FINAL BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
MASTERS AND SPECIAL REFEREES

Gordon G. Cooper, MASTER-IN-EQUITY

Case No. 2012-CP-42-0899

Bayview Loan Servicing, L.L.C. Respondent,

v.

Scott A. Schledwitz, Roxanne J. Schledwitz a/k/a Roxanne Johnson Schledwitz, Mortgage Electorinc Registration Systems, Inc. (MERS) as nominee for Taylor, Bean & Whitaker Mortgage Corp., The United States of America, by and through its agency, the Internal Revenue Service, and The South Carolina Department of Revenue, Defendants,

Of whom Scott A. Schledwitz and Roxanne Johnson Schledwitz are the Appellants.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On February 12, 2012, Bayview Loan Servicing, LLC (Respondent), brought this action of Summary Judgment and subsequent Foreclosure actions against Scott Allan Schledwitz and Roxanne Johnson Schledwitz (Appellants). Schledwitz answered alleging Bayview's claim was invalid as it had no standing to bring this type of action and receive judgment and requesting a Trial by Jury to provide a proper defense. The Summary Judgment Motion was heard on November 19, 2013, and judgment was entered on December 2, 2013.

On December 20, 2013, Schledwitz served the Notice of Appeal on Bayview. On January 29, 2014, Schledwitz served the Amended Notice of Appeal on Bayview.

FACTS

The following are the facts of Appellants complaint:

1. On November 25, 2005, Movant, executed a $160,000 adjustable rate mortgage with Taylor, Bean and Whitaker Mortgage Corporation (hereafter "TBW") secured by the aforementioned first mortgage on their principal residence located at 423 South Fairview Avenue Extension, Spartanburg, South Carolina, 29302. Recorded on November 30, 2005, instrument number MTG-2005-62325, Book 3565, Page 239.
2. On November 25, 2005, Movant, executed a $40,000 fixed rate mortgage with Taylor, Bean and Whitaker Mortgage Corporation secured by the aforementioned second mortgage on their principal residence located at 423 South Fairview Avenue Extension,

Spartanburg, South Carolina, 29302. Recorded on November 30, 2005, instrument number MTG-2005-62326, Book 3565, Page 255.

3. The Movant filed a Chapter 13 Plan on February 7, 2007.
4. The aforementioned case was confirmed on August 29, 2007 CASE Number 07-00666-hb United States Bankruptcy Court of South Carolina.
5. On February 29, 2008, Movant' were conditionally approved by Michigan Mutual (a.k.a First Premier Mortgage)for an FHA Mortgage for refinancing of their principal resident that was secured by the aforementioned mortgage with the Respondent. This approval was based on showing 12 months of on time payments made to the Trustee for the Chapter 13 Plan and 12 months of on time payments to the Respondent.
6. On May 7, 2008, the Movant' submitted a Motion to Incur Indebtedness that was approved by the court on June 12, 2008.
7. On or around March, 2008 Movant' received upon request to TBW, Payoff Statements for aforementioned mortgage with pay history. The statements showed incorrect interest rate applied to the adjustable rate mortgage, an accumulation of interest and late charges on the pre-petition arrearage and a pay history that was incorrectly showing the post-petition pay history (attached Payoff Statement).
8. On or about March, 2008, Movant' attorney requested information from TBWs' attorney regarding the interest and accumulated fees not covered in the plan that were on the Movant' Payoff Statement(attached Attorney Inquiry Email).
9. Due to the erroneous Payoff Statement, FHA terms mandated that the conditional approval would be retracted because of the stated post-petition pay history. This required

Michigan Mutual to obtain conditional approval from another FHA lender willing to lock the rate while TBW updated the pay history and pay off statement to reflect the correct post petition pay history and a payoff that accounted for the remaining principal balance and pre-petition arrearage and an estimate of the daily interest rate based on actual payoff date, with no accumulation of interest, fees and other penalties on pre-petition arrearage.

10. On March 31, 2008, Michigan Mutual obtained a new conditional approval with a higher interest rate, based on the Trustee Pay History and awaiting the aforementioned post-petition pay history and adjusted payoff statement for the secured mortgage with the TBW.

11. On April 30, 2008, TBWs' attorney replied with partial information regarding adjustable interest rate and a pre-petition balance that was different than the pre-petition Proof of Claim amount (attached Korn April 30 Email). TBW offered no statement correcting post-petition pay history, adjustment to incorrect charges on pre-petition arrearage nor validation or adjustment of Adjustable Rate Interest for the monthly payment.

12. On May 31, 2008, conditional approval for FHA mortgage refinance with Michigan Mutual expired due to the refusal of revised pay statement reflecting corrected adjustable rate interest, reduced over charge for erroneous compilation of late fees and penalty interest and updated post-petition pay history by Respondent.

13. On June 14, 2008, Plaintiff, Scott Allan Schledwitz, had to accept a position with his employer in another state. The new position would guarantee continued income that would allow for the Movant to continue making earnest effort to maintain payment schedules for the Chapter 13 plan, living expenses and mortgage payments to the best of

their ability. The new position added undue stress as it required a commute of 540 miles to Lake Mary, Florida with long term absences from the Plaintiff family for the next 56 weeks. Because of the inconsistent payment schedule with amounts and fraudulent actions of TBW, alternative employment options would not allow Scott Schledwitz to take employment at slightly lower income nor allow for a Mr. Schledwitz to obtain a second job for additional income to offset any reduction from taking other employment near the Movant' residence.

14. On or around August, 2008, Plaintiff Scott Allan Schledwitz, sought assistance from Dr. Christopher Caston seeking medical assistance due to stress and anxiety directly related to TBWs' actions and the resulting course taking by the Movant' to continue making payments to TBW for the secured mortgage. Mr. Schledwitz was prescribed 500mg of Depakote mid-day to help with the added stress and anxiety. The related stress and anxiety has placed a physical toll on Mr. Schledwitz.

15. On or around October, 2008, Movant' retained attorney Scott Talley to communicate with TBWregarding aforementioned erroneous activities.

16. On or around November, 2008, TBW attorney advised Movant' attorney to direct Movant to contact Respondent representative Deo Sengh directly to discuss erroneous activities attributed to accounting issues internal to Respondent.

17. On December 3, 2008, Movant' attempted to retrieve payment statements, Adjustable Rate Interest information that was scheduled to be reset on November 14, 2008, current payoff statements and pay history information through the TBW's website portal. The website portal located at http://www.taylorbean.com where TBW operates a public and

private informational website. TBW provides customers of their secured loan products login and password to view the account information specific to the customer and property secured. The Movant' access to the basic account information they required was intentionally blocked by the Respondent through the online portal(attached Taylor Bean restriction). Per the instructions from the website, Movant contacted the Respondent through the listed telephone number on the Respondent website and were told they were not allowed access but could not be told why access was restricted. This was the Movant' second, documented attempt to retrieve valid information from the TBW. TBW deceptively prevented the Movant' from accessing this information.

18. On December 9, 2008, Plaintiff called TBW and spoke with TBW representative, Deo Sengh, to discuss the next interest rate adjustment per the term of the Adjustable Rate Rider (attached). Mr. Sengh advised the Movant' that the rate had not been set as of yet and the new payment could not be determined. Mr. Sengh alleged that all statements and related information was being sent directly to Plaintiff Bankruptcy attorney, Gina McMaster. Movant' requested that Adjustable Rate Interest be reset to the original 7.25% and were informed by Mr. Sengh that would be illegal in bankruptcy and could not be done
19. January 14, 2009, Movant notified court and related creditors of *Pro Se* status.
20. On or about February, 2009, Movant discovered TBW had not been providing documentation alleged by Deo Sengh, TBW representative to Plaintiff Bankruptcy attorney regarding Adjustable Rate increase or related payment history– violating

mortgage agreement rules regarding written notification for adjustable rate interest per the Adjustable Mortage Rider (attached).

21. On August 24, 2009, TBW filed for Chapter 11 Bankruptcy protection in the United States Bankruptcy Court of Middle Florida CASE NO: 3:09-bk-07047-JAF.

22. On August 31, 2009, the Bankruptcy Court of Middle Florida in the Case of TBW, approved an order that required TBW to provide Bayview, US Bank and Ocwen Lending with servicing information and mortgage documentation of mortgages to be serviced by Bayview, US Bank and Ocwen Lending effective September 1, 2009. The three aforementioned servicers were to be provided this information, in part, to prevent harm to the customers as well as TBW.

23. On September 1, 2009, Appellants received a letter from Bayview Loan Servicing, LLC, identifying themselves as the new loan servicer.

24. On November 19, 2009, Appellants appeared in United States Bankruptcy Court of South Carolina, presided by the Honorable Judge Helen Burris, to review the complaint filed by the Movant in Bankruptcy Court regarding Violation of Automatic Stay by the TBW as well as the facts supporting the complaints outlined in the Violation of Automatic Stay. It was noted by the Court that while the Court in South Carolina did not have jurisdiction in this Complaint due to the TBW's Chapter 11 Bankruptcy filing, it would stay engaged through the Appellants' Trustee as to any and all actions resulting from the aforementioned complaint. It was also recommended that the complaint be facilitated through the United States Bankruptcy Court of Middle Florida, where the TBW has filed its Chapter 11 Bankruptcy.

25. On December 22, 2010, Appellants filed a Quiet Title Action. Final order was signed and set aside on April 19, 2011 by the Master-In-Equity for a final hearing to review the standing of TBW as a Respondent. Respondents were notified through publication.

26. On March 24, 2011, Movant United States Bankruptcy Court of South Carolina, presided by the Honorable Judge Helen Burris, to review Movant's motion to remove the Respondent as a secured creditor for failure to provide notification of the Transfer of Claim and the Respondent's subsequent failure to respond to requests for account information and documentation proving its standing as mortgage servicer and holder by assignment from Taylor, Bean and Whitaker. The Respondent failed to appear at the hearing and was removed as a secured creditor from the Movant's bankruptcy case.

27. On February 24, 2012, Respondent files a Lis Pens and Complaint against the Movant in order to secure a Summary Judgment and foreclose on the Appellants' property. The Appellants, TBW, Mortgage Electronic Registration System (hereafter "MERS")., the State of south Carolina and the Internal Revenue Service as Defendants.

28. The Assignment of Mortgage (hereafter "AOM") with as sole nominee for Taylor, Bean and Whitaker was filed, assigning the mortgage to Bayview Loan Servicing. The date of the signed AOM was February 2, 2012, with no stamp or recording for the Register of Deeds in Spartanburg County.

29. On March 6, 2012, the Appellants filed an Objection to the Complaint and responded with a demand for Trial by Jury.

30. March 26, 2012, the Assignment of Mortgage was filed with the Spartanburg Register of Deeds with the signatures of a Mortgage Electronic Registration Systems executive, Robert G. Hall dated March 15, 2012.

31. No Limited Power of Attorney has been filed by Taylor, Bean and Whitaker naming Bayview Loan Servicing with the Register of Deeds as constituting and appointing Bayview Loan Servicing, LLC or its successors as its true and lawful Attorney-in-Fact, with full authority to execute, sign, make, acknowledge, deliver and record any assignment of security instruments or any other document necessary to transfer its interest in the security instrument, including a mortgage or deed of trust to Bayview Loan Servicing.

32. November 8, 2013, Appellants received a notice of the Summary Judgment hearing scheduled for November 19, 2013. Appellants replied on November 11, 2013 with an Objection to the Summary Judgment hearing and demanded a Trial by Jury.

33. November 16, 2013, Appellants filed a Motion for Continuance in order to depose the Respondents representatives, request transcript and redacted documents from the United States Bankruptcy Courts of Middle Florida and South Carolina and conduct Discovery for both the Appellants and Respondent.

34. November 18, 2013, Appellants requested status of the Motion for Continuance from the Master-In-Equity and were provided a copy of Ex-Parte communication conducted between the Master and the Respondent's attorney.

35. November 19, 2013, Summary Judgment hearing was held with the Appellants.

36. November 27, 2013, the Master-In-Equity signed the Summary Judgment and related Foreclosure notice and Sale.

37. December 20, 2013, Appellants received the Master-In-Equity signed orders.

ARGUMENTS

I. BECAUSE RESPONDENT FAILED TO PROVIDE PROOF IT WAS THE ASSIGNEE TO THE NOTE, IT HAS NO RIGHT TO FORECLOSE ON THE APPELLANT PROPERTY

A. The Respondent presented bankruptcy orders for blanket assignment of loan servicing from TBW to several Loan Servicers covering more than 4,200 mortgages throughout the United States This original order provided detail of required account information for transfer of servicing. Detail would include the documentation of the Appellants' Mortgage, Note, RESPA and other related information. Respondent asserted the order covered its' legal holding and/or ownership of the Appellants' mortgage but never presented the supporting documentation that validates the aforementioned order is applicable and provides the Respondent with adequate evidence it had standing to foreclose. If the original note was lost or destroyed, the Respondent failed to file a Lost Note Certificate in its original filing of the LIS PENS and Complaint or in an amendment. Appellant requested a jury trial with the Spartanburg County Master-In-Equity with pre-trial discovery to resolve this issue or validate the defense's assertion that the Respondent is neither owner nor holder of the mortgage and has no standing to bring action on the Appellants.

B. The Assignment of Mortgage original mortgage holder, Taylor, Bean and Whitaker, is under Chapter 11 Bankruptcy protection, authentication of the Assignment of Mortgage specific to the Appellant through the Bankruptcy Court of Middle Florida by judge signature and court seal is a reasonable and defined by South Carolina Civil Court Procedure Rule 44 Proof of Record –

> Rule 44(a) Authentication.
>
> (1) Domestic. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of

> embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept and authenticated by the seal of his office.

Respondent failed to provide authentication, while other servicers for mortgages in similar proceedings have sought Motion for Relief from Automatic Stay for the mortgage and title or have been granted Limited Power of Attorney, with similar filings in Spartanburg County. The Appellant has demonstrated numerous challenges to the Respondents' status as holder or owner of the mortgage in question in timely responses in this case as well as in the Appellant filings in the Bankruptcy Court of South Carolina.(Record on Appeal Exhibit 1, page 63, Exhibit 2, page 69 and Exhibit 4, page 77) This is a violation of UCC Laws § 9-406 (c) DISCHARGE OF ACCOUNT DEBTOR; NOTIFICATION OF ASSIGNMENT; IDENTIFICATION AND PROOF OF ASSIGNMENT; RESTRICTIONS ON ASSIGNMENT OF ACCOUNTS, CHATTEL PAPER, PAYMENT INTANGIBLES, AND PROMISSORY NOTES INEFFECTIVE –

> (c) [Proof of assignment.]
>
> Subject to subsection (h), if requested by the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge its

obligation by paying the assignor, even if the account debtor has received a notification under subsection (a) (subsection (a) - [Discharge of account debtor; effect of notification.]).

Subject to subsections (b) through (i), an account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

(h) [Rule for individual under other law.]

This section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

C. The actions of the Respondent are Predatory and Fraudulent. Respondent's assumption that it is the servicer is further clouded by its inability to correctly calculate the Adjustable Interest Rate,

defined in the Adjustable Rate Rider to the mortgage(Amended Record on Appeal Exhibit 3, page 76). Even if the Court believes the Respondent is the holder of the mortgage, the fact the interest rate has been egregiously miscalculated over the term of the agreement shows that the summary amounts are incorrect as well. In responses to the Respondent's Complaint filed with the Master-In-Equity of Spartanburg County(Motion for Continuance, page 56), Appellants filings in South Carolina Bankruptcy Court(Exhibits1 and 2) and direct Qualified Written Request to the Respondent, the Appellants have continuously requested servicing information from the Respondent regarding the payment history, Adjustable Rate Mortgage Interest and related. This is a violation of South Carolina Code of Law SECTION 37-22-190 (11) Prohibited activities –

> (11) fail to comply with the mortgage loan servicing transfer, escrow account administration, or borrower inquiry response requirements imposed by Sections 6 and 10 of the Real Estate Settlement Procedures Act (RESPA), 12 U. S.C. Section 2605 and Section 2609, and regulations adopted pursuant to them by the Secretary of the Department of Housing and Urban Development and state law;

The Complaint filed by the Respondent is a violation of UCC § 3-305(a)(ii)(iii) DEFENSES AND CLAIMS IN RECOUPMENT –

> (a) Except as otherwise provided in this section, the right to enforce the obligation of a party to pay an instrument is subject to the following: (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, (iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms,

Failure to reply to the Qualified Written requests further clouds the standing of the Respondent to file a complaint or request action as it pertains to the Appellants.

II. BECAUSE RESPONDENT FAILED TO PROVIDE ASSIGNMENT OF MORTGAGE PRIOR TO ITS LIS PENS FILING AND NO AMENDMENT THEREAFTER, THE RESPONDENT IS NOT INTITLED TO A SUMMARY JUDGMENT.

A. The Assignment of Mortgage was recorded by the Registrar of Deeds 30 days after the Lis Pens filing by the Respondent for this case. Respondent had no standing at the time of the filing to file its' complaint and Motion for Summary Judgment and has fully relied on a back dated Assignment of Mortgage that was never recorded by the Register of Deeds in Spartanburg County as its' right to continue through the proceedings. The original complaint and subsequent motions by the Respondent should have been denied based on the lack of legal standing

evidenced through their original filing.

B. Assignment of Mortgage to the Respondent was through Mortgage Electronic Registration Systems, Inc. ("MERS") acting solely as nominee for Taylor, Bean and Whitaker Mortgage Corporation ("TBW"). MERS is a Defendant in this civil case. The MERS executive that signed the Assignment of Mortgage is an employee of the Respondent as are the witness and notary of the same document. Appellant challenges the validity of the assignment and had requested a trial, discovery and deposition of the Assignment of Mortgage signer(Objection to Motion of Foreclosure, page 41). Furthermore, Respondent Attorney should be disqualified for representing both Respondent (Plaintiff) and a Defendant in this civil case.

C. In the Lis Pens and Complaint filed by the Respondent, under the General Allegations item #7 Respondent references a certain Note in the principal sum of one hundred sixty thousand and 00/100 ($160,000.00) Dollars with an interest rate of 7.2500% per annum commencing installment payments on January 1, 2006. A copy of the note is attached to the complaint and recorded as Exhibit "A". Upon review of Respondent Exhibit "A", there are noted differences in the signature page acknowledgements of the signor with a missing signature of Roxanne Johnson Schledwitz, one of the Appellants. Roxanne Schledwitz signed all other documents during the closing of the mortgage on the property. The Note was signed at the time of the closing. Appellants have asserted that this document appears to be altered. This falls under the definition of UCC Laws - § 3-407(a). ALTERATION –

(a) "Alteration" means (i) an unauthorized change in an instrument that purports to modify in any respect the obligation of a party,

The Appellants objected to the Complain to the Master-In-Equity and asked for referral of this case to a Trial by Jury and allow evidence to be reviewed.

Respondent presented in its Complaint Exhibit "A, which is an altered document and the Respondent knew that the purported Adjustable Rate Note was fraudulent. Exhibit "A" only represents the Adjustable Rate Note. This is an incomplete filing of the required Note. If Respondent did not own the Mortgage, then it could not have validly instituted this Mortgage Foreclosure action.

III. MASTER-IN-EQUITY ERRED IN DENYING APPELLANTS' TIMELY AND REPEATED REQUEST FOR A TRIAL TO HEAR ARGUMENTS, TESTIMONY AND EVIDENCE

A. Appellant requested a trial by jury to present a proper defense, conduct discovery, depose witnesses and request documentation from the Bankruptcy Courts of South Carolina and Middle Florida in its Objections and Motion for Continuance. This violates South Carolina Civil Procedure Rule 38 –

Rule 38(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 only or of specific real or personal property must be tried by a jury, unless a jury trial be waived.
>
> (b) Demand. 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 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.

As with all responses, Appellant made this request in a timely fashion and was not granted the trial.

B. Respondent filed an Emergency Motion in the United States Bankruptcy Court of Middle Florida on August 27, 2009(Exhibit 1), stating that it had not received the information regarding the mortgage servicing for bundles of mortgages, including the Appellants. This motion was continued until August 10, 2010 where Bank of America requested the court to reactivate a second motion that did not prejudice the ownership of mortgages in allowing Bayview and U.S.

Bank to service the mortgages transferred from TBW. In an attached item to the motion, the Loan Service and Purchase Agreement state the requirements of transfer of the Mortgage, with a sample letter and attachment, or a Lost Mortgage Note Affidavit. It states that by agreeing to this motion, the Respondent acknowledges that mortgage transfer cannot occur without meeting that aforementioned condition. The Respondent failed to provide as evidence any documentation related to the transfer including account numbers, original mortgage documents, or Sales Certificate. The Appellants Objected as to the validity of Respondent's claim as the mortgage servicer and holder. As mentioned previously, in the objections filed by the Appellants, a trial by jury was demanded.

C. Appellants filed a Lis Pens and Motion for Quiet Title on December 22, 2010(Exhibit 4), following proper procedures through the Final Order of Quiet Title. The Master-In-Equity of Spartanburg originally signed the order, then set aside pending a final hearing in which the Court would review the standing of the Appellant and effect on TBW, and assumedly, the Respondent. The Master for the Quiet Title Case is the same in this civil case. As mentioned in the Assignment of Mortgage as well as the objections filed by the appellant and the Quiet Title standing, the Title of the mortgaged property in this case is in question. The Respondent acknowledges the original mortgage holder, Taylor, Bean and Whitaker is currently in Chapter 11 Bankruptcy with Automatic Stay. The Appellant has requested Continuance and trial to conduct discovery, depose witnesses and gather information from the Bankruptcy Courts of South Carolina and Middle Florida that contains redacted documentation that must be released based on request to each court. Appellant was not granted this request to settle Title issues, which

is contrary to South Carolina Civil Procedure Rule 71 –

> Rule 71(e) Actions When Title Is at Issue. In foreclosure or partition actions when title to real property is at issue the court or master to whom the action is referred shall take testimony and receive evidence as to the title and interest in the premises of the several parties. In all such actions the judge or master shall ascertain the rights and interests of the several parties and set forth in the report or order of judgment the conveyances or probate estates, if any, through which the rights or interests were acquired. In all such actions a transcript of record shall be made and preserved in the case file in the office of the clerk of court.

D. At no time does any waiver of Trial by Jury apply to the Appellant's demand. As stated previously, the Respondent continuously violated South Carolina Code of Law SECTION 37-22-190 (11) by attempting to illegally service the Mortgage and disregarding the calculation of the Adjustable Rate Mortgage. Whether it was the Respondent of TBW guilty of the fraudulent practice, the Appellants has no way of knowing at the time they signed the Mortgage and related documents, that the Mortgage Servicer would go outside of the scope of the Mortgage and Rider to calculate the monthly payment.

In *Partain v. Upstate Automotive Group, 386 S.C. 488, 689 S.E.2d 602 (2010),* Partain alleged Upstate Auto fraudulently replaced the truck he purchased with a different truck at the time of pick-up. 386 S.C. at 490, 689 S.E.2d at 603. Partain filed suit against Upstate Auto alleging he was the victim of a "bait and switch" in violation of the South Carolina Unfair Trade Practices Act. Id. Based on an arbitration agreement, Upstate Auto moved to dismiss Partain's claim. The Partain court found Aiken was controlling and concluded the arbitration clause did not apply because "the alleged actions of Upstate Auto constituted 'illegal and outrageous acts' unforeseeable to a reasonable consumer in the context of normal business dealings." Partain, 386 S.C. at 493, 689 S.E.2d at 604-05. Our supreme court noted Partain could not be held to have foreseen that Upstate Auto, after completing a sale, would substitute an entirely different vehicle in place of the truck he had agreed to purchase. Moreover, the court found Partain could not have "contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from allegedly fraudulent conduct." The Appellants could not have considered when signing the document that the mortgage owner would fraudulently service the mortgage in the manner in which has been conducted. Therefore, *Partain v. Upstate Automotive Group* is applicable to the Appellants.

E. The Master did not apply the appropriate Standard of Review, as defined by South Carolina Rules of Civil Procedure, Rule 56 –

> (e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made

> on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

In *Quail Hill, LLC v. Cnty. of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010)* the South Carolina Supreme Court held that "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56, SCRCP." Rule 56, SCRCP provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party."

In this case, the Master ignored the two Objections, Motion for Continuance and Motion for a Hearing for Evidentiary Review filed by the Appellant where genuine issues of material fact were raised regarding the Respondent's standing to foreclose, citing filings in a Federal Criminal Court, two Federal Bankruptcy Courts and referencing documents filed by the Respondent as well as documents on file with the Spartanburg County Register of Deeds. Additionally, the Master set aside a previously signed Final Motion for Quiet Title order in part, to review in hearing the standing of TBW and any John Doe Defendant. In the Quit Title case, the Master acted without response from any named or unnamed Defendant in accordance with Rule 56. Finally, the Appellants raised the fraudulent activities of TBW during the time it originated and service the Appellant's mortgage. The point about fraud regarding the original mortgage owner has clouded the standing of mortgages across the country, including South Carolina. In Spartanburg County, TBW originated and serviced 1133 mortgages from 1995 to 2009. As mentioned previously, other assignees have recorded Limited Power of Attorney from TBW and specific to the mortgages recorded by the County Register of Deeds. The Respondent does not have a Limited Power of Attorney for the Appellant's mortgage nor any other mortgage, object or instrument in Spartanburg County Register of Deeds. The absence of these plus filings of AOM after the LIS PENS and no Affidavit of Lost Note added to the issues with TBW fraud establish enough basis for referral to a Jury Trial, as requested by the Appellants.

CONCLUSION

The Respondent had failed to file the LIS PENS and Complaint with any standing due to the disparity in the filing of the Assignment of Mortgage, which had not been filed at the time of the Respondent filing. The Respondent failed to provide adequate proof of its standing as the mortgage servicer and holder. Finally, the Master-In-Equity erred in not referring the case back to the Court of Common Pleas, subsequently denying the Appellants their right and timely demand for a Trial by Jury. For the reasons stated, this Court should reverse the judgment of the Master-In-Equity.

Respectfully submitted,

August 5, 2015

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FORM 7
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FINAL BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
MASTERS AND SPECIAL REFEREES

Gordon G. Cooper, MASTER-IN-EQUITY

Case No. 2012-CP-42-0899

Bayview Loan Servicing, L.L.C. — Respondent,

v.

Scott Allan Schledwitz; Roxanne Johnson Schledwitz — Appellant.

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant on Bayview Loan Servicing, L.L.C. by depositing a copy of it by United States Postal Service, postage prepaid, on July 17, 2015, addressed to the attorneys of record, Damon Christian Wlodarczvyk and Heidi Carey, Riley, Pope and Laney, LLC, 2838 Devine Street, Columbia, SC 29205.

August 5, 2015

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