

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
Mikell R. Scarborough, Master in Equity

Civil Action No. 2010-CP-10-05825  
Unpublished Opinion No. 2015-UP-353 (S.C. Ct. App. filed July 15, 2015)  
Appellate Case No. 2015-001945

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Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust as  
Trustee of the American Mortgage Investment  
Partners Fund I Trust, ..... Respondent,

v.

Melissa Furmanchik; Masonborough at Park West Association, Inc.  
and Wells Fargo Bank, N.A., ..... Defendants,

Of whom Melissa Furmanchik is the ..... Petitioner.

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**RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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Respondent Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust as Trustee of the American Mortgage Investment Partners Fund I Trust (the “Trust”)<sup>1</sup> opposes Petitioner Melissa Furmanchik’s (“Furmanchik”) Petition for a Writ of Certiorari on the following grounds:

### QUESTIONS PRESENTED FOR REVIEW

- I. Do any special and important reasons exist for the Court to issue a Writ of Certiorari?**
- II. Did Furmanchik abandon several of the issues raised in the Petition for Writ of Certiorari by failing to raise them in her Petition for Rehearing?**
- III. Did the Court of Appeals err in finding that Furmanchik failed to preserve for appellate review her challenge to the Master’s power to *sua sponte* reopen the case and hold the second foreclosure hearing?**
- IV. Did the Master have the authority to *sua sponte* reopen the foreclosure hearing?**
- V. Did the Court of Appeals err in affirming the Master’s finding that Selene had standing to prosecute the foreclosure action?**
- VI. Did the Court of Appeals err in affirming the Master’s admission into evidence of the documents offered by Selene at the two foreclosure hearings?**

### STATEMENT OF THE CASE

Furmanchik’s petition arises from a foreclosure action in which she does not dispute the existence of the mortgage debt or the default on the repayment of that debt. Rather, Furmanchik only disputes the mortgagee’s standing to foreclose, the mortgagee’s right to interest on the debt, the admission of certain evidence at the foreclosure hearing,

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<sup>1</sup> By Order of July 15, 2015, the Court of Appeals substituted the Trust into this appeal as Respondent in place of Selene RMOF REO Acquisition, LLC (“Selene”) due to an assignment of the Mortgage into the Trust that occurred during the appeal. Selene was the foreclosure plaintiff at the time of the lower court foreclosure hearings at issue in this case.

and the Master in Equity's ("Master") decision to reopen the foreclosure hearing for additional testimony.

In September 2005, David H. Furmanchik<sup>2</sup> obtained a \$464,000 construction loan ("Loan") from Wachovia Mortgage Corporation for the purpose of constructing improvements on the property that is the subject of this foreclosure action ("Subject Property"). (R. pp. 25 – 29.) To evidence the loan, David H. Furmanchik executed and gave an Adjustable Rate Note to Wachovia Mortgage Corporation dated September 7, 2005, in the principal amount of \$464,000 ("Original Note"). (R. pp. 280 – 284.) A "Construction/Permanent Financing" Addendum amended and supplemented the Original Note (R. pp. 288 – 289.) The Construction Addendum provided for payments of interest-only during the construction phase and that interest would accrue on the unpaid principal balance of the Original Note "at a rate equal to the 'WSJ Prime Rate.'" (R. p. 288.)

To secure the repayment of the Loan, David H. Furmanchik and Melissa Furmanchik<sup>3</sup> gave to Mortgage Electronic Registration Systems, Inc. ("MERS"), acting solely as nominee for Wachovia Mortgage Corporation, a real estate mortgage ("Mortgage") on the Subject Property. (R. pp. 290 – 318.) The Mortgage was dated September 7, 2005, and recorded on September 19, 2005, in the Office of the Register

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<sup>2</sup> David H. Furmanchik passed away on March 3, 2008.

<sup>3</sup> David H. Furmanchik conveyed the subject property to David H. Furmanchik and Melissa Furmanchik, as joint tenants with the right of survivorship, by Deed dated September 13, 2005, and recorded on September 19, 2005, in the Office of the Register Mesne Conveyance for Charleston County in Deed Book D554 at Page 866. After David H. Furmanchik passed away on March 3, 2008, his interest vested in Melissa Furmanchik as the surviving joint tenant. (R. pp. 290 – 318.) Subsequently thereafter, Melissa Furmanchik conveyed the subject property to Melissa Furmanchik, as Trustee of the Melissa Furmanchik Living Trust by Deed dated October 23, 2012, and recorded on November 21, 2012, in the Office of the Register Mesne Conveyance for Charleston County in Deed Book 0292 at Page 659. (R. p. 183, lines 1-7.)

Mesne Conveyance for Charleston County in Book F554 at Page 170. (R. p. 318.)

After completion of the construction phase, David H. Furmanchik executed and gave Wachovia Mortgage Corporation a “Mortgage Modification Agreement Amendment to Note and Security Instrument” dated August 31, 2006, and recorded on September 11, 2006, in the Office of the Register Mesne Conveyance for Charleston County in Book W597 at Page 260 (“Modification Agreement”). (R. pp. 337 – 369.) The Modification Agreement modified certain terms of the Original Note and Mortgage.

The Loan went into default as of January 2010 for failure to make the required payments.

MERS executed an Assignment of the Mortgage to Wachovia Mortgage Corporation dated July 7, 2010, and recorded on July 15, 2010, in the Office of the Register Mesne Conveyance for Charleston County in Book 0133 at Page 352. (R. pp. 319 – 320.)

On July 20, 2010, Wachovia Mortgage Corporation filed this foreclosure action against Furmanchik and others. (R. pp. 63 – 74.) On November 28, 2010<sup>4</sup>, Furmanchik filed an Answer that raised, among others, affirmative defenses of lack of standing and failure to provide notice. (R. pp. 89 – 93.)

Meanwhile, Wachovia Mortgage Corporation had executed an Assignment of the Mortgage to Selene Finance LP dated October 7, 2010, and recorded on March 18, 2011, in the Office of the Register Mesne Conveyance for Charleston County in Book 0177 at

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<sup>4</sup> Furmanchik initially failed to respond to the Complaint and was held in default. On September 27, 2010, Furmanchik filed a Motion for Leave to File out of Time Answer and Notice of Election to Participate in Foreclosure Intervention. (R. pp. 80 – 81.) Wachovia Mortgage Corporation and Furmanchik entered into a Consent Order resolving the motion. (R. p. 6.)

Page 657 (R. pp. 321 – 322.) Selene Financial LP then executed an Assignment of the Mortgage to SRMOF 2009-1 Trust dated March 29, 2011, and recorded on May 3, 2011, in the Office of the Register Mesne Conveyance for Charleston County in Book 0185 at Page 205. (R. pp. 323 – 324.) Finally, SRMOF 2009-1 Trust executed an Assignment of the Mortgage to Selene RMOF REO Acquisition, LLC (“Selene”), dated March 29, 2011, and recorded on May 3, 2011, in the Office of the Register Mesne Conveyance for Charleston County in Book 0185 at Page 206. (R. pp. 325 – 326.)

On September 10, 2012, the Master entered an Order substituting Selene into the foreclosure action as the plaintiff. (R. p. 8.)

On March 28, 2013, Furmanchik filed a Motion to Dismiss or in the alternative for Summary Judgment. (R. pp. 96 – 97.) In the motion, Furmanchik argued that Plaintiff lacked standing and was not the real party in interest to maintain the foreclosure action. On May 20, 2013, the Master entered an Order denying Furmanchik’s motion. (R. pp. 11 – 15.)

On June 20, 2013, the Master held a foreclosure hearing in this case. At the hearing, Mamie Clark, a contested default manager with Selene’s loan servicer, testified on behalf of Selene. (R. pp. 184 – 233.) Ms. Clark testified as to her job duties as a custodian of the company’s business records. (R. p. 211, lines 17 – 23.) She testified that her company maintained records for the Loan on behalf of Selene in the ordinary course of its business and that she was familiar with those records. (R. p. 185, line 10 – p. 186, line 4.) She testified that the records of the prior servicer of the Loan were incorporated into her company’s record keeping system. (R. p. 204, lines 8 – 16.) She testified as to her company’s maintenance of an internal system screen that displays a full break down

of the debt amount (R. p. 207, line 4 – p. 209, line 12) and her company’s maintenance of the loan payment history (R. pp. 185, line 20 – p. 186, line 1). Finally, she testified to her company’s receipt and incorporation of the records for the Loan of the prior servicer, Wells Fargo, into her company’s record keeping system (R. p. 204, lines 8 – 16, p. 206, lines 16 – 21, p. 220, lines 13 – 19, p. 224, lines 4 – 6).

Through Ms. Clark’s testimony, Selene offered into evidence copies of the Original Note, the Mortgage, the Modification Agreement, the various Assignments of Mortgage, the loan payment history, a demand letter from Wells Fargo dated February 14, 2010, notifying the Furmanchiks of the loan delinquency and their right to cure it (“demand letter”), and a print-off of the debt figures from the servicer’s internal system.

Selene also produced the Original Note with the original Allonge for inspection by the Master and Furmanchik. (R. p. 187, lines 15 – 16.) The Original Note and Allonge showed an endorsement from the original payee, Wachovia Mortgage Corporation, to Wachovia Bank, N.A. (R. p. 284), and an endorsement in blank by Wells Fargo as Successor by Merger to Wachovia Bank, N.A. (R. p. 285).

Furmanchik objected to the admissibility of the Original Note on the grounds that Ms. Clark allegedly lacked personal knowledge as to how Selene came into possession of it (R. p. 187, lines 5 – 12) or who endorsed it in blank on behalf of Wells Fargo on the Allonge (R. p. 191, lines 12 – 15), and that the Original Note had not been properly authenticated (R. p. 189, lines 15 – 17, p. 191, lines 24 – 25). While Furmanchik raised similar objections to the admissibility of the Mortgage, Modification Agreement, and Assignments, she eventually conceded at the hearing that publicly recorded documents were admissible into evidence. (R. 201, lines 11 – 15)(“Your Honor, my objection is this

is public record so I acknowledge it can come in from that. Just acknowledging this is not a document she testified to is maintained within their record or anything else, but acknowledge it's a public record.”). Furmanchik further objected to Ms. Clark’s ability to testify to the payment history records and demand letter of a prior servicer of the Loan. (R. p. 203, lines 23 – 25, p. 204, line 19 – p. 205, line 4.)

In summary, Furmanchik’s defense strategy at the foreclosure hearing was to argue that Selene’s witness was unqualified to authenticate the loan documents or to be deemed a business records custodian for purposes of the hearsay exception. But Furmanchik offered no counter-evidence to cast any doubt as to the authenticity or trustworthiness of any of Selene’s evidence.

Towards the end of the foreclosure hearing, it was discovered that the copy of the Modification Agreement that Selene had previously offered into evidence was incomplete in that it omitted copies of the four exhibits referenced in and recorded with that agreement. (R. p. 242, lines 4 – 10.) Despite these exhibits being publicly recorded, and despite her prior concession that publicly recorded documents were admissible into evidence, Furmanchik nonetheless objected to the admissibility of the exhibits to the Modification Agreement on the grounds that she believed the evidence was closed by that point in the hearing (R. p. 243, lines 21 – 22, p. 245, lines 21 – 23), that no foundation had been laid for their admission (R. p. 247, lines 12 – 14), and that she had no opportunity to cross-examine Ms. Clark about them (R. p. 249, lines 11 – 12). Over these objections, the Master admitted the four exhibits to the Modification Agreement as “Exhibit 2B.” (R. p. 249, lines 20 – 24.)

At no point during the foreclosure hearing on June 20, 2013, did Furmanchik argue that the Master lacked authority to reopen the hearing to take additional testimony or evidence. (R. pp. 178 – 252.)

On June 28, 2013, before the Master entered any written order, Furmanchik filed a Motion for Reconsideration of the Master's oral ruling in favor of Selene at the foreclosure hearing. (R. pp. 119 – 128.)

On July 11, 2013, after reviewing Furmanchik's Motion for Reconsideration, the Master *sua sponte* entered a Form 4 Order stating:

After trial and review of the defendants[sic] Rule 59e, this court finds that the matter should be reopened for the express purpose of taking additional testimony with regards to the note and subsequent modification agreement. This is done pursuant to Rule 50(d), SCRCPC. This matter is to be reset for Monday, August 12 at 10:00 a.m.

(R. p. 16.)

The second foreclosure hearing took place on August 12, 2013. Furmanchik failed to make a motion to alter or amend or any other motion challenging the Master's authority to reopen the case prior to this hearing.

At the second foreclosure hearing, Selene again called Ms. Clark as its witness. Through her testimony, Selene offered a complete copy of the Modification Agreement with all four exhibits included as "Exhibit 2C." (R. p. 260, line 18 – p. 265, line 8.) Furmanchik made only a single, unspecified objection to the admissibility of the completed Modification Agreement. (R. p. 264, lines 9 – 12) ("For purposes of the record, Your Honor, I would like to mark it as an exhibit. I don't want it entered into evidence. I don't think it can be, but so the record is clear for future purposes."). The Master admitted the completed Modification Agreement into evidence over the objection. (R. p.

265, line 7.) Furmanchik was then given the opportunity to cross-examine Ms. Clark, which she did. (R. p. 266, line 8 – p. 268, line 23.)

Furmanchik made no argument or objection to the Master's authority to reopen the case for additional testimony and evidence during the second foreclosure hearing on August 12, 2013, and acquiesced to the second hearing taking place. (R. pp. 253 – 279.)

On February 7, 2014, the Master entered a Judgment of Foreclosure and Sale in favor of Selene. (R. pp. 18 – 33.)

On February 21, 2014, Furmanchik filed a Motion for Reconsideration and Vacate as to the Judgment of Foreclosure and Sale. (R. pp. 131 – 142.) In this motion, Furmanchik for the first time challenged the Master's authority to reopen the case for additional testimony and evidence at the second foreclosure hearing. *Id.*

On March 28, 2014, the Master entered a Form 4 Order denying Furmanchik's Motion for Reconsideration and Vacate. (R. p. 34.)

On April 23, 2014, Furmanchik served a Notice of Appeal concerning the following orders: the Order of May 20, 2013, denying her Motion to Dismiss or in the alternative for Summary Judgment; the Form 4 Order of July 11, 2013, reopening the case to take additional testimony; the Judgment of Foreclosure and Sale of February 7, 2014; and the Form 4 Order of March 28, 2014, denying Furmanchik's Motion for Reconsideration and Vacate.

Furmanchik raised the following issues to the Court of Appeals in her briefs:

- 1) Whether the Master lacked the power to *sua sponte* reopen the case and hold the second foreclosure hearing;
- 2) Whether the Master showed bias towards Selene by reopening the case for

- a second foreclosure hearing and admitting certain evidence;
- 3) Whether Selene had standing to enforce the Original Note and foreclose the Mortgage;
  - 4) Whether the Master erred in admitting the evidence offered by Selene at the two foreclosure hearings; and
  - 5) Whether the Master erred in awarding interest on the debt to Selene.

(App. pp. 373 – 399, 421 – 428.)

On July 15, 2015, the Court of Appeals issued an opinion finding that Furmanchik's challenge to the Master's authority to reopen the case was unpreserved for review, affirming the Master's finding that Selene had standing to foreclose, affirming the Master's admission of Selene's evidence in support of its foreclosure cause of action, and affirming the Master's award of interest on the debt to Selene. (App. pp. 429 – 432.)

On July 29, 2015, Furmanchik filed a Petition for Rehearing. (App. pp. 433 – 454.) Her petition sought rehearing from the Court of Appeals on only the following three issues:

- 1) Whether the Master lacked the power to *sua sponte* reopen the case and hold the second foreclosure hearing;
- 2) Whether Selene had standing to enforce the Original Note and foreclose the Mortgage; and
- 3) Whether the Master erred in admitting the evidence offered by Selene at the two foreclosure hearings.

*Id.*

Furmanchik's Petition for Rehearing failed to request rehearing on the Court of

Appeals' opinion that Furmanchik had failed to preserve her challenge to the Master's power to *sua sponte* reopen the case. *Id.* Her Petition for Rehearing also failed to request rehearing on the issues of 1) whether the Master showed bias towards Selene by reopening the case for a second foreclosure hearing and admitting certain evidence, and 2) whether the Master erred in awarding interest on the debt to Selene. *Id.*

On August 19, 2015, the Court of Appeals entered an Order denying Furmanchik's Petition for Rehearing. (App. pp. 455 – 460.)

Furmanchik now petitions for a writ of certiorari from this Court to review the Court of Appeals' final decision. She presents the following questions:

- 1) Whether the Court of Appeals erred in finding that her challenge to the Master's power to *sua sponte* reopen the case and hold the second foreclosure hearing was unpreserved;
- 2) Whether the Master lacked the power to *sua sponte* reopen the case and hold the second foreclosure hearing;
- 3) Whether the Master showed bias towards Selene by reopening the case for a second foreclosure hearing and admitting certain evidence;
- 4) Whether Selene had standing to enforce the Original Note and foreclose the Mortgage;
- 5) Whether the Master erred in admitting the evidence offered by Selene at the two foreclosure hearings; and
- 6) Whether the Master erred in awarding interest on the debt to Selene.

Furmanchik failed to include questions # 1, 3, and 6 in her Petition for Rehearing in the Court of Appeals.

## ARGUMENTS

### **I. No special and important reasons exist for the Court to issue a Writ of Certiorari.**

Furmanchik's Petition does not meet the "special and important" standard required by Rule 242(b), SCACR. Reasons that may justify this Court's review of a decision of the Court of Appeals include the following: 1) where there is a dissent in the decision of the Court of Appeals; 2) where substantial constitutional issues are directly involved; 3) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court; 4) where there are novel questions of law; and 5) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court. Rule 242(b), SCACR.

None of the judges on the Court of Appeals issued a dissenting opinion. Furmanchik's Petition does not involve any substantial constitutional issues or federal questions, and does not conflict with any decision of the United States Supreme Court. Furmanchik's Petition presents no novel questions of law; rather, each question presented in the Petition can be answered (and was answered by the Court of Appeals) by resorting to existing case law, the South Carolina Rules of Civil Procedure, or the South Carolina Rules of Evidence. Finally, Furmanchik does not contend that the decision of the Court of Appeals conflicts with any prior decision of this Court.

Because Furmanchik's Petition fails to present any of the traditional special and important reasons that justify this Court's review of a decision of the Court of Appeals, the Court must deny her Petition.

**II. Furmanchik abandoned several of the issues raised by the Petition for Writ of Certiorari by failing to raise them in her Petition for Rehearing.**

Furmanchik has improperly included the following issues in her Petition for a Writ of Certiorari that were not raised in her Petition for Rehearing in the Court of Appeals:

- 1) Whether the Court of Appeals erred in finding that her challenge to the Master's power to *sua sponte* reopen the case and hold the second foreclosure hearing was unpreserved (Pet. pp. 4 – 8);
- 2) Whether the Master showed bias towards Selene by reopening the case for a second foreclosure hearing and admitting certain evidence (Pet. pp. 9 – 11);  
and
- 3) Whether the Master erred in awarding interest on the debt to Selene (Pet. pp. 22 – 24).<sup>5</sup>

“Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.” Rule 242(d)(2), SCACR (emphasis added). Furmanchik raised none of these issues in her Petition for Rehearing. Therefore, the issues are abandoned and not properly before this Court.

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<sup>5</sup> While the preamble to Furmanchik's Petition for Rehearing states that she “wishes to incorporate by reference all the arguments made before the Court and contained in her briefs,” this statement was grossly insufficient to request rehearing on these particular issues where they were discussed nowhere else in the petition. *See* Rule 221(a), SCACR (“A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court.”)(emphasis added).

**III. The Court of Appeals did not err in finding that Furmanchik failed to preserve for appellate review her challenge to the Master's power to *sua sponte* reopen the case and hold the second foreclosure hearing.**

Even if the issue was properly before this Court, the Court of Appeals did not err in finding that her challenge to the Master's power to *sua sponte* reopen the case and hold the second foreclosure hearing was unpreserved.

“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). “At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge.” *Id.* A party cannot acquiesce to an issue at trial and then complain on appeal. *Ex parte McMillan*, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995). Further, “[a] party cannot raise an issue for the first time in a Rule 59(e), SCRPC motion which could have been raised at trial.” *MailSource, LLC v. M.A. Bailey & Associates, Inc.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003).

At the first foreclosure hearing on June 20, 2013, Furmanchik never argued that the Master lacked the power to reopen the hearing at that time or at a later date for additional testimony. She merely objected to the admissibility of the exhibits to the Modification Agreement on the grounds that she believed the evidence was closed by that point in the hearing (R. p. 243, lines 21 – 22, p. 245, lines 21 – 23), that no foundation had been laid for their admission (R. p. 247, lines 12 – 14), and that she had no opportunity to cross-examine Ms. Clark about them (R. p. 249, lines 11 – 12).

After the Master entered the Form 4 Order of July 11, 2013, Furmanchik failed to make a motion to alter or amend or any other motion challenging the Master's authority to reopen the case prior to the start of the second foreclosure hearing.

Furmanchik made no argument or objection to the Master's authority to reopen the case for additional testimony during the second foreclosure hearing on August 12, 2013, and thereby acquiesced to the second hearing taking place. (R. pp. 253 – 279.)

Furmanchik challenged the Master's authority to reopen the case for the first time in her Motion for Reconsideration and Vacate filed on February 21, 2014—over six months after the second foreclosure hearing. (R. pp. 131 – 142.). *Id.*

Despite raising this issue for the first time in a post-trial Rule 59(e) motion, which is prohibited by the case law, Furmanchik now attempts to save this unreserved issue by conflating her objections to the *admissibility* of the exhibits to the Modification Agreement with an objection to the propriety of the second hearing itself. However, a close reading of the transcripts from both foreclosure hearings reveals no objection by Furmanchik to the Master's authority to reopen the case, only her acquiescence to proceeding with the second foreclosure hearing. (R. pp. 178 – 279.)

Therefore, the Court of Appeals did not err in finding that Furmanchik failed to preserve her challenge to the Master's power to *sua sponte* reopen the case and hold the second foreclosure hearing.

**IV. The Master had the authority to *sua sponte* reopen the foreclosure hearing.**

Even if Furmanchik had preserved her challenge to the reopening of the foreclosure hearing, the Master was well within his authority in doing so. “The decision whether to reopen a record for additional evidence is within the trial court's sound

discretion and will not be disturbed on appeal absent an abuse of that discretion. *Brenco v. S. Carolina Dep't of Transp.*, 377 S.C. 124, 127, 659 S.E.2d 167, 169 (2008). “The trial judge is endowed with considerable latitude and discretion in allowing a party to reopen a case.” *Spinx Oil. Co., Inc. v. Federated Mut. Ins. Co.*, 310 S.C. 477, 482, 427 S.E.2d 649, 651 (1993) *overruled on other grounds*, *Joe Harden Builders, Inc. v. Aetna Cas. and Sur. Co.*, 326 S.C. 231, 486 S.E.2d 89 (1997).

In the present case, the Master, following the first foreclosure hearing and a review of Furmanchik’s Motion for Reconsideration, decided to reopen the case “for the express purpose of taking additional testimony with regards to the note and subsequent modification agreement.” (R. p. 16.) There is no evidence in the record to suggest that the Master abused his discretion; instead, he acted well within his “considerable latitude and discretion” to “reopen the record for additional evidence” on the exhibits to the Modification Agreement following the lengthy argument at the first hearing. (R. pp. 243 – 249.) Furthermore, the Master’s action afforded Furmanchik full due process by way of the opportunity to cross-examine Ms. Clark on the exhibits to the Modification Agreement. (R. p. 266, line 8 – p. 268, line 23.)

Finally, it appears that the Master’s ruling was actually based on Rule 59(d), SCRCF. “Not later than 10 days after entry of judgment, the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party.” Rule 59(d), SCRCF. The Form 4 Order reopening the case was timely because the Master had not yet entered a judgment. (R. pp. 18 – 33.) Furmanchik concedes that “at the time the Court acted *sua sponte*, no verdict or ruling had been

granted in favor of Plaintiffs.” (Pet. p. 9.) Thus, the Master was well within his time and discretion to reopen the case under the authority vested in him by Rule 59(d), SCRPC.

**V. The Court of Appeals did not err in affirming the Master’s finding that Selene had standing to prosecute the foreclosure action.**

The Court of Appeals correctly affirmed the Master’s finding that Selene had standing to prosecute the foreclosure action.

“Standing refers to a party’s right to make a legal claim or seek judicial enforcement of a duty or right.” *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 219-20, 746 S.E.2d 478, 480-81 (Ct. App. 2013), *reh’g denied* (Aug. 27, 2013). “Generally, a party must be a real party in interest to the litigation to have standing.” *Id.* (internal quotation marks omitted). “A real party in interest for purposes of standing is a party with a real, material, or substantial interest in the outcome of the litigation.” *Id.* (internal quotation marks omitted). “The requirement of standing is not an inflexible one.” *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 524, 537 S.E.2d 299, 304 (Ct.App.2000) (internal quotation marks omitted).

Because a mortgage automatically follows the promissory note that it secures,<sup>6</sup> a foreclosure plaintiff can show standing by proving that it has the right to enforce the underlying promissory note secured by the mortgage. *See Draper*, 405 S.C. at 223, 746 S.E.2d at 482.

A person or entity is entitled to enforce a negotiable promissory note if they are

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<sup>6</sup> *Union Nat’l Bank v. Cook*, 110 S.C. 99, 96 S.E. 484 (1918) (“The note is the principal and the mortgage is the incident and follows the note in its delivery from one person to another.”); *Draper*, 405 S.C. at 220, 746 S.E.2d at 481 (“[T]he assignment of a note secured by a mortgage carries with it an assignment of the mortgage...”); *see also Carpenter v. Longan*, 83 U.S. 271, 275 (1872) (“All the authorities agree that the debt is the principal thing and the mortgage an accessory.”). This is why “[n]o written assignment of the mortgage is required under state law.” *In re Woodberry*, 383 B.R. 373, 377 (Bkrcty. D.S.C. 2008).

“(i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 36-3-309 or 36-3-418(d).”<sup>7</sup> S.C. Code Ann. § 36-3-301. A “holder” is a person or entity “who is in possession of a document or title or an instrument or a certificated investment security drawn, issued, or indorsed to him or to his order or to bearer or in blank,” *i.e.*, someone who takes the promissory note through the process of “negotiation.” § 36-1-201(20); § 36-3-201. “When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.” § 36-3-205(b).

At the first foreclosure hearing, Selene produced the Original Note with the original Allonge. (R. p. 187, lines 15 – 16.) The Original Note contained an endorsement from Wachovia Mortgage Corporation to Wachovia Bank, N.A. (R. p. 284.) The Allonge contained a blank endorsement by Wells Fargo as Successor by Merger to Wachovia Bank, N.A., which converted it into bearer paper. (R. p. 285.) By possessing the Original Note and Allonge containing a blank endorsement at the first foreclosure hearing, Selene proved that it was the holder of the Original Note. The interest in the Mortgage automatically followed the Original Note as a matter of law when it was negotiated to Selene. Thus, the Master correctly found that Selene had the right to enforce the Original Note and foreclose the Mortgage.

Furmanchik’s complaint that the chain of mortgage assignments does not perfectly mirror the chain of note endorsements is a red herring because “[n]o written

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<sup>7</sup> S.C. Code Ann. § 36-3-309 deals with the enforcement of instruments which have been lost, destroyed, or stolen, and S.C. Code Ann. § 36-3-418(d) deals with circumstances where an instrument has been paid or accepted by mistake and the payor or acceptor recovers payment or revokes acceptance. Neither is applicable here.

assignment of the mortgage is required under state law.” *In re Woodberry*, 383 B.R. 373, 377 (Bkrcty. D.S.C. 2008). If timely assignments of mortgage were relevant to a noteholder’s right to foreclose, then surely state law would require them. But it does not.<sup>8</sup> Furmanchik concedes the irrelevance of the mortgage assignments in her Petition by stating that “the note and mortgage are inseparable, and the assignment of the note carries the mortgage with it, while an assignment of the mortgage alone is a nullity.” (Pet. p. 11.)

Furmanchik’s argument that the lack of an endorsement on the modified note attached as Exhibit A to the Modification Agreement somehow nullified Selene’s status as a holder is also without merit. Paragraph 2 of the Modification Agreement provided that the terms of the Original Note “are amended and modified in accordance with the terms and provisions” of Exhibit A. (R. p. 354.) This language sufficiently incorporated the modification and its terms into the Original Note. Adding endorsements on Exhibit A to the Modification Agreement would have been superfluous and unnecessary.

Therefore, the Court of Appeals did not err in affirming the Master’s finding that Selene had standing to prosecute the foreclosure action.

**VI. The Court of Appeals did not err in affirming the Master’s admission into evidence of the documents offered by Selene at the two foreclosure hearings.**

The Master did not abuse his discretion in admitting the evidence offered by Selene at the two foreclosure hearings in support of its foreclosure cause of action.

“The admission of evidence is within the discretion of the trial court.” *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 69, 773 S.E.2d 607, 613 (Ct. App.

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<sup>8</sup> While the practice of executing and recording assignments of mortgages is irrelevant to the issue of standing in judicial foreclosure proceedings, they serve other important purposes, such as ensuring that the current owner of the mortgage receives legal notices that may impact the mortgage lien, such as notices of county tax sales, criminal forfeiture proceedings, foreclosures by junior lienholders, etc.

2015). “The court’s ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law.” *Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 448, 772 S.E.2d 544, 551-52 (Ct. App. 2015), *reh'g denied* (June 18, 2015), *cert. denied* (Oct. 8, 2015). “To warrant a reversal based on the admission of evidence, the appellant must show both error and resulting prejudice.” *Id.*

Further, “[t]he appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.” Rule 220(c), SCACR.

**a. The Master did not abuse his discretion in finding that the evidence offered by Selene at the foreclosure hearings was authentic.**

The requirement of authentication is a condition precedent to the admissibility of evidence. Rule 901(a), SCRE. The authentication requirement “is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” *Id.* “[T]he burden to authenticate ... is not high and requires only that the proponent offer [] a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.” *Deep Keel, LLC*, 413 S.C. at 64, 773 S.E.2d at 610 (internal citations and quotations omitted)(alteration in original).

The authentication requirement does not demand that the authenticating witness know the “when, how, or by whom the documents were prepared, how they came to be in the possession of [the bank], or how they were maintained by that bank.” *Id.* at 65, 773 S.E.2d at 611.

Further, evidence may be authenticated based on “[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstance.” Rule 901(b)(4), SCRE.

Loan documents are self-authenticating. “Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to ... [c]ommercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.” Rule 902(9), SCRE. “In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings.” S.C. Code Ann. § 36-3-308(a)(emphasis added).

In her Answer, Furmanchik did not deny the existence or validity of the Original Note, Mortgage, or Modification Agreement, but merely “crave[d] reference to the documents identified therein and denie[d] any allegation inconsistent with the specific terms of said documents...” (R. p. 90 ¶ 7.) Such a response was insufficient to contest the authenticity of these loan documents or any signatures contained therein. *Deep Keel, LLC*, 413 S.C. at 68, 773 S.E.2d at 612 (holding that an Answer stating that it was making “reference to the original loan documents and den[ying] any allegations of these paragraphs inconsistent therewith” was too general to challenge the authenticity of the loan documents). Therefore, Ms. Clark’s testimony was not even necessary to authenticate the Original Note, Mortgage, or Modification Agreement.

To the extent that this Court deems her testimony was necessary to establish the authenticity of these instruments, the appearance, contents, and substance of these instruments, taken in conjunction with Ms. Clark’s testimony, was sufficient to support a finding that they were what Selene claimed. The same was true as to the remaining evidence offered by Selene at the foreclosure hearing—the loan payment history, the demand letter, and the servicer’s internal system debt figures print-off.

Ms. Clark testified as to: 1) the ownership history of the Loan (R. p. 200, line 14 – p. 203, line 5), 2) the servicing history of the Loan (R. p. 204, lines 2 – 7), 3) her company’s maintenance of these documents for the Loan in the ordinary course of its business and her familiarity with these documents (R. p. 185, line 10 – p. 186, line 4), 4) her company’s generation of the debt figures print-off, 5) her company’s generation and maintenance of the loan payment history (R. pp. 185, line 20 – p. 186, line 1), and 6) her company’s receipt and incorporation of the documents from the prior servicer into her company’s record keeping system, including the loan documents, its loan payment history, and the demand letter (R. p. 204, lines 8 – 16, p. 206, lines 16 – 21).

While Furmanchik continually argued as to whether Selene sufficiently satisfied the authentication requirement, she never offered any counter-evidence to cast any doubt as to the authenticity of the documents offered by Selene. For these reasons, the Master did not abuse his discretion in finding that the evidence that Selene offered at the foreclosure hearings was authentic.

**b. The Master did not abuse his discretion in finding that the evidence offered by Selene at the foreclosure hearings was not hearsay.**

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE.

The evidence offered by Selene at the foreclosure hearings was intended to establish the existence of the debt, Selene’s right to enforce the instruments, the loan default, and the amount of the debt. *See U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 374-75, 684 S.E.2d 199, 205 (Ct. App. 2009) (“Generally, the party seeking foreclosure

has the burden of establishing the existence of the debt and the mortgagor's default on that debt.”).

The Note, Mortgage, and Modification Agreement (with exhibits) were not hearsay because they were offered to establish the existence of a contract and the terms of that contract. “Written contracts offered in court not for the truth of any facts stated in [them] but to prove the existence of a contractual right or duty should not be excluded as hearsay.” *Deep Keel, LLC*, 413 S.C. at 70, 773 S.E.2d at 613 (“We find the loan documents were properly admitted to show the existence of an agreement to loan money, the terms of repayment, and the existence of a security interest in the real estate. Because the loan documents were not offered to prove the truth of any statement, they were not hearsay and the master correctly admitted them.”).

The Mortgage, Modification Agreement (with exhibits), and Assignments of Mortgage were not hearsay because they were publicly recorded documents. Rule 803(14), SCRE (“The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office”); S.C. Code Ann §§ 30-7-10, 30-7-20, and 30-7-40 (providing for recording of mortgages, assignments, and modifications). Furmanchik conceded this point. (R. 201, lines 11 – 15)(“Your Honor, my objection is this is public record so I acknowledge it can come in from that. Just acknowledging this is not a document she testified to is maintained within their record or anything else, but acknowledge it’s a public record.”).

The demand letter was not hearsay because it was offered to prove the Furmanchiks' notice of their loan delinquency and of their right to cure the delinquency. "[S]tatements offered not for the truth of the matter asserted, but rather as evidence of notice, do not constitute hearsay." *Thomas v. Dootson*, 377 S.C. 293, 298, 659 S.E.2d 253, 256 (Ct. App. 2008).

Finally, the loan payment history and the servicer's internal system debt figures print-off, along with all of the evidence offered by Selene, were not hearsay because they were records of regularly conducted business activity.

"A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness" is not excluded from evidence by the hearsay rule. Rule 803(6), SCRE (emphasis added).

Our local federal courts construing the business records exception under the comparable Federal Rules of Evidence have found that "[b]usiness records of an entity are admissible even though another entity made the records, and the rule does not require an employee of the entity that prepared the record to lay the foundation." *Midfirst Bank, SSB v. C.W. Haynes & Co., Inc.*, 893 F. Supp. 1304, 1310 (D.S.C. 1994). "Moreover, Rule 803(6) does not require the testifying witness to have personally participated in the creation of the document or to know who actually recorded the

information.” *Id.* at 1311. “Obviously, such a requirement would eviscerate the business records exception, since no document could be admitted unless the preparer (and possibly others involved in the information-gathering process) personally testified as to its creation.” *Id.* “Rather, the business records exception requires the witness to be familiar with the record keeping system.” *Id.*

Ms. Clark testified as to her job duties as a custodian of the company’s business records. (R. p. 211, lines 17 – 23.) She testified that her company maintained the records for the Loan on behalf of Selene in the ordinary course of its business and that she was familiar with those records. (R. p. 185, line 10 – p. 186, line 4.) She testified that the records of the prior servicer of the Loan were incorporated into her company’s record keeping system. (R. p. 204, lines 8 – 16.) She testified as to her company’s maintenance of the debt figures print-off (R. p. 207, line 4 – p. 209, line 12) and her company’s maintenance of the loan payment history (R. pp. 185, line 20 – p. 186, line 1). Finally, she testified to her company’s receipt and incorporation of the documents from the prior servicer into her company’s record keeping system, including the loan documents, its loan payment history, and the demand letter (R. p. 204, lines 8 – 16, p. 206, lines 16 – 21, p. 220, lines 13 – 19, p. 224, lines 4 – 6).

This testimony was sufficient to establish that these documents fell within the business records exception to the hearsay rule. Furmanchik’s attack on Ms. Clark’s ability to testify to the records of the prior servicer is without merit because the business records exception merely requires that the records be “made at or near the time by, *or from information transmitted by*, a person with knowledge.” Rule 803(6), SCRE (emphasis added). The records at issue were transferred to Selene’s servicer by the prior

servicer, Wells Fargo, and Furmanchik never argued that Wells Fargo lacked knowledge of the information contained in these documents. The business records exception merely requires the witness to be familiar with the company's record keeping system. Ms. Clark's testimony satisfied that test. Further, Furmanchik offered no counter-evidence at either hearing to cast any doubt on the trustworthiness of the documents offered into evidence by Selene.

Therefore, the Court of Appeals did not err in affirming the Master's admission into evidence of the documents offered by Selene at the two foreclosure hearings.

### CONCLUSION

No special and important reasons exist for this Court to issue a Writ of Certiorari in this matter. Based on the foregoing, the Court must deny Furmanchik's Petition for a Writ of Certiorari.

Respectfully submitted,



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FSB, d/b/a Christiana Trust as  
Trustee of the American Mortgage  
Investment Partners Fund I Trust

November 24, 2015

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
Mikell R. Scarborough, Master in Equity

**RECEIVED**

NOV 24 2015

S.C. Supreme Court

Civil Action No. 2010-CP-10-05825  
Unpublished Opinion No. 2015-UP-353 (S.C. Ct. App. filed July 15, 2015)  
Appellate Case No. 2015-001945

Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust as  
Trustee of the American Mortgage Investment  
Partners Fund I Trust, .....Respondent,

v.

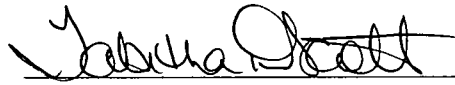
Melissa Furmanchik; Masonborough at Park West Association, Inc.  
and Wells Fargo Bank, N.A., ..... Defendants,

Of whom Melissa Furmanchik is the ..... Petitioner.

**PROOF OF SERVICE**

I HEREBY CERTIFY that I have served the Return to Petition for a Writ of  
Certiorari on November 24, 2015, by depositing a copy of each in the United States Mail,  
postage prepaid, addressed to the each of following attorneys of record:

Mary Leigh Arnold, Esquire  
MARY LEIGH ARNOLD, P.A.  
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Tabitha D. Scott  
Paralegal to Sean M. Foerster, Esquire  
ROGERS TOWNSEND & THOMAS, PC