STATE OF SOUTH CAROLINA COUNTY OF RICHLAND **NATIONSTR MORTGAGE, LLC,** Appellee, vs. **BARBARA A. GIBBS, MELVIN E. GIBBS, And WESTBROOK PHASE IV HOMEOWNERS' ASSOCIATION** Appellants.	)	IN THE COURT OF APPEALS OF SOUTH CAROLINA CASE NO: 2015-001873 **MOTION FOR RECONSIDERATION** and **AMENDED TRO**

MEMORANDUM OF LAW

As to Appellants' motion for reconsideration, the Court overlooked Appellants having included the certificate of service on the Notice of Appeal and notified the Court the circuit court did not issue a written order denying Appellants' motion to dismiss. Appellants called the Court each day to inquire as to the status of the case. Additionally, Appellants' filed the instant appeal at the request of the circuit court judge to do so if Appellants did not agree with his decision. AND, Appellants have attached hereto a copy of the certificate of service; and a second written order being appealed from.

Appellants filed their motion for reconsideration on the 29th day of July 2015. The trial court has not ruled on that motion or filed a written motion denying Appellants' motion to dismiss – said motion was denied from the bench.

Appellants' submission, *supra*, is designed as persuasive rather than controlling authority:

Judge Posner authored a unanimous opinion at the close of 2010 holding that a denial of a Rule 12(b)(6) motion to dismiss based on Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007),

raised a "controlling question of law" suitable for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Judge Posner found the appeal to concern a controlling question of law, which was the legal significance of the facts as alleged, rather than the resolution of disputed facts. A question of law under 1292(b) includes the "question of the meaning of a . . . common law doctrine . . ." 630 F.3d at 626. The legal standard set forth in Twombly was not settled, but instead had placed pleading standards "in ferment." Thus, the case did not concern the "routine application of well-settled legal standards to facts alleged in a complaint . . ." (630 F.3d at 626), which would not meet the requirements for a Section 1292(b) interlocutory appeal. Instead, the "question requires the interpretation, and not merely the application, of a legal standard – that of Twombly." 630 F.3d at 625.

Granting an appeal would promote the "main task of an appellate court, which is to maintain the coherence, uniformity and predictability of the law . . ." Id. In addition, concerns underlying the holding in Twombly supported empowering the district court and court of appeal to authorize an interlocutory appeal. Twombly is "designed to spare defendants the expense of responding to bulky, burdensome discovery unless the complaint provides enough information to enable an inference that the suit has sufficient merit to warrant putting the defendant to the burden of responding to at least a limited discovery demand." 630 F.3d at 625. Permitting a complex case of extremely dubious merit to proceed would place defendants in a "discovery swamp," and create "unjustifiable harm to a defendant that only an immediate appeal can avert." Id. at 626.

Gibbs has demonstrated irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law. *Id.* at 4, 623 S.E.2d at 834; *Sanford v. S.C. State Ethics Com'n*, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (2009). "An injunction is a drastic remedy

issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). Denman v. City of Columbia, 387 S.C. 131, 140-41, 691 S.E.2d 465, 470 (2010). Actions for injunctive relief are equitable in nature. *See Grosshuesch v. Cramer*, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005).

The US Supreme Court resolved the issue Appellants present to this Honorable Court 143 years ago. The Supreme Court decision "clearly states Appellee [Plaintiff] must own the **Note** and **Mortgage** at the time the Complaint is filed. The most basic elements of standing are deliberately violated. *See*, **Carpenter v. Longen**, 83 U.S. 271, 16 Wall. 271, 21 L. ed. 313 (1872).

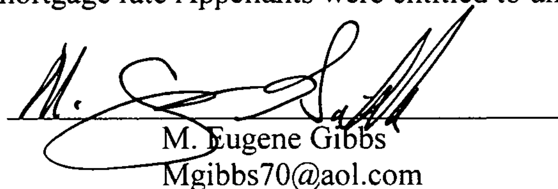
Standing is a fundamental requirement for instituting an action. Brock v. Bennett, 313 S.C. 513, 519, 443 S.E.2d 409, 412 (Ct.App.1994). "Generally, a party must be a real party in interest to the litigation to have standing." Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010) (internal quotation marks omitted).

Unless a claimant can colorably assert a loss, it lacks standing. See, **Lujan v. Defenders of Wildlife**, 504 U.S., 560 (1992) (noting that an injury is a required element of constitutional standing))... "[T]he assignment of a note secured by a mortgage carries with it an assignment of the mortgage, but . . . the assignment of the mortgage alone does not carry with it an assignment of the note." **Hahn v. Smith**, 157 S.C. 157, 167, 154 S.E. 112, 115 (1930); *see* also **Ballou v. Young**, 42 S.C. 170, 176, 20 S.E. 84, 85 (1894) ("The transfer of a note carries with it a mortgage given to secure payment of such note."). "A mortgage and a note are separate securities for the same debt, and a ***mortgagee who has a NOTE and a MORTGAGE*** to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action." **U.S. Bank**

Trust Nat'l Ass'n v. Bell, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009). The party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt. Id. at 374-75, 684 S.E.2d at 205.

At all times relevant to this foreclosure, Appellee was/is aware they have committed fraud on the court, to wit: a default did not occur; falsely claiming Appellants did not apply for mortgage modification: September 2011; falsifying certification that Gibbs failed to request mortgage modification within 30 days after service [**CERTIFICATION OF MORTGAGOR NON-COMPLIANCE**, filed December 17, 2013]: Request for Foreclosure Intervention – Administrative Order 2011-05-02-01; was filed by Appellants on the 19th day of November 2014 (*Motion to Dismiss, ¶ 9, Exhibit-F*). *See*, ***Exhibit - B***

ARGUMENDO: Because Appellee does not have the MORTGAGE NOTE, it is a ***legal impossibility*** for Appellee to offer Appellants mortgage modification. Appellants established by clear and convincing evidence – uncontroverted by Appellee, Appellants paid their mortgage! A mandatory injunction must issue requiring Appellee to grant Appellants two (2) mortgages: replacement of Appellants' two (2) homes.[1] Purchase money [Mortgage note] shall be in the form of a mortgage rate of .5% for 5 years; allowing Appellants to be made WHOLE: moneys illegally collected by Appellee by denying Appellants' HAMP applications and 2% for the remaining 25 years; the mortgage rate Appellants were entitled to under HAMP.



M. Eugene Gibbs
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1 Appellant, Mr. Gibbs underwent CANCER surgery at Johns Hopkins Hospital, Baltimore, Maryland and while being treated lived at his [their] primary home: 20105 Torrey Pond Place, Montgomery Village, Maryland 20886. Ms. Gibbs lived at her [their] primary home: 4257 Monterey Drive. Mr. Gibbs had been awarded more than $350,000 (Department of Defenses): in retaliations a district manager "caused" almost $1,500 per month to be deducted from Gibbs' benefits. Mrs. Gibbs had retired and her income was reduced more than $40,000 per year: these factors made both mortgages eligible for modification: 2% under HAMP....