

STATE OF SOUTH CAROLINA)

COUNTY OF COLLETON)

James C. Kincannon, James J. Kincannon, and)
Carolyn R. Kincannon,)
 Plaintiff)

v.)

U.S. Bank National Association, U.S. Bank National)
Association ND, Unknown U.S. Bank Entities,)
Greenville Process Service, Five Brothers Mortgage)
Company Services And Securing Inc., And John)
Does #1-50,)
 Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.

2013-CP-15-1023

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

RECEIVED

NOV 12 2015

Plaintiff's Attorney: J. Todd Kincannon, Bar No. Address: PO Box 7901, Columbia, SC 29201 phone: fax: e-mail: other:	Defendant's Attorney: <i>SC Court of Appeals</i> John C. Hawk; Jana B. Baker, Bar No. Address: WCSR, 5 Exchange Street, Charleston, SC 29401 phone: 843-722-3400 fax: e-mail: jhawk@wcsr.com; jabaker@wcsr.com other:
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	

2015 MAY -6 AM 11:38
PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS

SECTION I: Hearing Information

Nature of Motion: Order Granting US Bank's Motion to Strike Plaintiffs' Form 4 Orders and Judgments by Confession filed January 13, 2015 and January 30, 2015

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 4, 2015

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 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: _____

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF COLLETON)
)
 James C. Kincannon, James J. Kincannon, and)
 Carolyn R. Kincannon,)
)
 Plaintiffs,)
)
 vs.)
)
 U.S. Bank National Association and U.S. Bank)
 National Association ND,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FOURTEENTH JUDICIAL CIRCUIT
 CASE NUMBER: 2013-CP-15-1023

RECEIVED
 NOV 12 2015
 SC Court of Appeals

**ORDER GRANTING U.S. BANK'S
 MOTION TO STRIKE PLAINTIFFS'
 FORM 4 ORDERS AND JUDGMENTS
 BY CONFESSION FILED JANUARY 13,
 2015 AND JANUARY 30, 2015**

Judge: The Honorable Doyet A. Early, III
 Plaintiffs' Attorney: Todd Kincannon, Esquire
 Defendants Attorney: John C. Hawk, Esquire

This matter came before the Court on April 14, 2015, for a hearing on Defendant U.S. Bank's Amended Motion to Strike Plaintiffs' Form 4 and Judgment by Confession (the "Hearing"). At the Hearing, the Plaintiffs James C. Kincannon, James J. Kincannon, and Carolyn R. Kincannon ("Plaintiffs") were represented by Todd Kincannon of The Kincannon Firm. Defendants U.S. Bank National Association and U.S. Bank National Association ND (collectively, "U.S. Bank") were represented by John Hawk of Womble Carlyle Sandridge & Rice, L.L.P.

At the Hearing, Plaintiffs' counsel advised the Court that Plaintiffs consented to U.S. Bank's efforts to strike their purported confession of judgment dated January 13, 2015, their Form 4 dated January 13, 2015, and their Form 4 dated January 30, 2015. As such, the only remaining issue is for the Court to determine whether the Plaintiffs' "Judgment by Confession in

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Favor of Defendants as to Setoff/Recoupment,” filed January 30, 2015, should be struck from the judgment roll of Colleton County.

After carefully reviewing the memoranda submitted by the parties, hearing arguments from counsel for both parties, and considering the applicable law and facts related to this Motion, the Court finds it is proper to enter an Order Striking Plaintiffs’ Form 4 orders and Judgments by Confession filed January 13, 2015 and January 30, 2015.

FINDINGS OF FACT

1. On February 10, 2010, Plaintiffs James John Todd Kincannon and James Charles Kincannon executed a promissory Note promising to repay \$300,000.00, plus interest, over a period of thirty years (“Note”). The Note is secured by a Mortgage on the subject property dated February 2, 2010 (the “Mortgage”).
2. U.S. Bank brought a foreclosure action against Plaintiffs on November 9, 2012, styled *U.S. Bank v. Kincannon*, 2012-CP-15-885 (“Foreclosure Action”). U.S. Bank dismissed that action *without* prejudice on July 18, 2013, after the parties entered into a Loan Modification Agreement.¹
3. After the Foreclosure Action was dismissed, Plaintiffs brought a separate action against U.S. Bank styled *Kincannon v. U.S. Bank*, 2013-CP-15-708 (“First Kincannon Lawsuit”). The First Kincannon Lawsuit sought money damages and a declaration that the Note and Mortgage were unenforceable.
4. The parties dismissed the First Kincannon Lawsuit, *with prejudice*, on October 22, 2013.
5. One day after the Stipulation of Dismissal with Prejudice was entered by the Court in the First Kincannon Lawsuit, Plaintiffs brought the present lawsuit. Like the First Kincannon

¹ The Loan Modification Agreement was filed with the Register of Deeds Office of Colleton County on May 2, 2013.

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Lawsuit, Plaintiffs' Complaint sought a declaration that the Note and Mortgage are unenforceable. Plaintiffs' Complaint included four causes of action: (1) declaratory judgment; (2) statutory failure to release mortgage; (3) contractual failure to release mortgage; and (4) permanent injunction.

6. On December 18, 2013, this Court rejected the Plaintiffs' legal theory and entered an Order filed on January 6, 2014 Granting Defendants' Motion to Dismiss, in Part, and Denying Defendants' Motion to Dismiss, in Part (the "Order," filed on Jan. 6, 2014). The Order dismissed all Plaintiffs' causes of action related to the enforceability of the Note and Mortgage and specifically found that "the Note and Mortgage remain enforceable." Order, p. 4.
7. Plaintiffs initially appealed the Order. However, Plaintiffs ultimately filed a Notice of Abandonment of Appeal. The Court of Appeals entered an order dismissing the appeal on January 16, 2015.
8. Plaintiffs' only remaining cause of action is equitable. Specifically, Plaintiffs seek a permanent injunction which would prevent U.S. Bank from performing property inspections on the Plaintiffs' mortgaged property "without Plaintiffs' express prior permission." Complaint, ¶ 59. Plaintiffs seek only injunctive relief, and not damages, with regard to this cause of action.
9. U.S. Bank filed an Amended Answer in response to the remaining cause of action on January 15, 2014. The Answer listed twenty-six affirmative defenses, including an affirmative defense of set-off/recoupment. That defense stated: "[I]f and to the extent Plaintiffs are entitled to recover damages against U.S. Bank, which is expressly denied, U.S. Bank is entitled to set off the damages caused by Plaintiffs' breach of the terms of

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[the] promissory note against any amount U.S. Bank is required to pay on the claims asserted by Plaintiffs.” Amended Answer, ¶ 78.

10. Without conferring with U.S. Bank, Plaintiffs filed a Form 4 and Judgment by Confession in Favor of Defendants on January 13, 2015.
11. In response, U.S. Bank filed a Notice of Motion and Motion to Strike same on January 26, 2015.
12. On January 30, 2015, Plaintiffs filed a Consent to Defendants’ Request to Strike Materials Filed by Plaintiffs.
13. Also on January 30, 2015, and again without conferring with U.S. Bank, Plaintiffs filed a new Form 4 (“Form 4”) and Judgment by Confession in Favor of Defendants as to Setoff/Recoupment (“Judgment by Confession”).
14. On the Form 4, Plaintiffs stated that the “Judgment Amount to be Enrolled” was \$0.
15. The Judgment by Confession does not confess judgment to a sum certain, but rather purports to confess judgment as to “U.S. Bank’s setoff/recoupment defense.” It specifically states: “Plaintiffs hereby confess judgment. . . to U.S. Bank’s setoff/recoupment defense. Plaintiffs authorize the entry of a final judgment in favor of U.S. Bank on the setoff/recoupment defense permitting U.S. Bank to reduce any monetary award to Plaintiffs in this action by \$381,651.73.”
16. On February 23, 2015, U.S. Bank filed an Amended Notice of Motion and Motion to Strike to address the Form 4 and Confession of Judgment filed on January 30, 2015.
17. On April 17, 2015, Plaintiffs’ counsel consented to summary judgment on Plaintiffs’ last remaining cause of action.

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18. Also on April 17, 2015, Plaintiffs' counsel consented to striking from the judgment roll the Plaintiffs' Form 4 filed January 13, 2015, Plaintiffs' Judgment by Confession in Favor of Defendants filed on January 13, 2015, and Plaintiffs' Form 4 filed on January 13, 2015.

ANALYSIS

1. U.S. Bank's affirmative defense of setoff/recoupment was legally insufficient and is hereby struck from U.S. Bank's Amended Answer.

Any discussion of the adequacy or appropriateness of Plaintiffs' Confession of Judgment is unnecessary. Instead, this Court need only examine U.S. Bank's affirmative defense of "setoff/recoupment." That defense is legally insufficient and is therefore struck from the Amended Answer. With no affirmative defense to confess judgment to, Plaintiffs' Confession of Judgment fails as a matter of law and must also be struck from the record.

Rule 12(f) allows courts to strike insufficient pleadings *sua sponte*: "[U]pon the court's own initiative, at any time the court may order stricken from any pleading any insufficient defense." SCRCP 12(f). As set forth above, at the time U.S. Bank filed its Amended Answer, Plaintiffs' only surviving cause of action was a claim for permanent injunction.² This cause of action only sought to prevent U.S. Bank from performing interior inspections of the mortgaged property. Importantly, it did *not* seek actual damages. Because it is impossible to take a setoff from injunctive relief, U.S. Bank's setoff/recoupment defense was meaningless and therefore legally insufficient. The Court therefore strikes the defense of setoff/recoupment from U.S. Bank's Amended Answer.

Plaintiffs' Confession of Judgment specifically confesses judgment "as to U.S. Bank's setoff/recoupment defense." Because the setoff/recoupment defense has been struck from the

² Plaintiffs have since consented to summary judgment on this cause of action.

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pleadings, Plaintiffs' purported Confession of Judgment confesses judgment to nothing, and therefore must also be struck. As such, to the extent it was enrolled as a judgment, Plaintiffs' Confession of Judgment shall now be struck from the judgment roll of Colleton County.

2. Sections 15-35-350 and 15-35-360 do not permit a judgment by confession in this case.

Even if the affirmative defense of setoff/recoupment had not been struck from U.S. Bank's Amended Answer, Plaintiffs' purported Confession of Judgment to U.S. Bank's setoff defense would still be legally insufficient and would still be struck from the judgment roll of Colleton County. The South Carolina Code does not permit a confession of judgment under these circumstances.

Judgments by confession are governed by S.C. Code Ann. § 15-35-350, *et seq.* According to the Code:

A judgment by confession may be entered without action either for money due or to become due or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed in this article.

S.C. Code Ann. § 15-35-350:

There are three situations when a judgment by confession is permitted: when money is due, when money will become due, and to secure against a contingent liability. In the present case, none of those situations apply and a judgment by confession is not permitted. As explained, Plaintiffs' only remaining cause of action at the time U.S. Bank filed its Amended Answer was for permanent injunction. This cause of action sought a ruling that U.S. Bank is not permitted to inspect the Property without the prior written consent of the Plaintiffs. It did not seek monetary damages. Plaintiffs could not collect damages as a result of this lawsuit, and without damages, there could be no setoff. Therefore, while the Plaintiffs purport to confess judgment as to U.S.



Bank's setoff/recoupment defense, in reality, confessing judgment was impossible. There was no money due³, no money would become due, and there could be no contingent liability. Therefore, there could be no confession of judgment on U.S. Bank's setoff/recoupment defense. S.C. Code Ann. § 15-35-350.

Further, the Plaintiffs consented to summary judgment on their claim for permanent injunction. Logically, when they consented to summary judgment on this last remaining cause of action, they waived the ability to collect damages on that cause of action. Again, Plaintiffs could not collect damages as a result of this lawsuit, and without damages, there could be no setoff. As to U.S. Bank's setoff/recoupment defense, there was no money due, no money would become due, and there could be no contingent liability. Therefore, there could be no confession of judgment on U.S. Bank's setoff/recoupment defense. S.C. Code Ann. § 15-35-350.

Further still, U.S. Bank's affirmative defense of setoff was conditional. It stated: "[I]f and to the extent Plaintiffs are entitled to recover damages against U.S. Bank . . ." The defense of setoff was contingent on an award of damages to the Plaintiffs, but this never happened, and indeed, could not have happened. The Court never determined, and could not have determined, that Plaintiffs were "entitled to recover damages against U.S. Bank." Therefore, there was no verdict from which Plaintiffs could take a setoff. The Confession of Judgment is a meaningless and legally insufficient filing, and must be struck from the judgment roll.⁴

S.C. Code Ann. § 15-35-360 sets out additional requirements for judgments by confession, and includes the following:

³ This Order in no way implies that U.S. Bank is barred from bringing a foreclosure action on the Note and Mortgage in the future.

⁴ The Form 4 filed contemporaneously with the confession of Judgment supports the finding that the confession of Judgment was meaningless. It lists the "amount to be enrolled" against Plaintiffs as \$0.

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Before a judgment by confession shall be entered a statement in writing must be made and signed by the defendant and verified by his oath to the following effect:

(1) It must state the amount for which judgment may be entered and authorize the entry of judgment therefor. . .

S.C. Code Ann. § 15-35-360. Plaintiffs' Confession of Judgment does not comply with these requirements because it does not actually confess judgment to any money nor does it authorize the entry of a judgment for any actual money. Again, it is a meaningless filing. It purports to confess judgment by "reduc[ing] any monetary award to Plaintiffs' in this action by \$381,651.73." As set forth above, however, there can be no monetary award to Plaintiffs in this matter. That explains why, in the Form 4 accompanying the Judgment by Confession, the judgment amount to be enrolled against each of the Plaintiffs is listed by the Plaintiffs as *zero dollars*. Because the purported judgment does not actually state the amount of the judgment to be entered and does not authorize the entry of a money judgment, it fails to satisfy the statutory requirement and is therefore struck from the record.

IT IS THEREFORE ORDERED:

1. The following filings by Plaintiffs are hereby struck from the record and removed from the judgment roll of Colleton County:
 - a. Form 4 filed January 13, 2015.
 - b. Judgment by Confession in Favor of Defendants filed January 13, 2015.
 - c. Form 4 filed January 30, 2015.
 - d. Judgment by Confession in Favor of Defendants as to Setoff/Recoupment filed January 30, 2015.

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2. Plaintiffs shall not file any additional Form 4 Orders or judgments by confession in this matter without first obtaining the express written consent of U.S. Bank, and if Plaintiffs fail to abide by the terms of the Order, Plaintiffs shall be contempt of this Order.
3. This Order shall not affect U.S. Bank's enforcement rights as to the subject Note and Mortgage, including U.S. Bank's rights to file future foreclosure actions against Plaintiffs.

AND IT IS SO ORDERED.



The Honorable Doyet A. Early, III

April 24, 2015
_____, South Carolina