacks sufficient information to form a belief as to the allegations of Paragraph 124 and therefore, denies the same and requests proof thereof.

46. The allegations of Paragraphs 125 through 129 are denied.

47. The allegations of Paragraph 130 are denied, except to the extent specifically admitted or modified above.

48. The allegations of Paragraphs 131 through 136 are denied.

49. The allegations of Paragraph 137 are denied, except to the extent specifically admitted or modified above.

50. The allegations of Paragraphs 138 are denied.

51. Bank asserts that the terms of the Homeowner Affordability and Stability Plan and United States Treasury Supplemental Directive 09-01 speak for themselves, and therefore no response is require to the allegations of Paragraph 139. To the extent such allegations contradict the allegations contained herein and/or in the Complaint, such allegations are denied.

52. The allegations of Paragraph 140 are denied.

53. The allegations of Paragraph 141 are denied, except to the extent specifically admitted or modified above.

54. The allegations of Paragraphs 142 through 144 are denied.

55. Bank denies the allegations of Lindsay's Prayer for Relief.

FOR A THIRD REPLY
(SCRCP 12(b)(6))

56. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

57. Defendant Lindsay fails to state a claim upon which relief can be granted upon her Counterclaim pursuant to S.C. Rule of Civil Procedure 12(b)(6).

FOR A FOURTH REPLY
(Unclean Hands)

58. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

59. Defendant Lindsay is barred from recovering on her Counterclaim pursuant to the doctrine of unclean hands.

FOR A FIFTH REPLY
(Economic Loss Rule)

60. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

61. Defendant Lindsay should be denied any relief on her counterclaims under tort theories because of the contractual relationship of the parties and the fact that Defendant has only suffered economic losses, not personal injury or property damage to other property.

FOR A SIXTH REPLY
(Mitigation of Damages)

62. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

63. Defendant should be denied any relief under its counterclaims or any such relief should be reduced since Defendant has failed to mitigate his damages

FOR A SEVENTH REPLY
(Material Breach of Contract)

64. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

65. Defendant should be denied relief in her Counterclaim based on Defendant's material breach of contract entitling the holder of the documents to accelerate the balance due on the promissory note.

FOR AN EIGHTH REPLY
(Comparative Negligence)

66. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

67. The damages complained of by Lindsay, which are specifically denied and admitted solely for the purposes of this defense, are the sole, direct and proximate result of Lindsay's own negligence, carelessness, recklessness, willfulness and wantonness. Such negligence, carelessness, recklessness, willfulness and wantonness on the part of Lindsay acted as a 50% or greater proximate cause of Lindsay's damages, if any, and this defense of comparative negligence is pled as a complete and total defense of the claims of Lindsay.

68. Even if Bank was negligent, which is expressly denied but admitted solely for the purposes of this defense, and if such conduct on the part of Bank operated as a 50% or greater

proximate cause of Lindsay's damages, Bank is entitled to a determination as to Lindsay's negligence, carelessness, recklessness, willfulness and wantonness which contributed to its damages and a reduction of any amount awarded to Lindsay in an amount equal to that percentage of Lindsay's negligence, carelessness, recklessness, willfulness and wantonness.

FOR A NINTH REPLY
(Punitive Damages Unconstitutional -- S.C. Constitution)

69. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

70. Any award of punitive damages against Bank will violate the rights guaranteed by the Constitution of the State of South Carolina for the following reasons:

- a. Any award of punitive damages violates the prohibition against excessive fines found in Article I, § 15 of the Constitution of the State of South Carolina;
- a. Any award of punitive damages violates the guarantee of due process found in Article I, § 3, of the Constitution of the State of South Carolina because of the lack of objective guidelines upon which a jury might base its award; and, further, that such guidelines as do exist are arbitrary and void for vagueness.

FOR A TENTH REPLY
(Punitive Damages Unconstitutional - U.S. Constitution)

71. The allegations contained in the preceding Paragraphs are incorporated by reference as if fully set forth herein.

72. Any award of punitive damages against Bank will violate rights guaranteed by the Constitution of the United States for the following reasons:

- a. Any award of punitive damages violates the prohibition against excessive fines found in the Eighth Amendment to the Constitution of the United States as

applied to the states by way of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

- b. Any award of punitive damages violates the guarantee of due process found in the Fourteenth Amendment to the Constitution of the United States because of the lack of objective guidelines on which a jury might base its award and further that such guidelines as do exist are arbitrary and void for vagueness.

WHEREFORE, having replied to the Answer and Counterclaim of Defendant Rachel R. Lindsay, Bank respectfully prays that the Answer and Counterclaims be dismissed with prejudice, that Bank be granted the relief sought in the Complaint, and that Bank be granted such other and further relief as the Court may deem just and proper.



M. Kevin McCarrell, S.C. Bar #76255
SMITH MOORE LEATHERWOOD LLP
300 East McBee Avenue, Suite 500, PO Box 87
Greenville, South Carolina 29602
(864) 242-6440; (864) 240-2474 (fax)
kevin.mccarrell@smithmoorelaw.com
ATTORNEYS FOR PLAINTIFF

July 24, 2009

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
The Bank of New York Mellon, as
Successor Trustee under NovaStar
Mortgage funding Trust, Series 2004-1,

Plaintiff,

-vs-

Rachel R. Lindsay; Jeffery Wayner;
Tammy Wayner; Tiffany Spann-Wilder,
Esq.; The Steinberg Law Firm; and United
States of America, Acting by and through
its agency, The Internal Revenue Service

Defendants.

Rachel R. Lindsay,

Third-Party Plaintiff,

-vs-

Saxon Mortgage Services, Inc.

Third-Party Defendant

IN THE COURT OF COMMON PLEAS

C.A. NO. 2009-CP-18-1311

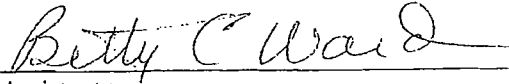
CERTIFICATE OF SERVICE

CERTIFIED
2009 JUL 27 AM 11:11
Clerk of Court
DORCHESTER COUNTY

This is to certify that I have, this 24th day of July, 2009, served copies **Plaintiff's Reply**
to Defendant Rachel R. Lindsay's Answer and Counterclaims in the above-captioned action
by enclosing same in an envelope with postage thereon prepaid and depositing same in the
United States mail, addressed to the following:

Brian M. Knowles
Knowles Law firm, PC
PO Box 50201
Summerville, SC 29485

Lee E. Berlinsky
Assistant U. S. Attorney
151 Meeting Street, Suite 200
Charleston, SC 29401

A handwritten signature in cursive script, reading "Betty C. Ward", written over a horizontal line.

Assistant to
M. Kevin McCarrell, S.C. Bar #76255
SMITH MOORE LEATHERWOOD LLP
300 East McBee Avenue, Suite 500, PO Box 87
Greenville, South Carolina 29602
(864) 242-6440; (864) 240-2474 (fax)
kevin.mccarrell@smithmoorelaw.com
ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
2008-CP-18-2543

THE BANK OF NEW YORK MELLON,)
AS SUCCESSOR TRUSTEE UNDER)
NOVASTAR MORTGAGE FUNDING)
TRUST 2004-1,)

Plaintiff.)

vs.)

RACHEL R. LINDSAY; JEFFREY)
WAYNER; TAMMY WAYNER;)
TIFFANY R. SPANN-WILDER, ESQ.;)
THE UNITED STATES OF AMERICA)
ACTING BY AND THROUGH ITS)
AGENCY, THE INTERNAL REVENUE)
SERVICE; AND SOUTH CAROLINA)
DEPARTMENT OF REVENUE,)

Defendants.)

**MOTION FOR TEMPORARY
RESTRAINING ORDER AND
SHOW CAUSE ORDER;
(EMERGENCY HEARING
REQUESTED)**

2009 JAN 30 PM 11:22
CLERK OF COURT
DORCHESTER COUNTY

COMES NOW the Defendant, RACHEL R. LINDSAY, by and through her undersigned counsel, Brian M. Knowles, and requests that this Honorable Court issue a temporary restraining order and order Plaintiff, THE BANK OF NEW YORK MELLON, AS SUCCESSOR TRUSTEE UNDER NOVASTAR MORTGAGE FUNDING TRUST 2004-1, to show cause why a preliminary injunction forbidding a foreclosure sale of the subject property should not be issued pursuant to S.C.R.C.P. Rule 65(b) for the following reasons:

1. Defendant, Rachel R. Lindsay, never received Notice of the January 8, 2009 Final Hearing in this matter, as the notice was sent regular U.S. Mail.
2. Defendant, Rachel R. Lindsay, is and has been actively engaged with Saxon Mortgage to restructure the Promissory Note and Mortgage related to the subject matter property.

3. Upon information and belief, Saxon Mortgage is in agreement to restructure said Note and Mortgage.

4. Defendant Lindsay will be irreparably harmed by the loss of her home.

5. The subject property is unique and Defendant Lindsay has no adequate remedy at law.

6. Any delay in the issuance of a temporary restraining order forbidding the foreclosure sale of the subject property until the hearing on the preliminary injunction will result in the following immediate and irreparable harm to Defendant Lindsay, to wit, Defendant Lindsay will lose her home.

7. To allow the Plaintiff to proceed with the sale of the subject property runs against the public policy interests of the State of South Carolina and its citizens.

8. To allow the Plaintiff to proceed with the sale of the subject property runs against the interests of fairness and justice.

WHEREFORE, Defendant, RACHEL R. LINDSAY, prays that this Honorable Court order the following:

(a) Plaintiff be immediately enjoined and restrained, directly and indirectly, whether alone or in concert with others, including any of its officers, agents, employees, and/or representatives, until further order of this court, from proceeding with the foreclosure sale on Defendant Lindsay's home.

(b) Plaintiff be immediately enjoined and restrained from pursuing any other activity to seek or effect a foreclosure sale of the Property until further order of this Court.

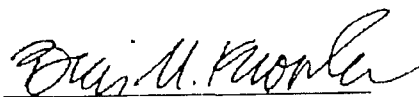
(c) Defendant Lindsay be allowed a period of one hundred and twenty (120) days from the date of this hearing to restructure the Note and Mortgage with Saxon Mortgage or Plaintiff.

(d) This order shall remain in full force and effect until this Court specifically orders otherwise.

Plaintiff shall show cause before this court on Monday, February 2, 2009, at 4:00 p.m. at the
Dorchester County Master-in-Equity, or as soon thereafter as counsel may be heard, why a
preliminary injunction should not be ordered according to the terms and conditions set forth above.

Respectfully submitted,

KNOWLES LAW FIRM, PC



BRIAN M. KNOWLES

107 W. 7th N. Street, Summerville, SC 29483

P.O. Box 50201, Summerville, SC 29485

T: (843) 810-7596

F: (843) 871-6420

bknowles.lawfirm@gmail.com

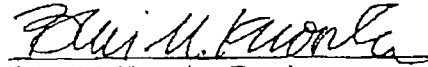
Attorney for the Defendant Rachel R. Lindsay

Summerville, South Carolina
January 29, 2009

ATTORNEY CERTIFICATION OF GOOD FAITH

The undersigned counsel for the Defendant Rachel R. Lindsay hereby certifies pursuant to S.C.R.C.P. Rule 11 and attests that he has made a good faith attempt via letter dated January 28, 2009 with Plaintiff's counsel regarding a Consent Order to Stay the Foreclosure Sale in an effort to resolve the specific issue at hand and, to date, despite counsels' attempts to resolve the issue, they have been unable to do so and given the impending February 3, 2009 foreclosure sale date the Motion was necessary to protect the Defendant Lindsay's interests.

CERTIFIED TO THE COURT BY:



Brian M. Knowles, Esquire

Attorney for the Defendant Rachel R. Lindsay

FILED
2009 JAN 30 AM 9:35
CLERK OF COURT
NORCHESTER COUNTY

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
2008-CP-18-2543

THE BANK OF NEW YORK MELLON,
AS SUCCESSOR TRUSTEE UNDER
NOVASTAR MORTGAGE FUNDING
TRUST 2004-1,

Plaintiff.

vs.

RACHEL R. LINDSAY; JEFFREY
WAYNER; TAMMY WAYNER;
TIFFANY R. SPANN-WILDER, ESQ.;
THE UNITED STATES OF AMERICA
ACTING BY AND THROUGH ITS
AGENCY, THE INTERNAL REVENUE
SERVICE; AND SOUTH CAROLINA
DEPARTMENT OF REVENUE,

Defendants.

AFFIDAVIT OF RACHEL R. LINDSAY

FILED
2009 JAN 30 AM 9:35
CLERK OF COURT
DORCHESTER COUNTY

PERSONALLY appeared before me, Rachel R. Lindsay, who being duly sworn, states:

1. I am the owner of the subject matter property in the above-captioned action.
2. I never received notice of the final hearing to be held on January 8, 2009 allegedly sent to me via regular U.S. mail.
3. I am actively engaged in restructuring the Promissory Note and Mortgage at issue in this action with Saxon Mortgage.
4. Saxon Mortgage has indicated to me that they are willing to restructure said Note and Mortgage.
5. The failure to grant my requested Motion for Restraining Order and Show Cause Order will result in irreparable harm to me, to wit, the loss of my home and primary residence.

6. I would respectfully request that this Honorable Court grant said Motion and allow me one hundred and twenty days from the date of the hearing to finalize the restructure.

FURTHER AFFIANT SAITH NOT!

Rachel R. Lindsay
RACHEL R. LINDSAY

SWORN to before me this
29 day of January, 2009

Barb A. Mott
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires:

My Commission Expires
May 23, 2011

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
2008-CP-18-2543

THE BANK OF NEW YORK MELLON,)
AS SUCCESSOR TRUSTEE UNDER)
NOVASTAR MORTGAGE FUNDING)
TRUST 2004-1,)

Plaintiff.)

vs.)

RACHEL R. LINDSAY; JEFFREY)
WAYNER; TAMMY WAYNER;)
TIFFANY R. SPANN-WILDER, ESQ.;)
THE UNITED STATES OF AMERICA)
ACTING BY AND THROUGH ITS)
AGENCY, THE INTERNAL REVENUE)
SERVICE; AND SOUTH CAROLINA)
DEPARTMENT OF REVENUE,)

Defendants.)

CERTIFICATE OF SERVICE

2009 JAN 30 AM 9:36
CLERK OF COURT
DORCHESTER COUNTY

I, Kelly Knowles, on behalf of Knowles Law Firm, PC, hereby certify that I have on January 29, 2009, served a copy of the Motion for Restraining Order and to Show Cause and a copy of the Certificate of Service for the same upon the Plaintiffs by to the following addresses:

VIA FACSIMILE & U.S. MAIL
Finkel Law Firm, LLC
ATTN: Beverly J. Finkel, Esquire
P.O. Box 71727
North Charleston, SC 29415

Facsimile: 725-0015

VIA FACSIMILE ONLY
United States of America
Lee E. Berlinsky, Esquire
151 Meeting Street, Ste. 200
Charleston, SC 29401

Facsimile: 727-4443

VIA FACSIMILE ONLY

South Carolina Department of Revenue
Ronald W. Urban, Esquire
P.O. Box 12265
Columbia, SC 29211

Facsimile: 803-898-5147

VIA FACSIMILE & U.S. MAIL

The Steinberg Law Firm
Steven E. Goldberg, Esquire
61 Broad Street
Charleston, SC 29401

Fax: 722-1190

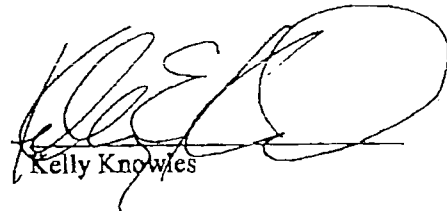
VIA FACSIMILE & U.S. MAIL

Tiffany R. Spann-Wilder, Esquire
2131 Dorchester Road
North Charleston, SC 29405

Fax: 266-7797

VIA OVERNIGHT U.S. MAIL

Jeffrey and Tammy Wayner
1602 Fuji Drive
Titusville, FL 32796



Kelly Knowles

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER) FIRST JUDICIAL CIRCUIT

The Bank of New York Mellon, as) Civil Action No. 2011-CP-18-1013
Successor Trustee under NovaStar)
Mortgage Funding Trust, Series 2004-1,)

Plaintiff,)

vs.)

Rachel R. Lindsay, Jeffrey Wayner,)
Tammy Wayner, Tiffany Spann-Wilder,)
Esq., The Steinberg Law Firm, and)
United States of America acting by and)
through its agency, the Internal Revenue)
Service,)

Defendants.)

**JOINT MOTION OF PLAINTIFF
AND THIRD-PARTY DEFENDANT
FOR A NON-JURY TRIAL IN THE
EQUITY COURT AND TO STRIKE
THE JURY DEMAND**

Rachel R. Lindsay,)

Third-Party Plaintiff,)

vs.)

Saxon Mortgage Services, Inc.,)

Third-Party Defendant.)

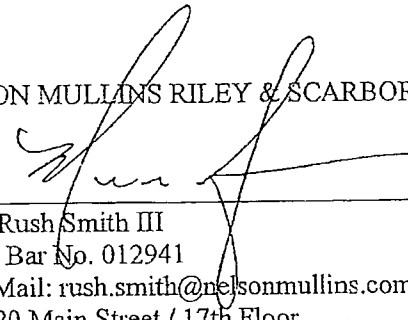
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CLERK OF COURT
DORCHESTER COUNTY

Plaintiff The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 ("Bank" or "Plaintiff") and Third-Party Defendant Saxon Mortgage Services, Inc. ("Saxon" and, jointly with Plaintiff, "Movants"), hereby jointly move this Court for an order that this matter be tried non-jury in the equity court and striking the jury demand of Defendant/Third-Party Plaintiff, Rachel R. Lindsay.

This Motion is based on the South Carolina Rules of Civil Procedure, the attached Memorandum in Support and any additional materials that may be submitted at or before the hearing on this matter.

Counsel for Movants certifies that he attempted to consult with opposing counsel as evidenced by the email correspondence attached hereto as Exhibit A, but as of the filing of this Motion, opposing counsel had not responded.

NELSON MULLINS RILEY & SCARBOROUGH LLP

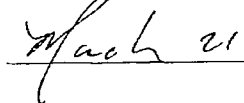
By: 

B. Rush Smith III
SC Bar No. 012941
E-Mail: rush.smith@nelsonmullins.com
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Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 255-9492

Merritt G. Abney
SC Bar No. 71893
E-Mail: merritt.abney@nelsonmullins.com
Dow A. Davidson
SC Bar No. 80512
E-Mail: dow.davidson@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

*Attorneys for The Bank of New York Mellon, as Successor
Trustee under NovaStar Mortgage Funding Trust, Series 2004-
1 and Saxon Mortgage Services, Inc.*

Charleston, South Carolina

 , 2013

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Saxon Mortgage Services, Inc., 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:

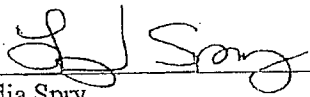
**JOINT MOTION OF PLAINTIFF AND THIRD-PARTY
DEFENDANT FOR A NON-JURY TRIAL IN THE EQUITY
COURT AND TO STRIKE THE JURY DEMAND**

Counsel Served:

G. Thomas Hill, Esq.
Hill and Hill Law Firm
6209 Savannah Highway
PO Box 369
Ravenel, SC 29470
Attorney for Defendant and Third-Party Plaintiff
Rachel R. Lindsay

Matthew J. Modica, Esq.
U.S. Attorney's Office
151 Meeting Street, Suite 200
Charleston, SC 29401
*Attorney for United States of America acting by and through its
agency, the Internal Revenue Service*

CERTIFIED COPY
2013 MAR 22 PM 12:25
CLERK OF COURT
DOMESTIC COUNTY


Lydia Spry
Administrative Assistant

March 21, 2013

Merritt Abney

From: Merritt Abney
Sent: Tuesday, March 19, 2013 2:06 PM
To: hillpdq@aol.com
Cc: Rush Smith; Dow Davidson; Lauren Lynch (lauren.lynych@nelsonmullins.com)
Subject: BONY Mellon v. Lindsay
Attachments: Redline - Saxon's Answer to Third Party Complaint and Saxon's Amended Answer to Lindsay's Third.docx; Redline - PL's Reply to Def Lindsay's Answer Counterclaim and Plaintiff's Amended Reply to Linds.docx; Saxon's Amended Answer to Lindsay's Third Party Complaint - 4831-0675-4323 v 1.docx; Plaintiff's Amended Reply to Lindsay's Answer and CCs - 4834-3050-2163 v 2.docx

Hello Tommy - Attached please find a proposed amended Reply to Counterclaims on behalf of BONY Mellon and Answer to Third-Party Complaint on behalf of Saxon (and redlines showing changes from the originals). Please let me know at your earliest convenience whether or not you will consent to our filing these amended pleadings or whether we need to make a motion.

Also, I realize that your client demanded a jury trial in the Answer & Counterclaim, but please let me know whether or not you will consent to a bench trial for this matter.

If I haven't heard from you by the end of the day on Thursday, March 21, I'll assume that I need to file motions on these issues.

Best regards,

Merritt

Merritt G. Abney
Partner
Nelson Mullins Riley & Scarborough, LLP
151 Meeting Street, Suite 600
Charleston, SC 29401
P (843) 534-4110
F (843) 720-4324

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2013 MAR 22 PM 12:25
Cheryl A. Davidson
CLERK OF COURT
DORCHESTER COUNTY

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

The Bank of New York Mellon, as
Successor Trustee under NovaStar
Mortgage funding Trust, Series 2004-1,

Plaintiff,

-vs-

Rachel R. Lindsay; Jeffery Wayner; Tammy
Wayner; Tiffany Spann-Wilder, Esq.; The
Steinberg Law Firm; and United States of
America, Acting by and through its agency,
The Internal Revenue Service

Defendants.

Rachel R. Lindsay,

Third-Party Plaintiff,

-vs-

Saxon Mortgage Services, Inc.

Third-Party Defendant

IN THE COURT OF COMMON PLEAS

CASE NO.: 2011-CP-18-1013

FILED-RECORDED
2013 MAY 24 PM 3:26
CHERYL GARNHAM
CLERK OF COURT
DORCHESTER COUNTY

**MEMORANDUM OF LAW
IN RESPONSE TO THE
PLAINTIFF AND THIRD PARTY
DEFENDANT'S MOTION TO
DENY THE DEFENDANT/THIRD PARTY
PLAINTIFF THE RIGHT TO A JURY
TRIAL**

INTRODUCTION

Summary Judgment has already been denied in the case at hand. Saxon Mortgage Services, Inc., Third-Party Defendant, acts as the servicer for the mortgage loan of the Plaintiff "The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage funding Trust, Series 2004-1", being the subject matter of this action. Said Third-Party Defendant acted as agents or apparent agents of the Plaintiff; all acts of said Third-Party Defendant were within the scope of their

authority or agency, and/or were ratified by the Plaintiff, including the doctrine of *respondeat superior*. On or about the early spring or summer of 2008, Defendant/Third-Party Plaintiff "Rachel Lindsay" provided payment to the Plaintiff via Third-Party Defendant in the amount of approximately \$6,557.04 to be applied to prior late payments. Neither the Third-Party Defendant or the Plaintiff applied this payment to Defendant/Third-Party Plaintiff's account. Although said payment cleared Defendant/Third-Party Plaintiff's bank on or about June 19, 2008. In the Fall of 2008 in case number 2008-CP-18-2543, the Plaintiff in this instant action brought a foreclosure suit against the same parties as in this matter, which resulted in a judgment against the Defendant/Third-Party Plaintiff. Defendant/Third-Party Plaintiff was never a Summons and Complaint nor served any notices of hearing(s) in Case #:2008-CP-18-2543. Upon Defendant/Third-Party Plaintiff's hiring of legal counsel after finding out that her property had been surreptitiously foreclosed on, Third-Party Defendant acknowledged the aforementioned payment had not been applied and agreed to apply this previously made payment to Defendant/Third-Party Plaintiff's account in or around the first months of 2009. Plaintiff dismissed the prior foreclosure action Case #:2008-CP-18-2543 by Stipulation of Dismissal of Foreclosure Action and Cancellation of Lis Pendens dated March 20, 2009 and filed on April 2, 2009. Defendant/Third-Party Plaintiff along with her present counsel spoke on numerous instances via telephone and e-mail regarding correction of Defendant/Third-Party Plaintiff's account. Third-Party Defendant supervisor and employee, Sharon Cotton, indicated via numerous e-mails that this payment would be applied to Defendant/Third-Party Plaintiff's account. The Plaintiff and Third-Party Defendant have failed to properly apply payments to Defendant/Third-Party Plaintiff's account. Defendant/Third-Party Plaintiff has made additional payments to Plaintiff via Third-Party Defendant. Third-Party Defendant and Plaintiff have failed to apply these additional loan payments to Defendant/Third-Party Plaintiff's account. Defendant/Third Party Plaintiff adamantly asserts

that her money was stolen. Plaintiff and Third-Party Defendant have refused to modify Defendant/Third-Party Plaintiff's loan after numerous discussions and requests for the same. The Plaintiff on May 13, 2009 filed a foreclosure action Case #:2009-CP-18-1311 against Defendant Lindsay. On May 28, 2010 the Plaintiff pursuant to SCRCR Rule 40(j) dismissed the action. On May 17, 2011 the parties consented to restoring this case under Case#:2011-CP-18-1013. Third-Party Defendant and Plaintiff reported negative/late payments and foreclosure on now two instances upon Defendant/Third-Party Plaintiff's credit report. Defendant/Third-Party Plaintiff has suffered a myriad of damages, attorney fees, costs, expenses, emotional distress, damage to her credit report, and other harm due to the improper actions/inactions of the Plaintiff and Third-Party Defendant. The Defendant/Third-Party Plaintiff has asserted the following Causes of Action against the Third-Party Defendant and Plaintiff.

CAUSES OF ACTION	Counterclaims against Plaintiff	Claims against Third- Party Defendant
1. Breach of Contract	X	X
2. Negligence	X	
3. Negligence		X
4. Fraud/Fraud in the Inducement	X	X
5. Negligent Misrepresentation	X	X
6. Promissory Estoppel	X	X
7. Violation of the South Carolina Unfair Trade Practices Act	X	X
8. <i>Quantum Meruit</i> /Unjust Enrichment	X	X
9. Intentional Infliction of Emotional Distress/Outrage	X	X
10. Invasion of Privacy/Intrusion Upon Solitude	X	X
11. Defamation/Libel <i>Per Se</i>	X	X
12. Intentional Interference with Existing Contracts	X	X
13. Intentional Interference with Prospective Contractual Relations	X	X
14. Declaratory Judgment for Compliance with Homeowner Affordability and Stability Plan and United States Treasury Supplemental Directive 09-01, April 6, 2009	X	X
15. Declaratory Judgment ordering correction of credit reports	X	X

AFFIRMATIVE DEFENSES

1. Laches
2. Waiver
3. Estoppel
4. Mitigation of Damages
5. Comparative Negligence
6. Negligences of Others
7. Actions of other not within the employ or control caused damage
8. Sole Negligence
9. Incorrect Accounting
10. Accord and Satisfaction

ARGUMENT

The Defendant Lindsay asserted compulsory Counterclaims and Claims raising legal issues while at all times demanding a trial by jury. If the complaint is equitable and the counterclaim is legal and compulsory the defendant has a right to a jury trial on the counterclaim. C&S Real Estate Services, Inc., v. Massengale, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986).

I. Right to Trial by Jury

The South Carolina Constitution preserves the right of trial by jury only in those cases in which parties would have been entitled to it at the time of the adoption of the Constitution. Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). See also Rule 38 (a), SCRPC ("The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived."). "Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." Lester, 327 S.C. at 267, 491 S.E.2d at 242 (citation omitted). Whether an action is legal or equitable is

primarily determined by the allegations in the complaint. See Nat'l Bank of South Carolina v. Daniels, 283 S.C. 438, 440, 322 S.E.2d 689, 690 (Ct. App. 1984). Where legal and equitable issues or rights are raised in the same complaint, the legal issues are for determination by a jury and the equitable issues are for determination by the court. Floyd v. Floyd, 306 S.C. 376, 379, 412 S.E.2d 397, 398-99 (1991). Furthermore, either party may demand a trial by jury of any issue triable by jury. See Rule 38 (b), SCRCP.¹

II. Counterclaims

Counterclaims are governed by Rule 13, SCRCP, which provides:

13(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

13(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought the suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

The purpose of Rule 13(a) is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." S. Constr. Co. v. Pickard, 371 U.S. 57, 60 (1962) "Rules of procedure, like statutes, should be given their plain meaning." Valentine v. Davis, 319 S.C. 169, 173, 460 S.E.2d 218, 220 (Ct. App. 1995). "By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's

¹ Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor[e] in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

claim." First-Citizens Bank & Trust Co. v. Hucks, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991). The test for determining if a counterclaim is compulsory is whether there is a "logical relationship" between the claim and the counterclaim. Mullinax v. Bates, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). Whether a counterclaim is logically related to the initial claim depends upon the facts of each case. See Hucks, 305 S.C. at 298, 408 S.E.2d at 223 (finding a logical relationship between a trustee regarding the administration of a trust and a legal counterclaim alleging that the trustee breached a fiduciary duty); N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518-19, 381 S.E.2d 903, 905 (1989) (finding a logical relationship between an action on a note brought by the lender to foreclose and the validity of a purported oral agreement modifying the note alleged by the borrower). If a compulsory counterclaim is not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action. Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997). The South Carolina Reporter's Note following Rule 13 states: "[c]ounterclaims arising out of the same transaction or occurrence that is the subject of the action are 'compulsory' under Rule 13(a) and are barred by res judicata or estoppel by judgment if not asserted."

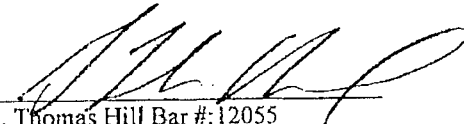
III. Law and Equity

The Plaintiff and Third-Party Defendant attempts to classify the Defendant Lindsay's Counterclaims and Third Party Plaintiff's Claims as being entirely equitable in nature. Fraud and Negligent Misrepresentation are not equitable in nature. The Plaintiff and Third-Party Defendant stole money and attempted to steal the Lindsay's house without even notifying her of the initial lawsuit Case #:2008-CP-18-2543. Violation of the South Carolina Unfair Trade Practices Act Intentional Interference with Existing Contracts, Breach of Contract, Negligence, Intentional Interference with Prospective Contractual Relations, Intentional Infliction of Emotional Distress/Outrage, Invasion of Privacy/Intrusion Upon Solitude, and Defamation/Libel *Per Se* are

all completely legal in nature. Although other claims or counterclaims may be considered equitable in nature; there are sufficient compulsory claims/counterclaims which have been asserted which arise out of the same transaction and occurrence logically relating back to the wrongful acts of the Plaintiff and Third Party Defendant to warrant a trial by jury. But for the Plaintiff's and Third Party Defendant's action of stealing Lindsay's money this legal action would have never be filed in the first place.

CONCLUSION

The Defendant/Third Party Plaintiff has filed an Answer, Counterclaim and Third Party Complaint asserting both legal and equitable issues, most compulsory and some which may be considered permissive counterclaims and claims. Thus pursuant to South Carolina law and in order to prevent a multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters this case should be determined by jury trial.



G. Thomas Hill Bar #: 12055
HILL & HILL
6209 Savannah Highway
Post office Box 369
Ravenel, South Carolina 29470
(843) 889-2261
(843) 638-3715
**ATTORNEYS FOR DEFENDANT/
THIRD-PARTY PLAINTIFF**
(RACHEL R. LINDSAY)

Ravenel, South Carolina

May 23, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

The Bank of New York Mellon, as)
Successor Trustee under NovaStar)
Mortgage Funding Trust, Series 2004-1,)
)
Plaintiff,)

Civil Action No. 2011-CP-18-1013

vs.)

MOTION TO ALTER OR AMEND
JUDGMENT

Rachel R. Lindsay, Jeffrey Wayner,)
Tammy Wayner, Tiffany Spann-Wilder,)
Esq., The Steinberg Law Firm, and)
United States of America acting by and)
through its agency, the Internal Revenue)
Service,)
)
Defendants.)

Rachel R. Lindsay,)
)
Third-Party Plaintiff,)

vs.)

Saxon Mortgage Services, Inc.,)
)
Third-Party Defendant.)

2013 AUG 15 PM 2:23
CLERK OF COURT
DORCHESTER COUNTY

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Plaintiff The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 ("Plaintiff") and Third-Party Defendant Saxon Mortgage Services, Inc. ("Saxon" and, jointly with Plaintiff, "Movants") hereby file this motion to alter or amend the order denying Movants' Joint Motion (the "Motion") for Non-Jury Trial in the Equity Court and to Strike the Jury Demand of Defendant/Third-Party Plaintiff Rachel Lindsay ("Lindsay") entered by this court

on August 14, 2013 (the "Order"). Movants request that the Court reconsider its ruling, that the Order be vacated, and that Court enter an order granting Movants' Motion on the following grounds:

1. This entire action is one in equity, such that Lindsay has no right to a jury trial. This is a foreclosure, which is an action in equity. The fact that Lindsay asserts defenses, counterclaims and third-party related to the loan being foreclosed does change the nature of the action to one at law. Collier v. Green, 244 S.C. 367, 370, 137 S.E.2d 277, 279 (1964) ("Where in actions of foreclosure, the defendant sets up a defense and/or a counterclaim affecting the consideration, and arising out of the transaction in which the mortgage or lien was created, the authorities hold that the issues thus raised are equitable and are to be tried by the court upon its equity side."); see also Byrn v. Walker, 275 S.C. 83, 85, 267 S.E.2d 601, 602 (1980) (counterclaims in a foreclosure action that affect the validity of a mortgage lien or the amount due are equitable in nature). The Supreme Court has squarely rejected attempts by litigants to "earn" the right to jury trial by asserting legal counterclaims in an action on which a plaintiff has a right to proceed non-jury. See Rosenbaum v. S-M-S 32, 311 S.C. 140, 142, 427 S.E.2d 898 (1993) (allowing a defendant to "earn" a right to a jury trial in equitable action to quiet title would deny plaintiff its statutory right to "efficient, unencumbered method of clearing [] titles".) Allowing Lindsay a jury trial in this matter would similarly deny Plaintiff its right to proceed under the statutory regime governing foreclosure actions. See Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) (the right to proceed in the proper mode of trial is a substantial right, and a court may not require a party to proceed before a jury in an equity case).

2. Each of Lindsay's individual claims is either equitable or permissive, such that she has no right to a jury trial on any individual claim. Wells Fargo Bank v. Smith, 398 S.C. 487, 494, 730 S.E.2d 328, 332 (Ct. App. 2012) (because foreclosure proceedings are equitable, a defendant has no right to a jury trial on any counterclaim that is not both legal and compulsory).

- a) Lindsay's claims for promissory estoppel and unjust enrichment are plainly equitable in nature. Rushing v. McKinney, 370 S.C. 280, 289, 633 S.E.2d 917, 922 (Ct. App. 2006) (promissory estoppel); Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994) (unjust enrichment).
- b) Lindsay's claims for declaratory relief are equitable in nature because they seek equitable relief in the form of an injunction and not recovery of damages. Williams v. Wilson, 349 S.C. 336, 340, 563 S.E.2d 320, 322 (2002) (action for declaratory judgment is equitable where relief sought is equitable in nature).

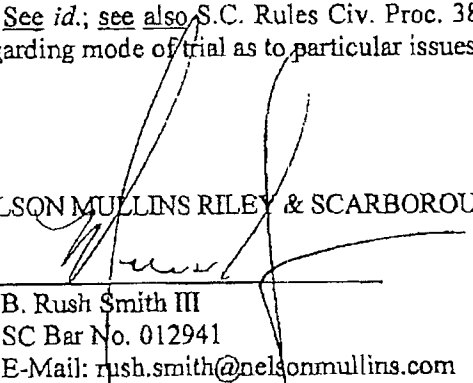
- c) Lindsay's claims based upon alleged misapplication of loan funds are equitable, regardless of how she has styled them, because the main purpose of the claims is to avoid foreclosure.¹ See e.g. Verenes v. Alvanos, 387 S.C. 11, 18, 690 S.E.2d 771, 774 (2010) (where "damages" alleged in action for breach of fiduciary duty were primarily in the nature of restitution and disgorgement, action was one in equity rather than at law); Smith, at 496-497, 730 S.E.2d at 333 (counterclaim for common law unconscionability in foreclosure action deemed equitable where "main purpose" was to have mortgage declared void); Mortgage Elec. Sys., Inc. v. White, 384 S.C. 606, 614, 682 S.E.2d 498, 502 (Ct. App. 2009) (counterclaim for fraud deemed equitable where main purpose was to have mortgage declared void); Wells Fargo Bank, N.A. v. Barker, Op. No. 2012-UP-551 (Ct. App. 2012) (counterclaim for alleged predatory lending deemed equitable where primary purpose was to prevent foreclosure and compel lender to modify loan terms);
- d) Lindsay's third-party claims against Saxon are permissive. N.C. Fed. Sav. & Loan Assoc. v. DAV Corp., 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989) (third-party claims are permissive); Tatnall v. Gardner, 350 S.C. 135, 139, 564 S.E.2d 377, 378 (Ct. App. 2002) (same).
- e) Lindsay's counterclaims are permissive because they do not bear upon the enforceability of the underlying note. Smith, at 495, 730 S.E.2d at 333 (in a foreclosure action, counterclaim bears a logical relationship to the complaint only when it bears upon the enforceability of the loan documents). Accordingly, Lindsay's counterclaims are permissive because none of her claims challenge the enforceability of the underlying loan documents.

3. If the Order is not vacated in its entirety, then, in the alternative, it should be amended to state which of Lindsay's claims the Court deems to be equitable and/or permissive and which claims the Court deems to be legal and compulsory. Gaymon v. Richland Memorial Hosp., 327 S.C. 66, 68, 488 S.E.2d 332, 333 (1997) (legal and equitable issues in same action must be determined separately and plaintiff not entitled to jury trial on equitable issues); Winter v. U.S. Fidelity & Guaranty Co., 240 S.C. 561, 573, 126 S.E.2d 724, 730 (1962) (where legal and equitable issues and rights are asserted in the same complaint, legal issues are for determination by a jury and equitable issues for the judge); Airfare, Inc. v. Greenville Airport Comm'n, 249 S.C. 265, 269, 153 S.E.2d 846, 848 (1967) (directing that legal and equitable issues be separated and tried by the appropriate

¹ This category of claims clearly includes the causes of action for breach of contract, negligence, and unjust enrichment, which are expressly based upon Plaintiff and Saxon's alleged misapplication of Loan payments, but also includes any other claims to the extent that they are based upon improper accounting on the Loan.

branches of court). Movants are entitled to determination of the issues under the proper mode of trial and to notice prior to trial of the manner in which each issue will be determined. See id.; see also S.C. Rules Civ. Proc. 38, 39 (providing for notice to litigants regarding mode of trial as to particular issues in dispute).

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*Attorneys for Plaintiff The Bank of New York Mellon, as
Successor Trustee under NovaStar Mortgage Funding
Trust, Series 2004-1 and Third-Party Defendant Saxon
Mortgage Services, Inc.*

Charleston, South Carolina
August 15, 2013

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Saxon Mortgage Services, Inc., 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):

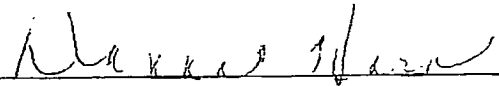
Pleadings:

MOTION TO ALTER OR AMEND JUDGMENT

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Attorney for United States of America acting by and through its
agency, the Internal Revenue Service


Donna Horn
Administrative Assistant

Aug 15, 2013

2013 AUG 15 PM 2:23
CLEAN COPY
DEFENDANT

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

The Bank of New York Mellon, as Successor Trustee
under NovaStar Mortgage Funding Trust, Series 2004-1,

Plaintiff,

vs.

Rachel R. Lindsay, et al.,

Defendants.

Rachel R. Lindsay,

Third-Party Plaintiff,

vs.

Saxon Mortgage Services, Inc.,

Third-Party Defendant.

Case No. 2011-CP-18-1013

**MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**

Plaintiff and Third-Party Defendant's Attorney: Merritt G. Abney, Esq., SC Bar No. 71893 Nelson Mullins Riley & Scarborough LLP 151 Meeting Street, Suite 600 Charleston, SC 29401 Phone: (843) 853-5200; Fax: (843) 722-8700 Email: merritt.abney@nelsonmullins.com		Defendant and Third-Party Plaintiff's Attorney: G. Thomas Hill, Esq., SC Bar No. 12055 Hill and Hill Law Firm 6209 Savannah Highway Ravenel, SC 29470 Phone: 843-889-2261; Fax: 843-631-4430 E-mail: hillpdg@aol.com	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: <u>Motion to Alter or Amend Judgment</u>		Court Reporter Needed: ☐ YES / ☐ NO	
Estimated Time Needed: <u>15 min.</u>			
SECTION II: Motion Type			
☒ Written motion attached ☐ Form Motion—I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for ☒ Plaintiff/ ☐ Defendant		August 15, 2013 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: <u>\$25.00</u> ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ Sexually Violent Predator Act ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE CODE: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ (print name)		Date filed: _____	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

State of South Carolina	)	
County of Dorchester	)	In the Court of Common Pleas
	)	
Bank of New York Mellon,	)	
Plaintiff,	)	Case No: 2011-CP-18-01013
	)	
versus	)	Date: May 24, 2013
	)	
Rachel R. Lindsay, et al,	)	St. George, South Carolina
Defendants.	)	
	)	

TRANSCRIPT OF RECORD

B E F O R E:

The Honorable Diane Goodstein

A P P E A R A N C E S:

Merritt Gordon Abney, Esquire
ATTORNEY FOR THE PLAINTIFF

G. Thomas Hill, Esquire
ATTORNEY FOR DEFENDANT RACHEL R. LINDSAY

FOR COPIES CONTACT: DeeAnne Varnadoe
Official Court Reporter
Fifth Judicial Circuit, At-Large
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I N D E X

HEARING 4

CERTIFICATE 36

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E X H I B I T S

FOR THE PLAINTIFF:

(NONE WERE SUBMITTED FOR THIS HEARING)

FOR THE DEFENDANT:

(NONE WERE SUBMITTED FOR THIS HEARING)

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P R O C E E D I N G S

1
2 THE COURT: All right. Counsel, I've got a note that
3 says per Judge Goodstein, this matter is continued pending
4 certification by counsel of whether the loan modification
5 can be done or not. Once the loan modification efforts
6 have been exhausted, counsel is to notify the Court within
7 ten days.

8 Did you guys do that?

9 MR. ABNEY: We've made an offer, Your Honor.

10 MR. HILL: And I don't know how old that is. I think
11 both of us are new counsel on this and I don't know how
12 long that note has been out there.

13 THE COURT: It says 11/26/12 or shortly therefore
14 because it was continued from the 11/26/12 Roster.

15 MR. HILL: Well, we were -- I guess we were not able
16 to formulate a modification. Since then Merritt Abney has
17 taken over the case from Kevin McCarroll and this case is -
18 - I've taken the case over from a gentleman named Bryan
19 Knowles, so we're ---

20 MR. ABNEY: I'm happy to revisit it, Your Honor, if we
21 -- My understanding is we never got a response to the prior
22 offer.

23 MR. HILL: Well, I think we responded that we wanted
24 to go through with the case.

25 MR. ABNEY: That was never communicated to me.

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1 MR. HILL: We did discuss modification but their terms
2 were not satisfactory at the time.

3 THE COURT: Okay. Okay. Well, let me read this
4 again. This matter is continued pending certification by
5 counsel of whether the loan modification can be done or
6 not. Once the loan modification efforts have been
7 exhausted, counsel is to notify the Court within ten days.

8 And so what you are certifying to me today, counsel,
9 is that you're certifying to me that loan modification
10 cannot be successful.

11 MR. HILL: Yes, that is correct, Your Honor.

12 MR. ABNEY: And I think since then we've had a Summary
13 Judgement Motion. I mean, there's been some other things
14 going on since then. We probably should have -- and I
15 apologize to the Court but we should have sent that
16 certification in sooner.

17 THE COURT: Well, I've got it now.

18 MR. ABNEY: Okay.

19 THE COURT: All right. Now, tell me what motions you
20 all believe are to be heard today.

21 MR. HILL: Your Honor, the Motion to Amend that he has
22 today, I'm not ---

23 MR. ABNEY: I have three.

24 MR. HILL: --- agreeing to but I'm not contesting it
25 either because I understand that the Court has such liberal

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1 decision-making powers on amending the pleadings ---

2 THE COURT: Okay.

3 MR. HILL: --- that I'm not going to issue any
4 argument against that.

5 THE COURT: Okay. So, the Motion to Amend -- the
6 Joint Motion for Plaintiff and Third Party Defendant to
7 Amend; is that what you're talking about?

8 MR. HILL: Yes. I'm not actively opposing it.

9 THE COURT: Okay. So, this one is granted. All
10 right. And then let me tell you what I've got, what I am
11 showing. I'm showing a Motion for a Rule To Show Cause and
12 to Compel Responses, and then I'm showing a Motion for
13 Plaintiff and Third Party Defendant to Strike the Jury, and
14 then that's it.

15 MR. ABNEY: That's what I've got, Your Honor.

16 THE COURT: Okay. All right. So, first of all, then
17 is the Motion and Rule To Show Cause and to Compel
18 Responses.

19 MR. HILL: Sure.

20 MR. ABNEY: Your Honor, let me give you just a little
21 bit of background on the case ---

22 THE COURT: All right.

23 MR. ABNEY: --- that I think will help on this issue.

24 THE COURT: Sure.

25 MR. ABNEY: This is a foreclosure case.

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1 THE COURT: All right.

2 MR. ABNEY: Straight foreclosure is what was plead.
3 Deficiency was waived. All we're seeking is foreclosure.

4 The Defendant, Ms. Lindsay, answered and filed
5 counterclaims and third party, Saxon Mortgage Services,
6 which is the servicer ---

7 THE COURT: Okay.

8 MR. ABNEY: --- and they allege 26 causes of actions
9 which we can go through but it covers the waterfront of
10 available causes of action under South Carolina law,
11 essentially.

12 THE COURT: Okay.

13 MR. ABNEY: And then some.

14 THE COURT: Okay.

15 MR. ABNEY: But they break down into four categories
16 of claims: one being that certain payments were misapplied
17 to the loan; and number two being that there were false
18 statements by the servicer to the effect that the
19 misapplications would be fixed.

20 THE COURT: Okay.

21 MR. ABNEY: Number three, that there were inaccurate
22 statements made about the account in the pleadings -- the
23 foreclosure pleadings -- and to credit bureaus; and four
24 being the refusal to grant a loan modification request.

25 That is sort of how all of these causes of action, I

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1 guess, sort of break down.

2 The damages alleged are, I think, in three different
3 categories: one is emotional distress; two being the
4 inability of the Defendant to obtain credit, I guess,
5 because of the credit reporting issues; and three being an
6 injury to her business.

7 She is a property manager and she has operated
8 primarily through two businesses over the last several
9 years, and it's my understanding they are alleging injury
10 to those businesses as a result of the filing of the
11 foreclosure and injury to credit.

12 So, we filed a Motion to Compel. It was actually
13 filed by my predecessor near the end of last year seeking
14 11 categories of documents. That went to a hearing before
15 Judge Murphy in October. Judge Murphy issued an Order the
16 following month identifying 11 categories of documents that
17 they were ordered to provide.

18 The deadline provided in that Order passed and I had
19 not gotten the supplemental responses to the discovery or
20 the documents and a Rule To Show Cause at that point. That
21 Motion went before Judge Dickson.

22 Judge Dickson ordered, at that point, that they were
23 to provide that information that was ordered in the prior
24 Order by Judge Murphy by February 15th. It was also
25 ordered -- Based on the fact that Ms. Lindsay had refused

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1 to answer basic questions about discovery at her
2 deposition, Judge Dickson ordered the deposition to be
3 reconvened and they were also supposed to provide responses
4 to second interrogatories and second requests for
5 production by the 15th as well.

6 We didn't get that stuff by the 15th. Judge Dickson
7 ordered that any documents that were not produced by the
8 15th could not be used at trial.

9 So, there's nothing now that we are seeking as far as
10 documents they're going to use, you know, to put on their
11 case. What we're trying to get are responses to the second
12 request for production and documents relating to injury to
13 the businesses and the business operations so that we can
14 determine whether there was any damage to the businesses
15 and whether it was caused by anything we conceivably could
16 have done.

17 Also, we have asked for information regarding mental
18 health treatment because they have produced a therapist who
19 is going to come into the court and say that she suffered a
20 depressive -- a massive depressive episode as a result of
21 the filing of this foreclosure complaint. So, obviously,
22 we want to be able to assess whether or not there was any -
23 - any impact and whether or not it was the result of this
24 foreclosure or possibly something else.

25 So, the second discovery request specifically requests

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1 information related to those categories ---

2 THE COURT: Have those been ordered to be produced up
3 to this point?

4 MR. ABNEY: That was done by Judge Dickson. He
5 ordered because there had been no response whatsoever to
6 the second request at that point. He ordered responses be
7 produced. We didn't get them. I certainly didn't get
8 them. I was in -- I had taken over at that point and I
9 never got anything in response to the second request for
10 production. I contacted the prior firm to see if they got
11 anything and they said they never received anything from
12 Mr. Hill.

13 I sent an e-mail to Mr. Hill saying we're still
14 looking for this stuff. I got nothing back so I filed this
15 Motion, in part, seeking responses to those requests: the
16 second request for production and second interrogatories.

17 I got them yesterday, and my understanding is they
18 were at least dated February 15th, the deadline set forth
19 in Judge Dickson's Order, but whether they were sent, I
20 don't know.

21 But, in any event, what I got yesterday -- there were
22 four interrogatories relating primarily to the information
23 that -- that I just explained to you. All of them were
24 objected to as irrelevant. So, while I now have responses,
25 I have no information and I would -- you know, what I don't

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1 want to have to do is come back to the Court and, say,
2 again, file another Motion to Compel trying to get
3 responses to these unresponsive written requests -- written
4 responses. So, that's what we're seeking -- full, complete
5 responses to the second requests.

6 We've asked for basic business information for us to
7 be able to determine whether, in fact, there was any impact
8 on the business that happened after this foreclosure action
9 was filed, and all of that has been objected to as
10 irrelevant. And the responses specifically state that the
11 reason being that these businesses through which she has
12 operated are not parties to the action, but her earlier
13 discovery responses specifically identified damages that
14 she has suffered as being injury to these businesses
15 through which she's operating.

16 So, we're just trying to get basic information here in
17 order to defend against this case and we have not gotten
18 it. This is the third time we've had to come back to the
19 Court to get it.

20 So, I don't usually ask for sanctions or fees in
21 connection with discovery motions, but this is the third
22 time we've had to come to court. We would like our fees.
23 We would like compliance with this ---

24 THE COURT: What are the fees? Do you have an
25 Affidavit?

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1 MR. ABNEY: I don't have an Affidavit yet. I would --
2 I mean, I would include the fees for being here today ---

3 THE COURT: Okay.

4 MR. ABNEY: --- in connection with that. And also,
5 ultimately, what I would like is compliance or, in the
6 alternative, an Order striking the counterclaims to the
7 extent they're not going to produce this -- these documents
8 to let us evaluate these claims.

9 THE COURT: I understand. I've got it.

10 Yes, sir.

11 MR. HILL: Your Honor, this is -- a lot of what he
12 says is correct. When Kevin McCarroll was in on the case,
13 I e-mailed him the responses. We were supposed to come --
14 we were supposed to have a hearing back in January. I sent
15 him the discovery that was requested at the time. I
16 thought that that was all right. When the new firm got
17 involved, they wanted more information.

18 Now, what the judge said in court was if we don't
19 produce it, then it won't be, you know, that anything new
20 would not be able to be presented at trial.

21 And we contend all along -- and I did prepare those,
22 my responses, back on February 15th and I e-mailed them out
23 or I thought I had because that's what was in my computer
24 and I use my electronic signature when I do that so they
25 will get it. But, nevertheless, they contend they did not

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1 get those responses.

2 The responses are to object to us presenting any more
3 information involving PNL Property Management and One
4 Sterling Place. We contend that they are not parties to
5 this action.

6 Now, we do contend that Ms. Lindsay's inability to get
7 credit has harmed those businesses because she owns the
8 businesses and her inability to get credit means that she
9 has to work on a cash basis. That's how those businesses
10 have been harmed, but they're not listed as parties.

11 We have allowed and have not objected to numerous and
12 innumerable subpoenaed duces tecums for the Mayo Clinic or
13 access to any bank she has. We haven't objected to any of
14 that. Whatever they want they could get it. But we just
15 don't have this information that they want and Kevin
16 McCarroll understood that.

17 It's like, you know, where's the treasure, Tommy,
18 where's the treasure. Well, I've got no more. Where's the
19 treasure map? Well, I don't have a treasure map. It's
20 that kind of thing. I don't have anything more to give
21 them and that's been my explanation all the time. I think
22 Kevin McCarroll understood that in January. He was
23 replaced and this thing reared its head again.

24 I think we have complied with discovery. I've looked
25 back through this file, and this file is huge and I don't

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1 have a whole lot of money or staff to work with.
2 Everything comes through me, basically, and, you know, I
3 feel as though that I've complied as much as I can.

4 And it is not relevant regarding the tax returns of
5 PNL Management and One Sterling. It isn't -- their
6 checking account is not pertinent to this action.

7 This is an action involving a foreclosure where sixty-
8 five hundred dollars (\$6500) went missing that she -- that
9 my client paid. They foreclosed in 2008, then decided they
10 made a mistake. They dismissed the claim. They later re-
11 filed, then filed a 40(j) and then restored the case and
12 here we are today, you know, and we've given everything
13 that is pertinent to this case. All the checks that we
14 have, they've had full access to any accounts and any
15 doctors that we've seen, so I think we've complied.

16 I think we could have objected to the Mayo Clinic. I
17 mean, under the HIPAA rules I think we could have objected
18 to some of this but we just, you know, let them find what
19 they -- whatever they want to find. We haven't objected to
20 the subpoenas.

21 THE COURT: Okay. Specifically, tell me what you're
22 asking.

23 MR. ABNEY: Sure. All right. So, set forth any and
24 all instances of psychiatric or psychological or mental
25 health-related treatment or examinations of Ms. Lindsay,

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1 including but not limited to physicians, doctors,
2 psychiatrists. We're trying to get her providers. So, for
3 example, she's alleged that suddenly she had -- she became
4 depressed as a result of the filing of a foreclosure
5 action. I would like to know if she saw providers prior to
6 the foreclosure action. All I have asked here is a list of
7 the providers that she's seen. The answer: Objection.
8 Overly broad. All pertinent information has already been
9 provided.

10 They can't come in here, Your Honor, and put on -- put
11 up a doctor or a counselor who is going to say that she
12 suffered a million dollars in emotional distress damages
13 because of the filing of the foreclosure action, and then
14 claim my attempts to investigate what other mental health
15 treatments she received ---

16 THE COURT: Hold on a second. What -- Was this
17 particular interrogatory the subject of one of the orders
18 that counselor has just mentioned?

19 MR. HILL: I'm not sure but I could give you the
20 response. Dr. Taylor -- and they know this -- was the only
21 person that she's ever seen and they know that. That's why
22 we say that we can't give them anything else that we don't
23 have. They know about the Mayo Clinic. They know about
24 this health -- there is nobody else.

25 THE COURT: Okay. But you don't know of any -- In

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1 other words, what you're telling me is you don't know
2 whether or not this particular interrogatory was the
3 subject of these prior orders?

4 MR. HILL: What ---

5 THE COURT: Are you not sure?

6 MR. ABNEY: It was.

7 MR. HILL: What date was that?

8 MR. ABNEY: It absolutely was.

9 MR. HILL: I'm not sure it was.

10 MR. ABNEY: It was the subject of -- It was expressly
11 ordered in Judge Dickson's order ---

12 THE COURT: Okay.

13 MR. ABNEY: --- to respond to these interrogatories.

14 THE COURT: Okay.

15 MR. ABNEY: We got written responses. I got them
16 yesterday. But there's four interrogatories.

17 THE COURT: That's not a response.

18 MR. ABNEY: None of them were responses.

19 THE COURT: An objection is not a response.

20 MR. ABNEY: They are all objections. There's not a
21 piece of information.

22 MR. HILL: We provided ---

23 THE COURT: Let me make this clear for you. When the
24 Court says respond, that means respond. In other words,
25 you have an opportunity to answer within the period of time

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1 with an objection, but when the Court says respond that
2 means you have to answer.

3 MR. HILL: And I believe I did. And I believe that
4 was sent ---

5 MR. ABNEY: Would you like to see ---

6 THE COURT: Okay.

7 MR. HILL: --- on February 15th. And I resent it
8 yesterday because they kept asking us and I said, Merritt,
9 I think I've already done that. All I owe you for is the
10 third set that was sent after the January hearing was
11 scheduled. And I was under the impression that I had sent
12 that all along, by February 15th, because I knew about the
13 Order and I had sent it.

14 THE COURT: Okay.

15 MR. HILL: I believe I sent that.

16 THE COURT: Very well.

17 MR. HILL: There may have been objections involved ---

18 THE COURT: I understand.

19 MR. HILL: --- but I did send it to comply.

20 THE COURT: Very well. Where is, then, your copy with
21 your Certificate of Service?

22 MR. HILL: Well, I would have e-mailed it, Your Honor.

23 THE COURT: That is not -- That is not an adequate
24 response under our current law. So, you have to send a
25 hard copy with a Certificate of Service, and the reason for

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1 that is it's the only way that the Court can deal with
2 whether or not -- whether or not, in fact, items have been
3 sent or received. And what counsel, as an Officer of the
4 Court, is telling me is that he didn't get them; yes?

5 MR. ABNEY: Absolutely correct.

6 THE COURT: Okay. Very well. So, I have to deal with
7 what I have to deal with, so with response -- in response
8 to those four interrogatories that there's an objection,
9 then you must respond; okay? Yes?

10 MR. HILL: Yes.

11 THE COURT: Very well. Yes?

12 MR. ABNEY: And the same with the request for
13 production, Your Honor. I mean, again ---

14 THE COURT: Tell me specifically which ones you are
15 referring to.

16 MR. ABNEY: All right. Number one -- this is on the
17 second request for production, again, ordered to be
18 responded to by Judge Dickson.

19 THE COURT: I understand.

20 MR. ABNEY: I'm trying to get PNL -- just basic
21 business information about PNL Management and One Sterling
22 Place. Number one: Objection. Irrelevant. PNL Property
23 Management and One Sterling Place are not parties.

24 THE COURT: Okay.

25 MR. ABNEY: That's fine.

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1 THE COURT: I got it, I got it. What other ones?

2 MR. ABNEY: Number two: Same objection. Number
3 three, it just says returns -- this is asking about the tax
4 returns for those entities.

5 THE COURT: Okay.

6 MR. ABNEY: It says unavailable. I don't know whether
7 that means they were -- weren't filed or they don't exist
8 or what. It just says returns unavailable.

9 THE COURT: Okay.

10 MR. ABNEY: That's all it says. Number four:
11 Objection. Irrelevant. Again, PNL ---

12 THE COURT: I -- go ahead.

13 MR. ABNEY: Number five and seven, again, it just says
14 unavailable. I don't know what that means.

15 THE COURT: Okay.

16 MR. ABNEY: Number six is objected to because the
17 public record would reflect the requested information.
18 This is information about tax liens related to these
19 entities. That's not a valid objection, as I understand
20 the law.

21 And again, responses to numbers 10, 11 and 13 -- or
22 I'm sorry, 12 -- all just say not available. If the
23 documents don't exist, then if he'll just put that in here,
24 I can live with that. That's something I can show the
25 jury, that these documents don't exist. But not available

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1 doesn't help me. I just don't know what that means.

2 THE COURT: Okay. Got it.

3 MR. HILL: It means that we can't put our hands on
4 them. If something exists that we can find it, we'll
5 produce it. But we have -- you know, as far as the tax
6 returns are concerned, they haven't been filed. So, I
7 mean, we don't have them. Kevin McCarroll knew all of
8 that. I know Merritt is getting up to date and that's why
9 I kept telling Merritt I can't send you something I don't
10 have.

11 THE COURT: Why didn't you ---

12 MR. HILL: Now, in number six they left out that they
13 want -- they want all the lease -- leases on 127 Cambridge
14 Road which has nothing to do with this case. You know,
15 it's just a barrage of questions that I don't believe are
16 pertinent.

17 If the Court says, well, you better find whatever you
18 can find -- and that's what the judge said. He said, Look,
19 if you can't produce anything else, then it's not going to
20 -- you know, if you can't find it, then it won't be able to
21 be produced. Judge Dickson said that, and I said, well, we
22 understand that, Your Honor. And so if we can't produce
23 it, then we won't be able to use it at trial. And that's -
24 - you know, if we can find it -- there's a box or a bunch
25 of boxes and she's looked for this stuff and we've gone

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1 through this and we've sent them everything we've had.
2 We've sent Kevin McCarroll things. Anytime we would find
3 it we would supplement or send him the additional
4 information.

5 But that's why if they can find, by subpoenaing the
6 checking accounts or whatever they want to, then that's
7 fine if they can -- if that can be found. We didn't oppose
8 that, but we were unable to produce a lot of these things.
9 We produced a lot of these checks that were relevant but we
10 didn't produce every check that she had ever written
11 because we didn't have that. We got a lot of the
12 information from one bank but it was difficult getting it
13 from the other bank. But anything relevant to this case,
14 we've produced.

15 And they know that we don't have tax returns and they
16 -- they know Dr. Taylor is the only one that has ever seen
17 my client. In her deposition, which was seven hours long,
18 six or seven hours long, she talked about seeing her or
19 seeing Ms. Lindsay back in the '90s. That's it. There is
20 nothing else. I can't give them anything else that we just
21 don't have.

22 MR. ABNEY: Judge, I can't -- I don't know that Dr.
23 Taylor is the only doctor she has ever seen because they
24 won't tell me. Every -- When I ask they object to that
25 question. All I've asked is for all of the providers. Dr.

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1 Taylor has said that she has seen her, but Dr. Taylor
2 doesn't know that she's the only provider that Ms. Lindsay
3 has seen. All I want is the names of the ones that she's
4 seen. If it's -- if it is the case that Dr. Taylor is the
5 only mental health provider that she has seen during this
6 time period, an answer to that effect will suffice. But
7 they're objecting when I even ask the question. I just
8 want an answer to that effect.

9 MR. HILL: Well, they -- you asked for her lifetime.
10 I mean, do you want her pediatrician back in, you know, 19
11 -- I don't know, 1965? I don't know, I'm not sure. You
12 know, I mean ---

13 MR. ABNEY: If there's an objection to the time frame,
14 I can deal with that but I didn't get any responses. I
15 didn't see this until ---

16 THE COURT: Here's -- here's the problem. Let me --
17 Here's what I'm going to do and I'd like to sort of cut to
18 the chase.

19 You have raised some very good and potentially very
20 valid counterclaims and resistance to this foreclosure.
21 And you have alleged damages and they have a right to
22 discover those damages.

23 MR. HILL: Okay.

24 THE COURT: And the question is, is whether or not you
25 and your client wish to proceed with your counterclaims.

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1 Those counterclaims are going to be dealt with just as
2 aggressively as you are dealing with the foreclosure.

3 MR. HILL: Okay.

4 THE COURT: And you've got to get yourself prepared
5 for that. You've got to be there. If you want to drop
6 some of these counterclaims, then you can certainly drop
7 the counterclaims. But don't lose them by virtue of the
8 fact that you choose not to comply with discovery, and
9 that's where -- exactly where you are headed.

10 MR. HILL: Okay.

11 THE COURT: And when you raise these counterclaims,
12 which are pretty well drafted counterclaims, you should
13 have been prepared for this sort of aggressive discovery to
14 those counterclaims.

15 MR. HILL: Okay.

16 THE COURT: And your client objects to this
17 foreclosure having been -- been handled in the way that it
18 was handled and -- but she must be prepared when she
19 alleges damages which very well could have happened. If
20 you're a property manager and you get a foreclosure filed
21 against you and it is not a properly filed foreclosure and
22 they're doing things to your credit, it's going to -- it is
23 not going to do your property management business a bit of
24 good. But, you must be prepared for an aggressive
25 discovery back at you.

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1 MR. HILL: Okay.

2 THE COURT: And that is where you are.

3 MR. HILL: Okay.

4 THE COURT: So.

5 MR. HILL: Understood.

6 THE COURT: And the fact that she is suffering
7 emotional upset as a result of all of that very well may
8 have happened. I would tell you that you very well have a
9 fantastically plead counterclaims to a foreclosure, but you
10 mustn't be surprised that it's going to be discovered very
11 aggressively and that is where you are.

12 MR. HILL: Okay.

13 THE COURT: If you all decided that that is not
14 something that you want to do, then just drop those
15 counterclaims. But, otherwise, be prepared to -- to
16 aggressively be discovered.

17 MR. HILL: Okay.

18 THE COURT: That's simply where this case is.

19 MR. HILL: All right.

20 THE COURT: So, I mean, and so here's where we are.
21 So, these counterclaims -- these answers to the
22 interrogatories got to be responded to.

23 MR. HILL: Okay.

24 THE COURT: She'll help you. If she's seeing these
25 doctors, they're going to back her up. Give him the names.

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1 MR. HILL: Okay.

2 THE COURT: Don't be reluctant, you know? If it's
3 there, it's there. Give it to him.

4 These -- you know, if she's got income tax returns
5 that she hasn't been able to find, just say it. If there
6 are income tax -- if she's got contracts and maybe she
7 didn't do the same amount of money she would have done or
8 maybe she was kept from succeeding better. Give it to him.
9 You know, if that's her position, it is what it is. Give
10 him -- give him the discovery. They're entitled to it.

11 MR. HILL: Okay.

12 THE COURT: She's claiming damages, then they're
13 entitled to her -- her discovery and nothing short of it
14 and it's been ordered by the Court.

15 MR. HILL: Yes.

16 THE COURT: So, the four interrogatories and the
17 request to produce have to be responded to. If these
18 documents do not exist, you must have your client file an
19 Affidavit that they don't exist.

20 MR. HILL: Okay.

21 THE COURT: And if she files an Affidavit that they
22 don't exist, they better not show up; okay?

23 MR. HILL: Right.

24 THE COURT: Because then you're going to have a
25 spoliation problem, and you may have a spoliation problem

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1 anyway, but that must be done by -- what's today? -- a week
2 from today.

3 MR. HILL: All right.

4 THE COURT: You've got to have them in your hands,
5 otherwise, the counterclaims are going to be stricken;
6 okay?

7 MR. HILL: Yes.

8 THE COURT: All right. So, your interrogatories --
9 you have to do those four interrogatories that you have
10 discussed with me and they must be responded to and all
11 those requests to admit must be responded to. And if these
12 things don't exist, an Affidavit from your client saying I
13 have looked diligently and they don't exist, and then
14 you're done with it.

15 MR. HILL: Okay.

16 THE COURT: And now you understand that if they should
17 exist, you're going to have a spoliation problem.

18 MR. HILL: Yes.

19 THE COURT: And there's just nothing anybody can do
20 about that. But if they -- if you haven't filed them, just
21 put I haven't filed the income tax returns for whatever
22 year.

23 MR. HILL: And I ---

24 THE COURT: And just be done with it.

25 MR. HILL: And I have -- this is like the third

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1 generation that has been answered in a -- in prior
2 interrogatories and we have produced the other damages by
3 the checks and closing statements and other things, so they
4 do have quite a bit of discovery from us. It's just this
5 second round.

6 THE COURT: I'm with you.

7 MR. HILL: But we will answer.

8 THE COURT: Fantastic. Okay?

9 MR. ABNEY: Thank you.

10 THE COURT: Great. And your attorney's fees are ... ?

11 MR. ABNEY: I'm sorry. I haven't calculated them
12 through today, but I will do that and submit an Affidavit
13 to the Court.

14 THE COURT: It's your problem if I don't have them
15 today because they don't have an opportunity to oppose
16 them. If you wish to have your attorney's fees, then
17 you're going to have to have another hearing because
18 they're entitled to meet them and to contest them. So,
19 there you have it.

20 MR. ABNEY: May I send you an Affidavit and send it to
21 Mr. Hill and give him an opportunity to object?

22 THE COURT: Sure.

23 MR. ABNEY: And if he objects, then we'll have another
24 hearing.

25 THE COURT: We'll deal with it then.

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1 MR. HILL: And Your Honor, we are down here anyway on
2 these other motions, so I would, you know ---

3 THE COURT: So, object.

4 MR. HILL: I guess it ---

5 THE COURT: Just object when he does it.

6 MR. HILL: I will.

7 THE COURT: On that basis.

8 MR. ABNEY: I will apportion between the hearings,
9 Your Honor.

10 THE COURT: I understand. I understand.

11 MR. ABNEY: Yes, Your Honor.

12 THE COURT: All right. Now, what are the other
13 motions we have?

14 MR. ABNEY: Well, it sounds like the Motion to Amend
15 has been granted, so the other is our Motion to Strike the
16 Jury Demand. We have a straight foreclosure case. We've
17 not sought any deficiency. Foreclosure is an equitable
18 cause of action. Every defense and counterclaim that has
19 been raised goes to whether or not -- what the amount is
20 due on the debt. That is exactly what the Master in Equity
21 is supposed to decide in connection with a foreclosure
22 case; whether the amount that is plead is due, and whether
23 or not foreclosure is proper. Every one of these
24 counterclaims fails if we're not entitled -- I mean, if
25 we're entitled to foreclose.

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1 THE COURT: All right. Let me look at it. Mr. Hill,
2 give me my first counterclaim; what is it?

3 MR. HILL: Breach of Contract. In my memorandum it
4 lists the amount and numbers them.

5 THE COURT: Give me one. Give me the first one.

6 MR. HILL: The Breach of Contract.

7 THE COURT: That's a jury trial. Breach of Contract
8 has to go to a jury trial.

9 MR. ABNEY: Your Honor, all he's -- all he's alleging
10 is that we've breached a contract because we've misapplied
11 a payment.

12 THE COURT: Okay.

13 MR. ABNEY: I mean, it's just a defense couched as a
14 counterclaim. It's a defense to foreclosure couched as a
15 counterclaim.

16 THE COURT: Right.

17 MR. ABNEY: Well, that's -- that doesn't convert the
18 action -- it shouldn't convert the action from one inequity
19 to one in law. I mean, otherwise, there is no -- there is
20 no right to a case before the Master in Equity on a
21 foreclosure action because every defendant will do that
22 simply if they want to defend, just couch it as a breach of
23 contract.

24 THE COURT: What's your second one?

25 MR. HILL: Well, the next one would be fraud.

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1 THE COURT: All right. How about that?

2 MR. ABNEY: Fraud? The Court of Appeals in the White
3 case that we've cited in our memorandum, Your Honor, where
4 the fraud allegation goes to simply the amount due on the
5 debt, that we have fraudulently misstated what is due like
6 this one does, and that can be considered an equitable
7 cause of action when the purpose of the claim is to defeat
8 a claim for foreclosure. And that's what is happening
9 here.

10 There are other causes -- there are purely straight
11 equitable causes of action as well; promissory estoppel,
12 unjust enrichment. There are two declaratory judgement
13 claims both seeking injunctive relief. And these -- all of
14 these what otherwise would be legal claims in a sort of, I
15 guess if they were affirmatively plead in a separate
16 action, are simply defenses to foreclosure re-plead and
17 repackaged as every conceivable cause of action in South
18 Carolina law under the sun. They shouldn't be allowed to
19 avoid or deprive us of our right to an equity trial which
20 is what we clearly have on the foreclosure claim just
21 because they've couched counterclaims -- or defenses as
22 counterclaims.

23 And the claims, Your Honor, related to the credit
24 reporting, they may be -- they may be legal but they are
25 clearly, clearly permissive. They didn't have to be

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1 brought in this action. In the Wells Fargo versus Smith
2 case, last year the Court of Appeals held that a claim for
3 violation of the Attorney Preference Statute, in connection
4 with a mortgage closing, is a permissive counterclaim to a
5 foreclosure. The Courts have repeatedly held that cases --
6 claims like that that do not logically relate to the
7 primary cause of action are permissive. This claim -- this
8 case is chocked full of them. All third party claims are
9 always permissive. No question about it. The DAV case
10 decided by the Supreme Court squarely says any one cross-
11 claim, third party claims, are permissive.

12 There is not a single claim in this action,
13 counterclaim that they've asserted or a third party claim,
14 that is not either equitable or permissive or both,
15 regardless of how they have styled it.

16 And as I said, Your Honor, we -- we -- we briefed this
17 extensively and I have received a response memorandum just
18 now.

19 MR. HILL: Your Honor, I think it -- I only need like
20 -- I only need one compulsory counterclaim in order to get
21 to the jury trial, and I think that fraud and negligent
22 misrepresentation, negligence, violation of South Carolina
23 Unfair Trade Practices Act, defamation and -- you know, it
24 just goes on and on. And just one of those is -- I mean, I
25 think they're all compulsory. I understand that quantum

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1 meruit and unjust enrichment and promissory estoppel may be
2 equitable, but I just need one compulsory counterclaim and
3 I think they're there and it's sufficient.

4 MR. ABNEY: Your Honor, what the Courts have said is
5 you've got to look to the substance of what they're
6 alleging. It's pretty easy to say -- to slap a fraud label
7 on a counterclaim. Every single defendant, as I've said,
8 could do that in response to any foreclosure action. And
9 that would mean, if that's the rule then, that every single
10 foreclosure action goes to the jury.

11 MR. HILL: The difference ---

12 THE COURT: All right. Exactly. This one has got a
13 little bit of a different history. As I understand it,
14 there's -- there was a -- it was a -- According to Mr.
15 Hill, he tells me that this was a foreclosure that was
16 filed.

17 MR. HILL: It was.

18 THE COURT: It was deemed to have been improperly
19 filed. It was then dismissed and then it was re-filed and
20 then it was 40(j)'d and then it was renewed. Now, that's
21 what he's told me and I'm sure you disagree with that. So,
22 you know.

23 MR. HILL: Actually, it is worse than that. It was
24 filed, never served, and she finds out that it's being sold
25 at auction because the foreclosure went through and she

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1 never received any notices of the hearing. And then they
2 found out and, oh, we've got a problem and let's dismiss
3 this case and where is our sixty-five hundred dollars
4 (\$6500) that wasn't applied to those months which is the
5 whole reason for -- plus, there's more money than that.
6 It's around eleven thousand dollars (\$11,000), my client is
7 saying. But there was a sixty-five hundred dollar (\$6500)
8 check and then there were other checks, and none of it was
9 applied. She contends it was -- the money was stolen.

10 We have some real issues here and -- and this is not
11 your ordinary foreclosure case. She made the payments.
12 They didn't apply them. Then they filed foreclosure. They
13 didn't even serve her. They didn't give her notice of the
14 hearing. She finds out because it comes up in the paper.
15 She gets a lawyer. The lawyer tells the other attorneys
16 involved. They dismiss the case. They go through this and
17 by that time, you know, they won't take a payment from her.
18 They try to straighten it all out. And then the right hand
19 not knowing what the left hand is doing, a department
20 within the bank filed against her a second time.

21 And then they've got all these problems and in 2010, a
22 year later, they say, oh, well, let's do a 40(j) because
23 we've got -- we've got other problems, and so they 40(j)
24 it. A year later, they come back up -- almost a year later
25 -- and then restore it.

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1 I mean, this is not your typical foreclosure case.
2 They're -- they've got some real problems and I think this
3 is a jury question and that's where the fraud comes
4 involved. And that's why I think it's very personal too.
5 A lot of these causes of action may tangently relate to her
6 business, but many of them are just against her personally.
7 I mean ---

8 THE COURT: I understand. Yes, sir?

9 MR. ABNEY: Taking what he said is true and just
10 assuming that that is true, and, obviously, we dispute all
11 of that, but it's still the causes of actions are either
12 permissive or equitable in nature.

13 If it's related to a prior foreclosure that existed,
14 it doesn't have to be brought in this cause of action. If
15 it's related to credit reporting, that is not something
16 that has to be brought in this cause of action.

17 THE COURT: Okay.

18 MR. ABNEY: It would not be a compulsory counterclaim.
19 Foreclosure is an equitable cause of action, Your Honor.

20 THE COURT: Right.

21 MR. ABNEY: And we should be entitled to the right to
22 proceed in the right mode.

23 THE COURT: Very well. At this point, I'm going to
24 deny your Motion to Strike the Jury. If, in fact, what I'm
25 being told that those are causes of action, then she ought

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1 to be able to bring in, in conjunction with this
2 foreclosure. If they aren't, that will shake out in time
3 and it can be struck at that point.

4 MR. ABNEY: Thank you.

5 THE COURT: All right.

6 MR. HILL: Thank you, Your Honor.

7 THE COURT: Thank you. All right. Orders? I need
8 them from everybody.

9 MR. ABNEY: One from me and one from Mr. Hill?

10 THE COURT: I think so.

11 MR. HILL: Okay.

12 THE COURT: Thirty days, Gentlemen.

13 MR. ABNEY: Very good.

14 THE COURT: Thank you.

15 MR. HILL: Thank you.

16 (WHEREUPON, THE HEARING IN THE ABOVE-
17 ENTITLED MATTER WAS CONCLUDED.)
18
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25

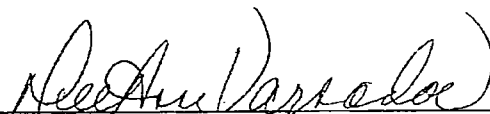
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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND) CERTIFICATE

Be it known that I, the undersigned DeeAnne Varnadoe, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing transcript represents a true, accurate and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, before the Court of Common Pleas for Dorchester County, South Carolina, so given on May 24, 2013, to the best of my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

IN WITNESS WHEREOF I have here unto set my hand and seal this 28th day of August, 2013.


DeeAnne Varnadoe
Official Court Reporter
Notary Public for South Carolina
My commission expires 3/15/2016.

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BK 4015PG266

After Recording Return To:
NOVASTAR MORTGAGE, INC.
ATTN: COLLATERAL CONTROL
6200 OAK TREE BLVD. 3RD FLOOR
CLEVELAND, OH 44131

FILED-RECORDED
RMC / ROD

2004 FEB 26 AM 8:42

LINDA T. MESSERVY
DORCHESTER COUNTY, SC

WHEN RECORDED PLEASE RETURN TO:
LOWCOUNTRY TITLE SERVICES, LLC.
2183 ASHLEY PHOSPHATE ROAD, STE. A
NORTH CHARLESTON, SC 29406

23
This instrument was prepared by:

Title Order No.: LINDSAY
Record No.: LINDSAY

[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, 19, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 18.
(A) "Security Instrument" means this document, which is dated FEBRUARY 13, 2004, together with all Riders to this document.

(B) "Borrower" is RACHEL R. LINDSAY, ~~THAT SHE HAS~~ LRL

Borrower is the mortgagor under this Security Instrument.

(C) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, Michigan 48501-2026, tel (888) 679-MERS.

(D) "Lender" is UNIVERSAL MORTGAGE CONSULTING, LLC.,

Lender is a CORPORATION,
THE STATE OF VIRGINIA.
SUITE 202, CHARLESTON, SC 29406.

organized and existing under the laws of
Lender's address is 6650 RIVERS AVENUE

Lender is the mortgagee under this Security Instrument.

(E) "Note" means the promissory note signed by Borrower and dated FEBRUARY 13, 2004. The Note states that Borrower owes Lender *****ONE HUNDRED FORTY THOUSAND TWO HUNDRED FIFTY AND NO/100 ***** Dollars (U.S. \$140,250.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than MARCH 1, 2034.

(F) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(G) "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.

(H) "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	☒ Other(s) (specify) INTEREST
☐ 1-4 Family Rider	☐ Biweekly Payment Rider	ONLY ADDENDUM TO ADJUSTABLE
		RATE NOTE

(I) "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.

Initials: LRL

BK 4015P6267

(J) "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.

(K) "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.

(L) "Escrow Items" means those items that are described in Section 3.

(M) "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.

(N) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(O) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 9 of this Security Instrument.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §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 regulations 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.

(Q) "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 MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS the following described property located in the

(Type of Recording Jurisdiction) of **DORCHESTER**

(Name of Recording Jurisdiction):

SEE LEGAL DESCRIPTION ATTACHED HERETO AND MADE A PART HEREOF. (STATE: SOUTH CAROLINA, COUNTY: DORCHESTER)

APR 8: 171-06-01-016

which currently has the address of **503 FAIRBORN DRIVE, SUMMERVILLE,**

[Street] [City]

South Carolina 29485

(Property Address):

[Zip Code]

TO HAVE AND TO HOLD this property unto MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, 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 understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seized 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

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by Lender as payment under the Note or this 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 becomes 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, such 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 attach priority over this Security Instrument as a lien or encumbrance on the Property; (b) household 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 8. 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 8 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.

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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; Lien.** 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.

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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 8 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 attach 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. Borrower shall not surrender the leasehold estate and interests herein conveyed or terminate or cancel the ground lease. Borrower shall not, without the express written consent of Lender, alter or amend the ground 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

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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.

(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 10, 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.

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 10, 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

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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 those 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 ensure 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.

Initials: RRR

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20. **Sale of Note; Change of Loan Servicer; Notice of Grievance.** The Note or a part or 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 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 Plaintiff 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 this 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 pay 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

Initials: PPC

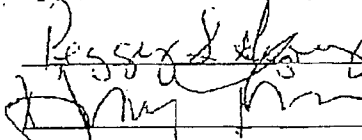
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APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY. This waiver shall not apply so long as the Property is used as a dwelling place as defined in § 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:

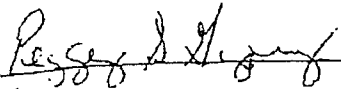

Peggy D. Hargis

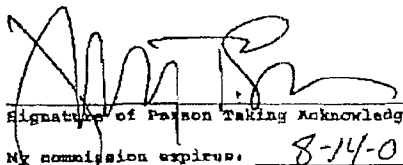
 (Seal)
RACHEL R. LINDSAY

State of SOUTH CAROLINA
County of Charleston

The foregoing instrument was acknowledged before me this 2-13-04 (date)

by RACHEL R. LINDSAY
(name of person acknowledged).


Peggy D. Hargis


Signature of Person Taking Acknowledgement
My commission expires: 8-14-08

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EXHIBIT "A"

ALL that certain piece, parcel or lot of land, together with all buildings and improvements thereon, situate, lying and being in the County of Dorchester, State of South Carolina, and known and designated as Lot 18, Block 13, King's Grant on the Ashley, as shown on a plat of Section Two of King's Grant on the Ashley by C. Robert Jennings, RLS, dated November 1872, and recorded in Plat Book 20, at Page 72, in the RMC Office for Dorchester County.

SUBJECT in all respects to the restrictive covenants and easements of record.

BEING the same property conveyed to Rachel R. Lindsey by Deed of Raymond G. Pardue, dated November 22, 2001 and recorded December 3, 2001, in Book 2807 at Page 022, in the RMC Office for Dorchester County, South Carolina.

TMS # 171-08-01-018

BK 4015PG276

PLANNED UNIT DEVELOPMENT RIDER

MIX #: 100000190022610512

THIS PLANNED UNIT DEVELOPMENT RIDER is made this 13TH day of FEBRUARY, 2004 and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust or Security Deed (the "Security Instrument") of the same date, given by the undersigned (the "Borrower") to secure Borrower's Note to UNIVERSAL MORTGAGE CONSULTING, LLC., A LIMITED LIABILITY CORPORATION,

(the "Lender")
of the same date and covering the Property described in the Security Instrument and located at: 903 FAIRINGTON DRIVE, SUMMERSVILLE, NC 29485.

The Property includes, but is not limited to, a parcel of land improved with a dwelling, together with other such parcels and certain common areas and facilities, as described in COVENANTS, CONDITIONS AND RESTRICTIONS

(the "Declaration").
The Property is a part of a planned unit development known as KINGS GRANT ON THE ASHLAY (the "PUD"). The Property also includes Borrower's interest in the homeowners association or equivalent entity owning or managing the common areas and facilities of the PUD (the "Owners Association") and the uses, benefits and proceeds of Borrower's interest.

PUD COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. PUD Obligations. Borrower shall perform all of Borrower's obligations under the PUD's Constituent Documents. The "Constituent Documents" are the (i) Declaration; (ii) articles of Incorporation, trust instrument or any equivalent document which creates the Owners Association; and (iii) any by-laws or other rules or regulations of the Owners Association. Borrower shall promptly pay, when due, all dues and assessments imposed pursuant to the Constituent Documents.

B. Property Insurance. So long as the Owners Association maintains, with a generally accepted insurance carrier, a "master" or "blanket" policy insuring the Property which is satisfactory to Lender and which provides insurance coverage in the amounts (including deductible levels), for the periods, and 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, then: (i) Lender waives the provision in Section 3 for the Periodic Payment to Lender of the yearly premium installments for property insurance on the Property; and (ii) Borrower's obligation under Section 5 to maintain property insurance coverage on the Property is deemed satisfied to the extent that the required coverage is provided by the Owners Association policy.

What Lender requires as a condition of this waiver can change during the term of the loan. Borrower shall give Lender prompt notice of any lapse in required property insurance coverage provided by the master or blanket policy.

In the event of a distribution of property insurance proceeds in lieu of restoration or repair following a loss to the Property, or to common areas and facilities of the PUD, any proceeds payable to Borrower are hereby assigned and shall be paid to Lender. Lender shall apply the proceeds to the sums secured by the Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

C. Public Liability Insurance. Borrower shall take such actions as may be reasonable to insure that the Owners Association maintains a public liability insurance policy acceptable in form, amount, and extent of coverage to Lender.

D. Condemnation. The proceeds of any award or claim for damages, direct or consequential, payable to Borrower in connection with any condemnation or other taking of all or any part of the Property or the common areas and facilities of the PUD, or for any conveyance in lieu of condemnation, are hereby assigned and shall be paid

Initials: *[Signature]*

BK 4015PG277

to Lender. Such proceeds shall be applied by Lender to the sums secured by the Security Instrument as provided in Section 11.

E. Lender's Prior Consent. Borrower shall not, except after notice to Lender and with Lender's prior written consent, either partition or subdivide the Property or consent to: (i) the abandonment or termination of the PUD, except for abandonment or termination required by law in the case of substantial destruction by fire or other casualty or in the case of a taking by condemnation or eminent domain; (ii) any amendment to any provision of the "Constituent Documents" if the provision is for the express benefit of Lender; (iii) termination of professional management and assumption of self-management of the Owners Association; or (iv) any action which would have the effect of rendering the public liability insurance coverage maintained by the Owners Association unacceptable to Lender.

F. Remedies. If Borrower does not pay PUD dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph F shall become additional debt of Borrower secured by the Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and provisions contained in this PUD Rider.

X Rachel R. Lindsay (Real)
RACHEL R. LINDSAY

BK 4015PG278

INTEREST-ONLY RIDER TO THE SECURITY INSTRUMENT

THIS INTEREST-ONLY RIDER is made this 13TH day of FEBRUARY, 2004 and is incorporated into and shall be deemed to amend and supplement the Fixed/Adjustable Rate Note (the "Note") and the Mortgage, Deed of Trust or Security Deed (the "Security Instrument") of the same date given by the undersigned (the "Borrower") to secure the Note to UNIVERSAL MORTGAGE CONSULTING, LLC.

(the "Lender")
of the same date and covering the property described in the Security Instrument and located at: 303 FAIRMONT DRIVE
BURKEVILLE, NC 29485

THIS RIDER SUPERSEDES Sections 3(A) and (B), and 5 of the Note. None of the other provisions of the note are changed by this addendum.

3. PAYMENTS

(A) Time and Place of Payments

I will pay interest by making payments every month for the first 60 payments (the "Interest-Only Period") in the amount sufficient to pay interest as it accrues. I will pay principal and interest by making payments every month thereafter for the next 300 payments in an amount sufficient to fully amortize the outstanding principal balance of the Note at the end of the Interest-Only Period over the remaining term of the Note in equal monthly payments.

I will make my monthly payments on the 1st day of each month beginning APRIL 1, 2004. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before principal. If on MARCH 1, 2034, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my payments at
P.O. BOX 808911
KANSAS CITY, MO 64184-8911

or at a different place if required by the Note Holder.

(B) Amount of My Initial Monthly Payments

Each of my initial interest-only monthly payments will be in the amount of U.S. \$847.34. This amount may change in accordance with Sections 4 and 5 of this Note. Notwithstanding Section 4(C) of this Note, if the Change Date occurs during the Interest-Only Period, the new amount of the monthly payment will be the amount sufficient to pay interest on the unpaid principal at my new interest rate as it accrues.

5. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of principal at any time before they are due. A payment of principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.

I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date of my monthly payment unless the Note Holder agrees in writing to those changes. If the partial Prepayment is made during the Interest-Only Period, the amount of the monthly payment will decrease for the remainder of the

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Interest-Only Period. If the partial Prepayment is made after the Interest-Only Period, my partial Prepayment may reduce the amount of my monthly payments after the first Change Date following my partial Prepayment. However, any reduction due to my partial Prepayment may be offset by an Interest rate increase.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Interest-Only Rider.

X Rachel R. Lindsey (Seal)
RACHEL R. LINDSEY

BK 4015PG280

ADJUSTABLE RATE RIDER

(LIBOR Six-Month Index (As Published In The Wall Street Journal)-Rate Caps)

MTS: 100080190022610612

THIS ADJUSTABLE RATE RIDER is made this 13TH day of FEBRUARY, 2004 and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date given by the undersigned ("Borrower") to secure Borrower's Adjustable Rate Note (the "Note") to UNIVERSAL MORTGAGE CONSULTING, LLC., A LIMITED LIABILITY CORPORATION

of the same date and covering the property described in the Security Instrument and located at

503 FAIRINGTON DRIVE, SUMMERSVILLE, NC 29485
[Property Address]

THE NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN THE INTEREST RATE AND THE MONTHLY PAYMENT. THE NOTE LIMITS THE AMOUNT BORROWER'S INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE BORROWER MUST PAY.

ADDITIONAL COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. INTEREST RATE AND MONTHLY PAYMENT CHANGES

The Note provides for an Initial Interest rate of 7.250%. The Note provides for changes in the interest rate and the monthly payments, as follows:

4. INTEREST RATE AND MONTHLY PAYMENT CHANGES

(A) Change Dates

The interest rate I will pay may change on the 1ST day of MARCH, 2006, and on that day every 6th month thereafter. Each date on which my interest rate could change is called a "Change Date."

(B) The Index

Beginning with the first Change Date, my interest rate will be based on an Index. The "Index" is the average of interbank offered rates for 6 month U.S. dollar-denominated deposits in the London market ("LIBOR"), as published in The Wall Street Journal. The most recent Index figure available as of the first business day of the month immediately preceding the month in which the Change Date occurs is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new Index that is based upon comparable information. The Note Holder will give me notice of this choice.

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding FIVE AND ONE-HALF percentage point(s) (5.500%) to the Current Index. The Note Holder will then round the result of this addition to the

Initials: VRL

MULTISTATE ADJUSTABLE RATE RIDER-LIBOR SIX-MONTH INDEX (AS PUBLISHED IN THE WALL STREET JOURNAL)-

Single Family-Family Mass Uniform Instrument

Form 5128 1/01

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nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date.

The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

(D) Limits on Interest Rate Changes

The interest rate I am required to pay at the first Change Date will not be greater than 7.750%, or less than 6.750%. Thereafter, my adjustable interest rate will never be increased or decreased on any single Change Date by more than ~~one-half of one~~ ^{one-half of one} percentage point(s) (^{.500%}) from the rate of interest I have been paying for the preceding 6 month(s). My interest rate will never be greater than 12.250%.

(E) Effective Date of Changes

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

(F) Notice of Changes

The Note Holder will deliver or mail to me a notice of any changes in my interest rate and the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

B. TRANSFER OF THE PROPERTY OR A BENEFICIAL INTEREST IN BORROWER
Uniform Covenant 18 of the Security Instrument is amended to read as follows:

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. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to

Initials: YKRL

ADJUSTABLE RATE NOTE
(LIBOR Six-Month Index (As Published In The Wall Street Journal)-Rate Caps)

THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENT. THIS NOTE LIMITS THE AMOUNT MY INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE I MUST PAY.

FEBRUARY 13, 2004
[Date]

CLEVELAND,
[City]

OHIO
[State]

503 FAIRINGTON DRIVE, SUMMERVILLE, SC 29485
[Property Address]

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$140,250.00 (this amount is called "Principal"), plus interest, to the order of Lender, Lender is UNIVERSAL MORTGAGE CONSULTING, LLC., A LIMITED LIABILITY CORPORATION.

I will make all payments under this Note in the form of cash, check or money order.

I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 7.250%. The interest rate I will pay may change in accordance with Section 4 of this Note.

The interest rate required by this Section 2 and Section 4 of this Note is the rate I will pay both before and after any default described in Section 7(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payments on the 1ST day of each month beginning on APRIL 1, 2004.

I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal, if, on MARCH 1, 2034, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at P.O. BOX 808911

KANSAS CITY, MO 64184-8911

or at a different place if required by the Note Holder.

(B) Amount of My Initial Monthly Payments

Each of my initial monthly payments will be in the amount of U.S. \$847.34. This amount may change.

(C) Monthly Payment Changes

Changes in my monthly payment will reflect changes in the unpaid principal of my loan and in the interest rate that I must pay. The Note Holder will determine my new interest rate and the changed amount of my monthly payment in accordance with Section 4 of this Note.

4. INTEREST RATE AND MONTHLY PAYMENT CHANGES

(A) Change Dates

The interest rate I will pay may change on the 1ST day of MARCH, 2006 and on that day every 6th month thereafter. Each date on which my interest rate could change is called a "Change Date."

(B) The Index

Beginning with the first Change Date, my interest rate will be based on an index. The "Index" is the average of interbank offered rates for six month U.S. dollar-denominated deposits in the London market ("LIBOR"), as published in The Wall Street Journal. The most recent index figure available as of the first business day of the month immediately preceding the month in which the Change Date occurs is called the "Current Index."

If the index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding FIVE AND ONE-HALF percentage point(s) (5.500%) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date.

The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

(D) Limits on Interest Rate Changes

The interest rate I am required to pay at the first Change Date will not be greater than 7.750% or less than 6.750%. Thereafter, my interest rate will never be increased or decreased on any single Change Date by more than ONE-HALF OF ONE percentage point(s) (.500%) from the rate of interest I have been paying for the preceding 6 month(s). My interest rate will never be greater than 12.250%.

Initials: YRC

MULTISTATE ADJUSTABLE RATE NOTE-LIBOR SIX-MONTH INDEX (AS PUBLISHED IN THE WALL STREET JOURNAL)-Single Family

Family Mass Uniform Instrument Form 8520 1/01

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Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, 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.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Adjustable Rate Rider.

Rachel R. Lindsey (Seal)
RACHEL R. LINDSEY

MULTISTATE ADJUSTABLE RATE RIDER—LIBOR SIX-MONTH INDEX (AS PUBLISHED IN THE WALL STREET JOURNAL)—
Single Family Private New Uniform Instrument Form 0158 1/01
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PD188DU
02-13-2004 9:17

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
Filed for record this 26th
Day of July 2004
at 8:42 AM and recorded
in book 4015 page 26
LINDA T. MESSERLY
REGISTER OF MESNE CONVEYANCES

ROA_00185

App. 191

(E) Effective Date of Changes

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

(F) Notice of Changes

The Note Holder will deliver or mail to me a notice of any changes in my interest rate and the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

5. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under this Note.

I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount before applying my Prepayment to reduce the Principal amount of this Note. If I make a partial Prepayment, there will be no changes in the due dates of my monthly payments unless the Note Holder agrees in writing to those changes. My partial Prepayment may reduce the amount of my monthly payments after the first Change Date following my partial Prepayment. However, any reduction due to my partial Prepayment may be offset by an interest rate increase.

6. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this 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 me that exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

7. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charges for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of 15 calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.000% of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal that has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Unless the Note Holder requires a different method, any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

10. WAIVERS

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

11. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions read as follows:

INITIALS: *RR*

MULTISTATE ADJUSTABLE RATE NOTE-LEON SIX-MONTH INDEX (AS PUBLISHED IN THE WALL STREET JOURNAL)-Single Family-

Florida Note Uniform Instrument Form 2826 1/01

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Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 16, "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.

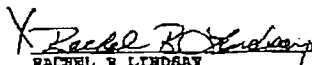
If all or any part of the Property or any interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

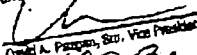
If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security 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.

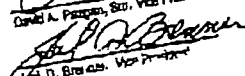
WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

THE PROVISIONS CONTAINED IN THE INTEREST ONLY ADDENDUM TO THE NOTE, SIGNED BY ALL BORROWERS NAMED HEREIN, ARE HEREBY INCORPORATED INTO AND SHALL AMEND AND SUPPLEMENT THIS NOTE.

 (Seal)
RACHEL R. LINDSAY

PAY TO THE ORDER OF:
JP Morgan Chase Bank, as Trustee
WITHOUT RECOURSE
Mortgage Loan Trust, Inc.


David A. Padden, Sr. Vice President


John D. Brown, Sr. Vice President

• JP Morgan Chase Bank, as Trustee of the Worcester
Mortgage Funding Trust, Series 2004-1, relating to the
Worcester Home Equity Loan Asset-Backed Certificates,
Series 2004-1

(Sign Original Only)

MULTISTATE ADJUSTABLE RATE NOTE (BOR SIX-MONTH INDEX (AS PUBLISHED IN THE WALL STREET JOURNAL)—Single Family—

Form 5220 1/01

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Form 5220 01 0307

ROA_00188

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**INTEREST-ONLY ADDENDUM TO
FIXED/ADJUSTABLE RATE NOTE**

THIS INTEREST-ONLY ADDENDUM is made this 13TH day of FEBRUARY, 2004 and is incorporated into and shall be deemed to amend and supplement the Fixed/Adjustable Rate Note (the "Note") and the Mortgage, Deed of Trust or Security Deed (the "Security Instrument") of the same date given by the undersigned (the "Borrower") to secure the Note to UNIVERSAL MORTGAGE CONSULTING, LLC.

(the "Lender") of the same date and covering the property described in the Security Instrument and located at:
503 SPRINGWOOD DRIVE
SUNDERVILLE, SC 29465

THIS ADDENDUM SUPERSEDES Sections 3(A) and (B), and 5 of the Note. None of the other provisions of the note are changed by this addendum.

3. PAYMENTS

(A) Time and Place of Payments

I will pay interest by making payments every month for the first 60 payments (the "Interest-Only Period") in the amount sufficient to pay interest as it accrues. I will pay principal and interest by making payments every month thereafter for the next 300 payments in an amount sufficient to fully amortize the outstanding principal balance of the Note at the end of the Interest-Only Period over the remaining term of the Note in equal monthly payments. I will make my monthly payments on the 1st day of each month beginning APRIL 1, 2004. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before principal. If on MARCH 1, 2034, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my payments at P.O. BOX 808911
KANSAS CITY, MO 64184-8911

or at a different place if required by the Note Holder.

(B) Amount of My Initial Monthly Payments

Each of my initial interest-only monthly payments will be in the amount of U.S. \$847.34. This amount may change in accordance with Sections 4 and 5 of this Note. Notwithstanding Section 4(C) of this Note, if the Change Date occurs during the Interest-Only Period, the new amount of the monthly payment will be the amount sufficient to pay interest on the unpaid principal at my new interest rate as it accrues.

5. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of principal at any time before they are due. A payment of principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.

I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date of my monthly payment unless the Note Holder agrees in writing to those changes. If the partial Prepayment is made during the Interest-Only Period, the amount of the monthly payment will decrease for the remainder of the Interest-Only Period. If the partial Prepayment is made after the Interest-Only Period, my partial Prepayment may reduce the amount of my monthly payments after the first Change Date following my partial Prepayment. However, any reduction due to my partial Prepayment may be offset by an interest rate increase.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Interest-Only Addendum.

 (Seal)
RACHEL R. LINDSEY

LA18710A 0305
02-13-2004 9:17

ALLONGE

This Allonge is to be made a part of the Note:

Dated: *February 13, 2004*

Borrower: *Rachel Lindsay*

Property Address: *503 Fairington Drive, Summerville, SC 29485*

Original Lender: UNIVERSAL MORTGAGE CONSULTING, LLC

Loan #: [REDACTED]

Loan Amount: \$ *140,250.00*

Interest Rate: *7.250 %*

Maturity Date: *March 1, 2034*

Pay to the Order of: *JPMorgan Chase Bank, as Trustee**
Novastar Mortgage, Inc., A Virginia Corporation

Without Recourse

UNIVERSAL MORTGAGE CONSULTING, LLC

By: *Mike Kinard*

Print Name: *Mike Kinard*

Print Title: *President*

* JPMorgan Chase Bank, as Trustee of the NovaStar
Mortgage Funding Trust, Series 2004-1, relating to the
NovaStar Home Equity Loan Asset-Backed Certificates,
Series 2004-1

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Case No. 2011-CP-18-1013

Appellate Case No. 2013-002066

Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 Appellant,

v.

Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner, Tiffany Spann Wilder, Esq., The Steinberg Law Firm and United States of America acting by and through its agency, the Internal Revenue Service, Defendants,

Of Whom Rachel R. Lindsay is the Respondent.

Rachel R. Lindsay Respondent,

v.

Saxon Mortgage Services, Inc. Appellant.

FINAL BRIEF OF APPELLANT

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A. Mattison Bogan (SC Bar No. 72629)
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Attorneys for Appellants

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court erred by finding that Lindsay is entitled to a jury trial because the ~~entire action lies in equity~~
- II. The trial court erred by finding that Lindsay has a right to a jury trial because ~~none of Lindsay's counterclaims are legal and compulsory~~
- III. The trial court erred by failing to specifically identify which claims it concluded Lindsay is entitled to a trial by jury upon, a critical mode of trial determination.

STATEMENT OF THE CASE

The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 (the "Bank") initiated foreclosure proceedings against Rachel R. Lindsay ("Lindsay" or "Respondent") by way of a Complaint filed on May 13, 2009, seeking solely to foreclose on the mortgage given by Lindsay on real property located in Dorchester County. (R. 49). On June 16, 2009, Lindsay answered and asserted numerous counterclaims against the Bank, along with third-party claims against Saxon Mortgage Services, Inc. ("Saxon"), a servicer for the subject loan. (R. 57). Lindsay demanded a jury trial on all counterclaims asserted against the Bank and Saxon (jointly "Appellants"). *Id.* All of Lindsay's counterclaims arise in connection with events occurring after the closing of the loan.

On March 22, 2013, Appellants filed a Joint Motion for a Non-Jury Trial in the Equity Court and to Strike the Jury Demand. (R. 115). The Court held a hearing on the motion on May 24, 2013 (R. 132), and subsequently denied it via an Order issued on August 14, 2013. (R. 22). Appellants timely filed a Motion to Alter or Amend pursuant to SCRCR Rule 59(e) on August 15, 2013 (R. 126), which the Court denied via Form 4 Order issued on August 22, 2013. (R. 26). Appellants appeal the determination that Lindsay is entitled to a jury trial.

STATEMENT OF FACTS

On February 13, 2004, Universal Mortgage Consulting, LLC ("Universal") made a loan to Lindsay in the amount of \$140,250.00 (the "Loan"). (R. 49 at ¶ 6). Lindsay executed and delivered to Universal a promissory note, under which she agreed to make timely monthly interest-only payments at a variable rate for a fixed term. (R. 186). The

Loan was secured by a mortgage on Lindsay's residence located in Dorchester County, South Carolina. (R. 169). The Note and Mortgage were subsequently assigned to the Bank. (R. 50 at ¶ 10).

After Lindsay defaulted on the Loan, on October 8, 2008, the Bank filed a foreclosure action against her (the "First Foreclosure", R. 32). Prior to the foreclosure sale, the First Foreclosure was voluntarily dismissed without prejudice after Lindsay disputed whether or not certain payments were properly applied to the Loan. (R. 9). On May 13, 2009, the Bank filed a second foreclosure action. (the "Second Foreclosure", R. 49). In both actions, the Bank expressly waived any right to a deficiency judgment against Lindsay. (R. 51 at ¶ 15).

On June 16, 2009, Lindsay answered the Second Foreclosure Complaint and asserted counterclaims and crossclaims against Appellants for breach of contract, negligence, fraud in the inducement, negligent misrepresentation, promissory estoppel, violation of the South Carolina Unfair Trade Practices Act, unjust enrichment, intentional infliction of emotional distress, invasion of privacy, defamation, intentional interference with existing contracts, intentional interference with prospective contractual relations, a declaratory judgment for compliance with the Homeowner Affordability and Stability Plan and U.S. Treasury Supplemental Directive 09-01, and an injunction requiring correction of credit reporting related to the Loan. (R. 57-79). Lindsay demanded a jury trial on all claims. (Id., R. 57).

Lindsay's 26 causes of action are based primarily upon the allegation that in the Summer 2008, she sent the Loan servicer, Saxon, a payment in the amount of \$6,557.04, which she intended for Saxon to apply toward her delinquent balance on the Loan. (R. 62

at ¶ 25). According to Plaintiff, the Bank and Saxon did not apply this payment and other unspecified payments appropriately. (R. 62 at ¶ 30; R. 63 at ¶¶ 34-36). In addition, Lindsay alleges that the Bank refused to grant her requests for a loan modification and provided derogatory information about her Loan to credit reporting agencies. (R. 63 at ¶¶ 37-38). Thus, Lindsay asserts four basic categories of allegedly wrongful conduct by the Bank and Saxon: 1) alleged misapplication of Lindsay's Loan payments (breach of contract, negligence, unjust enrichment); 2) allegedly false statements to the effect that certain errors related to her Loan account would be corrected (fraud in the inducement, negligent misrepresentation, promissory estoppel); 3) allegedly inaccurate statements to the public – via the foreclosure pleadings – and to credit reporting agencies about the status of the Loan (negligence, invasion of privacy, defamation, intentional interference with existing and prospective contracts, declaratory judgment); and 4) alleged failure to modify the terms of the Loan at Lindsay's request (declaratory judgment).¹ (R. 57-79). Lindsay seeks equitable and injunctive relief, along with actual and punitive damages in an unspecified amount. (R. 78-79).

ARGUMENT

Appellants are entitled to a bench trial because this action is one for foreclosure, which is an action in equity. The trial court has ordered the trial to proceed in an improper mode. In a foreclosure action, the determination of all issues relating to the amount due on the loan and the plaintiff's right to foreclose are for the court, not a jury, based upon the South Carolina statutory foreclosure regime contained in Title 29 and Rule 71 of the South

¹ The Complaint does not specify a particular basis for the claims for intentional infliction of emotional distress or violation of the SCUTPA.

Carolina Rules of Civil Procedure. In any event, the particular counterclaims and third-party claims asserted by Lindsay in this case are equitable in nature, such that she has no right to a jury trial on any claim. Moreover, Lindsay's claims relate to events that occurred years after the creation of the subject promissory note and mortgage, which means they do not attack the enforceability of the underlying Loan obligations and are therefore permissive claims. Because the entire action sounds in equity, and, in any event, none of the individual claims are legal and compulsory, Lindsay is not entitled to a jury trial on any issue in this equitable foreclosure action. The entire matter must be tried by the court.

I. The Entire Action is One in Equity

“Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions.” Mortgage Elec. Sys., Inc. v. White, 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009) (citing Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997)). The right to proceed in the proper mode of trial is a substantial right, and a court should not erroneously require a party to proceed before a jury in an equity case. Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000). Conversely, a jury trial right does not arise in connection with a case to be tried within the equitable jurisdiction of the court. Pelfrey v. Bank of Greer, 270 S.C. 691, 244 S.E.2d 315 (1978).

A foreclosure action is an equitable action. Collier v. Green, 244 S.C. 367, 370, 137 S.E.2d 277, 279 (1964). Further, “[w]here in actions of foreclosure, the defendant sets up a defense and/or a counterclaim affecting the consideration, and arising out of the transaction in which the mortgage or lien was created, the authorities hold that the issues thus raised are equitable and are to be tried by the court upon its equity side.” Id. at 371,

137 S.E.2d at 280; see also Byrn v. Walker, 275 S.C. 83, 267 S.E.2d 601, (1980) (counterclaims in a foreclosure action that affect the validity of a mortgage lien or the amount due are equitable in nature). In Collier, the assignee of a mortgage brought a foreclosure action against the mortgagor. Id. at 368, 137 S.E.2d at 278. The mortgagor admitted to execution and delivery of the note and mortgage but alleged that the assignment was fraudulent and sought a jury trial on that issue. Id. at 369, 137 S.E.2d at 279. In affirming the trial court's order referring the entire case to the master in equity, the Supreme Court initially noted that a foreclosure is an action in equity and concluded that the nature of the action does not change to one at law by virtue of the fact that the defendant asserts counterclaims related to the amount due on the loan. Id. at 371, 137 S.E.2d at 280. As support for its decision, the Court cited to its prior opinions in foreclosure cases holding that where the defenses and counterclaims bear primarily upon the amount due, the entire case, including the defenses and counterclaims, remains one in equity. Id. at 371-372, 137 S.E.2d at 280 (citations omitted).² Thus, where a defendant asserts counterclaims in a foreclosure action that go to the plaintiff's right to foreclose or challenge the amount due upon the debt secured by the mortgage, the counterclaims are merely part and parcel of the equitable action, and a defendant has no right to a jury trial on such claims. Id.

Moreover, the South Carolina Supreme Court has rejected attempts by litigants to "earn" the right to a jury trial in an equitable action. In Rosenbaum v. S-M-S 32, the

² Obviously, if a defendant could convert an equitable foreclosure action to an action at law simply by artfully pleading any defense to the debt as a counterclaim, then the plaintiff's right to an order of reference in foreclosure actions would be completely eviscerated resulting in an improper mode of trial in every foreclosure action.

plaintiff purchased real property at a tax sale and filed an action to clear title pursuant to S.C. Code Ann. § 12-61-20. The defendant answered by way of general denial and asserted a counterclaim for trespass to try title, seeking damages for trespass and demanding a jury trial. 311 S.C. 140, 141, 427 S.E.2d 897, 897 (1993). The circuit court struck the counterclaim because the plaintiff had asserted an equitable claim seeking a remedy via a non-jury process expressly provided by statute for purchasers at tax sales. Id. at 141-142, 427 S.E.2d at 897. The Supreme Court affirmed the circuit court's decision, holding that the defendant could not "evade the intent of the legislature and obtain the right to a jury trial by interposing a counterclaim designed the thwart the reasonable and practical implication of Chapter 61." Id.

In the instant action, although Lindsay asserts various different theories of recovery, a necessary element of each of her claims is that she is not in default and Plaintiff is not entitled to foreclose. Several of the claims, such as the claims for breach of contract, directly allege improper accounting on the Loan. Other claims challenge Plaintiff's right to foreclose indirectly. For example, even Lindsay's claim for defamation based on the allegedly false allegations contained in the Complaint would require her to prove that the statements pled therein regarding her default on the Loan were untrue. See Parrish v. Allison, 376 S.C. 308, 656 S.E.2d 382 (Ct. App. 2007) (a false statement is an element of claim for defamation). All 26 of Lindsay's causes of action fail as a matter of law if the Court determines that she defaulted on the Loan. Thus, each of her claims bears upon the amount due. Under Collier, therefore, the counterclaims and third-party claims do not change the character of this equitable action to one at law, and Lindsay has no right to a jury trial on any issue.

Furthermore, under the Supreme Court's decision in Rosenbaum, Lindsay may not "earn" the right to a jury trial in this equitable foreclosure action by styling her allegations as legal counterclaims. Like the plaintiff in Rosenbaum, the Bank brought this action pursuant to a statutory scheme created by the legislature that provides for a non-jury trial. Specifically, S.C. Code Ann. § 29-3-610 to -790 provides a procedure by which a mortgagor may foreclose in an equitable action decided by the court. SCRPC 71 also provides that foreclosure actions "shall be tried by the court, and shall ordinarily be referred to a master." This codified a process established by the Act of 1791, which integrated the actions of foreclosure and the action for deficiency after sale into one equitable action, without the right to a jury trial. See McConnell, et al. v. Barnes, et al., 142 S.C. 112, 140 S.E. 310 (1927). Therefore, consistent with Rosenbaum, this Court should not permit Lindsay to evade the statutory scheme created by the Legislature for resolving foreclosure actions. Her request for a jury trial should be stricken.

II. Each of Lindsay's Individual Claims Is Either Permissive or Equitable.

The above inquiry should end the analysis, and the Court should determine this entire proceeding, counterclaims and defenses included, is an equitable action. However, an examination of the particular defenses, counterclaims, and cross-claims may also be called for as in more recent times our courts have stated that "[i]f the complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim." N.C. Federal Savings and Loan Ass'n v. DAV Corp., 298 S.C. 514, 516, 381 S.E.2d 903, 904 (1989) (citing C & S Real Estate Servs., Inc. v. Massengale, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986)). If a defendant asserts a counterclaim which is not legal and compulsory in an equitable action, he waives any right to a jury trial on that

counterclaim. See id.; Johnson v. S.C. Nat'l Bank, 292 S.C. 51, 54, 354 S.E.2d 895, 897 (1987) (summarizing the proper analysis for determining the trial of legal and equitable issues in complaints and counterclaims, holding, “[i]f the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial”). Because foreclosure proceedings are equitable proceedings in South Carolina, Lindsay has no right to a jury trial on any claim she has asserted in this action that is not both legal and compulsory. Wells Fargo Bank v. Smith, 398 S.C. 487, 494, 730 S.E.2d 328, 332 (Ct. App. 2012). Should the Court decide that it is necessary to examine each of Lindsay's claims to determine whether it is permissive or compulsory and legal or equitable, the outcome is the same: Lindsay has no right to a jury trial.

A. Lindsay's Counterclaims for Promissory Estoppel, Unjust Enrichment and Declaratory Relief Are Equitable.

First, Lindsay's claims for promissory estoppel, unjust enrichment and declaratory relief are plainly equitable in nature. Promissory estoppel and unjust enrichment are *always* equitable causes of action. Rushing v. McKinney, 370 S.C. 280, 289, 633 S.E.2d 917, 922 (Ct. App. 2006) (promissory estoppel); Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994) (unjust enrichment). “Whether an action for declaratory relief is legal or equitable in nature depends on the plaintiff's main purpose in bringing the action.” Williams v. Wilson, 349 S.C. 336, 340, 563 S.E.2d 320, 322 (2002). In this case, Lindsay's two separate causes of action for declaratory judgment seek, respectively, an injunction requiring Appellants to modify the terms of her Loan and another injunction requiring correction of alleged errors contained in her credit reports. (R. 78 at ¶¶ 140, 144). Neither claim seeks recovery of damages. Id. As such, her

counterclaims for declaratory relief are equitable. Lindsay therefore is not entitled to a jury trial on any of these claims.

B. Lindsay's Claims Based Upon Misapplication of Payments Are Equitable Because the Main Purpose of the Claims Is to Prevent Foreclosure.

Second, Lindsay's claims based upon alleged misapplication of Loan payments are necessarily equitable in nature regardless of how Lindsay has styled them in the Answer & Counterclaim.³ Characterization of a claim as equitable or legal depends on the plaintiff's "main purpose" in bringing it. Smith, at 495, 730 S.E.2d at 332, n.4 (quoting Floyd v. Floyd, 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991)). "[A]n action sounding in law may be transformed to one in equity because equitable relief is sought." Ins. Fin. Servs., Inc. v. S.C. Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) (citing 1 Am. Jur. 2d, Actions § 7 (1962)); see also Crewe v. Blackmon, 289 S.C. 229, 232-33, 345 S.E.2d 754, 756-57 (Ct. App. 1986) (concluding that although a complaint included allegations of fraud and misrepresentation, the action was one in equity when primary relief sought was equitable in nature). "Generally...it may be said that the essential character of the cause of action, and the remedy or relief it seeks, as shown by the allegations of the [pleading], determine whether a particular action is at law or equity, **unaffected by the conclusions of the pleader or what the pleader calls it....**" Rogers v. Nation, 284 S.C. 330, 332, 326 S.E.2d 182, 183 (Ct. App. 1985) (quoting Bell v. Mackey, 191 S.C. 105, 119, 3 S.E.2d 816, 822 (1939) (emphasis added)).

³ This category of claims clearly includes the causes of action for breach of contract, negligence, and unjust enrichment, which are expressly based upon Appellants' alleged misapplication of Loan payments, but also includes any other claims to the extent that they are based upon improper accounting on the Loan.

Where the primary purpose of a counterclaim in a foreclosure action is to halt the foreclosure, South Carolina courts have characterized the counterclaim as equitable regardless of how the claim is styled. See e.g. Smith, at 496-497, 730 S.E.2d at 333 (counterclaim for common law unconscionability deemed equitable where primary purpose was to have mortgage declared void); White, at 614, 682 S.E.2d at 502 (counterclaim for fraud deemed equitable where primary relief sought was to have mortgage declared void); Wells Fargo Bank, N.A. v. Barker, Op. No. 2012-UP-551 (Ct. App. 2012) (counterclaim for alleged predatory lending deemed equitable where primary purpose was to prevent foreclosure and compel lender to modify loan terms).⁴

Likewise, in the instant case, the main purpose of Lindsay's claims alleging that Appellants misapplied her Loan payments is naturally to avoid the foreclosure and evade the statutory foreclosure regime established by Title 29 and Rule 71 of the South Carolina Rules of Civil Procedure. In her Answer & Counterclaim, Lindsay expressly seeks denial of Plaintiff's request for foreclosure and public sale of her property, an order requiring Plaintiff and/or Saxon to modify her loan to allow her keep her property, and dismissal of all costs requested by Plaintiff. (R. 78-79). Indeed, it is difficult to imagine what other relief Lindsay could possibly be entitled to in connection with this category of claims. Although Lindsay also seeks damages, any alleged damage could have resulted only from the Bank and/or Saxon's allegedly false statements about the Loan, not the misapplication of payments. Lindsay's counterclaims based upon the latter amount to nothing more than defenses to the foreclosure and are therefore necessarily equitable in nature. See Smith, at 496-497, 730 S.E.2d at 333; White, at 614, 682 S.E.2d at 502; Barker, Op. No. 2012-UP-

⁴ While this Court's unpublished decision in Barker is not binding precedent, it is informative for the purposes of this appeal.

551, at *2. As a result, Lindsay's claims for breach of contract, negligence, unjust enrichment, and any other claims based upon the alleged misapplication of payments, are equitable, and she is not entitled to a jury trial on these claims.

C. Lindsay's Third-Party Claims Against Saxon are Permissive.

Next, a third-party claim is *always* permissive, regardless of its relationship to the claims asserted in the underlying action. N.C. Fed. Sav. & Loan Assoc. v. DAV Corp., 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989); Tatnall v. Gardner, 350 S.C. 135, 139, 564 S.E.2d 377, 378 (Ct. App. 2002). Thus, by impleading Saxon into this foreclosure action, Lindsay waived any right to a jury trial on her third-party claims to the extent that any of them are deemed to be legal, rather than equitable. Id.

D. Lindsay's Counterclaims Against Plaintiff Are Permissive.

Finally, a counterclaim is compulsory only where there is a "logical relationship" between the complaint and the counterclaim. Wells Fargo Bank v. Smith, 398 S.C. 487, 495, 730 S.E.2d 328, 333 (Ct. App. 2012). In the foreclosure context, there is a logical relationship between the counterclaim and the complaint only when the counterclaim bears upon the enforceability of the loan documents. Id. In Smith, the Court of Appeals applied this test and determined that the defendant's counterclaim for violation of the attorney-preference statute was not logically related to the foreclosure complaint because a violation of the statute would not affect the enforceability of the promissory note and mortgage. Id. at 499, 730 S.E.2d at 334-335.

In the present case, Lindsay's counterclaims are permissive under Smith and prior South Carolina law. None of her claims challenge the enforceability of the Loan documents. Rather, each claim is based upon conduct alleged to have occurred years *after*

Lindsay's execution of the Loan documents. The claims for invasion of privacy and defamation, for example, are based upon allegedly false statements made by Plaintiff about Lindsay to the public and to credit reporting agencies regarding the delinquent status of her Loan. (R. 73 at ¶ 108; R. 74 at ¶¶ 114-118). Similarly, her claims for interference with existing and prospective contractual relations allege that Plaintiff caused third parties to deny her credit and to refuse to do business with her. (R. 76, ¶¶ 128, 132-133). Like the claims for violation of the attorney-preference statute at issue in Smith, these allegations do not relate to the enforceability of the loan documents.

Even Lindsay's counterclaims for breach of contract, negligence, and unjust enrichment, which are based expressly upon Plaintiff's alleged misapplication of Loan payments, do not bear upon the *enforceability* of the underlying Loan documents. At most, the allegations go to the question of whether Lindsay defaulted on the Loan, but Lindsay has not even expressly pled that the Loan would not have been in default but for the alleged misapplication. Because the counterclaims do not contest enforceability, they are permissive. By electing to bring such counterclaims in response to a foreclosure complaint, Lindsay waived her right to a jury trial. The trial court therefore committed reversible error by finding that Lindsay is entitled to a jury trial.

III. The Trial Court Failed to Specify Which Claims are Subject to Trial by Jury, Thereby Leaving the Mode of Trial Unclear.

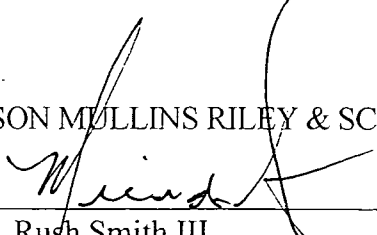
Lindsay is not entitled to a jury trial on any claim in this action. However, the trial court also committed reversible error by failing to specify the claim(s) on which it determined that Lindsay is entitled to a jury trial. Gaymon v. Richland Memorial Hosp., 327 S.C. 66, 68, 488 S.E.2d 332, 333 (1997) (legal and equitable issues in same action must be determined separately and plaintiff not entitled to jury trial on equitable issues);

Winter v. U.S. Fidelity & Guaranty Co., 240 S.C. 561, 573, 126 S.E.2d 724, 730 (1962) (where legal and equitable issues and rights are asserted in the same complaint, legal issues are for determination by a jury and equitable issues for the judge); Advance Int'l, Inc. v. N.C. Nat'l Bank, 316 S.C. 266, 270-271; 449 S.E.2d 580, 583 (Ct. App. 1994), reh'g denied, aff'd in part, vacated in part, 320 S.C. 532, 466 S.E.2d 367 (where a complaint is equitable and the counterclaim, for which a jury trial is requested, is legal and compulsory, the trial court must order separate trials pursuant to Rule 42(b), SCRPC). Appellants are entitled to determination of particular issues under the proper mode of trial and to notice prior to trial of the manner in which each issue will be determined. See id.; see also S.C. Rules Civ. Proc. 38, 39 (providing for notice to litigants regarding mode of trial as to particular issues in dispute). If this Court finds that any of Lindsay's claims are subject to jury determination, then it should specify which claims will be tried by the jury and which claims will be determined by the court. The failure to do so is error. The South Carolina appellate courts have recognized that the mode of trial is a critical issue that must be determined prior to trial. See Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) ("we repeatedly have held that the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2)") (listing cases).

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the circuit court's ruling that Lindsay is entitled to a jury trial. In the alternative, Appellants request that the Court specify which claims should be tried by the jury and which claims should be determined by the court.

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Mortgage Services, Inc.*

Charleston, South Carolina

March 25, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Case No. 2011-CP-18-1013

Appellate Case No. 2013-002066

Bank of New York Mellon, as Successor Trustee under
NovaStar Mortgage Funding Trust, Series 2004-1 Appellant,

v.

Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner, Tiffany
Spann-Wilder, Esq., The Steinberg Law Firm and United States
of America acting by and through its agency, the Internal
Revenue Service, Defendants,

Of Whom Rachel R. Lindsay is the Respondent.

Rachel R. Lindsay Respondent,

v.

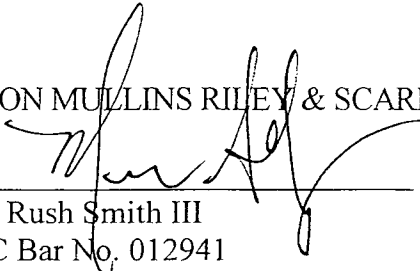
Saxon Mortgage Services, Inc. Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief of Appellant
complies with the Supreme Court Order dated August 13, 2007 regarding personal
identifiers and sensitive information.

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and United States of America acting by and through its
agency, the Internal Revenue Service, Defendants,

Of Whom Rachel R. Lindsay is the Respondent.

Rachel R. Lindsay Respondent,

v.

Saxon Mortgage Services, Inc. Appellant.

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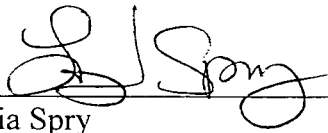
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Rachel R. Lindsay Respondent,

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Saxon Mortgage Services, Inc.,.....Appellant.

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STATEMENT OF ISSUES ON APPEAL

- I. Is a jury trial warranted when a party, who has demanded a trial by a jury of her peers, has alleged both legal and equitable causes of action?
- II. If a party asserts legal and compulsory counterclaims shouldn't her demand for a jury trial be granted?
- III. In the State of South Carolina when both legal and equitable issue are in dispute it is well established that legal matters will be entertained first by the jury and matters of equity entertained last by the judge, consequently, is it necessary or required for the motion hearing judge to specify and label each claim and counterclaim asserted in the case when one legal and compulsory counterclaim is identified?

STATEMENT OF THE CASE

The Bank of New York Mellon, Successor Trustee under NovaStar Mortgage funding Trust, Series 2004-1, (*lender/holder of note and mortgage*) filed a foreclosure action against the Defendant Rachel Lindsay (*borrower*) (R. pp. 29-40). Lindsay filed an Answer and Counterclaim against “Bank of New York” and Third Party Complaint against Third Party Defendant Saxon Mortgage Services, Inc., (*servicer*). (R. pp. 57-84), demanding a trial by jury. “Bank of New York” and “Saxon Mortgage” filed an Answer (R. pp. 85-95), and Reply. (R. pp. 96-106). Appellants filed a Joint Motion for a Non-Jury Trial in Equity Court and to Strike the Jury Trial Demand on March 22, 2013. (R. pp. 115-118). The Respondent Lindsay filed a Memorandum of Law in Opposition to Appellants’ Motion for a Non-Jury Trial in Equity Court and to Strike the Jury Trial Demand. (R. pp. 119-125). The Honorable Diane Schafer Goodstein issued an Order denying the Appellants’ motion on August 14, 2013. (R. pp. 22-25). The Appellant filed a Motion to Alter or Amend pursuant to Rule 59(e) on August 15, 2013. (R. pp. 126-131). The Honorable Diane Schafer Goodstein issued a Form 4 Order denying the Appellants’ motion on August 22, 2013. (R. pp. 26-28). The Appellant filed the subject appeal objecting to the Court Order recognizing and acknowledging the Respondent Lindsay’s right to a trial by a jury of her peers.

Procedural History - Case Filings.

I. FIRST CASE FILING (Case No. 2008-CP-18-02543):

1. The Appellant “Bank of New York Mellon” filed a Lis Pendens, Summons and Complaint on October 8, 2008. (R. pp. 29-40).
 - a. Causes of Action against “Lindsay”
 - (1) Foreclosure

2. An Order of Judgment of Foreclosure and Sale was filed on January 14, 2009. (R. pp. 1-8).
3. The Defendant “Lindsay” filed a Motion for Temporary Restraining Order & Show Cause Order on January 30, 2009. (R. pp. 107-114).
4. An Order Vacating Judgment and Dismissing Action was filed on April 2, 2009. (R. pp. 9-12).

II. **SECOND CASE FILING** (Case No. 2009-CP-18-01311) :

1. The Appellant “Bank of New York Mellon” filed a Lis Pendens, Summons and Complaint on May 13, 2009. (R. pp. 46-56).
 - a. Causes of Action against “Lindsay”
 - (1) Foreclosure
2. The Defendant “Lindsay” filed an Answer and Counterclaim and Third Party Complaint (i.e., against Saxon Mortgage Services, Inc. –Third Party Defendant) on June 16, 2009. (R. pp. 57-84).
 - a. Counterclaims against “Bank of New York” and Third Party Complaint Causes of Action against “Saxon Mortgage”:
 - (1) Breach of Contract
 - (2) Negligence
 - (3) Fraud
 - (4) Negligent Misrepresentation
 - (5) Promissory Estoppel
 - (6) Violation of the South Carolina Unfair Trade Practices Act
 - (7) Quantum Meruit/Unjust Enrichment
 - (8) Intentional Infliction of Emotional Distress/Outrage
 - (9) Invasion of Privacy
 - (10) Defamation/Libel Per Se

- (11) Intentional Interference with Contract
- (12) Intentional Interference with Prospective Economic Advantage
- (13) Declaratory Judgment for Compliance with Homeowner Affordability and Stability Plan
- (14) Declaratory Judgment for correction of credit report

3. A Consent Order pursuant to S.C. R. Civ. P. Rule 40(j) was filed on June 1, 2010 removing the case from the active docket. (R. pp. 12-17).

III. **THIRD (CURRENT) CASE FILING** (Case No. 2011-CP-18-01013) :

- 1. A Joint Consent Motion to Restore and Proposed Order was filed on May 20, 2011. (R. pp. 18-21).

STATEMENT OF FACTS

Respondent “Lindsay” executed and delivered a promissory note in the amount of \$140,250.00 and mortgage of property bearing TMS: 171-06-01-016-000 to Universal Mortgage Consulting, LLC on February 13, 2004. Appellant “Saxon Mortgage” became the servicer of the loan on behalf of Appellant “Bank of New York Mellon” which allegedly through assignment(s) of the note and mortgage became the holder of the of the note and mortgage. Said Appellant failed to apply payments made by the Lindsay. Appellants filed negative actions against Lindsay’s credit which has caused Lindsay to have a lower credit score and wrongfully filed the above referenced foreclosure actions against the Lindsay which has also adversely impacted Lindsay’s credit. Appellants’ Motion for Summary Judgment has been denied in the case at hand. Saxon Mortgage Services, Inc., Appellant, acts as the servicer of the mortgage loan held by Appellant “The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage funding Trust, Series 2004-1”. Said Appellant Saxon acted as agent or apparent agent of the Appellant

“Bank of New York Mellon”; all acts of said Appellant were within the scope of its authority or agency, and/or were ratified by Appellant “Bank of New York Mellon”, alluding to the doctrine of *respondeat superior*. On or about the early spring or summer of 2008, Respondent Lindsay “Rachel Lindsay” provided five months of payments to the Appellants in the amount of \$6,557.04 to be applied accordingly. Neither of the Appellants applied these payments to Respondent Lindsay’s account. However, said payment cleared Respondent Lindsay’s bank on or about June 19, 2008. In the Fall of 2008, the Appellant brought a foreclosure suit (Case #. 2008-CP-18-2543) against the same parties as in this matter, which resulted in a judgment against the Respondent Lindsay. However, Respondent Lindsay was never served with a Summons and Complaint nor served any notices of hearing(s) in Case #:2008-CP-18-2543. (R. pp. 61 - 63). Upon Respondent Lindsay’s hiring of legal counsel after finding out that her property had been surreptitiously foreclosed on, Appellant acknowledged the aforementioned payment had not been applied and agreed to apply this previously made payment to Respondent Lindsay’s account in or around the first months of 2009. Appellant dismissed the prior foreclosure action Case #:2008-CP-18-2543 by Stipulation of Dismissal of Foreclosure Action and Cancellation of Lis Pendens dated March 20, 2009 and filed on April 2, 2009. (R. pp. 41-45). Respondent Lindsay with her attorney communicated on numerous occasions with Appellants by telephone and by e-mail regarding correction of Respondent Lindsay’s account. Appellant supervisor and employee, Sharon Cotton, indicated via numerous e-mails that this payment would be applied to Respondent Lindsay’s account. The Appellants failed to properly apply payments to Respondent Lindsay’s account. Respondent Lindsay made additional payments to Appellant for which she received no credit. Also, Appellants failed to apply these additional loan payments to Respondent

Lindsay's account. Respondent vehemently declares and asserts that her money was stolen. Appellants refused to modify Respondent Lindsay's loan after numerous discussions and requests for the same. The Appellant "Bank of New York Mellon" on May 13, 2009 filed a foreclosure action Case #:2009-CP-18-1311 against Defendant Lindsay. (R. pp.46-56). On May 28, 2010 the Appellant "Bank of New York Mellon" pursuant to SCRCR Rule 40(j) dismissed the action. (R. pp. 13-17). On May 17, 2011 the parties consented to restoring this case under Case#:2011-CP-18-1013. (R. pp. 18-21). Appellants reported negative late payments and foreclosure on Respondent Lindsay's credit report. Respondent Lindsay has suffered a myriad of damages, attorney fees, costs, expenses, emotional distress, damage to her credit report, and other harm due to the improper actions/inactions of the Appellants.

ARGUMENT

The die is not cast in the "non-jury realm of civil litigation" just because a Bank is the first to file a Complaint asserting a foreclosure action against a borrower. If the borrower could have filed a Complaint, first, alleging certain legal causes of action entitling him/her to a jury trial for wrongs or breaches perpetrated by the Bank, then, s/he should be entitled to have his/her counterclaims heard by a jury of his/her peers. In the scenario where a borrower files a Complaint (*demanding a jury trial*) and the Bank asserts a counterclaim alleging a foreclosure cause of action, said equitable counterclaim would not facilitate nor require the removal of the case from the "jury trial docket" to "non-jury trial docket".

I. LINDSAY HAS ASSERTED LEGAL AND EQUITABLE CAUSES OF ACTION IN HER ANSWER, COUNTERCLAIM AND THIRD PARTY COMPLAINT AND INTENDS TO AMEND HER ANSWER, COUNTERCLAIM AND THIRD PARTY COMPLAINT TO INCLUDE THE CLAIM OF "CONVERSION" A PURE LEGAL CAUSE OF ACTION.

The legal causes of action already pled by Respondent Lindsay are as follows: Breach of Contract, Negligence, Fraud, Negligent Misrepresentation, Violation of the South Carolina Unfair Trade Practices Act, Invasion of Privacy, Intentional Infliction of Emotional Distress/Outrage, Defamation/Libel Per Se, Intentional Interference with Contract, Intentional Interference with Prospective Economic Advantage, justify the judicial determination that the Lindsay is entitled to a jury trial in the case at hand. (R. pp. 57-84).

The Appellants converted the Respondent's money (funds earmarked to make mortgage payments) to its/their own use. Conversion is a wrongful act emanating from either a wrongful taking or wrongful detention. Moore v. Weinberg, 373 S.C. 209, 227, 644 S.E.2d 740, 749 (Ct. App. 2007). The Respondent Lindsay intends to make a motion to amend her Answer and Counterclaim to include the cause of action of "Conversion" upon obtaining leave of court pursuant to S.C. R. Civ. P. Rule 15(a).¹ Conversion is defined as "the unauthorized assumption and exercise of the rights of ownership over goods or personal chattels belonging to another, to the alteration of their condition or to the exclusion of the rights of the owner." Mullis v. Trident Emergency Physicians, 351 S.C. 503, 507, 570 S.E.2d 549, 550-51 (Ct. App. 2002). "An action for damages for conversion is an action at law." Blackwell v. Blackwell, 289 S.C. 470, 471, 346 S.E.2d 731, 732 (Ct. App. 1986). But for said conversion of the mortgage money payments this foreclosure action would have never been filed against the Respondent. The Bank in the case at hand used the Respondent Lindsay's mortgage payments for its own devices, failed to give credit to

¹ **SCRCP Rule 15(a) Amendments.** *a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party.*

the Respondent Lindsay for making said payments, and, then held the Lindsay in default for failing to make said payments. Surely, this is a question of fact for a jury to determine regarding a legal cause of action. Conversion is definitely a legal and compulsory counterclaim and third party claim which would entitle Respondent to a trial by jury.

Appellant argues misapplication of payments were just an accounting error. Lindsay argues that the funds were intentionally misapplied which is tantamount to the funds being fraudulently converted for the benefit of the Appellant all to the detriment of the Lindsay (i.e., stolen). It is up to a jury to determine whether this money was stolen or simply negligently misapplied through an accounting error. Even if it were simply an accounting error that error caused "Lindsay" to suffer in a myriad of ways as set out in the subject Answer, Counterclaim and Third Party Complaint (R. pp. 57-84). Lenders and servicers regularly refuse to take monthly payments once a foreclosure action has been filed. It is very disingenuous for the "Bank of New York Mellon" and "Saxon Mortgage" to argue that Respondent "Lindsay" is living in the home without making payment. They refused payment. "Lindsay" has in fact asserted the causes of action (e.g., Quantum Meruit/Unjust Enrichment, Fraud, Negligence, etc.....) alleging damages for loss of her money. Query: *Where is the \$6,557.04 in payments? What did lender or servicer do with these funds?* Again, Respondent "Lindsay" contends that these funds have been taken by lender and/or servicer (i.e., Appellants). If these funds had been applied to the Respondent Lindsay's loan records/payment history the Appellant "Bank of New York Mellon" would have never considered Lindsay to be "in default" and would have never filed the first foreclosure action in 2008. The filing of the foreclosure action has caused the Respondent Lindsay to suffer in the eyes of her customers and their tenants. Lindsay "Lindsay" owns and operates 1 Sterling Place, LLC a real estate management company,

and one of the tenants she deals with failed to make a monthly payment and he came to her office to discuss the matter and averred that “*Lindsay does not make her payments why should I*”. The fact is, that the foreclosure (Case No. 2008-CP-18-02543) became public record in the Office of the Dorchester County Clerk of Court placing the foreclosure information regarding the “Lindsay” on the internet for the whole world to see. (R. pp.29-40). In the first case filing, Lindsay was never served with the Summons and Complaint, resulting in that case being dismissed, after the damage had been done to Respondent Lindsay’s reputation as a result of Libel². In the 2008 case, the Appellant erroneously obtained an Order of Foreclosure and Sale and published in the local newspaper that the Respondent Lindsay’s house would be auctioned off at a foreclosure sale. (R. pp. 1-8). This action amounts to defamation basically announcing that Rachel Lindsay is/was not fit to conduct the business of her chosen profession which that of a “Property Manager” (i.e., person *in the business of managing matters pertaining real estate for land/home owners*). Respondent Lindsay also suffered on a social level as a result of the defamation. The Appellant knew or should have known that “Lindsay” did not receive service of process yet Appellant obtained judgment and published in the newspaper anyway. The Appellant “Bank of New York Mellon” had a complete disregard for Lindsay’s “right to due process”³ and a complete disregard for the damages and suffering its actions would cause the Respondent “Lindsay”.

² South Carolina Constitution. Declaration of Rights, Section 16. Libel. In all indictments or prosecutions for libel, the truth of the alleged libel may be given in evidence, and the jury shall be the judges of the law and facts. (1970 (56) 2684; 1971 (57) 315.) Note: This concept has been recognized in criminal cases, thus, it is and/or should be extended to civil cases, for it is a question of fact in either event.

³ As a result of the 2008 foreclosure action, the Respondent “Lindsay” was going to be erroneously removed from her home and put out on the street via a wrongful foreclosure wherein she was never served with the Summons and Complaint. The circumstances in that case were dire and extremely important to the “Lindsay”, yet, the Appellant failed to serve “Lindsay”. The Appellant went

This case is about more than foreclosure, it is about wrongful foreclosure, a lender fraudulently stealing money from one of its borrowers, Breach of Contract; Negligence; Fraud; Negligent Misrepresentation; Promissory Estoppel; Violation of the South Carolina Unfair Trade Practices Act; Quantum Meruit/Unjust Enrichment; Intentional Infliction of Emotional Distress/Outrage; Invasion of Privacy; Defamation/Libel Per Se; Intentional Interference with Contract; Intentional Interference with Prospective Economic Advantage; Declaratory Judgment for Compliance with Homeowner Affordability and Stability Plan; Declaratory Judgment for correction of credit report, and "Conversion" . Lindsay in her Answer, Counterclaim and Third Party Complaint has demanded a trial by a jury of her peers. (R. pp. 57-84). Pursuant to Constitutional Law and South Carolina Law

through with the publication of the foreclosure even after it negligently filed the 2008 foreclosure action and even after it knew or should have known that the 2008 filing was erroneous because of the missing funds which were in the possession of the Appellant , furthermore, the action was tainted due to failure to serve the Lindsay.

All individuals have a constitutional right to due process under the Constitution of the State of South Carolina and Constitution of the United States America. This concept should apply in both criminal and civil cases. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. "*Due process is a flexible concept, and the requirements of due process in a particular case are dependent upon the importance of the interest involved and the circumstances under which the deprivation may occur*". S.C.N.B. v. Central Carolina Livestock Market, 289 S.C. 309, 345 S.E.2d 485 (1986). The U.S. Constitution, prohibits all levels of government from arbitrarily or unfairly depriving individuals of their basic constitutional rights to life, liberty, and property. The Due Process Clause of the Fifth Amendment, ratified in 1791, asserts that no person shall "*be deprived of life, liberty, or property, without due process of law*." This amendment restricts the powers of the federal government and applies only to actions by it. The Due Process Clause of the Fourteenth Amendment, ratified in 1868, declares, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law" (§ 1). The Constitution of the State of South Carolina, Article 1, Section 3. states that "*The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.*" The Appellant participates in HASP a program funded and created by the federal government. The Appellant in the action was acting on behalf of the federal government in some of its dealing with the Respondent "Lindsay". The Lindsay's right to due process should have been protected.

the Respondent Lindsay has a right to a trial by jury, and, therefore, demands a jury trial and contests the Appellants' efforts to have this matter referred.

A. Right to Trial by Jury

The South Carolina Constitution preserves the right of trial by jury only in those cases in which parties would have been entitled to it at the time of the adoption of the Constitution. Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). According to South Carolina Rules of Civil Procedure, Rule 38-Jury Trial of Right (a) Right Preserved. *The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate.* Issues of fact in an action for the recovery of money or of specific real or personal property must be tried by a jury, unless a jury trial be waived. "Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." Lester, 327 S.C. at 267, 491 S.E.2d at 242 . Whether an action is legal or equitable is primarily determined by the allegations in the complaint. See Nat'l Bank of South Carolina v. Daniels, 283 S.C. 438, 440, 322 S.E.2d 689, 690 (Ct. App. 1984). Where legal and equitable issues or rights are raised in the same complaint, the legal issues are for determination by a jury and the equitable issues are for determination by the court. Floyd v. Floyd, 306 S.C. 376, 379, 412 S.E.2d 397, 398-99 (1991). Furthermore, either party may demand a trial by jury of any issue triable by jury. See S.C. R. Civ. P. Rule 38 (b).⁴

⁴ Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor[e] in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

B. Types of Counterclaims

Counterclaims are governed by S.C. R. Civ. P. Rule 13, which provides:

13(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party ***not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.***

13(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it ***arises out of the transaction or occurrence that is the subject matter of the opposing party's claim*** and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought the suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

The purpose of Rule 13(a) is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." S. Constr. Co. v. Pickard, 371 U.S. 57, 60 (1962) "Rules of procedure, like statutes, should be given their plain meaning." Valentine v. Davis, 319 S.C. 169, 173, 460 S.E.2d 218, 220 (Ct. App. 1995). "By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." First-Citizens Bank & Trust Co. v. Hucks, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991). The test for determining if a counterclaim is compulsory is whether there is a "logical relationship" between the claim and the counterclaim. Mullinax v. Bates, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). Whether a counterclaim is logically related to the initial claim depends upon the facts of each case. See Hucks, 305 S.C. at 298, 408 S.E.2d at 223 (finding a logical relationship between a trustee regarding the administration of a trust and a legal counterclaim alleging that the trustee breached a fiduciary duty); N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.,

298 S.C. 514, 518-19, 381 S.E.2d 903, 905 (1989) (finding a logical relationship between an action on a note brought by the lender to foreclose and the validity of a purported oral agreement modifying the note alleged by the borrower). If a compulsory counterclaim is not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action. Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997).⁵

II. LINDSAY HAS ASSERTED LEGAL CLAIMS, COMPULSORY CLAIMS, EQUITABLE CLAIMS AND PERMISSIVE CLAIMS, NEVERTHELESS, LINDSAY'S RIGHT TO A JURY TRIAL REMAINS VALID DUE THE LEGAL AND COMPULSORY CLAIMS ASSERTED WHICH BASED ON THE FACTS OF THIS CASE ARE AND SHOULD BE INCLUDED IN LINDSAY'S ANSWER, COUNTERCLAIM AND THIRD PARTY COMPLAINT.

The Defendant Lindsay asserted compulsory Counterclaims and Claims raising legal issues while at all times demanding a trial by jury. If the complaint is equitable and the counterclaim is legal and compulsory the defendant has a right to a jury trial on the counterclaim. C&S Real Estate Services, Inc.. v. Massengale, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986). The Appellant attempts to classify the Respondent Lindsay's Counterclaims and Third Party Plaintiff's Claims as being entirely equitable in nature. For example, Fraud and Negligent Misrepresentation are not equitable in nature, therefore, Appellants argument and classification is faulty and erroneous. The Appellant stole money and attempted to steal the Lindsay's house without even notifying her of the initial lawsuit Case #:2008-CP-18-2543. (R. p. 163, line 19 – p. 166, line 7). Violation of the South Carolina Unfair Trade Practices Act Intentional Interference with Existing Contracts,

⁵ The South Carolina Reporter's Note following Rule 13 states: "[c]ounterclaims arising out of the same transaction or occurrence that is the subject of the action are 'compulsory' under Rule 13(a) and are barred by res judicata or estoppel by judgment if not asserted."

Breach of Contract, Negligence, Intentional Interference with Prospective Contractual Relations, Intentional Infliction of Emotional Distress/Outrage, Invasion of Privacy/Intrusion Upon Solitude, and Defamation/Libel *Per Se* are all legal in nature. Although other claims or counterclaims may be considered equitable in nature; there are sufficient compulsory claims/counterclaims which have been asserted which arise out of the same transaction and occurrence logically relating back to the wrongful acts of the Appellant to warrant a trial by jury. But for the Appellant's action of stealing Lindsay's money this legal action would have never be filed in the first place.

A. Lindsay Has Asserted Several Equitable Counterclaims Against the Bank, Such As Promissory Estoppel, Unjust Enrichment and Declaratory Relief.

It is acknowledged that Promissory Estoppel and Unjust Enrichment are equitable causes of action, also, the two requests for Declaratory Relief in the Answer, Counterclaim, and Third Party Complaint filed by Lindsay are likewise equitable in nature, so what! The Respondent also counterclaimed with several legal causes of action. According to the case of Johnson v. South Carolina Nat'l Bank, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987), if both the legal claims and the equitable claims are to be tried in a single proceeding, the legal issues are to be determined first, and the findings of the jury are binding on the court.

B. The Primary Purpose of the Claims Asserted by Lindsay is to Seek Justice and to Obtain Compensation for Damages Sustained by Lindsay as a Result of the Bank Converting Lindsay's Mortgage Payments to the Bank's Own Use and the Resulting Detrimental Ramifications and Effects said Theft/Conversion Had on Lindsay Financially, Psychologically and Physically.

Respondent Lindsay has a right to defend and protect herself and to sue for damages incurred by her as a result of the wrongs perpetrated against her by the Appellants. One can glean Respondent's motivations from the arguments delineated herein which explain

why she is justified in filing the subject Answer, Counterclaim and Third Party Complaint. Moreover, it is a question for the jury to determine whether or not any or all of Respondent's counterclaims and third party claims are valid.

C. The Third Party Complaint Against Saxon is mandatory.

Appellant Saxon was acting on behalf of Appellant "Bank of New York Mellon" and pursuant to the doctrine of "*Respondeat Superior*"⁶ the Appellant "Bank of New York Mellon" is responsible for the acts and omissions of its agent (i.e., Saxon). For example, Appellant "Saxon" stole the funds paid by Lindsay and then allow Lindsay to be foreclosed on, therefore, "Saxon" is liable to Lindsay for said act, likewise, the "Bank of New York Mellon" is responsible for the actions of Saxon. Lindsay had no choice but to file the Third Party Complaint against Saxon or risk having those causes of action being lost forever (e.g., pursuant to the doctrine of laches, the expiration of the statute of limitations, etc.....)(R. pp. 57-84). In the interest of judicial economy, prudence, logic, and common sense it was mandatory upon Lindsay to file the Third Party Complaint against Saxon.

D. The Counterclaims against Appellant are compulsory and actually could have been asserted in a Complaint against the Bank.

As argued above this case is about more than foreclosure it is about wrongful foreclosure, a lender fraudulently stealing money for one of its borrowers, Breach of Contract; Negligence; Fraud; Negligent Misrepresentation; Promissory Estoppel;

⁶"*Respondeat Superior*"- The maxim means that a master is liable in certain cases for the wrongful acts of the his servant, and a principal for those of his agent. **Black's Law Dictionary, Fifth Edition** The doctrine of *respondeat superior* rests upon the relation of master and servant. A plaintiff seeking recovery from the master for injuries must establish that the relationship existed at the time of the injuries, and also that the servant was then about his master's business and acting within the scope of his employment. An act is within the scope of a servant's employment where reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business. These general principles govern in determining whether an employer is liable for the acts of his servant. Lane v. Modern Music, Inc., 244 S.C. 299, 136 S.E.2d 713 (1964).

Violation of the South Carolina Unfair Trade Practices Act; Quantum Meruit/Unjust Enrichment; Intentional Infliction of Emotional Distress/Outrage; Invasion of Privacy; Defamation/Libel Per Se; Intentional Interference with Contract; Intentional Interference with Prospective Economic Advantage; Declaratory Judgment for Compliance with Homeowner Affordability and Stability Plan; Declaratory Judgment for correction of credit report, and "Conversion". The main legal and compulsory counterclaims and claims asserted are Breach of Contract, Negligence, Fraud, Negligent Misrepresentation, Conversion, etc..... The Respondent Lindsay asserted compulsory Counterclaims and Claims raising legal issues while at all times demanding a trial by jury. If the complaint is equitable and the counterclaim is legal and compulsory the defendant has a right to a jury trial on the counterclaim. C&S Real Estate Services, Inc., v. Massengale, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986).

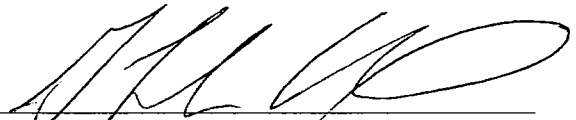
III. THE MODE OF TRIAL FOR THIS CASE WHICH INVOLVES BOTH LEGAL AND EQUITABLE CAUSES OF ACTION IS NOT UNIQUE AND SHALL BE HANDLED AS IS TRADITIONAL AND CUSTOMARY PURSUANT TO SOUTH CAROLINA JURISPRUDENCE.

The jury shall first decide the basic facts of this case and the trial judge assigned to handle the case at hand shall dictate how he or she wishes to conduct the trial. Where legal and equitable issues or rights are raised in the same complaint, the legal issues are for determination by a jury and the equitable issues are for determination by the court (i.e, presiding judge). Floyd v. Floyd, 306 S.C. 376, 379, 412 S.E.2d 397, 398-99 (1991). The jury will make its determination on the legal issues and after that point it shall be necessary for the judge to determine the equitable issues. If both the legal claims and the equitable claims are to be tried in a single proceeding, the legal issues are to be determined first, and the findings of the jury are binding on the court. Johnson v. South Carolina Nat'l Bank,

292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987). A motion hearing judge is not required to give the Appellant a complete road map for the “actual trial” at a motion hearing stage of the litigation. Nevertheless, failure on the part of the judge to specify and categorize each cause of action in the case at hand would be at worse considered a “harmless error”.

CONCLUSION

The Respondent Lindsay has filed an Answer, Counterclaim and Third Party Complaint asserting both legal and equitable issues, most compulsory and some which may be considered permissive counterclaims and claims. Thus pursuant to South Carolina law, in order to prevent a multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters this case should be determined by jury trial with the jury making those determinations customarily decided by a jury and the judge making judicial and equitable determinations customarily decided by a judge.



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Ravenel, South Carolina

March 13, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstien, Circuit Court Judge

Case No. 2011-CP-18-1013

Appellate Case No. 2013-002066

The Bank of New York Mellon, as Successor Trustee
under NovaStar Mortgage funding Trust, Series 2004-1,.....Appellant,

v.

Rachel R. Lindsay; Jeffery Wayner; Tammy Wayner;
Tiffany Spann-Wilder, Esq.; The Steinberg Law
Firm; and United States of America, Acting by and
through its agency, the Internal Revenue Service,
Defendants,

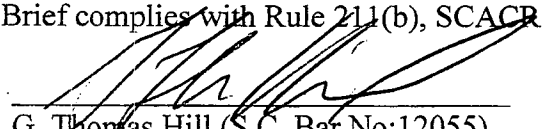
Rachel R. Lindsay Respondent,

v.

Saxon Mortgage Services, Inc.,.....Appellant.

CERTIFICATE OF COUNSEL

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


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(RACHEL R. LINDSAY)**

March 13, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstien, Circuit Court Judge

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The Bank of New York Mellon, as Successor Trustee
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v.

Rachel R. Lindsay; Jeffery Wayner; Tammy Wayner;
Tiffany Spann-Wilder, Esq.; The Steinberg Law Firm;
and United States of America, Acting by and through its
agency, the Internal Revenue Service, Defendants,

Rachel R. Lindsay Respondent,

v.

Saxon Mortgage Services, Inc.,.....Appellant.

PROOF OF SERVICE

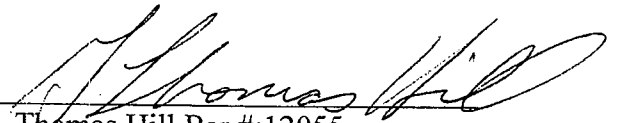
I HEREBY CERTIFY that I have served the FINAL BRIEF OF RESPONDENT on Appellants, Plaintiff, Defendant and Third Party Defendant by depositing copies of the same in the United States Mail, postage prepaid, addressed to the Counsel of Record, below:

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and through its agency, the Internal Revenue
Service.*



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Ravenel, South Carolina

March 14, 2014

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In The Court of Appeals

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Case No. 2011-CP-18-1013

Appellate Case No. 2013-002066

Bank of New York Mellon, as Successor Trustee under
NovaStar Mortgage Funding Trust, Series 2004-1 Appellant

v.

Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner,
Tiffany Spann-Wilder, Esq., The Steinberg Law Firm and
United States of America acting by and through its agency
the Internal Revenue Service, Defendants.

Of Whom Rachel R. Lindsay is the Respondent.

Rachel R. Lindsay Respondent

v.

Saxon Mortgage Services, Inc. Appellant

FINAL REPLY BRIEF OF APPELLANTS

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ARGUMENT

I. LINDSAY'S ARGUMENT I

A. Lindsay Failed to Raise the Issue of Whether She Would Be Entitled to a Jury Trial on a Claim for Conversion Because She Did Not Plead the Claim in Her Answer & Counterclaim and She Did Not Move to Amend Her Pleading.

The gist of Lindsay's claims is that she allegedly made a payment to Saxon, which she intended to have applied toward several months of delinquent mortgage payments, and Saxon did not give her credit for it. In her latest effort to re-characterize this case as being about something other than the calculation of the amount past due on her mortgage loan, Lindsay informs the Court that she *intends* to amend her pleadings below to assert a claim for conversion. Because Lindsay did not plead a claim for conversion or move to amend prior to this appeal, however, this Court should not consider whether the amendment would entitle Lindsay to a jury trial. Fraternal Order of Police v. South Carolina Dep't of Revenue, 352 S.C. 420, 435, 574 S.E.2d 717, 725 (2002) ("Generally, claims or defenses not presented in the pleadings will not be considered on appeal."). The law is clear that an appellate court may not consider an issue for the first time on appeal. Wilder Corp. v. Wilke, 330 S.C. 71, 75, 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 judge to be preserved for appellate review."). Here, Lindsay did not plead a claim for conversion nor did she move to amend her complaint to assert one. Thus, the issue is not preserved for appellate review.

B. Lindsay Would Not Be Entitled to a Jury Trial on a Counterclaim or Third-Party Claim for Conversion.

Even if Lindsay *had* pleaded a claim for conversion, the result would be the same. Lindsay is not entitled to a jury trial. Lindsay can denominate her claim as one for conversion, fraud, or any other legal theory, but artful pleading cannot change the fact that the substance of her claim is that she does not owe the amount that the Bank alleges is past due on her mortgage and that the court should not allow the Bank to foreclose. No matter how she styles the claim, and regardless of whether she requests unspecified damages, the essential question in this suit is equitable – namely, whether Lindsay is in default on her mortgage and, if so, the amount of the debt. Those are the primary questions that the master-in-equity exists to answer. (See Appellants' Initial Brief at Sections I. and II.B).

If Lindsay could transform this equitable action into one at law, and thereby obtain a jury trial, simply by framing as a legal counterclaim her argument that foreclosure is improper, then the defendant would be entitled through artful pleading to a jury trial in every foreclosure case. By merely denying default or the amount due, and characterizing the plaintiff's effort to foreclose as a breach of the note and mortgage, fraud, or some other legal theory, the defendant would always overcome a plaintiff's motion for a non-jury trial. That is not the law in South Carolina, and this Court has repeatedly looked beyond the defendant's own characterization of his counterclaims in foreclosure actions to determine whether the essence of the claim is legal or equitable. See, e.g., Wells Fargo Bank, NA v. Smith, 398 S.C. 487, 496-497, 730 S.E.2d 328, 333 (Ct. App. 2012) (counterclaim for common law unconscionability deemed equitable where primary purpose was to have mortgage declared void); Mortgage Electronic Systems, Inc. v. White, 384 S.C. 606, 614, 682 S.E.2d 498, 502 (Ct. App. 2009) (counterclaim for fraud deemed equitable where

primary relief sought was to have mortgage declared void). Hence, this Court should hold that the circuit court abused its discretion in failing to look beyond Lindsay's characterization of her claims and find that this entire foreclosure action – including the counterclaims and third-party claims – is equitable in nature and that Lindsay is not entitled to a jury trial.

II. LINDSAY'S ARGUMENT II

A. Lindsay's Third-Party Claims are Permissive.

Lindsay argues without citation to any authority that "it was mandatory [for her] to file the Third Party complaint against Saxon", apparently contending that her third-party claim was compulsory. A third-party claim is *always* permissive. N. Carolina Fed. Sav. & Loan Ass'n v. DAV Corp., 294 S.C. 27, 32, 362 S.E.2d 308, 310 (S.C. Ct. App. 1987) *aff'd in part, rev'd in part on other grounds*, 298 S.C. 514, 381 S.E.2d 903 (1989); Tatnall v. Gardner, 350 S.C. 135, 139, 564 S.E.2d 377, 378 (Ct. App. 2002); S.C. Rule of Civ. Proc. 14(a) ("[a]t any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not party to the action") (emphasis added). By impleading Saxon into this foreclosure action, Lindsay waived any right to a jury trial on her third-party claims to the extent that any of them are deemed to be legal, rather than equitable. DAV Corp., 294 S.C. at 32, 362 S.E.2d at 310-311.

III. LINDSAY'S ARGUMENT III

A. The Trial Court's Error in Failing to Specify the Claims on Which It Determined that Lindsay Is Entitled to a Jury Trial Was Not Harmless.

Lindsay argues that any error by the lower court in failing to specify the claims on which it determined that Lindsay is entitled to a jury trial was harmless because the legal

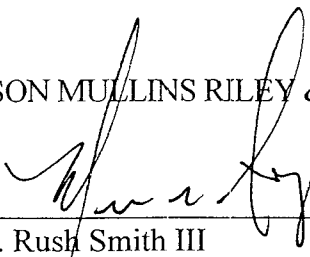
and equitable claims will be tried together in any event. Lindsay misstates the law. First, although the trial court *may* try legal and equitable claims together in a single proceeding, the court may also order separate trials pursuant to Rule 42(b) Johnson v. South Carolina Nat. Bank, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987). By denying the motion for a non-jury trial outright, and failing to specify which issues must be tried by jury, the lower court denied the Bank and Saxon the opportunity to move for separate trials as to the claims that they are entitled to have decided by the Court. Even if the trial court ultimately elects to try the jury and non-jury claims in a single proceeding, the Bank and Saxon are entitled to determination of each claim in the proper mode of trial and to notice prior to trial of the manner in which each issue will be determined. See Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) ("we repeatedly have held that the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2)") (listing cases). Consequently, the trial court's error in failing to identify the claims on which it found that Lindsay is entitled to jury trial was not harmless.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the circuit court's ruling that Lindsay is entitled to a jury trial. In the alternative, Appellants request that the Court specify which claims should be tried by the jury and which claims should be determined by the court.

[SIGNATURES ON FOLLOWING PAGE]

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Charleston, South Carolina

March 25, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Case No. 2011-CP-18-1013

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Revenue Service, Defendants,

Of Whom Rachel R. Lindsay is the Respondent.

Rachel R. Lindsay Respondent,

v.

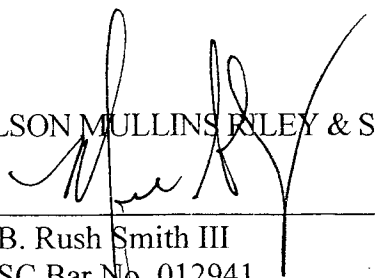
Saxon Mortgage Services, Inc. Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Reply Brief of Appellants
complies with the Supreme Court Order dated August 13, 2007 regarding personal
identifiers and sensitive information.

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March 25, 2014

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and United States of America acting by and through its
agency, the Internal Revenue Service, Defendants,
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Rachel R. Lindsay Respondent,

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Saxon Mortgage Services, Inc. Appellant.

PROOF OF SERVICE

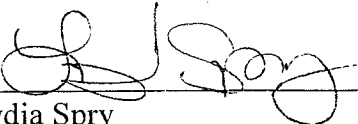
I HEREBY CERTIFY that I have served the **FINAL REPLY BRIEF OF APPELLANTS** on Respondents and Defendants by depositing copies of it in the United States Mail, postage prepaid, addressed to the below Counsel of Record:

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
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Of whom Rachel R. Lindsay is the Respondent.

Rachel R. Lindsay, Respondent,

v.

Saxon Mortgage Services, Inc., Appellant.

Appellate Case No. 2013-002066

Appeal From Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2015-UP-208
Heard March 11, 2015 → Filed April 22, 2015

REVERSED

Benjamin Rush Smith III and Allen Mattison Bogan, of
Columbia, and Merritt Gordon Abney and Dow Ambrose
Davidson, of Charleston, all of Nelson Mullins Riley &
Scarborough, LLP, for Appellants.

G. Thomas Hill, of Hill & Hill, LLC, of Ravenel, for
Respondent.

PER CURIAM: In this contested mortgage foreclosure action, Bank of New York Mellon (Bank) and Saxon Mortgage Services, Inc. (Servicer) (collectively, Appellants), challenge the circuit court's order denying their joint motion for an order requiring a non-jury trial and striking Rachel R. Lindsay's demand for a jury trial. Appellants argue the circuit court erred in concluding Lindsay was entitled to a jury trial on her counterclaims and third-party claims because the entire action lies in equity and none of Lindsay's counterclaims or third-party claims are both legal and compulsory. We reverse.

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). "The character of an action as legal or equitable depends on the relief sought." *Cedar Cove Homeowners Ass'n v. DiPietro*, 368 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct. App. 2006). "[A]n action sounding in law may be transformed to one in equity because equitable relief is sought." *Ins. Fin. Servs., Inc. v. S.C. Ins. Co.*, 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978); *see also Crewe v. Blackmon*, 289 S.C. 229, 232-33, 345 S.E.2d 754, 756-57 (Ct. App. 1986) (concluding that although a complaint included allegations of fraud and misrepresentation, the action was one in equity when most of the relief sought was equitable in nature).

"Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial." *Carolina First Bank v. BADD, L.L.C.*, Op. No. 27486 (S.C. Sup. Ct. filed Jan. 28, 2015) (Shearouse Adv. Sh. No. 4 at 21, 24). In *Collier v. Green*, our supreme court explained that in a mortgage foreclosure action, counterclaims relating to the plaintiff's right to foreclose or the amount due on the debt secured by the mortgage are merely part of the equitable action and the defendant has no right to a jury trial on such claims. 244 S.C. 367, 371-72, 137

S.E.2d 277, 280 (1964). "Where, in actions of foreclosure, [the] defendant sets up a defense and/or a counterclaim affecting the consideration, and arising out of the transaction in which the mortgage or lien was created, the authorities hold that the issues thus raised are equitable and are to be tried by the court upon its equity side." *Id.* at 371, 137 S.E.2d at 280; *see also Carolina First* at 24 (referencing the role played by the Act of 1791 in vesting courts of equity with jurisdiction to decide "mortgage-related disputes"); *id.* at 24-25 ("The power to render a deficiency judgment is included within the jurisdiction of courts of equity.").

Here, Lindsay's first eight counterclaims are based on Bank's alleged misapplication of several mortgage payments made by Lindsay.¹ Regardless of the label attached to each of these counterclaims, they are equitable in nature because they ultimately relate to the amount due on the underlying debt. *See Collier*, 244 S.C. at 371-72, 137 S.E.2d at 280. Therefore, Lindsay is not entitled to a jury trial on these claims. *See id.*

As to the following four counterclaims,² they are based on the allegation that Appellants published false information about Lindsay. These counterclaims are permissive, rather than compulsory, because they do not affect the enforceability of the note secured by the mortgage, which is the "transaction or occurrence" that is the subject of Bank's foreclosure complaint. *See* Rule 13(a), SCRCP ("A pleading *shall* state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it *arises out of the transaction or occurrence* that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." (emphases added)); *Carolina First* at 26 (holding a counterclaim is compulsory if it arises out of the same transaction or occurrence as the plaintiff's claim); *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514,

¹ Lindsay's first eight counterclaims against Bank and her identical first eight third-party claims against Servicer are styled as "Breach of Contract," "Negligence," "Fraud/Fraud in the Inducement," "Negligent Misrepresentation," "Promissory Estoppel," "SC Unfair Trade Practices Act," "Quantum Meruit/Unjust Enrichment," and "Intentional Infliction of Emotional Distress."

² These four counterclaims are styled as "Invasion of Privacy," "Defamation," "Intentional Interference with Existing Contracts," and "Intentional Interference with Prospective Contractual Relations." Lindsay has asserted four identical third-party claims against Servicer.

519, 381 S.E.2d 903, 905 (1989) (holding a foreclosure defendant's counterclaim alleging the plaintiff's breach of two agreements to purchase the defendant's interest in a joint venture was permissive because the alleged agreements did not affect the enforceability of the note).

Further, all of Lindsay's third-party claims against Servicer are permissive by nature. See Rule 14(a), SCRCP ("At any time after commencement of the action a defending party, as a third-party plaintiff, *may* cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." (emphasis added)); *Carolina First* at 22-23 n.2 (noting that the third-party claims of a foreclosure defendant against the plaintiff's alleged co-conspirator were permissive); *N.C. Fed. Sav. & Loan*, 298 S.C. at 519, 381 S.E.2d at 906 ("Generally, cross-claims are permissive, as are third party claims." (citations omitted)).

If a defendant in a mortgage foreclosure action asserts a permissive counterclaim or a third-party claim, the defendant waives any right to a jury trial she may have on that claim. See *Carolina First* at 22-23 n.2 (holding that a defendant's third-party claims were permissive and, thus, he was not entitled to a jury trial on them); *N.C. Fed. Sav. & Loan*, 298 S.C. at 519, 381 S.E.2d at 906 (holding that a defendant in a foreclosure action waived its right to a jury trial on a claim by bringing it as a permissive counterclaim in the foreclosure action); *Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987) (holding if a defendant in an equitable action asserts a permissive counterclaim, the defendant waives his right to a jury trial on that claim). Therefore, Lindsay has waived her right to a jury trial on all of her third-party claims and her counterclaims for Invasion of Privacy, Defamation, Intentional Interference with Existing Contracts, and Intentional Interference with Prospective Contractual Relations.

Lindsay's final two counterclaims and identical third-party claims seek injunctive relief and are, therefore, equitable in nature.³ See *Cedar Cove*, 368 S.C. at 258, 628 S.E.2d at 286 (concluding that an action seeking injunctive relief is one in equity); *id.* ("The character of an action as legal or equitable depends on the relief

³ Lindsay's final two counterclaims and identical third-party claims are (1) "Declaratory Judgment for Compliance with Homeowner Affordability and Stability Plan and United States Treasury Supplemental Directive 09-01, April 6, 2009" and (2) "Declaratory Judgment ordering correction of credit reports."

sought."). Therefore, Lindsay has no right to a jury trial on these claims. *See Lester*, 327 S.C. at 267, 491 S.E.2d at 242 (holding there is no right to trial by jury for equitable actions).

REVERSED.

THOMAS, KONDUROS, and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

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v.

Saxon Mortgage Services, Inc.,.....Appellant.

PETITION FOR REHEARING

The Respondent Rachel R. Lindsay by and through her counsel G. Thomas Hill hereby petitions the Court of Appeals to grant a rehearing of court's opinion in the above referenced case filed on April 22, 2015 (Opinion No. 2015-UP-208). The Court of Appeals is in error by ruling that in a foreclosure lawsuit the filing of a permissive counterclaim amounts to waiver of one's constitutional right to a jury trial, by ruling that in a foreclosure lawsuit that the filing of a compulsory counterclaim fails to preserve one's constitutional right to a trial by

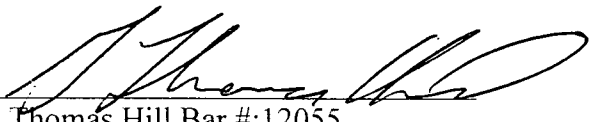
jury, and by ruling that Lindsay failed to file even one compulsory counterclaim. Furthermore, the rehearing is necessary based on the arguments delineated below:

- I. Opinion No. 2015-UP-208 issued by the South Carolina Court of Appeals in the case at hand erroneously extends the ruling by the South Carolina Supreme Court in the case of Carolina First Bank v. Badd, LLC Op. No. 27486 (S.C. Sup. Ct. filed Jan. 28, 2015) far beyond what the Supreme Court intended.**
- II. The Court of Appeals should reconsider its ruling due to distinctions and differences between in the case at hand and Carolina First Bank v. Badd, LLC Op. No. 27486 (S.C. Sup. Ct. filed Jan. 28, 2015), and, due to the fact that Lindsay did file compulsory counterclaim(s).**

In support of this Petition for Rehearing, Respondent refers to the Final Brief of Respondent, record on appeal, and arguments presented in this appeal.

WHEREFORE, Respondent Lindsay requests a rehearing and that the Court of Appeals reverse its decision and remand the case for trial by jury.

Respectfully submitted,


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**ATTORNEYS FOR RESPONDENT
(RACHEL R. LINDSAY)**

Ravenel, South Carolina

May 7, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstien, Circuit Court Judge

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its agency, the Internal Revenue Service, Defendants,

Rachel R. Lindsay Respondent,

v.

Saxon Mortgage Services, Inc.,.....Appellant.

MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING

The Respondent Rachel R. Lindsay refers the Court of Appeals to the Statement of the Case, Procedural History - Case Filings, Statement of Facts and Argument contained in the Final Brief of Respondent, as being restated and incorporated herein. The rehearing is necessary for the reasons delineated below:

I. Opinion No. 2015-UP-208 issued by the South Carolina Court of Appeals in the case at hand erroneously extends the ruling by the South Carolina Supreme Court in the case of Carolina First Bank v. Badd, LLC., Op. No. 27486 (S.C. Sup. Ct. filed Jan. 28, 2015) far beyond what the Supreme Court intended.

Upon reading the ruling in Bank of New York Mellon v. Lindsay, Opinion No. 2015-UP-208, it appears that the Court of Appeals ruled that once a party to a foreclosure action files just one permissive counterclaim that said party waives the right to a jury trial, whether or not the party has also asserted a compulsory counterclaim. Respondent Lindsay asserts that the converse is true, the ruling in Carolina First Bank v. Badd, LLC., indicates that the filing of just one compulsory counterclaim in a foreclosure action guarantees one's right to a trial by jury, even if permissive counterclaims are also pled. Surely, the filing of a permissive counterclaim does not taint a case initiated by foreclosure litigation to the point that a party waives her constitutional right to a trial by a jury of her peers.

II. The Court of Appeals should reconsider its ruling due to distinctions and differences between in the case at hand and Carolina First Bank v. Badd, LLC., Op. No. 27486 (S.C. Sup. Ct. filed Jan. 28, 2015), and, due to the fact that Lindsay did file compulsory counterclaim(s).

A. The Court of Appeals relies primarily on the case of Carolina First Bank v. Badd, LLC. in formulating its opinion regarding the case at hand. The differences and distinctions between the facts in Carolina First Bank v. Badd, LLC., and Bank of New York Mellon v. Lindsay, are delineated as follows:

1. Reason for the Filing of the Foreclosure Action.

(a) BADD, LLC actually failed to make loan payments to the lender and defaulted on the loan and involves the filing of one foreclosure action.

(b) Lindsay actually made the loan payments to the lender but through an "accounting error" or other nefarious act or omission on the part of the lender, Lindsay was not

credited with making the loan payments, and was erroneously classified as being in default. *Where did the money for the monthly mortgage payments go?* But for, the Banks admitted “accounting error” (*euphemism*) regarding loan payments made by Lindsay, Lindsay would have never been considered to be in default, and the foreclosure action would have never been filed in the first place. Also, this case involves the negligent filing of the first foreclosure action and the malicious filing of a second foreclosure action.

2. Borrower/Lender Relationship.

(a) McKown as a guarantor was ancillary to the dealings between borrower and lender; BADD, LLC was the primary participant in the borrower/lender relationship.

(b) Lindsay was the primary participant in the borrower/lender relationship.

3. Extent of interaction in the Borrower/Lender Relationship.

(a) McKown had no direct interaction with the lender regarding the making of loan payments, or the failure to make said payments.

(b) Lindsay personally interacted with the lender periodically by making the loan payments directly to the lender.

4. Reason for being named as a Defendant in a Foreclosure action.

(a) McKown was joined in as a party to the foreclosure action by the lender who did not claim that McKown was in default but only claimed that he was secondarily liable for the debt as a “guarantor”, due to the failure of BADD, LLC to make the required loan payments.

(b) Erroneously, Lindsay was directly sued by the lender in the foreclosure action based on the claim that Lindsay was in default. (*Lender admits to making an "accounting error"*).

5. Counterclaims asserted.

(a) McKnown as an ancillary party counterclaimed asserting permissive counterclaims involving the lender and William Rempher.

(b) Lindsay as a primary party did in fact assert compulsory counterclaims¹ and delineated in the Final Brief of Respondent.

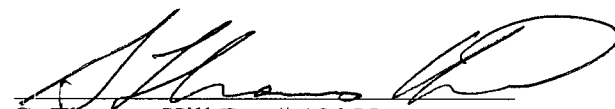
The transaction and occurrence involves the malevolent filing of the second foreclosure lawsuit after the Bank's misappropriation of Lindsay's monthly mortgage loan payments (*otherwise referred by the Appellant as an "accounting error" and by Respondent as fraudulent larceny*) and erroneous filing of the second foreclosure action. The Bank of New York Mellon admits to the fact that it took \$6,557.04 from Lindsay and failed to show said sum on its "Books", and that since its "Books" did not account for said payments it considered Lindsay to be in default for failure to make the loan payments represented by said \$6,557.04. It was after the filing the first foreclosure action against Lindsay, when confronted by Lindsay the Bank of New York Mellon inexplicably located said sum of money. The Bank dismissed the first case

¹ **SCRCP Rule 13(a) Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it ***arises out of the transaction or occurrence that is the subject matter of the opposing party's claim*** and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought the suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

after said revelation. It was later that the Bank, knowing that it created the circumstances which made it appear that Lindsay was in default, filed the second foreclosure action in complete disregard for Respondent Lindsay. At least one legal cause(s) of action pled by Respondent Lindsay (e.g., Breach of Contract, Negligence, Fraud, Negligent Misrepresentation,....) justify the judicial determination that the Lindsay is entitled to a Jury Trial in the case at hand. Based on the facts and circumstances of this case there are counterclaims filed by Lindsay which are compulsory as delineated in the Final Brief of Respondent.

Conclusion

The filing of one compulsory counterclaim in a foreclosure action preserves a parties right to a trial by jury. Lindsay filed at least one compulsory counterclaim, therefore, the Court of Appeals should reverse its decision and remand the case for trial by jury.



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ATTORNEYS FOR RESPONDENT
(*RACHEL R. LINDSAY*)

Ravenel, South Carolina

May 7, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Case No. 2011-CP-18-1013

Appellate Case No. 2013-002066

Bank of New York Mellon, as Successor Trustee under Appellant,
NovaStar Mortgage Funding Trust, Series 2004-1

v.

Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner, Tiffany
Spann-Wilder, Esq., The Steinberg Law Firm and United States
of America acting by and through its agency, the Internal
Revenue Service, Defendants,

Of Whom Rachel R. Lindsay is the Respondent.

Rachel R. Lindsay Respondent,

v.

Saxon Mortgage Services, Inc. Appellant.

**RETURN IN OPPOSITION
TO RACHEL LINDSAY'S PETITION FOR REHEARING**

Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage
Funding Trust, Series 2004-1 (the "Bank"), and Saxon Mortgage Services, Inc. ("Saxon",
jointly, "Appellants"), hereby file this opposition to Respondent Rachel R. Lindsay's
("Lindsay") Petition for Rehearing.

Lindsay's Petition does not raise a single point of law or case or issue this Court
overlooked or misapprehended or failed to consider. The Court's Opinion in *Bank of New
York Mellon v. Lindsay*, Op. No. 2015-UP-208 (S.C. Ct. App. filed April 22, 2015) (the

“Opinion”) is correct in every respect. Lindsay has no right to a jury trial in this foreclosure action for the reasons stated in the Court’s Opinion, as the Appellants briefed to the Court, as argued at oral argument, and as detailed herein.

This Court should deny Lindsay’s Petition for Rehearing for three primary reasons. First, the Court correctly determined that Lindsay is not entitled to a jury trial because all of her claims asserted in this case are equitable or permissive or both. Second, the Court did not misconstrue or misapply *Carolina First Bank v. BADD, L.L.C.*, Op. No. 27486 (S.C. Sup. Ct. filed Jan. 28, 2015), and, in any event, *Carolina First Bank* did not represent a change from prior law regarding the proper mode of trial in a foreclosure action. Third, Lindsay’s attempt to distinguish *Carolina First Bank* from the instant case is unavailing.

I. The Court correctly determined that Lindsay is not entitled to a jury trial because all of her claims asserted in this case are equitable or permissive or both.

The Opinion accurately sets forth the law of this State. A foreclosure action is an equitable action. *Collier v. Green*, 244 S.C. 367, 370, 137 S.E.2d 277, 279 (1964). Where the defendant asserts counterclaims in a foreclosure action that merely go to the plaintiff’s right to foreclose or challenge the amount due upon the debt secured by the mortgage, the counterclaims are merely part and parcel of the equitable action, and a defendant has no right to a jury trial on such claims. *Collier*, 244 S.C. at 371-72, 137 S.E.2d at 280; *see also Carolina First Bank*, at 24 (referencing the role played by the Act of 1791 in vesting courts of equity with jurisdiction to decide “mortgage-related disputes”). Thus, the Court correctly concluded that Lindsay’s claims related to Appellants’ alleged misapplication of mortgage loan payments bears directly upon the amount due on the loan and falls squarely within the jurisdiction of the Master-in-Equity to determine the amount due in foreclosure

actions. *See id.* Therefore, Lindsay is not entitled to a jury trial on her causes of action related to the alleged misapplication of her payments.

Moreover, the Court correctly concluded that Lindsay's legal styling of these causes of action does not determine whether they are legal or equitable. Lindsay can style her claim as one for conversion, fraud, or any other legal theory, but colorful pleading cannot change the fact that the substance of her claim is that she does not owe the amount that the Bank alleges is past due on her mortgage loan and that the court should not allow the Bank to foreclose. No matter how she styles the claim, and regardless of whether she requests unspecified damages, the essential question in this suit is equitable—namely, whether Lindsay is in default on her mortgage and, if so, the amount of the debt. Those are the primary questions that the Master-in-Equity exists to answer. (*See* Appellants' Brief at Sections I. and II.B; Appellants' Reply Brief at Section I.B.)

If Lindsay could transform this equitable action into one at law, and thereby obtain a jury trial, simply by framing as a legal counterclaim her argument that foreclosure is improper, then the defendant would be entitled through artful pleading to a jury trial in every foreclosure case. By merely denying default or the amount alleged to be due, and characterizing the plaintiff's effort to foreclose as a breach of the note and mortgage, fraud, or some other legal theory, the defendant would always overcome a plaintiff's motion for a non-jury trial. That is not the law in South Carolina, and our courts have previously looked beyond the defendant's own characterization of his counterclaims in foreclosure actions to determine whether the essence of the claim is legal or equitable. *See, e.g., Collier*, 244 S.C. at 371-72, 137 S.E.2d at 280; *Mortgage Electronic Systems, Inc. v. White*, 384 S.C. 606, 614, 682 S.E.2d 498, 502 (Ct. App. 2009) (counterclaim for fraud

deemed equitable where primary relief sought was to have mortgage declared void). Hence, this Court correctly looked beyond Lindsay's characterization of her claims to find that the claims related to the alleged misapplication of payments are equitable and that Lindsay is not entitled to a jury trial on these claims.

This Court also properly determined that Lindsay's claims based upon Appellants' allegedly false statements about the status of Lindsay's mortgage loan are permissive as pled in this action and that Lindsay waived any right to a jury trial by filing the claims in this foreclosure action. See Rule 13(a), SCRCF ("A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."); *Carolina First Bank*, at 26 (holding a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the plaintiff's claim); *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 905 (1989) (holding a foreclosure defendant's counterclaim alleging the plaintiff's breach of two agreements to purchase the defendant's interest in a joint venture was permissive because the alleged agreements did not affect the enforceability of the note). The relief sought in connection with these claims would not undo the underlying loan transaction and the facts alleged occurred years *after* the making of the loan, thereby demonstrating no logical relationship to the enforceability of the loan obligations. Thus, the claims were properly held to be permissive. *Id.*

Furthermore, the Court correctly determined that all of Lindsay's third-party claims against Saxon are permissible because third-party claims are *always* permissible in nature.

See Rule 14(a), SCRPC (“At any time after commencement of the action a defending party, as a third-party plaintiff, *may* cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff’s claim against him.” (emphasis added)); *Carolina First Bank*, at 22-23 n.2 (noting that the third-party claims of a foreclosure defendant against the plaintiff’s alleged co-conspirator were permissive); *N.C. Fed. Sav. & Loan*, 298 S.C. at 519, 381 S.E.2d at 906 (“Generally, cross-claims are permissive, as are third party claims.” (citations omitted)). Thus, Lindsay waived her right to a jury trial on these claims by asserting them in this foreclosure action. *Id.*

Moreover, Lindsay’s claims are jointly asserted in her pleadings against the Bank and Saxon. By joining each claim against the third-party defendant Saxon, Lindsay has waived any right to a jury trial on the claims on this basis in addition to the other reasons stated by the Court in its Opinion.

For all of these reasons, the Court properly determined that Lindsay is not entitled to a jury trial on any claim asserted in this action.

II. The Court’s Opinion does not erroneously extend the Supreme Court’s holding in *Carolina First Bank*.

Lindsay argues that this Court erroneously extended the holding in *Carolina First Bank* beyond what the Supreme Court intended. (Petition at 2.) Specifically, Lindsay asserts that this Court held in the Opinion that “once a party to a foreclosure action files just one permissive counterclaim that said party waives the right to a jury trial, whether or not the party has also asserted a compulsory counterclaim.” (Petition at 2.)

The Opinion says no such thing. In the Opinion, this Court recognized that a foreclosure defendant is entitled to a jury trial on a counterclaim that is both legal and

compulsory. *Bank of New York Mellon*, Op. No. 2015-UP-208, at 2-3. Upon closely examining substance of Lindsay's allegations (as opposed to Lindsay's legal styling of her claims), however, the Court determined that each of Lindsay's claims is equitable or permissive or both. *Bank of New York Mellon*, at 3-4. In other words, the Court correctly concluded that Lindsay did not assert a counterclaim that is both legal and compulsory in this foreclosure action, and therefore she is not entitled to a jury trial on any claim. (*Id.*)

Moreover, this Court's conclusion that Lindsay has no right to a jury trial did not require reliance upon *Carolina First Bank*, much less an *extension* of the Supreme Court's holding in that case. It has long been the law of this State that a foreclosure defendant is entitled to a jury trial only on a claim that is *both* legal *and* compulsory. *See, e.g., White*, 384 S.C. at 614, 682 S.E.2d at 502 (holding that the determination of whether a foreclosure defendant is entitled to a jury trial requires the court to analyze whether each counterclaim is 1) compulsory or permissive, and 2) legal or equitable in nature). In the Opinion, this Court applied the same analytical framework for mode of trial issues in foreclosure cases that existed prior to the Supreme Court's decision in *Carolina First Bank*. Thus, this Court did not improperly extend the holding of *Carolina First Bank* in any respect.

III. Lindsay's attempts to distinguish *Carolina First Bank* from the instant case are unavailing.

Although the Supreme Court's decision in *Carolina First Bank* was not essential to this Court's conclusions in the instant case, *Carolina First Bank* is of course controlling authority as the Supreme Court's most recent pronouncement of the law related to mode of trial in foreclosure cases. Lindsay's attempts to distinguish *Carolina First Bank* from the instant case are unavailing.

Although she lists five alleged distinctions between *Carolina First Bank* and this case (Petition, at 2-4), her list consists essentially of two primary grounds. First, Lindsay argues that the defendant who sought a jury trial in *Carolina First Bank* (“McKown”) was merely a guarantor who allegedly had no interaction with the lender, while Lindsay is the primary borrower and had significant direct interaction with the mortgage servicer. (*Id.* at 2-3.) Second, Lindsay argues that there was no dispute in *Carolina First Bank* that the borrower was in default, while Lindsay alleges in this case that she made her payments timely and that Saxon misappropriated them. (*Id.*) In making these arguments, Lindsay misstates the facts of this case and *Carolina First Bank*, and, in any event, her alleged distinctions have no bearing upon the question of whether or not she is entitled to a jury trial.

Lindsay’s first alleged distinction—that McKown had no direct interaction with the lender—misstates the facts of *Carolina First Bank*. McKown was one of two members of BADD, LLC (“BADD”), the borrower on the subject loans, and a guarantor. *Carolina First Bank*, at 1. Nothing in opinion suggests that McKown had no interaction with the lender, and it would be extremely uncommon for a personal guarantor not to interact directly with the lender on behalf of himself and the borrower under such circumstances.

In any event, Lindsay fails to identify any reason why this alleged distinction matters for purpose of determining the defendant’s right to jury trial. In fact, neither the status of the defendant (i.e., borrower or guarantor), nor the degree of interaction between the defendant and the lender, has any bearing upon the analysis. Governing case law requires the court to focus instead on *the nature of the claims alleged*, specifically whether each counterclaim is compulsory or permissive, and legal or equitable. *White*, 384 S.C. at

614, 682 S.E.2d at 502. Thus, even if it were true that McKeown had no interaction whatsoever with the lender, that fact would not meaningfully distinguish *Carolina First Bank* from the instant case for purposes of the issue at hand.

Lindsay's second alleged distinction—that the borrower's default was undisputed in *Carolina First Bank*—is also factually inaccurate and irrelevant to the question whether Lindsay is entitled to a jury trial in this case. In *Carolina First Bank*, McKeown alleged in his counterclaim and third-party claim that the lender and the third-party defendant conspired to cause BADD's default. *Carolina First Bank*, at 3. In other words, McKeown alleged that BADD would not have defaulted but for the alleged conspiracy to which the lender was a party. *Id.* Thus, there was a dispute in *Carolina First Bank* regarding whether BADD was properly in default.

In any event, the alleged distinction is irrelevant because there can be no question that the central dispute in the instant case is an equitable one—namely, what is the amount due on the debt and is the Bank entitled to foreclose. Lindsay claims in her Petition that she made her loan payments to Saxon in a timely manner and that the filing of a foreclosure action was consequently improper. Appellants contend that Lindsay failed to make her monthly loan payments, both before and after she submitted the \$6,557.04 payment¹, and that she also failed to pay her property taxes or to properly insure the property as required by the loan documents. Thus, Appellants contend, Lindsay is in default under the loan documents, and foreclosure is proper, regardless of whether or not Saxon initially misapplied the \$6,557.04 payment upon receipt. This Court properly held

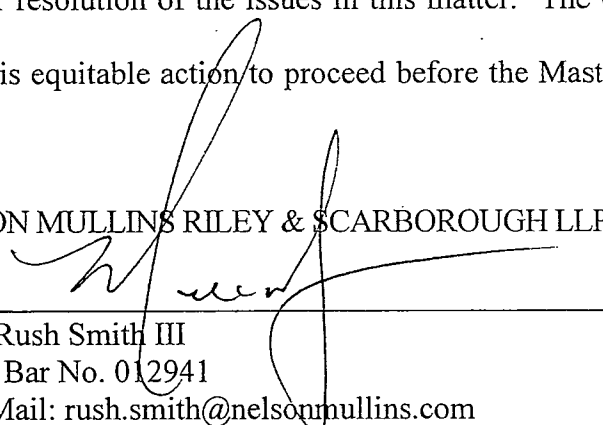
¹ In fact, Lindsay admits in her pleadings to failing to make timely loan payments. (R. at 62 ¶ 25) (“On or about the early spring or summer of 2008, [Lindsay] provided payment to the Plaintiff via Third-Party Defendant in the amount of approximately \$6,557.04 *to be applied to prior late payments.*”) (emphasis added).

that these are equitable determinations to be made by the Master-in-Equity. *See Collier*, 244 S.C. at 371-72, 137 S.E.2d at 280; *Carolina First Bank*, at 24. (See also Appellants' Brief at Sections I. and II.B; Appellants' Reply Brief at Section I.B.)

CONCLUSION

The Court should deny the Petition for Rehearing. The Opinion did not overlook or misapprehend any points necessary for resolution of the issues in this matter. The Court should issue the remittitur to permit this equitable action to proceed before the Master-in-Equity.

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*Attorneys for Plaintiff The Bank of New York Mellon, as
Successor Trustee under NovaStar Mortgage Funding
Trust, Series 2004-1 and Third-Party Defendant Saxon
Mortgage Services, Inc.*

Charleston, South Carolina

June 3, 2015

The South Carolina Court of Appeals

Bank of New York Mellon, as Successor Trustee under
NovaStar Mortgage Funding Trust, Series 2004-1,
Appellant,

v.

Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner,
Tiffany Spann-Wilder, Esq., The Steinberg Law Firm,
and United States of America acting by and through its
agency, the Internal Revenue Service, Defendants,

Of whom Rachel R. Lindsay is the Respondent.

Rachel R. Lindsay, Respondent,

v.

Saxon Mortgage Services, Inc., Appellant.

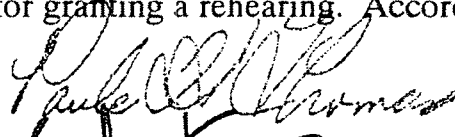
Appellate Case No. 2013-002066

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.

FILED

June 16, 2015



A. Williams

J.



John D. Beatty

J.

J.

Columbia, South Carolina

cc:

Benjamin Rush Smith, III, Esquire

Merritt Gordon Abney, Esquire

Dow Ambrose Davidson, Esquire

G. Thomas Hill, Esquire

Allen Mattison Bogan, Esquire

Columbia, South Carolina

cc:

Benjamin Rush Smith, III, Esquire

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Nelson Mullins

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September 9, 2013

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

RE: The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage
Funding Trust, Series 2004-1 v. Rachel R. Lindsay, et al.
Civil Action No.: 2011-CP-18-1013
Our File No.: 33576/01503

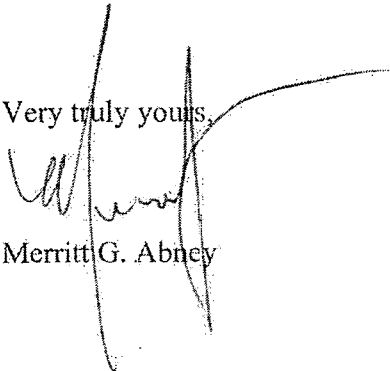
Dear Ms. Kitchings:

Enclosed please find the original and one copy of a Notice of Appeal in the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via the envelope provided for your convenience. Also enclosed is our Firm's check in the amount of \$100.00 as the required filing fee.

By copy of this letter to the Dorchester County Clerk of Court and counsel of record, we are serving them with a copy of this notice.

With kind regards, I remain

Very truly yours,



Merritt G. Abney

MGA:ls
Enclosures

cc: The Honorable Cheryl L. Graham
G. Thomas Hill, Esq.
Matthew J. Modica, Esq.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2011-CP-18-1013

The Bank of New York Mellon, as Successor Trustee
under NovaStar Mortgage Funding Trust, Series 2004-1,.... Appellant,

v.

Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner,
Tiffany Spann-Wilder, Esq., The Steinberg Law Firm,
and United States of America acting by and through its
agency, the Internal Revenue Service,..... Defendants,

Rachel R. Lindsay..... Respondent

v.

Saxon Mortgage Services, Inc..... Appellant.

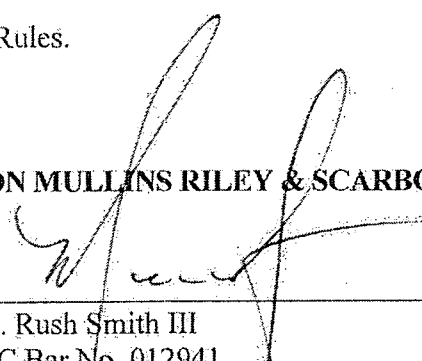
NOTICE OF APPEAL

Pursuant to Rule 203 of the South Carolina Appellate Court Rules, The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 and Saxon Mortgage Services, Inc., N.A. (jointly, the "Appellants") hereby timely appeal from the following Orders of the Honorable Diane S. Goodstein: Order denying Appellants' Joint Motion for Non-Jury Trial in the Equity Court and to Strike the Jury Demand of Defendant/Third-Party Plaintiff Rachel Lindsay entered August 14, 2013 (the "First Order") and Order denying Appellants' Motion to Alter or Amend the Order

Denying Appellants' Joint Motion for Non-Jury Trial in the Equity Court and to Strike the Jury Demand of Defendant/Third-Party Plaintiff Rachel Lindsay entered on August 22, 2013 (the "Second Order"). The orders are attached hereto as Exhibits A-B.

Appellants received written notice of the First Order on August 14, 2013 and timely filed a motion to Alter or Amend Judgment pursuant to Rule 59(e) on August 15, 2013 (attached as Exhibit C). Appellants received written notice of the Second Order on August 23, 2013. Thus, this appeal is timely served and filed pursuant to Rule 203(b)(1) of the South Carolina Appellate Court Rules.

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Attorneys for Appellants

Charleston, South Carolina

September 9, 2013

Other Counsel of Record:

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Attorney for Respondent

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U.S. Attorney's Office
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Charleston, SC 29401

Attorney for United States of America acting by and through its agency, the Internal Revenue Service

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2011-CP-18-1013

The Bank of New York Mellon, as Successor Trustee
under NovaStar Mortgage Funding Trust, Series 2004-1,.... Appellant,

v.

Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner,
Tiffany Spann-Wilder, Esq., The Steinberg Law Firm,
and United States of America acting by and through its
agency, the Internal Revenue Service,..... Defendants,

Rachel R. Lindsay..... Respondent

v.

Saxon Mortgage Services, Inc..... Appellant.

PROOF OF SERVICE

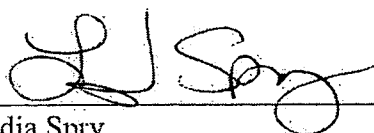
I HEREBY CERTIFY that I have served the **Notice of Appeal** on all counsel of record in
this action by depositing copies of it in the United States Mail, postage prepaid, addressed
to the below:

G. Thomas Hill, Esq.
Hill and Hill Law Firm
6209 Savannah Highway
PO Box 369
Ravenel, SC 29470

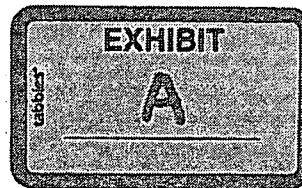
Attorney for Defendant and Third-Party Plaintiff
Rachel R. Lindsay

Matthew J. Modica, Esq.
U.S. Attorney's Office
151 Meeting Street, Suite 200
Charleston, SC 29401

*Attorney for United States of America acting by and through its agency, the
Internal Revenue Service*

By: 
Lydia Spry
Administrative Assistant to Merritt G. Abney
Nelson Mullins Riley & Scarborough, LLP

September 9, 2013



FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEASJUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP1801013

Bank Of New York Mellon

Rachel R Lindsay

2013 AUG 14 PM 3:00

Rachel R Lindsay

America United States
Of

Internal Revenue Service

CLERK OF COURT
DORCHESTER COUNTY

PLAINTIFF(S)

DEFENDANT(S)

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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Edgar Dickson
Circuit Court Judge2153
Judge Code8/14/2013
Date

For Clerk of Court Office Use Only

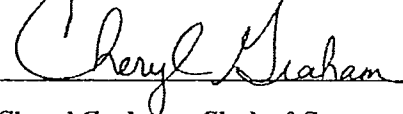
This judgment was entered on 8/14/2013, and a copy mailed first class or placed in the appropriate attorney's box on 8/14/2013, to attorneys of record or to parties (when appearing pro se) as follows:

H. Michael Bowers/Laura Johnson Evans 25 Calhoun
Street Ste. 250 Charleston, SC 29401
Benjamin Rush Smith III Meridian/17Th Floor 1320 Main
Street Columbia, SC 29201
Dow Ambrose Davidson/Merritt Gordon Abney 151
Meeting St., Ste. 600 Charleston, SC 29401

Matthew J. Modica 151 Meeting St., Ste. 200 Charleston,
SC 29401
G. Thomas Hill 6209 Savannah Hwy. Ravenel, SC 29470

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Court Reporter

Cheryl Graham - Clerk of Court

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

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

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

The Bank of New York Mellon, as
Successor Trustee under NovaStar
Mortgage Funding Trust, Series 2004-1,

Plaintiff,

vs.

Rachel R. Lindsay, Jeffrey Wayner,
Tammy Wayner, Tiffany Spann-Wilder,
Esq., The Steinberg Law Firm, and
United States of America acting by and
through its agency, the Internal Revenue
Service,

Defendants.

Civil Action No. 2011-CP-18-1013

ORDER

Rachel R. Lindsay,

Third-Party Plaintiff,

vs.

Saxon Mortgage Services, Inc.,

Third-Party Defendant.

2013 AUG 14 PM 3:03
CLERK OF COURT
DORCHESTER COUNTY

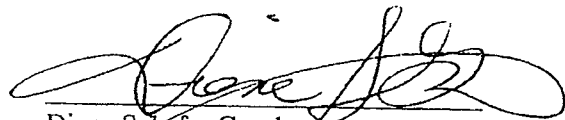
This matter came before the Court on joint Motions for a Non-Jury Trial in the Equity Court and to Strike the Jury Demand of the plaintiff The Bank of New York Mellon ("Plaintiff") and Third-Party Defendant Saxon Mortgage Services, Inc. ("Saxon" and jointly with Plaintiff, "Movants"). Defendant/Third-Party Plaintiff Rachel Lindsay ("Lindsay") filed a Memorandum of Law in Response to the Plaintiff and Third Party Defendant's Motion to Deny the Defendant/Third Party Plaintiff the Right to a Jury Trial. The Court heard oral argument on May 24, 2013. Present at the hearing were G. Thomas Hill, Esq., representing Lindsay, and Merritt G. Abney, Esq., representing Movants. Both parties stated their respective positions on the record.

Based upon the motions, supporting documentation, and arguments made, the Court finds as follows:

1. The Plaintiff filed a foreclosure action against the Defendant "Lindsay".
2. The Defendant "Lindsay" filed an Answer and Counterclaim in response to the Plaintiff's Complaint, together with a Third Party Complaint against Third Party Defendant "Saxon Mortgage".
3. The Answer, Counterclaim and Third Party Complaint asserted the causes of action of Breach of Contract, Negligence, Fraud, Negligent Misrepresentation, Promissory Estoppel, Violation of the South Carolina Unfair Trade Practices Act, Quantum Meruit, Intentional Infliction of Emotional Distress, Invasion of Privacy, Defamation/Libel Per Se, Intentional Interference with Existing Contracts, Intentional Interference with Prospective Economic Advantage, Declaratory Judgment for Compliance with Homeowner Affordability and Stability Plan, and Declaratory Judgment ordering correction of credit reports.
4. That Defendant/Third Party Plaintiff has asserted compulsory counterclaims of a legal nature in said Answer, Counterclaim and Third Party Complaint.
5. Based upon the above, the Court finds that Defendant/Third Party Plaintiff "Lindsay" has asserted sufficient compulsory counterclaims of a legal nature which affords "Lindsay" the right to a trial by a jury of her peers.

IT IS THEREFORE ORDERED that the Movants' Motion for a Non-Jury Trial in the Equity Court and to Strike the Jury Demand is DENIED.

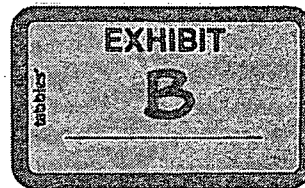
AND IT IS SO ORDERED.



Diane Schafer Goodstein
Circuit Court Judge
First Judicial Circuit

St. George, South Carolina

7-30, 2013



FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP1801013

Bank Of New York Mellon

Rachel R Lindsay

2013 AUG 22

Rachel R Lindsay
America United States
Of

Internal Revenue Service

PLAINTIFF(S)

DEFENDANT(S)

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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Diane S. Goodstein
Circuit Court Judge

2112
Judge Code

8/22/2013
Date

For Clerk of Court Office Use Only

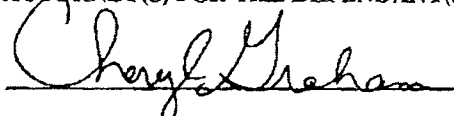
This judgment was entered on **8/22/2013**, and a copy mailed first class or placed in the appropriate attorney's box on **8/22/2013**, to attorneys of record or to parties (when appearing pro se) as follows:

Benjamin Rush Smith III Meridian/17Th Floor 1320 Main
Street Columbia, SC 29201
Dow Ambrose Davidson 151 Meeting Street Suite 600
Charleston, SC 294012239
Merritt Gordon Abney 151 Meeting St., Ste. 600
Charleston, SC 29401

Matthew J. Modica 151 Meeting St., Ste. 200 Charleston,
SC 29401
G. Thomas Hill 6209 Savannah Hwy. Ravenel, SC 29470

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Court Reporter

Cheryl Graham - Clerk of Court

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

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

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

The Bank of New York Mellon, as
Successor Trustee under NovaStar
Mortgage Funding Trust, Series 2004-1,

Plaintiff,

vs.

Rachel R. Lindsay, Jeffrey Wayner,
Tammy Wayner, Tiffany Spann-Wilder,
Esq., The Steinberg Law Firm, and United
States of America acting by and through its
agency, the Internal Revenue Service,

Defendants.

Rachel R. Lindsay,

Third-Party Plaintiff,

vs.

Saxon Mortgage Services, Inc.,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

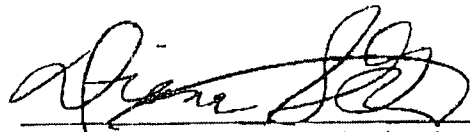
Civil Action No. 2011-CP-18-1013

**ORDER DENYING MOTION
TO ALTER OR AMEND**

CLERK
2013 AUG 22 AM 9:55
D.C.

This matter is before the Court by way of the Appellant's Motion to Alter or Amend brought forth pursuant to South Carolina Civil Procedure Rule 59. This Court has had the opportunity to review the Appellant's Motion and has determined that oral argument would not assist the Court in ruling on this Motion. Because the Appellant's Motion does not raise any novel issues for the Court's consideration, the Appellant's Motion to Alter or Amend is denied.

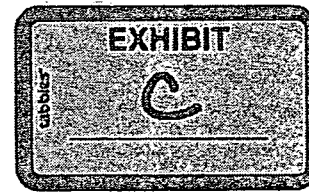
AND IT IS SO ORDERED.


The Honorable Diane Schafer Goodstein
First Judicial Circuit

August 19, 2013

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
151 Meeting Street / Sixth Floor / Charleston, SC 29401-2239
Tel: 843.853.5200 Fax: 843.722.8700
www.nelsonmullins.com



Merritt G. Abney
Tel: 843.534.4110
Fax: 843.722.8700
merritt.abney@nelsonmullins.com

August 15, 2013

Via Hand Delivery

The Honorable Cheryl Graham
Clerk of Court
Dorchester County Courthouse
5200 East Jim Bilton Blvd.
St. George, SC 29477

RE: The Bank of New York Mellon, as Successor Trustee under NovaStar
Mortgage Funding Trust, Series 2004-1 v. Rachel R. Lindsay, et al.
Civil Action No.: 2011-CP-18-1013
Our File No.: 33576/01503

Dear Ms. Graham:

Enclosed for filing in the above matter are the original and one copy of Plaintiff The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 and Third-Party Defendant Saxon Mortgage Services, Inc.'s Motion to Alter or Amend Judgment, along with the required Motion and Order Information Form and Cover Sheet and our check in the amount of \$25.00 to cover the fee associated with filing this motion. Please return the clocked-in copies to me via our courier.

By copy of this letter, we are serving these pleadings on all counsel of record.

Thank you for your assistance.

Very truly yours,

Merritt G. Abney

MGA:dh
Enclosures

cc: The Honorable Diane S. Goodstein (w/enclosure, via hand delivery)
G. Thomas Hill, Esq. (w/enclosure)
Matthew J. Modica, Esq. (w/enclosure)

With offices in the District of Columbia, Florida, Georgia, Massachusetts, North Carolina, South Carolina, Tennessee and West Virginia

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

The Bank of New York Mellon, as
Successor Trustee under NovaStar
Mortgage Funding Trust, Series 2004-1,

Plaintiff,

vs.

Rachel R. Lindsay, Jeffrey Wayner,
Tammy Wayner, Tiffany Spann-Wilder,
Esq., The Steinberg Law Firm, and
United States of America acting by and
through its agency, the Internal Revenue
Service,

Defendants.

Civil Action No. 2011-CP-18-1013

MOTION TO ALTER OR AMEND
JUDGMENT

Rachel R. Lindsay,

Third-Party Plaintiff,

vs.

Saxon Mortgage Services, Inc.,

Third-Party Defendant.

CLERK OF COURT
2013 AUG 15 PM 2:23

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Plaintiff The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust, Series 2004-1 ("Plaintiff") and Third-Party Defendant Saxon Mortgage Services, Inc. ("Saxon" and, jointly with Plaintiff, "Movants") hereby file this motion to alter or amend the order denying Movants' Joint Motion (the "Motion") for Non-Jury Trial in the Equity Court and to Strike the Jury Demand of Defendant/Third-Party Plaintiff Rachel Lindsay ("Lindsay") entered by this court

on August 14, 2013 (the "Order"). Movants request that the Court reconsider its ruling, that the Order be vacated, and that Court enter an order granting Movants' Motion on the following grounds:

1. This entire action is one in equity, such that Lindsay has no right to a jury trial. This is a foreclosure, which is an action in equity. The fact that Lindsay asserts defenses, counterclaims and third-party related to the loan being foreclosed does change the nature of the action to one at law. Collier v. Green, 244 S.C. 367, 370, 137 S.E.2d 277, 279 (1964) ("Where in actions of foreclosure, the defendant sets up a defense and/or a counterclaim affecting the consideration, and arising out of the transaction in which the mortgage or lien was created, the authorities hold that the issues thus raised are equitable and are to be tried by the court upon its equity side."); see also Byrn v. Walker, 275 S.C. 83, 85, 267 S.E.2d 601, 602 (1980) (counterclaims in a foreclosure action that affect the validity of a mortgage lien or the amount due are equitable in nature). The Supreme Court has squarely rejected attempts by litigants to "earn" the right to jury trial by asserting legal counterclaims in an action on which a plaintiff has a right to proceed non-jury. See Rosenbaum v. S-M-S 32, 311 S.C. 140, 142, 427 S.E.2d 898 (1993) (allowing a defendant to "earn" a right to a jury trial in equitable action to quiet title would deny plaintiff its statutory right to "efficient, unencumbered method of clearing [] titles".) Allowing Lindsay a jury trial in this matter would similarly deny Plaintiff its right to proceed under the statutory regime governing foreclosure actions. See Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) (the right to proceed in the proper mode of trial is a substantial right, and a court may not require a party to proceed before a jury in an equity case).
2. Each of Lindsay's individual claims is either equitable or permissive, such that she has no right to a jury trial on any individual claim. Wells Fargo Bank v. Smith, 398 S.C. 487, 494, 730 S.E.2d 328, 332 (Ct. App. 2012) (because foreclosure proceedings are equitable, a defendant has no right to a jury trial on any counterclaim that is not both legal and compulsory).
 - a) Lindsay's claims for promissory estoppel and unjust enrichment are plainly equitable in nature. Rushing v. McKinney, 370 S.C. 280, 289, 633 S.E.2d 917, 922 (Ct. App. 2006) (promissory estoppel); Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994) (unjust enrichment).
 - b) Lindsay's claims for declaratory relief are equitable in nature because they seek equitable relief in the form of an injunction and not recovery of damages. Williams v. Wilson, 349 S.C. 336, 340, 563 S.E.2d 320, 322 (2002) (action for declaratory judgment is equitable where relief sought is equitable in nature).

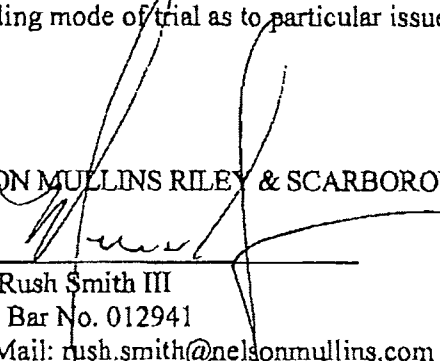
- c) Lindsay's claims based upon alleged misapplication of loan funds are equitable, regardless of how she has styled them, because the main purpose of the claims is to avoid foreclosure.¹ See e.g. Verenes v. Alvanos, 387 S.C. 11, 18, 690 S.E.2d 771, 774 (2010) (where "damages" alleged in action for breach of fiduciary duty were primarily in the nature of restitution and disgorgement, action was one in equity rather than at law); Smith, at 496-497, 730 S.E.2d at 333 (counterclaim for common law unconscionability in foreclosure action deemed equitable where "main purpose" was to have mortgage declared void); Mortgage Elec. Sys., Inc. v. White, 384 S.C. 606, 614, 682 S.E.2d 498, 502 (Ct. App. 2009) (counterclaim for fraud deemed equitable where main purpose was to have mortgage declared void); Wells Fargo Bank, N.A. v. Barker, Op. No. 2012-UP-551 (Ct. App. 2012) (counterclaim for alleged predatory lending deemed equitable where primary purpose was to prevent foreclosure and compel lender to modify loan terms);
- d) Lindsay's third-party claims against Saxon are permissive. N.C. Fed. Sav. & Loan Assoc. v. DAV Corp., 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989) (third-party claims are permissive); Tatnall v. Gardner, 350 S.C. 135, 139, 564 S.E.2d 377, 378 (Ct. App. 2002) (same).
- e) Lindsay's counterclaims are permissive because they do not bear upon the enforceability of the underlying note. Smith, at 495, 730 S.E.2d at 333 (in a foreclosure action, counterclaim bears a logical relationship to the complaint only when it bears upon the enforceability of the loan documents). Accordingly, Lindsay's counterclaims are permissive because none of her claims challenge the enforceability of the underlying loan documents.

3. If the Order is not vacated in its entirety, then, in the alternative, it should be amended to state which of Lindsay's claims the Court deems to be equitable and/or permissive and which claims the Court deems to be legal and compulsory. Gaymon v. Richland Memorial Hosp., 327 S.C. 66, 68, 488 S.E.2d 332, 333 (1997) (legal and equitable issues in same action must be determined separately and plaintiff not entitled to jury trial on equitable issues); Winter v. U.S. Fidelity & Guaranty Co., 240 S.C. 561, 573, 126 S.E.2d 724, 730 (1962) (where legal and equitable issues and rights are asserted in the same complaint, legal issues are for determination by a jury and equitable issues for the judge); Airfare, Inc. v. Greenville Airport Comm'n, 249 S.C. 265, 269, 153 S.E.2d 846, 848 (1967) (directing that legal and equitable issues be separated and tried by the appropriate

¹ This category of claims clearly includes the causes of action for breach of contract, negligence, and unjust enrichment, which are expressly based upon Plaintiff and Saxon's alleged misapplication of Loan payments, but also includes any other claims to the extent that they are based upon improper accounting on the Loan.

branches of court). Movants are entitled to determination of the issues under the proper mode of trial and to notice prior to trial of the manner in which each issue will be determined. See id.; see also S.C. Rules Civ. Proc. 38, 39 (providing for notice to litigants regarding mode of trial as to particular issues in dispute).

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

B. Rush Smith III
SC Bar No. 012941
E-Mail: rush.smith@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Merritt G. Abney
SC Bar No. 71893
Dow A. Davidson
SC Bar No. 80512
E-Mail: dow.davidson@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

*Attorneys for Plaintiff The Bank of New York Mellon, as
Successor Trustee under NovaStar Mortgage Funding
Trust, Series 2004-1 and Third-Party Defendant Saxon
Mortgage Services, Inc.*

Charleston, South Carolina
August 15, 2013

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Saxon Mortgage Services, Inc., 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 ALTER OR AMEND JUDGMENT

Counsel Served:

G. Thomas Hill, Esq.
Hill and Hill Law Firm
6209 Savannah Highway
PO Box 369
Ravenel, SC 29470
Attorney for Defendant and Third-Party Plaintiff
Rachel R. Lindsay

Matthew J. Modica, Esq.
U.S. Attorney's Office
151 Meeting Street, Suite 200
Charleston, SC 29401
Attorney for United States of America acting by and through its
agency, the Internal Revenue Service



Donna Horn
Administrative Assistant

Aug 15, 2013

2013 AUG 15 PM 2:23
CLERK OF COURT
DISTRICT COURT

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

The Bank of New York Mellon, as Successor Trustee
under NovaStar Mortgage Funding Trust, Series 2004-1,

Plaintiff,

vs.

Rachel R. Lindsay, et al.,

Defendants.

Case No. 2011-CP-18-1013

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Rachel R. Lindsay,

Third-Party Plaintiff,

vs.

Saxon Mortgage Services, Inc.,

Third-Party Defendant.

Plaintiff and Third-Party Defendant's Attorney:

Merritt. G. Abney, Esq., SC Bar No. 71893
Nelson Mullins Riley & Scarborough LLP
151 Meeting Street, Suite 600
Charleston, SC 29401
Phone: (843) 853-5200; Fax: (843) 722-8700
Email: merritt.abney@nelsonmullins.com

Defendant and Third-Party Plaintiff's Attorney:

G. Thomas Hill, Esq., SC Bar No. 12055
Hill and Hill Law Firm
6209 Savannah Highway
Ravenel, SC 29470
Phone: 843-889-2261; Fax: 843-631-4430
E-mail: hillpdq@aol.com

- ☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)
☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Alter or Amend Judgment

Estimated Time Needed: 15 min.

Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion Type

☒ **Written motion attached**

☐ **Form Motion—I hereby move for relief of action by the court as set forth in the attached proposed order.**

Signature of Attorney for ☒ Plaintiff/☐ Defendant

August 15, 2013
Date submitted

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$25.00**

☐ **EXEMPT:**
(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status

☐ Sexually Violent Predator Act

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

☐ State Agency v. Indigent Party

☐ Post-Conviction Relief

☐ Motion for Execution (Rule 69, SCRCP)

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE

CODE: _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ (print name)

Date filed: _____

☐ **MOTION FEE COLLECTED:** _____

☐ **CONTESTED - AMOUNT DUE:** _____