

THE STATE OF SOUTH CAROLINA  
In the 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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**RECEIVED**

MAR 21 2016

**SC Court of Appeals**

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 RETURN TO APPELLANT'S  
MOTION FOR RECONSIDERATION AND  
MOTION FOR ORDER TO ALTER OR AMEND  
MARCH 4, 2016 ORDER**

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Brian A. Calub  
S.C. Bar No. 72009  
MCGUIREWOODS LLP  
201 North Tryon Street  
Suite 3000  
Charlotte, NC 28202  
Tel: (704) 343-2009  
Fax: (704) 373-8842

*Attorney for Respondent*

Date: March 18, 2016

Pursuant to Rule 240(e) 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” or “Respondent”), respectfully files this Return (“Return”) to Appellant Michelle Minardi’s (“Minardi”) Motion for Reconsideration and Motion for Order to Alter or Amend March 4, 2016 Order (“Motion to Alter or Amend”). BANA files this Return to inform the Court that it has no objection to the inclusion in the record on appeal the October 18, 2010 letter and the December 6, 2010 letter, both addressed from BANA to Minardi (collectively “the Letters”<sup>1</sup>), which are the subject of Minardi’s Motion to Alter or Amend. The Letters were made part of the trial record independent from the July 16, 2014 deposition transcript of Minardi and the transcript of the April 15, 2015 Rule 30(b)(6) deposition of Diane Deloney (“Deloney”). This Court properly struck both deposition transcripts from the record on appeal in its March 4, 2016 Order granting BANA’s January 7, 2016 Motion to Strike Matter from Inclusion in the Record on Appeal (“Motion to Strike”).

In its Motion to Strike, BANA did not seek to preclude the Letters from the record on appeal because the Letters were made part of the trial record independent from the stricken deposition transcripts of Minardi and Deloney. The Letters were made part of the trial record when Minardi attached them to her memorandum of law<sup>2</sup> filed in support of her May 29, 2015 Rule 59(e) motion for reconsideration<sup>3</sup>; the Memorandum was referenced in the caption of, and filed contemporaneously with, the Rule 59(e) Motion.

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<sup>1</sup> See Attachments to Exhibit 1, Defendant Minardi Memorandum in Support of Motion for Reconsideration (“Memorandum”).

<sup>2</sup> See *id.*

<sup>3</sup> See Exhibit 2, Defendant Minardi Notice of Motion and Motion for Reconsideration (“Rule 59(e) Motion”).

Therefore, it was not necessary for the trial court to refer to the now-stricken deposition transcripts of Minardi and Deloney in order to evaluate the Letters that Minardi wants to include in the record on appeal. And, because the Letters were made part of the trial record, the trial court properly considered them. See *Plyler v. Burns*, 373 S.C. 637, 649, 647 S.E.2d 188, 194 (2007) (holding that, although motion to dismiss failed to include an affirmative defense, the indication in the motion that grounds for dismissal would be discussed in the supporting memorandum of law, and the inclusion of that affirmative defense in the supporting memorandum of law, were sufficient to meet Rule 8(c)'s pleading requirements, and the trial court did not err in considering the affirmative defense); *Wright v. Sparrow*, 381 S.E.2d 503, 505 (S.C. Ct. App. 1989) (when a notice of a motion for summary judgment failed to specify the grounds for the motion, but the motion stated that it would be based on the attached memorandum, the trial court properly considered the arguments raised in the attached memorandum). Indeed, BANA designated the Memorandum as matter to be included in the record on appeal.<sup>4</sup>

### CONCLUSION

Because the Letters were made a part of the trial record independent from the stricken deposition transcripts by Minardi's inclusion of the Letters in her Rule 59(e) Motion and supporting Memorandum, BANA has no objection to including in the record on appeal the October 18, 2010 letter and the December 6, 2010 letter that Minardi references in her Motion to Alter or Amend.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

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<sup>4</sup> See Exhibit 3, Respondent Bank of America, N.A.'s Designation Of Matter To Be Included In Record On Appeal.



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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM YORK COUNTY  
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S. Jackson Kimball, III, Master In Equity

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Case No. 2011-CP-46-04278  
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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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**AFFIDAVIT OF RESPONDENT'S COUNSEL IN SUPPORT OF  
RESPONDENT'S RETURN TO APPELLANT'S  
MOTION FOR RECONSIDERATION AND  
MOTION FOR ORDER TO ALTER OR AMEND  
MARCH 4, 2016 ORDER  
PURSUANT TO SCACR 240(c)(3)**

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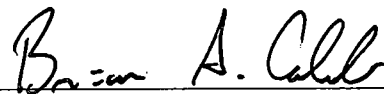
NOW COMES Respondent's counsel Brain A. Calub (S.C. Bar No. 72009) who,  
first being duly sworn, deposes the following:

I am counsel for Respondent Bank of America, N.A., successor by merger to  
BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP  
("BANA" or "Respondent") in the above captioned matter. I am filing this affidavit in  
support of Respondent's Return to Appellant's Motion for Reconsideration and Motion  
for Order to Alter or Amend March 4, 2016 Order ("Motion to Alter or Amend").

The Record on Appeal has yet to be published in this appeal. This appeal concerns the trial court's denial of Appellant Michelle Minardi's ("Minardi") Rule 59(e) motion to reconsider the trial court's order denying her motion to bifurcate and remand her counterclaims to the jury roster in the underlying foreclosure action ("Rule 59(e) Motion").

In response to Minardi's Designation of Matter to be Included in Record on Appeal, BANA filed a motion to strike the deposition transcripts of Minardi and Diane Deloney, and any accompanying exhibits, from inclusion in the record on appeal, which was granted in the Court's March 4, 2016 Order. BANA did not, however, seek to preclude from inclusion in the record on appeal the two letters referenced in Minardi's Motion to Alter or Amend as they were made part of the trial record independent from the deposition transcripts that were properly stricken by the Court in its March 4, 2016 Order. In this case, Minardi made the two letters, identified in her Motion to Alter or Amend, part of the trial record by attaching the letters to her memorandum of law, which was referenced in, and filed contemporaneously with, her Rule 59(e) Motion.

Further, affiant sayeth naught.



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Tel: (704) 343-2009  
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*Attorney for Respondent*

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

SUBSCRIBED and SWORN to before me on this 18<sup>th</sup> day of March, 2016,

by Brian A. Calub, known to me to be the person(s) who appeared before me.

*Candace Russell*

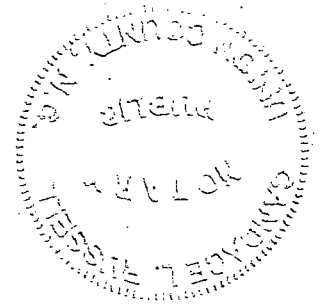
Notary Public, State of North Carolina

Commission No.: 10/12/2019

My Commission Expires: 10/12/2019

(SEAL)

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MAR 21 2016  
SC Court of Appeals



# EXHIBIT "1"

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STATE OF SOUTH CAROLINA  
COUNTY OF YORK

2015 MAY 29 AM 10:35

THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

DAVID HAMILTON  
C.C.P. & G.S.  
YORK COUNTY, SC

Bank of America, N.A.,  
Successor by merger to BAC  
Home Loan Servicing, LP,  
F/K/A Countrywide Home Loans  
Servicing, LP,

Case No. 2011-CP-46-04278

Plaintiff,

**DEFENDANT MINARDI  
MEMORANDUM IN SUPPORT OF  
MOTION FOR RECONSIDERATION**

vs.

Michelle Minardi, and Ameris  
Bank,  
Defendants.

SCRPC 59(e)

Defendant respectfully requests that the Master in Equity reconsider its Order, and ruling, that the Defendant's counterclaims in the case are permissive and not compulsory. Further, defendant respectfully asserts the trial court has erred as a matter of law by holding Wachovia Bank v. Blackburn, 407 S.C. 321, 755 S.E. 2d 437 (2014) as controlling precedent where Discovery now confirms that Plaintiff's acceptance of payments evidences no default, directly affecting the lender's right to enforce via foreclosure where Plaintiff denied a HAMP modification under the guise of "Special Forbearance", and not HAMP supplemental guidelines and/or directives. Exhibit-A.

### FACTUAL BACKGROUND

This case involves a June 11, 2008 mortgage where the Plaintiff alleges default in May, 2010. The undisputed facts evidence that the lender extends, and defendant accepted, a March 10, 2010 trial program under the Making Homes Affordable Program ("HAMP"). Pursuant to the parties' agreement, Defendant successfully tenders, beginning May, 2010, fourteen (14) payments from April, 2010 to May, 2011. Bank of America accepts and credits thirteen (13) of these payments. In May, 2011 the lender rejects payment returning the same to Minardi. The undisputed evidence in this case evidences Minardi entered a HAMP trial program, where she successfully completed all required trial payments. Under the guise of an in-house "Special Forbearance" program, the lender advises Minardi she has failed to qualify for permanent loan modification under the March 30, 2010 HAMP trial modification. This occurs after the lender advises Minardi she has successfully made all required payments. The age-old justification for need of yet more paperwork, or failure to qualify, is then invoked by the lender as justification for its denial of Minardi for help under the Making Homes Affordable Program, and the lender files for foreclosure in November 11, 2011.

### PROCEDURAL BACKGROUND

Plaintiff alleged Defendant's default as of May, 2010. Discovery evidences Minardi is making trial modification payments

as of May, 2010 accepted and credited by the lender. Defendant Minardi filed the motions at issue on May 18, 2015 pursuant to Rule 42(b), SCRCF. Plaintiff sought relief in bifurcating and remand of Defendants' counterclaims for the purpose of jury trial pursuant to Johnson v. South Carolina Nat. Bank, 292 S.C. 51, 354 S.E.2d 895 (1987). Defendant's motion alleged that Minardi would suffer irreparable harm if the foreclosure were to be tried prior to resolution of the legal counterclaims before jury.

The trial court's May 19, 2015 Order denied bifurcation and remand, and ordered that Defendant's counterclaims be tried non-jury "*in the same trial as Plaintiff's claim for foreclosure of its mortgage*". 5/20/2014 Order, P.4, at ¶(1). Rule 42(b) addresses separate trials of counterclaims "*in order to preserve (sic) a party's right to a jury trial.*" Id.

At oral argument Plaintiff counsel submitted the case of Carolina First Bank n/k/a T.D. Bank, N.A. vs. BADD, LLC, 400 S.C. 343, 733 S.E.2d 619 (2012) in support of denial of bifurcation and remand. The court's Order of May 19, 2015 cites Wachovia Bank v. Blackburn, 407 S.C. 331, 755 S.E.2d 442 for the legal ruling that there exists no logical relationship and Defendants' counterclaims do not affect Plaintiff's right to enforce its note and mortgage. Defendant respectfully assert error of law and abuse of discretion under Johnson, *supra*, where discovery evidences Bank of America denial of a HAMP modification utilizing its own in-house "Special

Forbearance" agreement - one that Plaintiff Bank of America never offers, and one which Defendant Minardi never requested. Exhibit-A.

#### STANDARD OF REVIEW

The purpose of Rule 59(e), SCRPC, to alter or amend judgment[,] is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Collins Music Co., Inc. v. IGT, 353 S.C. 559, 562, 579 S.E.2d 524, 525 (Ct. App. 2002) (citations omitted). "[I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment", but also as a vehicle to request reconsideration of issues and arguments. A motion under Rule 59(e) long has been viewed as "motion for reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 21-22, 602 S.E.2d 772, 778-79 (2004) (citations omitted).

A new trial may be granted to all or any of the parties and on all or a portion of the issues ... "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State; and ... (2) "in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State. On a motion for a new

trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law, or make new findings and conclusions, and direct the entry of a new judgment". SCRCP 59(a).

#### ARGUMENT

1. **The trial court's order was entered prior to discovery being concluded in this case which now evidences compulsory conduct of Plaintiff Bank of America, N.A. (see, Exhibit-A).**

The court's ruling occurs one (1) day prior to Rule 30(b)(6) deposition of Bank of America's designee occurring on April 15, 2014. Discovery confirms that Plaintiff notified Defendant October 18, 2010 as follows: *"We are pleased to tell you that we have received the last installment due under our (\*sic) "Special Forbearance Agreement", \*(sic) dated March 30, 2010, and it has been credited (sic) to your account ..."* Exhibit-A. Bank of America, N.A. then subsequently fails to provide a permanent modification citing "Excessive Forbearance" for the first time on December 6, 2010. Exhibit - B. Discovery in the case confirms that at no time does Plaintiff request a "Special Forbearance" or a non-HAMP modification. (The "Excessive Forbearance" term and justification for denying modification under the HAMP program Defendant successfully completes occurs on October 18, 2010, a "non-HAMP" justification for denial is unilaterally imposed by the lender to justify its rejection of payments that occurred in May, 2011. Until some six (6) months later, Defendant is unaware that she is not actually participating in a HAMP program, but rather a Bank of

America in-house program designated a "Special Forbearance". It is a program which Defendant never requested and Plaintiff did not offer. This is confirmed in deposition by Bank of America's designee in deposition.

The trial modification payment plan offered in March, 2010 (commencing April 10, 2010) is a written offer from Plaintiff to Defendant. It is accepted and signed by Defendant. Valuable consideration is paid. Payments are accepted by Plaintiff Bank of America and credited. Exhibit-A. This occurs through the date of May, 2011 - a total of thirteen (13) accepted payments. Defendant Minardi respectfully asserts the master has erred in failing to recognize offer, acceptance and consideration - and that a valid contract exist - which has a logical relation to the default. The issue of existence of a contract is a question of fact for the jury when its existence is questioned and the evidence is either conflicting, or gives rise to more than one inference. Small v. Springs Indus., Inc., 292 S.C. 481, 357 S.E.2d 452 (1987). Although as a general rule contracts are to be construed by the court, where a contract (the March 10, 2010 HAMP trial modification) is capable of more than one construction (Exhibit-A), the question of what the parties intended becomes one of fact to be submitted to the jury. Soil Remediation Co. v. Nu-Way Env'tl., Inc., 325 S.C. 231, 482 S.E.2d 554 (1997). Respectfully, the court's ruling has deprived Defendant of a mode of trial to which she would be

entitled where the documentary evidence shows offer of a HAMP modification denied under a non-HAMP in-house Bank of America program in which Defendant never requested and arguably Plaintiff never offered. The March 10, 2010 trial mod was offered - accepted - performance rendered, and valuable consideration exchanged - under the Making Homes Affordable Program.

Alternatively, the court has erred by failing to recognize negligence - *error or omission by Bank of America* - in unilaterally denying a permanent modification predicated, erroneously, on "Forbearance" under a "non-HAMP" program. Exhibit-B. At no time did Defendant Minardi request a forbearance, special forbearance, or Bank of America corporate version of a HAMP trial mod. The documents produced in this case do not dispute this. Whether breach of contract, or negligence, both arise out of the May, 2010 HAMP trial modification and are causally connected. Both affect the default. Both would affect enforceability of the Note through Mortgage foreclosure as an equitable remedy.

**2. Defendant's counterclaims are compulsory, and arise out of the same transaction or occurrence as the May, 2010 default alleged by Plaintiff.**

The Complaint in this action alleges default as of May, 2010. [See, ¶(14), 11/11/2011 Complaint]. All evidence and testimony in the case confirms that Defendant Minardi was making payments pursuant to a HAMP trial modification plan offered by Plaintiff

as of May, 2010. Thirteen (13) payments are accepted before the lender unilaterally rejects tender May 11, 2011. Some six (6) months later, Bank of America notifies Defendant Minardi of its reason for denying her as : "Excessive Forbearance" under a "non-HAMP" (in-house) modification. It is not disputed, however, that as of May, 2010 Defendant Minardi is tendering - **and Bank of America is accepting** - trial modification Payments pursuant to the Making Homes Affordable Program ("HAMP"). As such, the allegations of default are in error, and Plaintiff would not be entitled to the equitable remedy of foreclosure under the administrative order, or existing case law. This would particularly be the case should *no default* exist - or should *no forbearance* have been requested. The lender's conduct in rejecting payments under a trial mod program pursuant to HAMP affects enforceability of the note through foreclosure, specifically. The lender has failed to permit Minardi to consummate a HAMP modification, and unilaterally interrupted the same, prior to commencing foreclosure.

3. There is a logical relationship between the claim of default and the May 10, 2010 HAMP Payments accepted by Plaintiff from Defendant which affect enforceability of the note and mortgage via foreclosure, specifically.

Do the legal counterclaims by Minardi affect the lender's right to enforce the note and foreclose the mortgage ? It is not disputed that as of May 10, 2010 Minardi is paying (and Plaintiff is

accepting) trial mod payments. If Plaintiff is accepting payments, there exists no default. If no default, there exists no lender right to foreclose. The lender notifies Minardi that she has completed the trial modification on October 18, 2011. Exhibit-A. In violation of the administrative order 2011-05-02-01, p. 4, ¶(c), the lender has denied Defendant a **full and fair** opportunity to consummate a HAMP modification. Exhibit-B.

4. The April 15, 2015 Rule 30(b)(6) deposition warrants reconsideration of Defendant's claims for Negligence and Breach of Contract causes of action as compulsory in nature and affecting Plaintiff's right to enforce the note and mortgage via foreclosure.

The trial court has, at oral argument, inquired as to whether Plaintiff would have the right to enforce the Note and Mortgage via foreclosure, should *arguendo* the counterclaims be tried first pursuant to Johnson, supra. The answer is yes. The irreparable harm in this case would be denial of due process right to be heard, first in priority, before a jury as to compulsory claims that affect enforceability of the note. It would include agreements capable of more than one construction - the original mortgage or October 18, 2010 modification, would be controlling. What the parties intended should properly be a jury question. Soil Remediation, supra. It affects a mode of trial, or substantial right pursuant to Article I, Sections (3) and (14) of the South Carolina Constitution. An order that effectively forecloses a

party from contesting the case on the merits affects a substantial right and is immediately appealable. McLaughlin v. Strickland, 279 S.C. 513, 309 S.C. 513 (Ct. App. 1983).

a. Deposition testimony confirms lender error or omission by designating the May 10, 2010 HAMP trial plan as a "forbearance" or "excessive forbearance". Exhibit-A.

On October 18, 2010 the lender notifies Minardi that she has Completed (sic)<sup>1</sup> the trial modification program under HAMP. The lender has used the pervasive and age-old justification that Minardi failed to properly return adequate paperwork to secure a modification after this letter. Noteworthy, however, is that the lender submits to Minardi in December, 2010 notice of why Defendant has been declined for permanent modification under HAMP: "Excessive Forbearance". At no place, and at no time, did Defendant request a forbearance; it is unilaterally imposed as justification by Bank of America for failing to consummate a permanent modification. This occurred after Minardi receives notification from Bank of America that she has successfully navigated and made the last required payment under a trial modification plan as of October 18, 2010. Bank of America unilaterally imposes a "Special

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<sup>1</sup> Noteworthy is that the "*Special Forbearance Agreement*" references the March 30, 2010 Making Homes Affordable Trial Program entered into by Minardi with Bank of America on April 1, 2010. Minardi never applied for a Forbearance agreement of any type. She applied for (and received) a trial modification plan pursuant to the Making Homes Affordable Program ("HAMP").

Forbearance" in-house program for that of the HAMP modification they offered on March 30, 2015.

- b. Plaintiff's continued justification of need for "more information" is disingenuous, unmeritorious, and designed to evade a successful conclusion by Defendant of HAMP trial denied under lender in-house "Special Forbearance" program.**

"Excessive forbearance" becomes the legal justification used for Bank of America denying Minardi under "our" (sic) program, not HAMP. It is undisputed that Bank of America offered, and Minardi accepted, a HAMP trial plan of March 30, 2010. Enter, however, "Special Forbearance" - a non-HAMP Bank of America alternative to the Making Homes Affordable Program. It is a program Defendant never requested, never applied for, and never discussed with Plaintiff. It is a program never offered by Plaintiff. It is, nonetheless, the legal justification for denying Minardi a permanent modification. Exhibit-B.

- 5. The Court's Order of May 19, 2015 permitting amended causes of action for Breach of Fiduciary Duty evidence that the counterclaims are *compulsory* and affect the Bank of America's right to enforce the note and *foreclose*.**

- a. There can be no default as of May, 2010 where the lender is accepting HAMP trial modification Payments.**

The payment history produced in discovery evidences Defendant paying - and Plaintiff accepting - trial modification payments. They commence on April 10, 2010. They end May 11, 2011 some fourteen (14) payments later. Payments are unilaterally rejected

by Bank of America May, 2011. It occurs after the lender notifies Defendant it has received the last payment due under the March 30, 2010 trial mod. The lender imposes "in-house" modification secreted upon Defendant as "Special Forbearance" program; it is the very essence of Breach of Fiduciary Duty in this case, which the court has granted as amendment. Not until December 6, 2011 does Minardi even know that Bank of America has substituted its own modification for the HAMP program Minardi applied for, and in contravention of the original HAMP trial mod agreement. Exhibit-

B.

**b. Violation of the Administrative Order of the South Carolina Supreme Court 2011-05-02-01.**

The November 11, 2011 equitable cause of action for foreclosure is instituted by Plaintiff, who then notified Defendant of her rights to foreclosure intervention - including the very HAMP modification Bank of America disrupts. This occurs after the lender declines Defendant Minardi for "Excessive Forbearance" on December 6, 2010 where no request for special forbearance ever existed. The lender unilaterally has imposed forbearance in reference to the March 30, 2010 trial mod program under HAMP. The lender has (a) rejected payments under a trial mod in progress under HAMP, after (b) notifying Defendant Minardi she has made the last of the required trial payments, and (c) filed its complaint for foreclosure after denying Minardi a fair opportunity to consummate

a HAMP modification. Defendant respectfully asserts the court should vacate its prior order as it pertains to Breach of Contract and Negligence specifically affecting enforceability of the Note and Mortgage via foreclosure, and grant Defendant Bifurcation and trial of counterclaims, first, before a jury. Pursuant to Johnson, *supra*, any other course of action fails to mitigate damage and prejudices the Defendant.

6. Johnson v. S.C. Nat'l Bank, 292 S.C. 51, 53, 354 S.E.2d 895 (1987) is controlling precedent and is dispositive of the issue before the court as to compulsory counterclaims affecting enforceability via foreclosure.

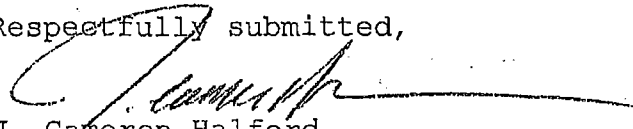
Despite Plaintiff's counsel citing BADD, LLC, 400 S.C. 343, 733 S.E.2d 619 (2012) at oral argument, the trial court has denoted Wachovia Bank v. Blackburn as controlling authority for the proposition that this Defendants' counterclaims are permissive; hence Defendant has waived its right to trial by jury. Defendant respectfully asserts error, where Johnson, *supra*, is and should be controlling precedent in the case, and not Wachovia Bank v. Blackburn. Johnson dictates that where "*the complaint is equitable and the counterclaim legal and compulsory, the Defendant has the right to a jury trial on the counterclaim.* In such a case, the proper procedure is as follows: (a) the trial judge should, pursuant to Rule 42(b), order separate trials of the legal and equitable claims. Id., 292 S.C. at 53. Where separate trials are ordered, the legal claims are to be tried first. Johnson, *supra*, 292 S.C. 56, 354 S.E.2d at 897. The court's

ruling deprives Defendant of a mode of trial constitutionally guaranteed in this state. See, Article I, Section 3 Constitution of South Carolina.

**CONCLUSION AND PRAYER FOR RELIEF**

Defendant Minardi respectfully asserts the court has erred as a matter law and abused its discretion by failing to bifurcate and order separate trial of compulsory legal counterclaims which affect note enforceability via foreclosure, specifically. Defendant respectfully prays that the court Reconsider its Order, alter and amend the same, pursuant to Johnson v. South Carolina Nat. Bank, 292 S.C. 51, 354 S.E.2d 895 (1987) and Order Bifurcation of the counterclaims and remand for jury trial. Defendant further requests reconsideration of the court's order as to Fraud, Negligence or Breach of Contract as compulsory counterclaims.

Respectfully submitted,



J. Cameron Halford  
S.C. Bar 17184  
Halford Niemiec & Freeman, L.L.P.  
238 Rockmont Drive,  
Fort Mill, South Carolina 29708  
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803-547-6638  
cam@fortmilllaw.com

**EXHIBIT A**

**BANK OF AMERICA LETTER TO  
DEFENDANT MINARDI DATED  
OCTOBER 18, 2010**

Bank of America



Home Loans

P.O. Box 10221  
Van Nuys, CA 91410-0221



Send Payments to:  
P.O. Box 15222  
Wilmington, DE 19886-5222

0001525-0001525 LETRS 001 ----- 017347

Michelle Minardi  
1808 Sam Smith Rd  
Fort Mill, SC 29708-8466

Notice Date: October 18, 2010

Account No.: 192460533

Property Address:  
1808 Sam Smith Road  
Fort Mill, SC 29715

**ABOUT YOUR LOAN**

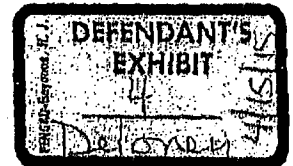
We are pleased to tell you that we have received the last installment due under our Special Forbearance agreement, dated March 30, 2010, and it has been credited to your account referenced above.

**THANK YOU FOR YOUR BUSINESS**

Thank you for fulfilling this commitment. You are now up to date and current on your home loan payments. You can resume making your normal monthly payments.

If you still have past due fees and/or charges, please pay those as soon as possible. We can tell you if you have past fee(s) or charge(s) and the amount(s) if you call us at 1-800-669-6650.

If you have any other questions, please contact us at 1-800-669-6650.



This communication is from BAC Home Loans Servicing, LP, the Bank of America company that services your home loan.

Please write your account number on all checks and correspondence.

LMPCURD 11987 03/04/0010

**EXHIBIT B**

**BANK OF AMERICA LETTER TO  
DEFENDANT MINARDI DATED  
DECEMBER 6, 2010**

Bank of America

Home Loans

4600 Amon Carter Blvd  
Fort Worth, TX 76165

December 06, 2010

Michelle Minardi  
1808 SAM SMITH ROAD  
FORT MILL, SC 29715

Loan Number: 192460533

Dear Michelle Minardi:

We have reviewed your request for a loan modification under the federal government's Home Affordable Modification Program. Unfortunately, your loan is not eligible for a Home Affordable Modification for the reason stated below.

We are currently reviewing your financial information to determine if there are other options available to you. These options may include:

- A different modification program that may help you achieve more affordable payments;
- A forbearance program, which would offer you lower payments or no payments for a limited number of months to either give you time to resolve your financial difficulties or give us time to work together with you on a more permanent solution;
- A short sale, in which you would agree to sell your home and the proceeds of the sale would be applied to your loan balance, even if it is not enough to pay off the loan in full; or
- A deed in lieu of foreclosure, in which you would transfer the deed to your home to us in full payment of the outstanding balance on your mortgage.

Once we have finished reviewing your information, we will contact you within 10 days to let you know what other options are available to you and the next steps you need to take. Please contact us at 1.888.325.5399 if you have questions about these options.

Under the guidelines of the Home Affordable Modification Program:

**Excessive Forbearance.** Your loan is not eligible for a Home Affordable Modification because we are unable to create an affordable payment equal to 31% of your reported monthly gross income without changing the terms of your loan beyond the requirements of the program. In other words, to create an affordable payment for you, the investor (owner) of your loan would be required to delay collecting too large a portion of your principal balance until the loan pays off, beyond what the Home Affordable Modification Program allows.

We strongly encourage you to continue making the normal monthly payments required under your original loan documents to help avoid foreclosure. Unfortunately, there is no guarantee that making your payments will help you qualify for a program that may resolve your situation, but not making any payments will increase your chance of foreclosure. We want to help you avoid that possibility.

**Important information about foreclosure proceedings**

If a foreclosure proceeding or foreclosure sale of your home is currently pending and on hold, that hold will continue and remain in effect while you are considered for other home retention programs.

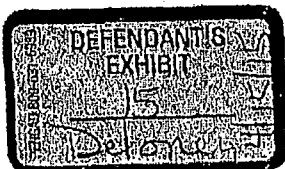
We're here to help you

Please call us today at 1.888.325.5399 if you believe your loan should be eligible for the Home Affordable Modification Program or if you have any questions. We will call you in 10 days to let you know what other options are available to you and the next steps you need to take.

You can also seek assistance at no charge from U.S. Department of Housing and Urban Development-approved housing counselors by calling the HOPE Hotline Number (1.888.995.HOPE). Assistance in understanding this notice is available through the HOPE Hotline by asking for MHA HELP.

BAC Home Loans Servicing, LP

Mortgages funded and administered by an Equal Housing Lender.  
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*For 800-320-5019  
716-635-2600  
Arik G.  
ED# 5943  
Letter of Intent  
2/10/11  
2/10/11  
Debra Cunningham  
Dec 2  
Abandonment  
Dec 6  
Profit & Loss  
2010  
Breakdown  
Monthly  
expenses  
For  
mortgage  
pay.*

*Memo  
to: [unclear]  
3/10/11  
[unclear]*

*Small  
letter  
2010  
for Honda  
just  
just*

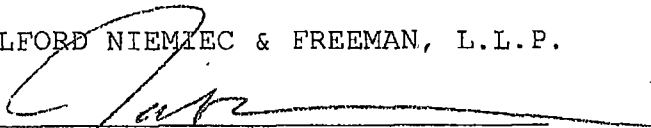
**CERTIFICATE OF SERVICE**

I hereby certify pursuant to Rule 59(g) that the undersigned received notice of entry and Form 4 of the trial court ruling on May 27, 2015, that the foregoing motion is filed in compliance with Rule 59(g) SCRPC, and that the foregoing Defendant Minardi Rule 59(e) Motion to Reconsider, Alter and/or Amend was served on the parties identified below by U.S. mail, postage prepaid, and addressed as follows:

**Hon. S. Jackson Kimball III**  
Master in Equity Court  
1 N. Congress Street,  
York, South Carolina 29745

**Caroline Glenn, Esq.**  
Brock & Scott, PLLC  
3800 Fernandina Road,  
Columbia, South Carolina  
**Attorney for Bank of America, N.A.**

HALFORD NIEMIEC & FREEMAN, L.L.P.

  
\_\_\_\_\_  
J. Cameron Halford, Esq.  
S.C. Bar 17184  
238 Rockmont Drive,  
Fort Mill, S.C. 29708  
803-547-6618  
803-547-6638 fax  
[cam@fortmilllaw.com](mailto:cam@fortmilllaw.com)

May 27, 2015  
Fort Mill, S.C.

# EXHIBIT "2"

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STATE OF SOUTH CAROLINA 2015 MAY 29 AM 10:35 IN THE COURT OF COMMON PLEAS  
COUNTY OF YORK SIXTEENTH JUDICIAL CIRCUIT

DAVID HAMILTON  
C.C.C.P. & G.S.  
YORK COUNTY, SC

Bank of America, N.A., )  
Successor by merger to BAC )  
Home Loan Servicing, LP, )  
F/K/A Countrywide Home Loans )  
Servicing, LP, )

Case No. 2011-CP-46-04278

Plaintiff, )

DEFENDANT MINARDI  
NOTICE OF MOTION AND MOTION  
FOR RECONSIDERATION

vs. )

AND MEMORANDUM IN SUPPORT  
SCRCP 59(e)

Michelle Minardi, and Ameris )  
Bank, )

Defendants. )

TO: HON. S. JACKSON KIMBALL, III;  
CAROLINE GLENN, ESQ., ATTORNEY FOR BANK OF AMERICA, N.A.

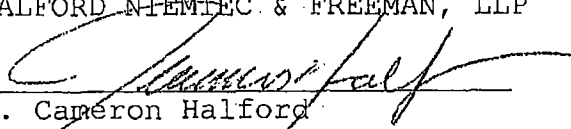
YOU WILL TAKE NOTICE that counsel for the Defendant Michelle Minardi will, pursuant to SCRCP 59(e), move before the Master in Equity Judge, within ten (10) days after service hereof, or as soon as counsel may be scheduled, for Reconsideration and for an Order to Alter or Amend the ruling of the Master in Equity dated May 18, 2015 and recorded May 20, 2015.

Defendant respectfully requests that the Master in Equity reconsider its ruling that the Defendant's counterclaims in the case are permissive and that Defendant is not entitled to, and has waived jury trial. Further, defendant respectfully asserts the trial court has erred as a matter of law by holding Wachovia Bank v. Blackburn, 407 S.C. 321, 755 S.E. 2d 437 (2014) as controlling

precedent in the case where Discovery now confirms that Plaintiff's acceptance of payments evidences no default, directly affecting the lender's right to enforce the note through foreclosure, specifically, as a remedy. The Rule 30(b)96) deposition taken April 15, 2015 evidences denial of HAMP modification under guise of "Special Forbearance" Bank of America in-house Programs Defendant never applied for, and Plaintiff never offered. Defendant Minardi therefore seeks reconsideration of the negligence, breach of contract, and fraud<sup>1</sup> (proposed) causes of action in this case and seeks an Order to Bifurcate and Remand these causes of action.

Respectfully submitted,

HALFORD NIEMTEC & FREEMAN, LLP



J. Cameron Halford  
S.C. Bar No. 17184  
238 Rockmont Drive  
Fort Mill, S.C. 29708  
803-547-6618  
803-547-6638 fax

May 29, 2015  
Fort Mill, S.C.

---

<sup>1</sup> The court's Order dated May 19, 2015 incorrectly cites Fraud as a counterclaim found within the original Answer. Fraud was proposed by Defendant motion to Amend Pleadings, and not claimed in the original defensive pleadings.

# EXHIBIT "3"

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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DEC 29 2015  
SC Court of Appeals

---

APPEAL FROM YORK COUNTY  
Court of Common Pleas

Honorable S. Jackson Kimball III, Master-in-Equity

---

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

---

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

---

**RESPONDENT BANK OF AMERICA, N.A.'S DESIGNATION OF MATTER  
TO BE INCLUDED IN RECORD ON APPEAL**

---

Respondent Bank of America, N.A. hereby submits the following Designation of Matter  
to be included in the Record on Appeal:

- Transcript of Hearing for First Motion for Order of Reference held on September 5, 2012
- Transcript of Hearing for Subsequent Motion for Order of Reference held on January 13, 2014
- Motion to Reconsider filed on May 29, 2015 and Memorandum in Support

The undersigned counsel hereby certifies that this Designation contains no matter which is  
irrelevant to the appeal.

Date: December 28, 2015

[SIGNATURE BLOCK ON FOLLOWING PAGE]

Brian A. Calub

Brian A. Calub  
S.C. Bar No. 72009  
MCGUIREWOODS LLP  
201 North Tryon Street  
Suite 3000  
Charlotte, NC 28202  
Tel: (704) 343-2009  
Fax: (704) 373-8842

*Attorney for Respondent*

**CERTIFICATE OF SERVICE**

The undersigned certifies that *Respondent Bank of America's Designation of Matter to be included in the Record on Appeal* was served on appellant's counsel by depositing a copy thereof in the United States Mail, first class, postage prepaid, addressed to:

J. Cameron Halford  
Halford Niemic & Freeman, LLP  
238 Rockmont Drive  
Fort Mill, SC 29708

This the 28th day of December, 2015.

Brian A. Calub

Brian A. Calub

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Direct: 704.343.2009

**MCGUIREWOODS**

bcalub@mcgulrewoods.com  
Fax: 704.343.2300

December 28, 2015

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

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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 one (1) copy of Respondent Bank of America, N.A.'s Answer Brief and Designation of Matters to be Included in Record on Appeal regarding the above-captioned matter.

Upon receipt, kindly file the originals and return the conformed copies to my attention in the postage-paid envelope provided for your convenience.

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 (w/encl.)

Atlanta | Austin | Baltimore | Brussels | Charlotte | Charlottesville | Chicago | Dallas | Houston | Jacksonville | London  
Los Angeles - Century City | Los Angeles - Downtown | New York | Norfolk | Pittsburgh | Raleigh | Richmond | Tysons Corner | Washington, D.C. | Wilmington

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UNITED STATES US

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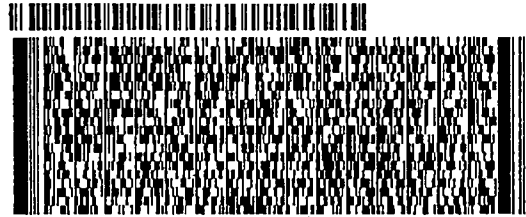
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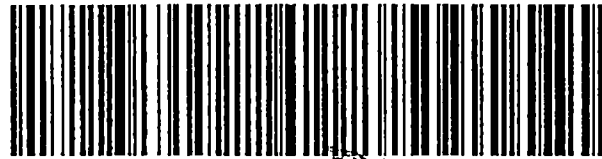
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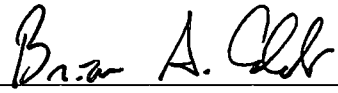
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**CERTIFICATE OF SERVICE**

The undersigned certifies that *Respondent's Return to Appellant's Motion for Reconsideration and Motion for Order to Alter or Amend March 4, 2016 Order and Rule SCACR 240(c)(3) Affidavit* were served on Appellant's counsel by depositing a copy thereof in the United States Mail, first class, postage prepaid, addressed to:

J. Cameron Halford  
Halford Niemic & Freeman, LLP  
238 Rockmont Drive  
Fort Mill, SC 29708

This the 18<sup>th</sup> day of March, 2016.

  
\_\_\_\_\_  
Brian A. Calub

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March 18, 2016

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**SC Court of Appeals**

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:

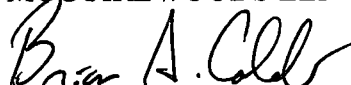
Enclosed please find an original and (8) copies of Respondent Bank of America, N.A.'s Return to Appellant's Motion for Reconsideration and Motion for Order to Alter or Amend March 4, 2016 Order, and Affidavit of Respondent's Counsel in Support regarding the above-captioned matter.

Upon receipt, kindly file the original and return a conformed copy to my attention in the postage-paid envelope provided for your convenience.

Please feel free to contact me should you have any questions. Thank you for your assistance.

Sincerely,

MCGUIREWOODS LLP

  
Brian A. Calub

BAC/mp  
Enclosures

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

ORIGIN ID:QWGA (703) 343-2000  
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UNITED STATES US

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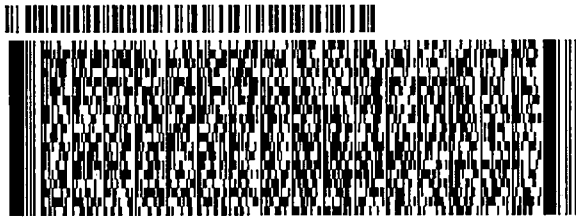
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