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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas Case No. 2011-CP-10-812
The Honorable Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2013-2694

NATIONSTAR MORTGAGE, LLC — Respondents,

v.

Rhonda Lewis Meisner — Appellant.

Final Brief of Appellant

April 17, 2015

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BACKGROUND

This is an appeal of a foreclosure proceeding where the loan was initiated by and between Lehman Brothers Holdings, Inc., (hereinafter "Lehman Bros.") and Rhonda Meisner (hereinafter " Meisner") in October 2007. A note was given to Lehman Bros. and a Mortgage was given to Mortgage Electronic Registration Services, Inc. (hereinafter "MERS") serving as the nominee for Lehman Bors. by Ms. Meisner. The closing was performed by an attorney for Pope and Bowens, LLP, Tony Catone. The loan was initially serviced by the lender, Lehman Bros. but then the servicing transferred to an owned subsidiary of Lehman Bros. Aurora Loan Services, LLC.

Prior to the closing of the loan, Lehman Bros. faxed instructions to the closing attorney stating that if any of the parties to the loan was not present in person then a power of attorney must be filed with the County of Charleston Record of Deeds offices prior to the day of the closing. The notice of the power of attorney must be on file with the register of deeds office prior to the date of the

loan closing. The attorney was further instructed not to proceed if the requisite power of attorney was not on file with register of deeds office prior to the day of the loan closing. The parties to the loan included Ms. Meisner as the borrower and Lehman Bros. as the lender All of the documents for the closing including the mortgage and the note were drawn up by Lehman Bros. and submitted to the closing attorney for administration. The documents included a note for $680,000 given to Lehman Bros. by Ms. Meisner and a mortgage that was drafted by Lehman Bros. given to Mortgage Electronic Registration Services, Inc. (hereinafter "MERS") as a nominee for Lehman Bros. by Ms. Meisner. The mortgage documents specifically state that MERS, Inc is a separate legal entity from Lehman Bros. and functions solely as the nominee for Lehman Bros. The instructions for the closing the loan did not indicate the necessity of filing a power of attorney with the state of South Carolina to ensure that MERS, in the role as nominee for Lehman Bros., could legally transfer the mortgage or assign the mortgage to others.

Lehman Bros. relied on the document itself for the authority of MERS to act independently of its principal, Lehman Bros., Initially, the loan was serviced by Lehman Bros., but shortly after the initiation of the loan, Aurora Loan Services, LLC a subsidiary of Aurora Bank, FSB which in turn is a wholly owned subsidiary of Lehman Bros. took over the servicing. In late 2007, the note was sold to Wells Fargo Bank, N.A. as Trustee for the Structured Adjustable Rate Mortgage Loan Trust Mortgage Pass through certificates series 2007-11; however no mortgage assignment into the trust was filed with Charleston County register

of deeds. On September 15, 2008 Lehman Bros. (which included Aurora Loan Services, LLC) filed for federal bankruptcy protection. In August of 2010 Ms. Meisner stopped making payments on the note. The interest rate associated with the note was an adjustable rate of 7 1/2% and was considered a jumbo loan. This home was Ms. Meisner's primary home. Ms. Meisner also resides in Blythewood, South Carolina but does not own that residence, it is owned by her husband. On February 3, 2011 Aurora Loan Services, LLC filed a lis pen dens and initiated foreclosure proceedings waiving their rights to a deficiency judgment. Plaintiff states that on February 10,2011 the note and mortgage were assigned to Aurora Loan Services, LLC. Lehman Bros. and Aurora Loan Services, LLC were both under Federal Bankruptcy protection.

Ms. Meisner answered the foreclosure lawsuit via her attorney William Sloan of Summerville, SC and made several defenses and counterclaims including (1) that the assignment from MERS as nominee for the original creditor was invalid without a recorded power of attorney (2) the original creditor is a necessary party to the action (3) MERS lack the authority to assign the subject mortgage. The Circuit Court denied Ms. Meisner motion to dismiss without prejudice and Ms. Meisner in the counter claim argued Aurora Loan Servicing, LLC did not have standing to foreclose. In 2012, Aurora Loan Servicing was forced to cease business by the Federal Bankruptcy Court. On June 26, 2012 the subject note and mortgage was assigned to Nationstar, LLC. By Order on October 23, 2012 Nationstar Mortgage, LLC was substituted as Plaintiff pursuant to Rules 17(a) 35(c) and 25 (e) SCRCP. The Court granted the motion without a

hearing. Subsequently, the new Plaintiff, Nationstar, LLC filed a motion for summary judgment and the Defendants filed a motion to compel discovery responses as well as a motion for stay, the Court denied both Motions by the Defendant and granted Summary Judgment to Nationstar, LLC. The foreclosure sale was scheduled for November 19, 2013. Ms. Meisner filed a motion to alter and amend arguing among other things Nationstar, LLC did not have standing to foreclose as their rights were inherited from Aurora Loan Services, LLC who also did not have standing to foreclose. The Master in Equity ruled Nationstar Mortgage, LLC did have standing and denied the Motion to alter and amend. This appeal follows.

INTRODUCTION

Mortgage foreclosure proceedings, like any other legal proceeding in South Carolina requires the plaintiff to have standing to initiate the lawsuit as a pre-requisite for the Court to have the required subject matter jurisdiction. In South Carolina, the law requires legal entities acting on behalf of other legal entities to have a power of attorney delineating the roles and responsibilities as well as the scope and breadth of the representation or approved actions on behalf of their principal **(R.p. 196-199; 216-219)** The South Carolina Court of Appeals ruled that a servicer can have standing to sue. *Bank of America, N.A. v. Draper.*, Opinion No. 5140 (Ct. App.) However, the issue of defective assignments of the mortgage were not reviewed as there were no allegations that the mortgage assignment was not filed prior to the initiation of the lawsuit. **(R.p.105-106)** In Draper, there were also no allegations that multiple entities were owners of the

note and of the mortgage.**(R.p.103-104;114-115;)** In Draper, the Court of Appeals did not review the function and role of MERS and whether that function complies with State laws considering MERS admission to the Nebraska Supreme Court that MERS never holds the notes of the mortgages it records; creating a dual path for the note and the mortgage. **(Rp.216-219)** *Mortgage Electronic. Reg. Sys., Inc v. Nebraska Department of Banking,* 270 Neb. 529, 530, 704 N.W. 2d 784 (2005). There was also not a review of the entities (Lehman Bros. and their wholly owned subsidiary Aurora Loan Services, LLC subject to Federal Bankruptcy protections laws. **(R.p.69)**

The mortgage and /or the note can be transferred in a variety of ways including by assignment as long as the entity holding the note and mortgage has the legal right to transfer the assignment of the note and mortgage. **(R.p.67-74)** Once an entity files for Federal Bankruptcy protection, the Bankruptcy court has jurisdiction over the assets of the entity including receivable negotiable and non-negotiable notes as classified under the Uniform Commercial Code (hereinafter "UCC")**(R.p.69)**

While only rightful holders of the mortgage and note can pursue foreclosure; a holder of a note in due course whether in rightful possession or not can pursue an action for a suit on a note, which is legal and not equitable **(R.p.197-198).** Plaintiff's can pursue either a suit on the note or initiate a mortgage foreclosure procedure, South Carolina law prohibits pursuing both remedies simultaneously, **(R.p.219;129-136).** Additionally, while the Court of Appeals in Draper ruled the servicer of the loan can file for foreclosure that

servicer must represent an entity that owns both the note and the mortgage and not just the note. Otherwise, the servicer of any loan that does not include a deed of trust would be able to file for foreclosure and that would undermine the real property foreclosure process in South Carolina and it would be contrary to century old law. Here, Aurora Loan Services, LLC initially claimed to own the note and the mortgage via recording the mortgage assignment in the county records and Plaintiff's assertion in their motion for summary judgment **(R.35-41).**

At the summary judgment hearing, it was brought to the court's attention that in the request to admit, the Plaintiff stated the note was owned by Wells Fargo Bank, N.A. as Trustee for the Structured Adjustable Rate Mortgage Loan Trust Mortgage Pass through certificates series 2007-11; however, there has been no assignment of the mortgage into this entity in the County records **(R.p.83).** During the summary judgment hearing the Court suggested Aurora loan services, LLC could begin a foreclosure proceeding as the servicer; but Aurora did not begin the foreclosure procedure as the servicers considering the assignments of the mortgage several days after the suit began and the representation of the Plaintiff. **(R.p.35-41**) Additionally, while the Plaintiff argues possession of the note and mortgage allows foreclosure as opposed to a suit on the note; the note and mortgage must be given to the same entity, this is not the case here. **(R.p.15-34)** In fact, the Plaintiff itself suggests conflicting evidence of the ownership of the note and mortgage **(R.p.15-34;113-115).**

Argument

I. Did the Master in Equity err by granting summary judgment to the Plaintiff?

The Appellant respectfully requests the Court of Appeals to review the following facts in the record that would preclude the grant of summary judgment. The following facts create issues of material fact as outlined in Anderson v. Liberty Lobby, Inc. 477 U.S. 242 (1986) and therefore make the grant of summary judgment and the subsequent sale of the subject property in error. The Respondent has created the most significant issue of material fact by suggesting there are multiple owners of the note and the mortgage via their conflicting representations in their court filings and their submissions via requests for admission and Court representations. The plaintiff's simultaneously states the Plaintiff is the owner of the note and mortgage (via recording of mortgage assignments and summary judgment arguments) while responding to requests for admissions that the note and the mortgage are owned by a trust, with Wells Fargo Bank, N.A. as the trustee and admitting as such in the Motion for summary judgment.

1). The Plaintiff simultaneously suggests that the note and mortgage are owned during the motion for summary judgment by a) the Plaintiff in their motion for summary judgment and b) Wells Fargo Bank, N.A. as Trustee in their answers to request for admission.

2). The fact that the Plaintiff filed the initial lis Pen dens and Summons and Complaint as the owner of the note and the mortgage considering the subsequent public filings of the mortgage assignments. As the owner of the note

and mortgage, the assignments create a material issue of fact of whether the Court had subject matter jurisdiction based on the fact the assignments were filed after the filing of the Lis Pen dens and summons and complaint.

3) The fact that the Master in Equity gave legal and tax advice during a substantive hearing suggesting that the Court was going to grant summary judgment in either 2013 or 2014 and there were advantages to acquiescing to Plaintiff motion sooner rather than later.

4) The status of MERS related to the agency laws of South Carolina and therefore the requirement of a "filed power of attorney" on hand prior to closing of the loan for a nominee to transfer rights without the direction of the former principal.

5). The bankruptcy of Lehman Bros. (which includes the wholly owned subsidiary of Aurora Loan Services, LLC) and the effects the bankruptcy Court Jurisdiction on transfers of assets and notes into and out of the trust.

II. The Master in Equity erred by ruling the Plaintiff had standing to initiate a foreclosure proceeding.

Mortgage loan securitization has created many questions regarding who actually owns the note and the mortgage simultaneously and therefore, which entity can legally initiate foreclosure proceedings. South Carolina Court have long held that 'the assignment of a note secured by a mortgage carries with it an assignment of the mortgage'. In *Carpenter v. Longan,* 83 U.S. 271, 21 L. Ed 313 (1872), the Supreme Court of the United States clearly stated the Plaintiff in a foreclosure proceeding must be the owner of the note and the mortgage to effect a

foreclosure action. In this action there are transfers or assignments of the mortgage but not of the note. In mortgage foreclosure proceedings the owner of note must be the one to enforce the note." Clearly the objective of this principle is "to keep the obligation and the mortgage in the same hand **unless the parties wish to separate them."** Restatement (Third) of Property (mortgages) § 5.4 (1997). The principle is justified, in turn, by reasoning that the " debt is the principal thing and the mortgage is the accessory". Carpenter v. Longan. Otherwise, "[e]quity puts the principal and the accessory upon a footing of equality, and gives the assignee of the evidence of the debt the same rights in regard to both." Id. " For this reason an assignment of the debt carries with it an assignment of the mortgage but an assignment of the mortgage is a nullity." Id, at 274, 16 Wall, 271.

Here, the mortgage was given to MERS as nominee for Lehman Brothers Bank, FSB. (**R.p.20**) MERS is the mortgagee of the mortgage "solely as the nominee" for the lender and lender's assigns. The language in the mortgage document does not define nominee so the plain and ordinary meaning must be applied. Black's Law Dictionary defines nominee in the following way: "[a] person designated to act on behalf of another usually in a very limited way" and "[a] party that holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others. Black's Law Dictionary 1076 (8th ed. 2004) Legal Title is defined as [a] title that evidences ownership but does not necessarily signify full and complete ownership or a beneficial interest. Id at 1523. This in contrast to Equitable title which gives [a] title that has a beneficial

interest in the property that gives the holder the right to acquire formal legal title. Id.

The language in the mortgage document gives MERS only "legal title" but then the document purports to give the ability of MERS to act as an agent for the note holder which under the laws of South Carolina require a "power of attorney". **(R p.125;215-219)** This expansion of the ability to act as an agent instead of a nominee requires a "power of attorney" effected by the owner of the note when issued to someone other than the note holder prior to the issuance of the mortgage. This "authority to act" must be instituted prior to closing the loan the mortgage secures, otherwise a mortgage is given to a non note holder (MERS) without a mechanism to marry the note to the mortgage and ownership of both the note and mortgage is required for foreclosure. Additionally, the mortgage itself discusses the rights of the note holder in the property not the in the property not the rights of MERS in the property **(R.p. 20-34)** Generally, a mortgage is un-enforceable if it is held by one who cannot enforce the security obligation. Restatement (Third) of Property, Mortgages §5.4 (c). The language in the mortgage document gives MERS only "legal title" but then the document purports to expand MERS role as the nominee and purports to give the ability of MERS to act as an agent for the note holder for the purposes of foreclosure which under the laws of South Carolina requires a "power of attorney" because MERS, by confession does not hold the note and only holds the mortgage in a nominee capacity not in the capacity of a principal.

Here, this nominee capacity is transferred via assignment to Aurora Loan Services, LLC on February 20,2011.**(R.p.35.)** As was explained in Draper, by the Court of Appeals, the transferee can only garner the rights he was assigned by the assignor. "MERS, by the terms of its deed of trust and its own stated purposes was the lender's agent." *LaSalle Bank Nat. Ass'n v. Lamy,* 2006 WL 2251721 at *2 (N.Y. Sup. 2006) (unpublished opinion). " A nominee of the owner of the note and mortgage may not effectively assign the note and mortgage to another for want of ownership interest in said note and mortgage by the nominee."

In this case, like many others, the mortgage assignment assigns only the nominee capacity to Aurora Loan Services, LLC and then subsequently to Nationstar, LLC. The mortgage loan becomes ineffectual when the note holder did not hold the deed of trust like in this case. *Bellistri v. Ocwen loan Servicing, LLC* 284 S.W. 3d 619 623 (Mo. App. 2009) Additionally, while the mortgage assignment to Aurora Loan Services, LLC only assigned those rights MERS had to give it, it was several days after the filing of the Lis Pen dens. the Plaintiff's simultaneously argue that Aurora Loan Services, LLC is the owner of the note and mortgage (via the register of deeds and assertion of counsel) and that the note and mortgage are owned by a securitized trust. **(R.p.35-41;p.103 lines10-25; p.104-106)**

In South Carolina like every other state, the Court must have subject matter jurisdiction in order to act. Subject matter jurisdiction of a court depends on the authority granted to the Court by the Constitution and laws of the state. Subject matter jurisdiction cannot be waived or **conferred by consent**. (emphasis

added by appellant). *Anderson v. Anderson,* 299 S.C. 110, 382 S.E. 2d 897 (1989). *Paschal v.Causey,* 309 S.C. 206,420 S.E. 2d 863 (Ct. App. 1992) It is undisputed and even argued in the summary judgment motion by the Plaintiff that the Lis pen dens was filed on February 3, 2011 **(R.p.64)** The plaintiff also state in the statement of facts that the Defendant executed and delivered a promissory note and a mortgage securing said note to Lehman Bros. Bank, FSB **(R. p.59-60)** The mortgage reflects that the mortgage was given to MERS as a nominee for Lehman Bros. FSB **(R.p.20).** The plaintiff goes on to state that "On February 10, 2011 "these" were assigned to Aurora Loan Services, LLC.**(R.p.35)** In *Fielden v Fielden,* 276 S.C. 219, 262, S.E. 2d 43 (1980) the Supreme Court held that a 1979 amendment to a divorce decree could not fix a 1977 Order incorporating an agreement between the parties because in 1977 the family court lacked subject matter jurisdiction. "This court is aware of the May 16, 1979 divorce decree which incorporated the 1977 separation agreement. **However, that event which occurred subsequent to the entry of the order on appeal, cannot operate to cure the Family Court's lack of subject matter jurisdiction at the time the Order was issued."** (emphasis added)

In the instant case, the assignment of the MERS mortgage after the filing of the lis pen dens and the summons and complaint cannot cure the Court's lack of subject matter jurisdiction at the initiation of the complaint because Aurora Loan Services, LLC did not possess the assigned mortgage rights on February 3, 2011 when the action was filed. **(R.p.35; p.57,58)** The subsequent assignment of the mortgage to Nationstar, LLC in the same action carries with the assignment the

lack of subject matter jurisdiction. **(R.p.37-38).** While the plaintiff would like to change the position that the foreclosure was initiated as the "servicer" the facts surrounding the subsequent mortgage assignment to Aurora Loan Services, LLC do not support this position.

The appellate courts of Florida and Alabama have found that subsequent cures cannot relate back. See: *Rigby v. Wells Fargo Bank,* (Fla. App. 4 District filed April 4, 2012) " a party must have standing to file suit at its inception and may not remedy this defect by subsequently obtaining standing." *Venture Holdings & Acquisitions Grp., LLC. v. A.I.M Funding Grp., LLC,* 75 So. 3d 773, 776 (Fla. 4th DCA 2011). Likewise, the Court of Appeals in Alabama reached the same result in *Patterson v. GMAC Mortgage, LLC (*Ala. Civ. App. Filed January 20,2012 Opinion No. 210490). South Carolina like Alabama and Florida have long noted the general principle of law. "Generally, jurisdiction of the court over a cause depends on the state of facts at the time the action in brought." Thus, a court must first find that a party with standing has brought the cause, and that he brings a justiciable issue before the Court. If such is not the situation, there is nothing before the Court, and the court is totally without jurisdiction to decide any issue in the cause." C.J.S. "Courts" § 16.

The Plaintiff attempts to defeat this black letter law by modifying the capacity of the plaintiff retroactively. However, this change in position is an attempt to "confer by consent" standing which is not allowed.**(R. p. 104 lines 3-18)** Notwithstanding the fact that MERS cannot act on its own accord to assign it's interests outside the direction of its principal in its nominee capacity. **(R. p.20)**

There is no evidence in the record that an assignment of the mortgage was ever made to the owner of the note. **(R.pp.35-41).**

While the court noted Aurora Loan Services, LLC based on the court of Appeals ruling that a servicer could bring an action as a servicer, this was clearly not the intended case here as they recorded a mortgage assignment to both entities. **(R.pp.35-41.)** The plaintiff's are attempting to graft the arguments in other cases to an alternative position to cure the subject matter jurisdiction issue and the standing of plaintiff. The plaintiff simultaneously argues that Aurora Loan Services, LLC was transferred the Mortgage and note and then subsequently transferred both the mortgage and note to Nationstar. **(R. p. 143-145;p.35-41)** Plaintiffs are attempting to retroactively state they filed the action as the servicer of the loan however there is no evidence that in that capacity they were the agent of the owner of the note and mortgage since they have submitted two possible owners of the note and mortgage.

The problem with this position is that in the request for admission the plaintiff acknowledges that the note and mortgage is still owned by Wells Fargo Bank , N.A. as trustee with no recorded transfers of the note and mortgage recorded. Therefore, in a Court of South Carolina the Plaintiff's are arguing both that they own the note and mortgage and that the trust owns the note and mortgage creating a material issue of fact. They have also registered the Plaintiff's mortgage in the register of deeds office but not the mortgage in and out of the Trust which the plaintiff claims still owns the note creating a material issue of fact an precluding summary judgment.

III. The Master in Equity erred by giving legal and tax advice during the motion for summary judgment hearing.

During the motion for summary judgment, the Court made it clear that he disagreed with the defendants position on standing and suggested the case would go to foreclosure and there may be some advantages to abandoning the defenses and submit to the foreclosure in 2013. The Court stated:

> "It was pointed out to me by another attorney in another firm who does a substantial amount of foreclosure work that through December of 2013 presently the law is---well, I guess I made an adverse ruling that---I think you a forgiveness on your principal residence that non-taxable." I've made the ruling it's not her principal residence. It might come back to haunt her. The Feds may have a different position than I do. I'm just telling you it could be---if she gets foreclosed next year as opposed to this year...So she may qualify as being non taxable transaction. $900,000 of unrealized income is going to be a substantial from a tax standpoint. Put that in the mix." **(R.p.116-117:1-17)**

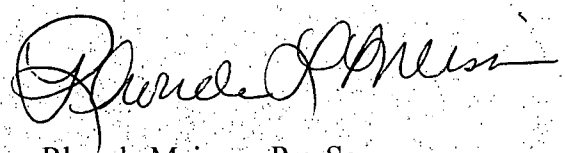
The effect of the Judges' information was at once confusing and suggested he had made a decision that with or without additional evidence to confirm the plaintiff lacked standing to sue that Summary Judgment was going to be granted whether in 2013 or 2014. The comments were made in an attempt to mitigate losses for the Appellant, but created confusion in addressing the issues on standing and designation of principal residence as a result the Defendant felt compelled to acquiesce to the foreclosure in 2013. Losing one's home is a very stressful situation and as such suggestions by the Court create an additional layer of conflict for the Appellant causing her to make knee jerk decisions based on erroneous information and abandoning a rigorous objection to many findings of fact.

IV. The Master in Equity erred by ruling the house was not Ms. Meisner's primary home.

The court ruled that the home was not Ms. Meisner's principal residence; however, the evidence contradicts his designation. The court ruled because Ms. Meisner was "served" via drop service at her husband's house in Blythewood e.g.: at a home that Ms. Meisner does not own was dispositive of the Supreme Court's ruling all the while acknowledging the Supreme Court did not outline specific guidelines of what qualifies as a primary residence for the purposes of the administrative order. Importantly, Meisner testified via affidavit that she owns the home in Isle of Palms, South Carolina, that she served on a jury in Charleston county and voted in at least three elections in the last 3 years based on her Isle of Palms residency. Charleston County's designation of the 6% taxable rate is based on the fact the house is rented in the summer weeks more than 10 days and that her husband claims 4% residency tax rate. Additionally, Ms. Meisner testified her job required her to travel throughout the state of South Carolina, North Carolina and Georgia accounting for the fact that she is frequently out of town for **both residences.** Importantly, (1) Ms. Meisner owned the house at Isle of Palms, SC and does not own the house in Blythewood. (2) voted in Isle of Palms, (3) had her cars registered in Isle of Palms, SC (4) maintained and personally paid for utilities at the Isle of Palms house (5) served on the jury in Charleston county based on her residence; but because she is married she is precluded from participating in the Supreme Court's Administrative Order based on the Master in Equity's ruling.

For the above reasons, the Appellant Rhonda Meisner respectfully requests the Court of Appeals to find the plaintiff's did not have standing to sue

which resulted in a lack of subject matter jurisdiction and warrants dismissal of the case. Alternatively, the Appellant respectfully requests that the Court of Appeals find material issues of fact as to the owner of both the note and the mortgage requiring a reversal of the grant of summary judgment.



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April 15, 2015

CERTIFICATE OF APPELLANT IN FINAL BRIEF

THE STATE OF SOUTH CAROLINA
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v.

RHONDA MEISNER — Appellant.

CERTIFICATE OF APPELLANT

The undersigned certifies that this Final Brief complies with Rule 211(b), S.C.A.C.R.

April 17, 2015

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v.

RHONDA MEISNER — Appellant.

PROOF OF SERVICE FINAL BRIEF AND REPLY BRIEF OF APPELLANT

I hereby certify that on April 17th I served a copy of the FINAL BRIEF AND THE REPLY BRIEF by the Appellant has been served on attorneys for the Respondent Nationstar Mortgage, LLC and has been served upon the parties in this action by mailing a copy postage pre-paid to: Robert A. Muckenfuss, T. Richmond McPherson McGuire Woods, LLP 201 North Tryon Street Suite 3000 Charlotte, NC 28202

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April 17th, 2015

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