

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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SC Court of Appeals

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

S. Jackson Kimball, III, Master In Equity

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Case No. 2011-CP-46-04278  
Court of Appeals No. 2015-001857

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Bank of America, N.A., successor by merger to BAC Home Loans  
Servicing, LP f/k/a Countrywide Home Loans Servicing, LP.....Respondent.

v.

Michelle Minardi and Ameris Bank, Defendants,  
Of whom Michelle Minardi is the.....Appellant.

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**RESPONDENT'S REPLY TO APPELLANT'S RETURN  
TO RESPONDENT'S MOTION TO STRIKE  
MATTER FROM INCLUSION IN THE RECORD ON APPEAL.**

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Date: February 1, 2016

Pursuant to Rule 240(f) of the South Carolina Appellate Court Rules, Respondent Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP (“BANA”), respectfully files its timely<sup>1</sup> Reply to Appellant Michelle Minardi’s (“Minardi”) Return (“Return”) to BANA’s Motion to Strike Matter from Inclusion in the Record on Appeal (“Motion”).

### **BACKGROUND**

In its Motion, BANA asks this Court to strike the following from Minardi’s Designation of Matter to be Included in Record on Appeal: (1) any portion of the transcript of the July 16, 2014 deposition of Minardi, and related exhibits; and, (2) any portion of the transcript of the April 15, 2015 Rule 30(b)(6) deposition of Diane Deloney (“Deloney”). As succinctly explained in BANA’s Motion, the South Carolina Appellate Court Rules prohibit the inclusion of matter in the record on appeal when the matter was not presented to the lower court. *See* SCACR 210(c) (“The Record shall not, however, include matter which was not presented to the lower court or tribunal.”).

Here, the trial court conducted a hearing for Minardi’s motion to bifurcate and remand her counterclaims for jury trial. The trial court denied Minardi’s motion and ruled that Minardi’s counterclaims are subject to a non-jury trial. Minardi filed a motion to reconsider, and the court held a hearing for that motion. Thereafter, the trial court denied Minardi’s motion to reconsider. Minardi appealed the denial of her motion to reconsider. During the hearing on Minardi’s motion to bifurcate and remand

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<sup>1</sup> As Minardi failed to comply with SCACR 240(c)(1) and (e)’s mandate that she include the date of service of her Return upon BANA, BANA provides the following to establish that the filing and service of its Reply is timely. Minardi’s SCACR 240(c)(3) affidavit of counsel (“Affidavit”), which was attached to and filed in support her Return, bears a notary signature dated January 25, 2016. As the Affidavit was included with Minardi’s Return when served upon BANA—as required by SCACR 240(c) and (c)(3)—the Return could not have been properly served upon BANA prior to January 25, 2016. Accordingly, BANA’s Reply is due to be filed and served on or before February 1, 2016. *See* SCACR 240(f) (providing the moving party five (5) days, from the date of service of a return, to file and serve a reply).

counterclaims for jury trial and the hearing on her motion to reconsider, no portions of the deposition transcripts of Minardi or Deloney were admitted into evidence by the lower court. (Exhibit 1, April 14, 2015 Tr. 24:20–23; Exhibit 2, June 30, 2015 Tr. 3:6–12). To this end, the transcripts cannot be included in the record on appeal.

### ARGUMENT

Minardi’s alleged references to and depictions of the testimony purportedly contained in the depositions do not remedy her failure to have the deposition testimony admitted into evidence during either of these hearings addressing the mode of trial for her counterclaims, which is only issue on appeal. *See Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct. App. 1986) (holding that the lower court properly disregarded the testimony that trial counsel *claimed* was reflected in depositions when those depositions had *not* been admitted into evidence). Despite conceding in her Return that the depositions or any portions thereof were not admitted into evidence, Minardi insists that BANA’s Motion should be denied because: (1) BANA did not object to the *taking* of the depositions; (2) Minardi claims portions of the depositions were “quoted”—without citing any such quotations; (3) BANA did not object to the admissibility of the depositions before the trial court; and (4) granting BANA’s Motion would preclude consideration of the depositions in *future* proceedings after remand of this case to the trial court. Each of these arguments fails.

**I. The lack of an objection to the *taking* of any depositions is irrelevant.**

In her Return, Minardi repeatedly asserts that BANA did not object to the taking of Diane Deloney’s deposition. Whether BANA objected to the taking of Deloney’s deposition is irrelevant to the question of whether the deposition testimony was admitted

into evidence during the hearings addressing the mode of trial for Minardi's counterclaims. The plain language of the Rule 32 SCRPC—quoted by Minardi in her Return—provides that any part of a deposition *may* be used in a trial court proceeding “so far as” the deposition testimony is “admissible under the rules of evidence.” Rule 32(a), SCRPC (emphasis added). The mere fact that a deposition was taken does not render the deposition testimony *admissible*, much less *admitted* into the record. See *Gilmore*, 290 S.C. at 58, 348 S.E.2d at 184; see also *Summersell v. S.C. Dep't of Pub. Safety*, 337 S.C. 19, 22, 522 S.E.2d 144, 145 (1999) (holding that the issue of the admissibility of testimony was not preserved for appellate review—and would be error for the appellate court to consider—when the trial court did not specifically address the issue of its admissibility at the hearing or in the resulting order, and the issue of its admissibility was not raised in a post-trial motion).

## **II. No portions of any deposition testimony were read into evidence.**

Although Minardi asserts that her counsel “quoted” the deposition testimony in the proceedings before the Master-in-Equity (Return 2, 6), she fails to provide any citation to the record where she did so. Indeed, a review of the transcript of the hearing on Minardi's Rule 59(e) motion to reconsider the trial court's order denying her motion to bifurcate and remand her counterclaims to the jury roster reveals no quotations of the deposition testimony. The closest Minardi comes to “quoting” from Deloney's deposition is the statement of Minardi's counsel to the court:

Now I have to get into the deposition at this point to demonstrate why we believe the claims to be permissive [sic], and I apologize, I don't have a copy for [opposing counsel], but when we questioned their designee under oath, Your Honor, and I will be happy to pass up a condensed version if you'd like to see it . . . .

(See Exhibit 2, June 30, 2015 Tr. 3:6–12.) At this hearing, however, Minardi’s counsel never read any portion of the deposition to the court nor offered any portion of the deposition to be admitted into evidence. (See *id.*) Trial counsel’s mere representations as to the nature of the testimony contained in depositions that have not been admitted into evidence cannot be considered by the court. See *Gilmore*, 290 S.C. at 58, 348 S.E.2d at 184. Therefore, the deposition transcripts of Minardi and Deloney should not be a part of the record for this appeal given the limited record developed by Minardi’s counsel during the hearings for the motion to bifurcate and remand counterclaims to the jury trial roster and the subsequent hearing for the motion to reconsider.

**III. Any purported failure to object to the admission of any deposition testimony from the deposition transcripts of Minardi or Deloney does not preclude exclusion of the transcripts from the record of appeal.**

Remarkably, Minardi insists in her Return that the “real issue” posited by BANA’s Motion “turns *not* on the procedural application of South Carolina Appellate Court Rules,” but on BANA’s failure to object to the depositions pursuant to Rule 32(b) of the South Carolina Rules of Civil Procedure. (Retrun 4 (emphasis added).) Minardi’s insistence that BANA’s Motion should be denied because it failed to raise an objection to the admission of the deposition testimony, pursuant to Rule 32(b) SCRCF, presupposes that the depositions were *admitted into evidence*.

As noted above, Minardi has conceded that *no* portions of the transcripts were admitted into evidence by the trial court. It is axiomatic that BANA could not object to the admission of the evidence when the evidence was never offered for admission. Minardi therefore seems to confuse the issues of the admissibility of evidence into the record *at trial* and inclusion of matter that has been admitted into evidence into the record

*on appeal.* Despite Minardi's insistence otherwise, the issue does "turn on" the application of the South Carolina Appellate Court Rules, which prohibit the inclusion of matter in the record on appeal that has not been presented to the lower court. Rule 201(h), SCACR; *see Henning v. Kaye*, 307 S.C. 436, 437–38, 415 S.E.2d 794, 794–95 (1992) ("[T]he South Carolina Appellate Court Rules are not mere technicalities . . . . It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review.").

On appeal, Minardi now effectively attempts to do that which she failed to do in the proceedings below—move for the admission of the deposition testimony of Minardi and Deloney into the trial court record for consideration of her motion to bifurcate and remand her counterclaims to the jury trial roster. If, as Minardi contends, the deposition testimony was admissible and relevant to the issues in her counterclaims and defenses, it was incumbent upon Minardi to offer the depositions to the trial court for admission into evidence and obtain a ruling on the issues. As she failed to do so below, Minardi cannot now seek the admission of the evidence on appeal. *See Summersell*, 337 S.C. at 22, 522 S.E.2d at 145. As no portions of the deposition transcripts of Minardi or Diane Deloney were admitted into evidence by the lower court, the transcripts cannot be included in the record on appeal. Accordingly, this BANA's Motion should be granted.

**IV. Granting BANA's Motion will not preclude Minardi from offering the depositions or portions of them into evidence in future proceedings before the trial court.**

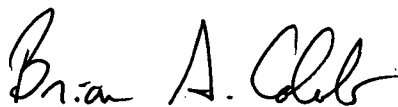
In an apparent attempt to confuse the issue at hand, Minardi mischaracterizes BANA's Motion as a motion to strike the depositions from "*future* trial proceedings." (Return, 7 (emphasis added).) BANA requests no such relief in its Motion. Rather,

BANA requests that this Court strike the depositions of Minardi and Deloney from the *record on appeal* because the depositions have *yet* to be admitted into evidence—a point conceded by Minardi in her Return, (Return 5 (“It is true that the lower court admitted no portion of the transcripts, and that no portions of the transcript [sic] was admitted into evidence.”)) and the affidavit of her counsel filed in support of her Return, (Affidavit 2 (“The deposition transcript pages were not, however, admitted into evidence, but rather referenced in oral argument before the [Master-in-Equity].”)). This Court clearly established in *Gilmore*, 290 S.C. at 58, 348 S.E.2d at 184, that mere *references to* or *depictions of* testimony purportedly contained in depositions is not sufficient for the testimony to be deemed admitted into evidence.

Because of the limited remedy sought by BANA’s Motion, granting BANA’s Motion and excluding the deposition transcripts of Minardi and Deloney from the record of this appeal will not preclude Minardi’s attempted use of either transcript at subsequent trial court proceedings. After remand of this case to the trial court, Minardi would be free to offer the depositions, or any portions thereof, into evidence and have the trial court determine the admissibility of the deposition testimony at that time.

#### CONCLUSION

For the foregoing reasons, BANA prays that the Court grant its Motion and exclude the deposition transcripts of Minardi and Deloney from the record for this appeal.



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STATE OF SOUTH CAROLINA	)	IN THE COURT OR COMMOM PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	Case No. 2011-CP-46-4278
Bank of America, N.A.,	)	
Successor By Merger to BAC	)	
Home Loans Servicing, LP,	)	
f/k/a Countrywide Home Loans	)	
servicing, LP,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Michelle Minardi and Ameris	)	
Bank,	)	
	)	
Defendants.	)	
	)	

**COPY**

TRANSCRIPT OF PROCEEDINGS

YORK, SOUTH CAROLINA

APRIL 14, 2015

This transcription was prepared from an open audio recording provided by the court and may contain portions that are inaudible or indiscernible and phonetic spellings of proper names and terms

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RESPONDENT'S EXHIBIT 1

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## 1 PROCEEDINGS

2 BEFORE: THE HONORABLE S. JACKSON KIMBALL

3 THE COURT: This is Case No. 2011-CP-46-  
4 4278, Bank of America against Michelle  
5 Minardi, and others. Present and representing  
6 the Plaintiff is Ms. Caroline Glenn. Present  
7 and representing the Defendant, Mr. Cam  
8 Halford.

9 According to what I have, I have three  
10 motions of the Defendant; is that right?

11 MR. HALFORD: That's correct, Your Honor.

12 THE COURT: All right. Proceed.

13 MR. HALFORD: Your Honor, just as a  
14 matter of housekeeping, the first motion was  
15 to compel their 30 (B)(6) deposition. That  
16 will occur at my offices tomorrow. So I'm  
17 going to pull -- Let's just hold onto that.

18 THE COURT: All right. So that's  
19 resolved, right?

20 MR. HALFORD: I believe so, Your Honor.  
21 I just -- I made the motion, out of abundance  
22 of caution, in keeping with the Court's  
23 scheduling order.

24 THE COURT: Well, I mean, is there a  
25 deposition scheduled tomorrow?

1 MR. HALFORD: Yes, sir, there is.

2 THE COURT: Okay. Well, that's resolved.

3 MR. HALFORD: Thank you, sir.

4 Moving to the second motion, Your Honor,  
5 it's Defendant's motion to remand the legal  
6 counterclaims back to the circuit court, Your  
7 Honor.

8 THE COURT: This is the circuit court.

9 MR. HALFORD: I'm sorry. Back to the  
10 jury roster, Your Honor.

11 As you're aware, this case was filed --  
12 and not to go over the history in too much  
13 detail, but it was filed November 11, 2011.  
14 I know it's an old case. My client answered  
15 and filed legal counterclaims on January 11,  
16 2012, Your Honor. But it is old. It went  
17 before Judge Alford September 7, 2013, on a  
18 motion for reference, which was denied. And,  
19 as you are aware, Judge Hayes later granted  
20 that motion. And we're here, Your Honor --

21 The case does have legal counterclaims,  
22 which are compulsory, Your Honor. They arise  
23 out of the stopping of payments or the default.  
24 I think Your Honor is aware of that facts in  
25 the case. This was the matter where a HAMP

1 modification was granted in the year 2010,  
2 and there were 13 accepted payments. On the  
3 14th payment, they were rejected, and then  
4 the commenced this foreclosure, Your Honor.  
5 So we'd move to remand the case - at least, the  
6 legal counterclaims - back to the jury roster,  
7 at this time, Your Honor.

8 THE COURT: Okay. Ms. Glenn, what about  
9 that?

10 MS. GLENN: Your Honor, it would be our  
11 argument that the counterclaims are not legal,  
12 that they are not compulsory. There are  
13 three new counterclaims that he has  
14 asserted --

15 THE COURT: Well, let me stop you there.  
16 The one question I had is which -- what I'm  
17 dealing with, I think, is the Answer and  
18 Counterclaim filed January of 2012, because  
19 the third motion is a motion to amend that.

20 In any event, I've read them both. So  
21 you go ahead.

22 MS. GLENN: Well, okay.

23 THE COURT: There's some added claims and  
24 defenses. But, in terms of the breach of  
25 contract, fraud and negligence, I believe

1 those claims are contained in both the -- in  
2 the old Answer and Counterclaim and the  
3 Proposed Amended Answer and Counterclaim. So  
4 go ahead from there.

5 MS. GLENN: What I was kind of going off  
6 of, there were a few new counterclaims added,  
7 but, your Honor, we think that the  
8 counterclaims are permissive. And, based on  
9 the U.S. case the Supreme Court just ruled on,  
10 Carolina First, BAC, LLC, in that case, they  
11 set out a couple of different assertions. And  
12 they ruled that breach of contract was not held  
13 to be a legal compulsory counterclaim. In this  
14 particular case, they say that was because  
15 the breach that they were referring to was  
16 two years after the guarantee had been  
17 executed; so, therefore, the claim does not  
18 arise out of the ongoing transaction or  
19 occurrence, because it does not affect the  
20 execution or the enforceability of the  
21 guarantee agreement.

22 THE COURT: Okay. Well, let's stop  
23 there. If I remember, from the first,  
24 obviously, it's not a mortgage foreclosure,

1 right? Was it a mortgage foreclosure? It  
2 had to do with the guarantee.

3 MS. GLENN: Guarantee, yes, sir. Yes,  
4 Your Honor.

5 THE COURT: Was it a mortgage foreclosure?  
6 What's the name?

7 MS. GLENN: BAC, LLC.

8 THE COURT: It's clearly a debt.

9 MS. GLENN: Yes, it's a foreclosure  
10 action.

11 THE COURT: Okay. All right.

12 MS. GLENN: I've been so focused on the  
13 last part.

14 THE COURT: Okay. And read that language  
15 again, please.

16 MS. GLENN: Well, this is just, right  
17 now, on the breach of contract counterclaim.

18 THE COURT: Correct.

19 MS. GLENN: They stated that the breach  
20 of contract that was claimed was -- took  
21 place two years after the guarantees had been  
22 executed; so, therefore, the claim does not  
23 arise out of the underlying transaction or  
24 occurrence, because it does not affect the  
25 execution or enforceability of the guarantee

1 agreement. And I would argue here the breach  
2 of contract that is counterclaimed, in our  
3 action, is actually talking about the breach  
4 of the trial mods, so that does not arise out  
5 of the stated transaction or occurrence,  
6 because it doesn't -- it doesn't enforce  
7 the -- it doesn't affect the enforceability  
8 of the note and mortgage. It was six years  
9 after the note and mortgage.

10 The case also held, Your Honor, -- I'm  
11 sorry. It cited another case that found that  
12 claims of fraud, negligence and unfair trade  
13 practices in a foreclosure action, were not  
14 compulsory, because those claims do not affect  
15 the enforceability of the note.

16 THE COURT: Go ahead.

17 MS. GLENN: Those were the other  
18 counterclaims that I believe were asserted.

19 THE COURT: I know I downloaded that  
20 case, but do you have a copy of it for me,  
21 please? It's brand new, right?

22 MS. GLENN: Yes, sir.

23 THE COURT: Couple of months or a month?

24 MS. GLENN: Very new. Well, the Supreme  
25 Court just ruled on it in January.

1 THE COURT: I remember reading it. I  
2 need to refresh my memory. I remember  
3 reading it, but I haven't looked at it,  
4 obviously. All right. I've read the BAC,  
5 LLC case. Again, go ahead, Ms. Glenn.

6 MS. GLENN: To continue on, BAC, LLC  
7 states that, one is entitled to a jury trial  
8 on counterclaims in an equitable action only  
9 if the counterclaims are legal and compulsory  
10 in nature. The counterclaim is compulsory,  
11 if it arises out of the same transaction and  
12 occurrence as the party's claim. In a  
13 foreclosure action, a counterclaim arises out  
14 of the same transaction and occurrence and is  
15 thus compulsory when there is a logical  
16 relationship between the counterclaim and the  
17 enforceability of the guarantee agreement,  
18 (inaudible), mortgage owner.

19 I would argue that these counterclaims  
20 asserted are permissive, in nature, as they  
21 do not affect the enforceability of the note  
22 and mortgage.

23 THE COURT: What about the logical  
24 relationship test?

1 MS. GLENN: I don't -- It's my position  
2 that there's not a logical relationship,  
3 because the counterclaims are based on the --  
4 any breach or fraud that he's alleging is  
5 based on the trial modification, which does  
6 not affect the enforceability of the  
7 underlying note and mortgage.

8 THE COURT: Okay. Mr. Halford?

9 MR. HALFORD: Yes, sir. In brief  
10 response, I respectfully disagree, Your  
11 Honor. What makes it compulsory, in this  
12 instance, is the default was cured by their  
13 own correspondence to my client; and then  
14 they continued to accept, as you recall, 13  
15 payments, in this instance, stopping the 14th  
16 and placing her in foreclosure. So the  
17 default was cured, actually, back in October  
18 of 2010, and she continued to make payments;  
19 and they continued accepting credit  
20 statements. It states here, thank you for  
21 fulfilling this commitment. So the default  
22 are the crediting the payments -- excuse me --  
23 stopping the payments, in this case, Your  
24 Honor, I'd argue, is both compulsory, and  
25 there's no fault in the original Complaint.

1 I made a motion to amend. But, as to the  
2 breach of contract and/or the negligence  
3 counterclaims, I believe those are questions  
4 of fact, and we'd ask that it be sent to the  
5 jury roster, Your Honor.

6 THE COURT: Well, not so fast.

7 MR. HALFORD: Yes, sir.

8 THE COURT: I would make a distinction  
9 between the breach of contract counterclaim  
10 and the fraud and unfair trade practices and  
11 FDCPA. The FDCPA counterclaim is just in the  
12 new -- in the one we -- in the opposing  
13 amended counterclaim? I can't remember.

14 MR. HALFORD: I believe that was in the  
15 original, but I --

16 THE COURT: Well, in any event, it seems  
17 to me to be that fraud, negligence, FDCPA  
18 claim and any unfair trade practices claim,  
19 are premised entirely on conduct unrelated to  
20 enforcement of the note and the mortgage and  
21 could be maintained separate and apart from  
22 the foreclosure action. And they are not  
23 related to the enforceability of the note and  
24 mortgage. They are related to the Plaintiff's  
25 alleged conduct not arising out of contract.

1 I'm talking about fraud, negligence, unfair  
2 trade practices, and FDCPA. Now, I'm not  
3 talking, you know, about the breach of  
4 contract.

5 MR. HALFORD: I understand, Your Honor.  
6 Those matters were not in the original  
7 Complaint, just the FDCPA that the -- You're  
8 referring to matters which we sought to  
9 amend. They're not in the original Answer.

10 THE COURT: Well, we can -- And maybe I'm  
11 covering too much at one time, but, now,  
12 answer my question, I guess. How do the --  
13 what the Defendant has alleged is improper or  
14 unlawful conduct of the Plaintiff, unrelated  
15 to the note and mortgage; but rather, in  
16 failing to abide by the terms of a trial  
17 modification agreement, right?

18 MR. HALFORD: No, sir. I would argue, in  
19 our position, that, as I've stated, that  
20 default is secured here, and she continued to  
21 make 13 payments. And the lender rejected  
22 the 14th and then placed her into foreclosure.  
23 However, Your Honor, with the enforceability  
24 of the note and mortgage, she also pleaded,  
25 in her original Answer, and, again, there

1 will be an equitable defense, obviously, Your  
2 Honor.

3 THE COURT: Well, we can cast those  
4 aside. Those would have to be heard. Well,  
5 they're non-jury, anyway. All but equitable  
6 defense -- And I've looked at that, in trying  
7 to get prepared for the motion. The equitable  
8 defenses do not afford a jury trial right, in  
9 any event.

10 MR. HALFORD: I would agree with that,  
11 Your Honor.

12 THE COURT: As an aside, what is her --  
13 what are her damages, in these legal causes  
14 of action?

15 MR. HALFORD: Increased fees, Your Honor,  
16 penalties and fines. As you've stated, I'm --  
17 I know it probably doesn't mean much to the  
18 Court, you know, she's got the right to have  
19 and communicate to her attorney. They've been  
20 to her door 15 or 20 times, after Dean was --  
21 excuse me -- after Korn and their client was  
22 notified that she's represented by counsel, I  
23 mean --

24 THE COURT: Well, isn't that conflict  
25 outside the enforceability of the note and

1 mortgage? I don't deny that that may afford  
2 the basis for a claim. And I denied -- You  
3 know, I think, didn't I deny summary judgment  
4 to the --

5 MR. HALFORD: You did. Today's motion is  
6 based to bifurcate and refer back to the jury  
7 roster, Your Honor.

8 THE COURT: I mean, I don't -- I'm not  
9 saying that there may not be conduct  
10 unrelated to the enforcement of the note and  
11 mortgage. An FDCPA claim doesn't have  
12 anything to do, necessarily, with the  
13 enforcement of the note and mortgage. It  
14 stands alone. If there may -- She could be  
15 current and, if they devoured the FDCPA, she  
16 has a standalone claim. She could be current,  
17 if she -- If they harassed her, she has a  
18 standalone claim. That's what I'm saying. If  
19 she's suffered damages by fraud -- She could  
20 be current, but if she suffered damages by  
21 fraud, in this trial mod program, she could  
22 bring a standalone claim, it seems to me.  
23 Now, again, I'm guessing which contract.

24 MR. HALFORD: Your Honor, in discussing  
25 both the negligence and the breach of

1 contract claim, we seem to be focused on the  
2 negligence, at the moment. If I'm wrong,  
3 please tell me. But, you know --

4 THE COURT: Well, no, I wasn't focusing  
5 on the negligence. I just named those three,  
6 negligence, fraud, FDCPA, unfair trade  
7 practices.

8 MR. HALFORD: Well, the interesting  
9 thing --

10 THE COURT: But go ahead, if you want to  
11 talk about the negligence.

12 MR. HALFORD: Well, one of the  
13 interesting things about the case is, Your  
14 Honor, they tell her, in 2010, after she  
15 successfully completes the three trial  
16 modification payments, that she's pleased to  
17 afford that, under their special forbearance  
18 agreement. She never applied for a  
19 forbearance agreement, ever.

20 THE COURT: Well, that's a question of  
21 fact. I'm not --

22 MR. HALFORD: That's the --

23 THE COURT: The question here is whether  
24 those facts are decided by a jury or the  
25 courts, without a jury. I don't -- Look,

1 I've seen plenty of crazy fact situations  
2 that have been created by numbers. I'm not  
3 saying this is one, because I don't know the  
4 facts. But what -- All I am saying is the  
5 issue here is whether -- whether, in respect  
6 to the tort claims, I'll call them, and  
7 statutory claims, those bear any logical  
8 relationship to enforcement to the note and  
9 mortgage, or are they essentially standalone  
10 claims. That's the problem I'm having. I'm  
11 not saying that she hasn't been -- Somebody  
12 would've -- Somehow, somewhere, sometime,  
13 somebody would determine whether she's --  
14 whether the Plaintiff has wronged her. The  
15 question is who will that be. Will it be a  
16 jury or a judge, sitting without a jury.

17 What's your response to that?

18 MR. HALFORD: I think there is a logical  
19 relationship. The HAMP modification grew  
20 straight out of the mortgage, which was in  
21 default. And I'm not denying that she had not  
22 missed payments, but at the point that she  
23 negotiated that HAMP modification, which  
24 occurred back in, again, 2012, it states that  
25 it is a HAMP modification, it's not a

1 forbearance. A 877.22 payment, and she  
2 successfully makes three. And they  
3 acknowledge, in writing, that she'd made  
4 three.

5 THE COURT: I understand.

6 MR. HALFORD: I think it's whether or not  
7 she modified the note. So what the agreement  
8 was, Your Honor --

9 THE COURT: Well, here's what I -- I'm  
10 sorry. Go ahead.

11 MR. HALFORD: As to what that agreement  
12 was, I think she successfully negotiated and  
13 navigated a HAMP modification; and, obviously,  
14 she was denied a fair opportunity to  
15 consummate that. I think it's a question for  
16 the jury.

17 THE COURT: Well, it's certainly a  
18 question of fact for somebody.

19 All right. Tell me -- Let's talk about  
20 the breach of contract.

21 MR. HALFORD: Yes, sir.

22 THE COURT: What's the essence of the  
23 breach of contract claim?

24 MR. HALFORD: Failure to meet the  
25 substance of offer, acceptance in writing,

1 and consideration of payment, which was  
2 accepted.

3 THE COURT: Let's talk about its  
4 relationship to the mortgage foreclosure.

5 MR. HALFORD: Yes, sir, I will. It's our  
6 fifth defense, Your Honor, that we alleged --  
7 and, again, those are equitable, also. But  
8 we alleged that there was a new agreement  
9 form, by contract, Your Honor; and, again, it  
10 was in writing, signed by my client, and  
11 consideration was conveyed and accepted. So,  
12 again, going back to whether or not it's  
13 compulsory and whether or not there is a  
14 logical relationship, clearly, I think it  
15 goes to the enforceability of the note and  
16 mortgage, as it was modified, not under the  
17 original terms of the mortgage. There is no  
18 question here that they modified it or that  
19 she, at least according to them, completes  
20 their trial plan. It was a HAMP trial plan.  
21 It was not a forbearance. So at the point  
22 that there is a default, Your Honor, it is  
23 not my client degrading the default; it is  
24 Bank of America.

1 THE COURT: It seems to me that she's  
2 either, at some point, in default, or she was  
3 not. If she was not, they can't foreclose  
4 the mortgage. If she was, they can,  
5 obviously.

6 MR. HALFORD: Do you want me to sit down,  
7 Judge?

8 THE COURT: Pardon me?

9 MR. HALFORD: Do you want me still  
10 standing? I didn't know --

11 THE COURT: No. Well, no, have a seat.

12 Ms. Glenn, how about this? If --  
13 What is the allegation of default? I've got  
14 the Complaint here. Hang on a minute. Let  
15 me --

16 MS. GLENN: As in the date of default?

17 THE COURT: Yes. Well, involvement. I  
18 assume that it -- It has to be failure to  
19 make a payment, right?

20 MS. GLENN: Yes, sir.

21 THE COURT: A timely payment.

22 MS. GLENN: May 1st, 2010.

23 THE COURT: Okay, hang on. I'm looking  
24 at the Complaint. Hang on just a minute.  
25 Okay. Monthly payments due or in default

1 since May 1, 2010. Is there anything in the  
2 file indicating to me what the basis of that  
3 assertion is? Payments were in default. Why  
4 were they in default? What is the  
5 Plaintiff's claim?

6 MS. GLENN: That she hasn't -- That her  
7 payments are not current.

8 THE COURT: Well, what triggered the  
9 default? That's what I want to know.

10 MS. GLENN: What I -- what's been  
11 explained to me --

12 THE COURT: Well, let's back up. Let me  
13 be sure I'm saying it right. All right.  
14 Does the Plaintiff acknowledge that there was  
15 some sort of modification agreement going  
16 forward?

17 MS. GLENN: The Plaintiff acknowledged  
18 that there was a modification -- a trial  
19 modification was offered and that they did  
20 accept payments, but that the modification  
21 agreement was never ratified. It never came  
22 into fruition into a full modification,  
23 because the -- my client claims that they  
24 never received the signed document back from

1 the Defendant, which would take it from a  
2 trial mod to a permanent modification.

3 THE COURT: But they kept --

4 MS. GLENN: They did continue to make  
5 payment -- or to collect payment, Your Honor,  
6 or keep the payments, Your Honor, and they --  
7 The way they explain that is that they just  
8 apply them to what is owed. As to a trigger  
9 that these banks do, as when they decide,  
10 we're going to file a foreclosure tomorrow. I  
11 don't know that. That's a good question,  
12 because sometimes you'll have one that is in  
13 default for three years before they decide to  
14 pull the trigger and file foreclosure.

15 THE COURT: Well, the trigger, in a  
16 general sense, if I understand you right, is  
17 that they say that the signed agreement was  
18 not returned?

19 MS. GLENN: That is correct. And we  
20 discussed that prior -- previously.

21 THE COURT: Yes, I don't remember what  
22 --

23 MS. GLENN: But she -- or they offer  
24 modification. They do all the paperwork,  
25 trial modifications, sets out payment

1 schedule. But my clients claim that they did  
2 not see a return signed document from the  
3 Defendant stating that -- and it clearly  
4 stated, you must returned this signed to us  
5 to tender into a full trial modification,  
6 permanent modification. My client's saying  
7 that that never occurred; so, therefore, the  
8 modification went away.

9 THE COURT: And she is in default.

10 MS. GLENN: Correct.

11 THE COURT: Then why isn't there some --  
12 and I don't mean necessarily a lot, but some  
13 logical relationship between their claim of a  
14 default and her claim of breach of contract?

15 MS. GLENN: I mean, I would just argue  
16 that there is a logical relationship, because  
17 the breach of contract claim that comes out  
18 of the trial modification, that never went to  
19 a permanent modification, so it didn't change  
20 any terms of the original contract and was  
21 in court --

22 THE COURT: Okay. Go ahead.

23 MS. GLENN: -- for years afterwards.

1 THE COURT: So she made the payments how  
2 long before they declared it in default? Is  
3 he right? Is Mr. Halford right?

4 MS. GLENN: I think that's about right.  
5 I think they've gotten about ten payments and  
6 then stopped those other payments.

7 THE COURT: Okay.

8 MR. HALFORD: Briefly, Your Honor.

9 THE COURT: Yes, sir.

10 MR. HALFORD: As of May, 2010, she is in  
11 a trial modification.

12 THE COURT: We've already been over that.

13 MR. HALFORD: Okay.

14 THE COURT: I mean, I'm assuming that to  
15 be true.

16 MR. HALFORD: All right. Thank you.

17 THE COURT: The question is whether  
18 there's logical relationship between -- You  
19 do need to stand up. I'm talking to you.

20 MR. HALFORD: I'm sorry, Your Honor.

21 THE COURT: Whether there's a logical  
22 relationship between the counterclaim of  
23 breach of contract and the enforceability of  
24 the note and mortgage. And I'm inclined to  
25 believe it probably is. It's not a

1 separate -- It's not -- It's really not -- In  
2 the mortgage business, it's really not a  
3 separate agreement. That was to become --  
4 Let me say it this way. If they hadn't  
5 declared her in default, in the trial  
6 modification agreement, they couldn't have  
7 enforced the note and mortgage. So I find  
8 that there is, in this -- and these facts --  
9 and the BAC case says that. Because it is a  
10 fact intensive thing, I find that there is  
11 some logical relationship between the breach  
12 of contract and the enforceability of the  
13 note and mortgage. Thus, that that is a  
14 compulsory legal counterclaim and is entitled  
15 to be bifurcated and tried before a jury.

16 Now, since we're talking about -- Y'all  
17 haven't done any discovery, have you? You  
18 have?

19 MR. HALFORD: Yes, sir.

20 THE COURT: What discovery do you have  
21 about damages, Mr. Halford?

22 MR. HALFORD: They've taken my client's  
23 deposition.

24 THE COURT: What are the alleged legal  
25 damages of breach of contract?

1 MR. HALFORD: According to their  
2 Affidavit of Debt, which she would -- in order  
3 to properly reinstate, there's over a hundred  
4 thousand dollars.

5 THE COURT: Well, that's not damages.  
6 That's what -- That's as a result of their  
7 failing to accept payments. I mean, they've  
8 waived the deficiency. There's a waiver of a  
9 deficiency. The damages all relate to -- If  
10 the damages all relate to the failure to  
11 make -- or what they claim -- Under the note  
12 and mortgage, that's not damage. She owes  
13 it. The question is whether she has to pay  
14 it so one of the mortgages can be foreclosed.  
15 She owes it. If it's -- If those are  
16 payments, under the note and mortgage, she  
17 owes it. The question is whether the note  
18 and mortgage can be enforced, under the  
19 circumstances. I mean, she owes the debt.  
20 But the breach of contract cause of action  
21 will not extinguish the debt. It will  
22 provide her -- It could provide her extra  
23 money -- I'm not sure what -- to apply to the  
24 debt, but it won't extinguish the debt any

1 more than a negligence or fraud cause of  
2 action.

3 Maybe I made a mistake in saying it's a  
4 compulsory counterclaim, because the result  
5 of the -- Well, I'm going to stick by that.  
6 The result of the -- what are the damages?  
7 Let me just ask that. What she owes is not  
8 her damages. She owes it.

9 MR. HALFORD: Damages being the amount of  
10 which they've sought to collect. That's in  
11 violation of the Fair Debt Collection  
12 Practices Act.

13 THE COURT: Well, what are they?

14 MR. HALFORD: I think that's determined  
15 by the charter of fact.

16 THE COURT: Well, what evidence is there?  
17 That's what I'm asking you.

18 MR. HALFORD: How many of these have you  
19 got on the --

20 MS. GLENN: I think, 15.

21 THE COURT: Money. Money. I'm talking  
22 about money.

23 MR. HALFORD: I don't recall what the  
24 fines are. I don't know, under the FDCPA,  
25 what the remedy would be.

1 THE COURT: Well, that'd be a statutory  
2 penalty. Or, I'm not sure. I don't -- There  
3 have been no motions -- Did we hear motions  
4 related to any of the counterclaims, like the  
5 FDCPA, fraud, or anything like that? Have  
6 there been any motions about that?

7 MS. GLENN: No, Your Honor, not on my  
8 behalf. The only motion, prior to this one,  
9 I believe, is his motion for summary judgment.

10 MR. HALFORD: That's correct.

11 THE COURT: Well, depending on what may  
12 come of it, there may not be an FDCPA cause  
13 of action at all. But that's not before me.

14 What I need to know is what damages does  
15 she claim? You haven't discovered that? Has  
16 any number been provided? Do you have  
17 interrogatories?

18 MS. GLENN: I see -- I mean, we have. I  
19 don't know, off the top of my head. Let me  
20 pull this up. He claims a seventy-five  
21 hundred dollar amount in the --

22 THE COURT: No, it just says over  
23 seventy-five hundred dollars, in the  
24 counterclaim. Damages in excess of seventy-

1 five hundred dollars. That's to keep it out  
2 of the magistrate's court, I guess.

3 MS. GLENN: I'm having a hard time finding  
4 their responses to all of those.

5 THE COURT: Well, you don't need to do  
6 that now. I just -- If Mr. Halford, can't  
7 tell me, I don't know how you would know.  
8 What out-of-pocket money has she lost? Or --

9 MR. HALFORD: Aside from hiring counsel,  
10 I'm not sure.

11 THE COURT: Well, there's no -- There  
12 would be no -- Is there a right to attorney  
13 fees for breach of contract?

14 MR. HALFORD: We sent the contract  
15 (inaudible) a statute. In a general  
16 response, I think, --

17 THE COURT: Well, I know.

18 MR. HALFORD: -- yes, sir. I mean, there  
19 is an agreement in writing, and I have --  
20 Forgive me, because I didn't memorize the  
21 three-page agreement, but it was signed by my  
22 client with a consideration extended. There's  
23 the chief's order. There are two of the  
24 chief's orders.

1 THE COURT: The chief's order doesn't  
2 provide for attorney fees, does it?

3 MR. HALFORD: I believe it does.

4 THE COURT: Does it, Ms. Glenn?

5 MR. HALFORD: In the discussion of the  
6 Court, Your Honor. I'm sorry.

7 THE COURT: I don't believe the chief's  
8 order provides payment of attorney fees. But,  
9 assuming it does, I'm at a loss to understand  
10 what her damages are. She can't claim, as  
11 her damages, what she owes. It's as simple  
12 as that. If she owes a hundred thousand  
13 dollars, that's not damages. Now, they might  
14 not be able to complete their foreclosure  
15 action, by reason of the breach of contract.  
16 But the hundred thousand dollar she owes, by  
17 definition, is not damages.

18 All right. I'm -- I find that the breach  
19 of contract action has some logical  
20 relationship to the enforcement of the note and  
21 mortgage, so that it's a compulsory  
22 counterclaim and the Defendant would be  
23 entitled to a jury trial on that, as to the  
24 tort claim. By that, I mean fraud and  
25 negligence. I rule they are permissive.

1 Their right to a jury trial has been waived,  
2 as to those, and they would be heard in  
3 conjunction with the foreclosure case.

4 As to the FDCPA, I don't know what -- Let  
5 me see what else is in the original answer and  
6 counterclaim.

7 MR. HALFORD: I was going to advise the  
8 Court that there was no fraud in the original.

9 THE COURT: Okay.

10 MS. GLENN: Fraud and unfair trade and  
11 breach of fiduciary duty, I think, were the  
12 three new ones.

13 THE COURT: Well, I'm going to leave  
14 questions of -- that the validity of the  
15 counterclaims to whatever motions the  
16 Plaintiff wants to make.

17 MR. HALFORD: Judge, are you changing  
18 your prior order?

19 THE COURT: To what?

20 MR. HALFORD: All motions were to be made  
21 by March 15th, I believe it was. I'd have to  
22 look at your --

23 THE COURT: Well, is the case on the jury  
24 roster? It's a 2011 case. You could probably  
25 be tried tomorrow.

1 MR. HALFORD: I don't think it'd take but  
2 a day.

3 THE COURT: Is the discovery complete?

4 MS. GLENN: We have a deposition tomorrow,  
5 at his office.

6 THE COURT: What else, other than that?

7 MR. HALFORD: That would complete it,  
8 from my side, Your Honor. It would be ready  
9 for trial.

10 THE COURT: Ms. Glenn?

11 MS. GLENN: I'd have to go talk with my  
12 client. I suppose they might want to -- But  
13 she's already been deposed, correct?

14 THE COURT: Yeah. I do not recall if  
15 there's a scheduling order that said that all  
16 motions have to be filed and heard, dispositive  
17 motions by a date.

18 MS. GLENN: Yes, Your Honor, I can do --  
19 set it for the May 4th -- stating that we  
20 will come back before you May 4th.

21 THE COURT: For the trial?

22 MS. GLENN: The trial.

23 MR. HALFORD: That's correct.

24 THE COURT: Well, that would go by the  
25 boards and, based on my ruling about the

1 contract, breach of contract, because that  
2 would have -- that could be tried first.

3 I know I'm stretching this out. But,  
4 Mr. Halford, I can't -- I have trouble  
5 conceptualizing what relief you would get --  
6 what legal relief you would get, as a  
7 result -- if the Defendant prevailed upon the  
8 breach of contract counterclaim. Let's just  
9 say she did, and the jury awarded her some  
10 additional -- maybe late charges or something  
11 like that, that was charged, as a result of  
12 Plaintiff declaring her in default, what then  
13 would be the status of the note and mortgage?

14 MR. HALFORD: After those claims were  
15 tried, they would be subject to foreclosure  
16 in a hearing before Your Honor.

17 THE COURT: Well, then the breach of  
18 contract claim would not affect the  
19 enforceability of the note and mortgage,  
20 then, would it?

21 MR. HALFORD: No, sir, I disagree. I  
22 think the breach of contract to the -- if  
23 true, if there is one -- which hasn't been  
24 determined -- does affect the enforceability  
25 of that mortgage to the state. And I think

1 to require her to go forward with the --

2 THE COURT: Well, let me say it this way.  
3 wouldn't it be true that -- wouldn't it be  
4 true that the note -- that if she prevailed  
5 on the breach of contract claim and received  
6 her damages, that the -- that she would still  
7 have to pay the note and the mortgage -- pay  
8 the note? She owes the money. Wouldn't she  
9 still have to pay?

10 MR. HALFORD: I think it's for the jury  
11 to decide which note or mortgage she would  
12 pay under.

13 THE COURT: Excuse me?

14 MR. HALFORD: I think it would be a  
15 question for the jury to determine which or  
16 what that agreement was, at this point. It  
17 has been modified, --

18 THE COURT: But we know that the  
19 agreement was that she agreed to pay, even  
20 the trial and the modification -- loan  
21 modification, she agreed to pay. So what  
22 you're saying is she's had damages for breach  
23 of contract. Well, so she recovers those  
24 damages and assumes (inaudible) that I'm  
25 correct, just in case I might be, about

1 the -- that she can't claim as damages what  
2 she knows. Now there's some statutory causes  
3 of action, for example, that don't apply to  
4 this case, where a remedy is -- that deals  
5 with extinction of the debt, but that's not  
6 what she's asked for. That's not what she's  
7 asking for. She's asking for money damages  
8 for breach of contract. So, if she gets her  
9 money damages, she's still left with a note  
10 and a mortgage to pay, under a completed loan  
11 modification.

12 MR. HALFORD: I think that's accurate.

13 THE COURT: Okay. Well, I'm going to  
14 reverse myself. I think that the breach of  
15 contract claim is not logically related to  
16 the enforceability of the note and mortgage.  
17 And, thus, the counterclaim is not compulsory.  
18 And the right to a jury trial has been waived.  
19 Because, when the dust settles, she still  
20 owes the money. I mean, the payments -- If  
21 she gets -- If a judge hears the case and  
22 rules in her favor for breach of contract and  
23 she's awarded some amount of damages, she's  
24 still going to have to pay the debt. And  
25 what puzzles me -- what troubles me about

1 that is that there's going to have to be some  
2 equitable relief granted, in conjunction with  
3 that, because they wouldn't accept payments.  
4 Now, and that equitable relief might have to  
5 be that she pays them those payments now and  
6 they go forward. She pays the payments up to  
7 date that they wouldn't accept, that  
8 presumably she's kept. And the case -- And  
9 then the mortgage goes forward and in current  
10 status.

11 All right. So, I'm going to -- I guess  
12 I'll say I'm going to reverse myself. I've  
13 talked myself right out of it. I believe  
14 that there isn't a logical relationship  
15 between the breach of contract claim, or any  
16 other counterclaim, and the enforceability of  
17 a note and the mortgage. Because, the relief,  
18 coming out of the breach of contract claim,  
19 will not extinguish the note and the  
20 mortgage. She will still have an obligation  
21 to pay. Now, all that means is she gets to  
22 try the case, but it just won't have a jury  
23 trial, and all of it will be tried together.

24 Now, -- And, you know, without comment on  
25 the facts, it does seem strange to me that

1 the Plaintiff would accept, what I remember,  
2 the payment's accepted, and then, all of a  
3 sudden say, well, okay, no more. And that's  
4 to be determined at a trial.

5 So, I deny your motion. That's where I  
6 am on that. Now, we've got the motion to  
7 amend. Is there anything different, in the  
8 causes of action, that you want to assert?  
9 What are the extra causes of action?

10 MR. HALFORD: Ms. Glenn has accurately  
11 recited them, breach of fiduciary duty being  
12 first.

13 THE COURT: All right. That does not  
14 affect -- I would rule that that's also not a  
15 compulsory counterclaim, so it could be tried  
16 with the -- could be tried with the rest of  
17 the case, non-jury.

18 MR. HALFORD: Thank you, Your Honor.

19 THE COURT: Is that the only one?

20 MR. HALFORD: No, sir. The second was  
21 fraud, which, as the Court's aware, --

22 THE COURT: I've already commented on  
23 that.

24 MR. HALFORD: -- it must be proved by  
25 (inaudible), and, presumably, the Court

1 doesn't want me to go through them, at this  
2 point. And --

3 THE COURT: Right.

4 MR. HALFORD: -- third would be unfair  
5 trade practices violation, Your Honor.

6 THE COURT: See, she's not -- Cam, she's  
7 not claiming that the note and mortgage, in  
8 its first instance, wasn't lawfully made. So  
9 you're left with that. The only question is  
10 whether she can be declared in default by  
11 the -- by a breach of the trial modification.  
12 The more I talk, the more I'm talking myself  
13 into believing it's not a logical  
14 relationship.

15 If the claims that she's making had to do  
16 with the original note and mortgage, then you  
17 got a point. And that's kind of what the  
18 case -- the BAC case says, but they're not.  
19 They're still there. The bank may not be --  
20 And you've asserted equitable defenses. The  
21 bank may not be able to foreclose, because  
22 they breached their agreement or the other  
23 equitable defenses, which means that Ms.  
24 Minardi would have to -- some arrangement  
25 would have to be made to catch up the

1 payments and go forward with the loan, under  
2 the modification agreement. But, the note  
3 and mortgage are still there, no matter what.  
4 Nobody's ever claimed that the note and  
5 mortgage were not lawfully made, on either  
6 side. So --

7 MR. HALFORD: Just briefly --

8 THE COURT: I'm going to let you -- If  
9 you're going to add causes of action, I'm  
10 going to extend the time for the making of  
11 motions to deal with them. Did we say we  
12 were going to try it in -- May the 4th or so?

13 MR. HALFORD: Yes, sir.

14 MS. GLENN: I believe that's what you had  
15 stated, Your Honor. But, I think you said,  
16 you know, if we can try and get something  
17 worked out. We've got this deposition  
18 tomorrow. We've got witness coming, someone  
19 in authority, so (inaudible).

20 THE COURT: All right. Well, I didn't  
21 pull the scheduling order, so you guys have  
22 got to tell me what's in it, what I said  
23 about the trial. Did I say May the 4th?

24 MR. HALFORD: Yes, sir, you did.

25 MS. GLENN: Yes, Your Honor.

1 THE COURT: Okay. If you want to add  
2 the -- If you want to add the causes of  
3 action, I'm going to extend the time to make  
4 motions, if any; and I will extend the trial  
5 date for 30 days, which will be June the 3rd.  
6 You'll have to check with Mary Ann to see what  
7 that is, for a date. I'm not sure what we  
8 may or may not have for that day, but that  
9 would be June the 3rd. So that's your choice.  
10 We can either go forward without the causes  
11 of action. I find that they are not  
12 compulsory. If you assert them, they're  
13 waived, the jury trial's waived, and they'll  
14 be tried non-jury. If you don't assert them,  
15 according to my ruling, they're not  
16 compulsory, and you could bring them later;  
17 but, that's up to you. So, do you know what  
18 you want to do?

19 MR. HALFORD: I would like to add the  
20 breach of fiduciary --

21 THE COURT: All right. So we'll extend --  
22 We'll extend the motions to May the 4th and  
23 extend the trial date to June the 3rd,  
24 assuming that that date is available. Okay?  
25 And I think that --

1 MS. GLENN: If you would like, I'll  
2 (inaudible) to Maryann, maybe tomorrow after  
3 our deposition, to make sure June 3rd works.

4 THE COURT: I think you ought to stop on  
5 your way out --

6 MS. GLENN: Okay. Okay.

7 THE COURT: -- and ask her. All right.  
8 Anything else? So the Motion to Amend is  
9 granted. The Motions to Bifurcate is denied.  
10 I want you to e-mail me an order, in Word  
11 format, denying the motion to bifurcate and  
12 for the jury trial, based on the logic  
13 I've -- if it's logical -- the logic upon  
14 which I've based the rule; that is, that the  
15 recovery, on the breach of contract claim,  
16 does not affect the enforceability of the  
17 note and mortgage, because the legality and  
18 propriety of the note and mortgage, the  
19 original transaction, is not challenged. At  
20 some point, it is enforceable. And I think  
21 that's consistent with the BAC case.

22 MR. HALFORD: And I apologize. I didn't  
23 have the B A C case before I appeared this  
24 morning. I just want to, for the record  
25 purpose, Your Honor, --

1 THE COURT: Yes, sir.

2 MR. HALFORD: What the contract now is,  
3 subsequent to the modification, I think, is  
4 to be determined by a trier of fact. I'll  
5 need a copy of the tape, before Your Honor,  
6 at this point.

7 THE COURT: I don't have a tape. What  
8 you have to do is you have to hire a court  
9 reporter. I will provide the court reporter  
10 with a -- with the -- this proceeding, a copy  
11 of this proceeding, on flash drive. They  
12 need to let us know when they're coming, so  
13 we can locate it, and all that.

14 MR. HALFORD: Yes, sir.

15 THE COURT: Anything else?

16 MR. HALFORD: Nothing from us, Your  
17 Honor.

18 THE COURT: That concludes the hearing.  
19 Thank you.

20 MS. GLENN: Thank you, Your Honor.

21 THE COURT: Yes.

22

23

24

25



1 APPEARANCES:

2 Representing the Plaintiff -

3 William Stork, Esquire  
4 Brock & Scott, PLLC  
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6 Columbia, South Carolina 29210

7 Representing the Defendant  
8 Michelle Minardi -

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PROCEEDINGS

BEFORE: THE HONORABLE S. JACKSON KIMBALL

(1:00 P.M.)

\* \* \* \* \*

THE COURT:

This is Case Number 2011-CP-46-4278, Bank of America against Michelle Minardi and others. Present and representing the Plaintiff is Mr. Will Stork. Present and representing the Defendant Ms. Minardi is Mr. Cam Halford. I believe, Mr. Halford, this is your motion to reconsider, isn't it?

MR. HALFORD:

Your Honor, that is correct.

THE COURT:

All right. Go ahead.

MR. HALFORD:

May it please the court, Your Honor, last time we were before you was April the 14th and the Court will recall that we had a deposition which was to occur the next day, April the 15th. That deposition did occur. Bank of America's designee under Rule 30(b)(6) appeared at my office and testified, Your Honor. We've asked the Court to reconsider its last Order, I believe the date was March -- excuse me, May 17th was that Order, Your Honor. And in that hearing,

1 Your Honor may recall, it was a pretty close call.  
2 between whether the counterclaims in this case were  
3 compulsory, legal counterclaims were permissive in  
4 the Court.

5 THE COURT:

6 I ruled, didn't I --

7 MR. HALFORD:

8 Yes, you --

9 THE COURT:

10 -- that they were permissive?

11 MR. HALFORD:

12 Yes, sir, Your Honor, and we're asking for  
13 reconsideration of that ruling. We have an equitable  
14 complaint here, Judge. We have legal counterclaims  
15 and you've ordered a single proceeding trial to occur  
16 not in the too distant future, so just as part of  
17 housekeeping, Your Honor, the claims were fraud in  
18 this case. I'm going to make clear there's a footnote  
19 in my memorandum, the fraud never was pleaded in  
20 the original Answer and Counterclaim. Now that  
21 sought by amendment and it was denied. We're also  
22 asking for reconsideration of that. Just as a matter of  
23 housekeeping, Your Honor --

24 THE COURT:

25 Okay, slow down just a little bit and give me just -

1 and stop for a second. Give me a minute. I'm going  
2 to dig out that order. I didn't do that, didn't get a  
3 chance to do that before the hearing. Bear with me.  
4 Okay, the order that was recorded May the 20th?

5 MR. HALFORD:

6 Yes, sir, Your Honor.

7 THE COURT:

8 Okay. Go ahead.

9 MR. HALFORD:

10 Yes, sir. Previously the Defendant had asked that you  
11 bifurcate these claims, and that she be permitted a  
12 jury trial on compulsory legal counterclaims. Your  
13 Honor held that they were permissive. We're asking  
14 for reconsideration of that today, Your Honor. When  
15 the deposition occurred in this case on April the 15th,  
16 Your Honor, you will recall that Ms. Minardi had  
17 entered a trial program, the HAMP modification  
18 program. It was extended to her by Bank of America  
19 back in March of 2010. She made her first payment in  
20 April 2010. And you will recall the fact she made  
21 some 14 payments before they were rejected by the  
22 lender, Your Honor. Attached to my memorandum is  
23 Exhibit A is where Bank of America notifies her that  
24 she has completed her last required trial payment and  
25 to please continue making your payments until we get

1 to you. And then Exhibit B to my memorandum, Your  
2 Honor, is a December 2011, that's the sum of one  
3 year later, notice to her from Bank of America that  
4 she has been declined or has failed to qualify for a  
5 HAMP modification. The two points I would like to  
6 point out to Your Honor at this point is, number one,  
7 in April 2010 she is granted a HAMP modification.  
8 There's no dispute about this fact. Bank of America  
9 grants to her in writing, she signs for acceptance,  
10 there is consideration exchanged and some one-year  
11 of payments go by before Bank of America interrupts  
12 and rejects her payment. The second point I would  
13 make --

14 THE COURT:

15 These payments were made under the HAMP program,  
16 right?

17 MR. HALFORD:

18 That is correct.

19 THE COURT:

20 Under the HAMP modification?

21 MR. HALFORD:

22 Under a HAMP trial modification program, Your Honor,  
23 that is correct.

24 THE COURT:

25 All right.

1 MR. HALFORD:

2 Going to Exhibit A, there's the notice from Bank of  
3 America, and here's where we allege that it is in fact  
4 compulsory, not permissive, Your Honor. They told  
5 her that date that she has made the last required  
6 payment under a special forbearance agreement. Now  
7 I have to get into the deposition at this point to  
8 demonstrate why we believe the claims to be  
9 permissive, and I apologize, I don't have a copy for  
10 Mr. Stork, but when we questioned their designee  
11 under oath, Your Honor, and I will be happy to pass  
12 up a condensed version if you'd like to see it, on the  
13 forbearance, there's never been a forbearance applied  
14 for ever. She never applied for one, they never gave  
15 her one. They never even proposed that she accept  
16 one. But the special forbearance agreement has been  
17 used as the justification in this case, and it's  
18 documented to say that she didn't qualify for the  
19 HAMP modification. So on the one hand, Bank of  
20 America has given a HAMP modification and she has  
21 successfully tendered all payments according to their  
22 documents. On the other hand, they've taken that  
23 HAMP modification away from her on the basis of  
24 excessive forbearance under their in-house special  
25 forbearance agreement. I'd argue, too, Your Honor,

1 that constitutes compulsory conduct. The default in  
2 this case that's alleged in the complaint, paragraph  
3 14, says she is in default as of May 2010, and this  
4 wasn't Mr. Stork's law firm that wrote the complaint,  
5 but in May 2010, it's undeniable that she's making  
6 payments under the HAMP modification program and  
7 their 30(b)(6) designee which is Diane Deloney from  
8 Plano, Texas, she flew here, had said they had all  
9 been credited, not only had they extended, not only  
10 had she accepted in writing, they had taken the  
11 payments, accepted, and credited them, but again, in  
12 December 2011, it's rejected based on excessive  
13 forbearance under their special in-house, and this is  
14 their testimony, not mine, forbearance agreement,  
15 special forbearance agreement. That's not what she  
16 was granted in May 2010. So as it alleges or as it  
17 concerns the default, which they allege to be --

18 THE COURT:

19 Which counterclaim are you talking about? Which  
20 one?

21 MR. HALFORD:

22 There were several.

23 THE COURT:

24 As I recall, they were all -- well, no, two of them were  
25 based on the -- this HAMP modification business,

1 HAMP loan modification program. There was another  
2 one that had to do with the FDCPA. Let me see, I  
3 don't remember if there was another one.

4 MR. HALFORD:

5 There was. And my amendment, just for the Court's  
6 occasion, you granted breach of fiduciary duty but  
7 there were two in there. There was a proposed for  
8 breach of contract which would be -- and this is  
9 another reason why I believe the jury should pass on  
10 these claims, Your Honor, is what contract, what note,  
11 you seem to say -- you had me on a hard question  
12 last time, Judge, "Does it affect the enforceability of  
13 the note," and I answered in the affirmative at the  
14 last hearing, but which note? We've got a 2008  
15 mortgage as the note they're seeking to foreclose  
16 after she successfully completes, according to their  
17 documents, a 2010 HAMP modification. So as to what  
18 agreement was intended or if they have, and I  
19 understand I lost the argument or the Chief's  
20 Administrative Order, what note and what agreement  
21 are we talking about? Are we talking about the 2008  
22 or are we talking about the 2010? Because according  
23 to Bank of America's records, she tendered the last  
24 required payment.

25 THE COURT:

1 That was the HAMP modification.

2 MR. HALFORD:

3 Yes, sir. And then we get into -- and you're recall Ms.  
4 Glenn was here last time, she didn't provide sufficient  
5 information, we needed more information. Their  
6 designee testifies that she later provided all the  
7 information. So again, are the claims compulsory?  
8 Do they arise out of the same transaction or  
9 occurrence? Are they that logically connected? It  
10 doesn't get any more compulsory than this. It arises  
11 straight out of the default that they allege in their  
12 complaint, which was a HAMP modification that she  
13 successfully navigated. At the point that it is rejected  
14 or taken from her, it is done so under the guise of a  
15 special forbearance agreement, and it is in black and  
16 white. So I'd respectfully ask for consideration.

17 THE COURT:

18 Mr. Stork?

19 MR. STORK:

20 Your Honor, the agreement entered into by  
21 Ms. Minardi is a trial period plan. And it states  
22 directly within the text of this document, I understand  
23 this plan is not a modification of the loan documents  
24 and that the loan documents will not be modified  
25 unless and until I meet all the requirements for

1 modification. Mr. Halford, in his memo in support,  
2 included the denial letter for this stating that they  
3 could not reach the 31 percent threshold, which would  
4 be a requirement for a permanent modification. This  
5 was not a guarantee of a modification in any way. As  
6 a matter of fact, it states right there that this is not a  
7 modification whatsoever. What it is is it's an attempt  
8 to try to work something out with Ms. Minardi, a good  
9 faith attempt on part of the Plaintiff Bank of America.  
10 They did tender these payments. They did apply  
11 these payments. Once that this trial period plan was  
12 completed, they then took a look at her economic  
13 situation at that time, and she wasn't denied for  
14 missing documents or one of those things. They went  
15 through, reviewed her finances, and denied her based  
16 on the federal guidelines of 31 percent. Bank of  
17 America's hands were tied in regards to issuing her a  
18 modification at that time. But regardless of the  
19 merits to any of the counterclaims that are before the  
20 Court in this, the real issue is whether these  
21 counterclaims are compulsory or are permissive. And  
22 as Your Honor correctly ruled in his Order issued this  
23 past May, these are all permissive counterclaims. Not  
24 a single one of them would affect the enforceability of  
25 the note and the mortgage. Let's just say even, you

1 know, assuming arguendo that Mr. Halford ends up  
2 succeeding on any of his counterclaims, he can get  
3 awarded money damages, absolutely he could get  
4 awarded money damages for that, but that has  
5 absolutely nothing to do with the fact that Bank of  
6 America still has the right to foreclose under the  
7 terms of the note and mortgage, which is the  
8 definition of permissive as stated by the South  
9 Carolina Supreme Court. So, Your Honor, we think  
10 that the Court got it a hundred percent right with  
11 their Order denying Defendant's Motion to Bifurcate.

12 THE COURT:

13 I doubt if I've ever get a hundred percent right.

14 MR. STORK:

15 And would ask that the Order stand as written.

16 THE COURT:

17 Okay. Mr. Halford, the issue is not whether she gets  
18 a trial on her counterclaims, the issue is whether by  
19 asserting them in this foreclosure action she's waived  
20 her right to a jury trial. And I find and confirm that  
21 she's done that. She has a trial, it's just non-jury,  
22 because the counterclaims are indeed permissive. In  
23 fact, this -- I want to say the last two weeks, I read  
24 another case that even tightens the target more. The  
25 foreclosure has to do with whether she's in default in

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the note and mortgage, and whether the lender, whomever that is in a particular case is entitled to foreclose. She has a right to assert the counterclaim, she's done them, they will be heard, but they're not compulsory under the law. So I deny your motion.

MR. HALFORD:

Thank you for hearing us, Judge.

THE COURT:

I will say there's nothing -- I have heard nothing new. That was all argued anyway.

\* \* \* \* \*

(Concluded at 1:39 P.M.),

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CERTIFICATE

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I, the undersigned, Cathy L. Young, CVR-M, Notary Public in and for the State of South Carolina, do hereby certify that the foregoing settlement was taken on the 30th day of June, 2015;

That the within deponents were sworn to tell the truth and that the foregoing is an accurate transcription of the testimony taken under oath;

I further certify that I am neither Counsel nor Solicitor to any of the parties in said suit, nor interested in the event of the cause.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 6th day of July, 2015.

\_\_\_\_\_  
CATHY L. YOUNG, CVR-M  
NOTARY PUBLIC FOR SOUTH CAROLINA  
MY COMMISSION EXPIRES FEBRUARY 19, 2019.

**RECEIVED**  
FEB 01 2016  
SC Court of Appeals

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February 1, 2016

FEB 01 2016

SC Court of Appeals

**VIA HAND-DELIVERY**

Jenny Abbott Kitchings  
Court of Appeals Clerk of Court  
1220 Senate Street  
Columbia, South Carolina 29201

Re: ***Bank of America, N.A. v. Michelle Minardi, et al.***  
**Court of Appeals No. 2015-001857**  
**Court of Common Pleas No. 2011-CP-46-04278**

Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Respondent Bank of America, N.A.'s Reply to Appellant's Return to Respondent's Motion to Strike Matter from Inclusion in the Record on Appeal (the "Reply") regarding the above-captioned matter.

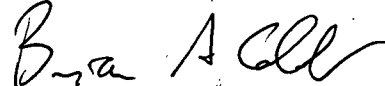
Also enclosed, are seven (7) copies of the exhibits referenced in our January 7, 2016 filing of Respondent Bank of America, N.A.'s Motion to Strike Matter from Inclusion in the Record on Appeal (the "Motion") which we inadvertently did not include with our original filing.

Please file the original Reply and exhibits to the Motion and return conformed copies to our courier.

Thank you for your kind consideration in this matter. Should you have any questions, please do not hesitate to contact our office.

Sincerely,

MCGUIREWOODS LLP

  
Brian A. Calub

BAC:bms  
Enclosures

cc: J. Cameron Halford, Esq. (w/encl.)