THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Charleston County Master in Equity

APPELLATE CASE NO. 2014-002590

BRENT E. BENTRIM , ...Appellant

v.

WELLS FARGO BANK, N.A.,..... Respondent

FINAL REPLY BRIEF OF APPELLANT

Robert B. Varnado (S.C. Bar # 0007850)
Alexis M. Wimberly (S.C. Bar # 101611)
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant

Other Counsel of Record:
Charles M. Baker III, Esquire
S. Sterling Laney III, Esquire
John C. Hawk IV, Esquire
WOMBLE CARLYLE SANDRIDGE & RICE, LLP
P.O. Box 999
Charleston, SC 29402
Attorneys for Respondent

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Argument 1

I. Introduction 1

II. Arguments Why 12 U.S.C.§ 215e is Inapplicable. 2

A. Genuine Issues of Material Fact Preclude 12 U.S.C. § 215e Application. 2

B. 12 U.S.C. § 215e Does Not Apply to Non-National Bank Subsidiaries. 9

C. Wells Fargo Miscites Authority as to How 12 U.S.C. 215e Operates. 9

D. Bentrim's Position is Consistent with General Principles of Statutory Construction. 11

E. 12 U.S.C.§ 215e Does Not Preempt UCC Article 3 13

F. Appellant Does Not Seek to Nullify UCC Article 3 14

III. Other Issues Abandoned by Wells Fargo. 15

A. Applicability of *Draper*. 15

B. Holder in Due Course. 16

C. Holder by Issue/Holder by Negotiation. 17

D. Master's Local "Rule of Thumb" for Enforcement. 17

E. Wells Fargo Not a Person Entitled to Enforce Through Transfer 18

IV. Reply to Summary Judgment Issues Raised by Respondent. 19

F. Fair Debt Collection Practices Act. 19

G. Consumer Protection SC Code Ann. § 37-5-108. 20

Conclusion 21

TABLE OF AUTHORITIES

Page(s)

CASES

Alexander v. Houston, 403 S.C. 615, 744 S.E.2d 517 (2013) 15

Bank of America v. Draper, 405 S.C 215, 746 S.E.2d 478 (Ct. App. 2013) 8, 14

Barnett Bank of Marion County, N.A. v. Nelson, Florida Ins. Commissioner, et al., 517 U.S. 25 (1996) 13

Becker v. Nat'l Bank & Trust Co., 222 Va. 716, 284 S.E.2d 793 (Va. 1981) 17

Berkshire Bank v. Hartford Club, 158 Conn. App. 705 (Conn. App. Ct. 2015) 10

Broom v. Jennifer J., 403 S.C. 96, 742 S.E.2d 382 (2013) 19

City of Casey v. Norfolk Southern, 391 S.C. 395, 688 S.E.2d 136 (2011) 12

Connolly v. Pots, 306 S.E.2d 123 (N.C. Ct. App. 1983) 10

Estate of Barr v. Carson, 300 S.C. 171, 386 S.E.2d 791 (Ct. App. 1989) 4

First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994) 18

First Union Nat'l Bank v. FCVS Commc'ns, 321 S.C. 496, 469 S.E.2d 613 (Ct. App. 1996) 16

Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001) 17

Glazer v. Chase Home Fin. LLC, 704 F.2d 453 (6th Cir. 2013) 19

Graves v. CAS Medical Systems, Inc., 401 S.C. 63, 735 S.E.2d 650 (2012) 2

Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 725 S.E.2d 693 (2012) 15

Hancock v. Mid-South Mgmt. Co., 381 S.C. 326,
673 S.E.2d 801 (2009) 2

In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) 18

In re Rodriguez, No. 11-BK-18847-RGM, 2015 WL 403968
(E.D. Va. Jan. 29, 2015) 11

In re Yopp, 217 N.C.App. 489, 720 S.E.2d 769 (N.C. Ct. App. 2011) 10

I'on, LLC v. Town of Mt. Pleasant, 338 S.C. 406,
526 S.E.2d 716 (2000) 15

Jennings v. Jennings, 401 S.C. 1, 736 S.E.2d 242 (2012) 11

Kaltenbach v. Richards, 464 F.3d 524 (5th Cir. 2006) 19

Knoke v. South Carolina Dep't of Parks, Rec. & Tourism,
324 S.C. 136, 478 S.E.2d 256 (1996) 7

McCall v. Finley, 294 S.C. 1, 362 S.E.2d 26 (Ct. App. 1987) 12, 14

Montgomery v. CSX Transport, Inc., 376 S.C. 37,
656 S.E.2d 20 (2008) 2, 7

Piper v. Portnoff Law Assocs., Ltd., 396 F.3d 227 (3d Cir. 2005) 19

Premier Bank v. Daigle, 599 So. 2d 503 (La. App. 1992) 10

Priester v. Cromer, 401 S.C. 38, 736 S.E.2d 249 (2012) 12

Quigley v. Rider, 357 S.C. 477, 593 S.E.2d 476 (Ct. App. 2003) 11, 13

Reese v. Ellis, Painter, Ratterree & Adams, LLP,
678 F.3d 1211 (11th Cir. 2012) 19

Robertson v. First Union Nat'l Bank, 350 S.C. 339,
565 S.E.2d 309 (Ct. App. 2002) 7

Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397,
581 S.E.2d 161 (2003) 2

Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 32 (Ct. App. 2003) .....

Shupe v. Settle, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994) 8

Smathers v. Smathers, 239 S.E.2d 637 (N.C. App. Ct. 1977) 9

St. Paul Fire and Marine Ins. Co. v. Am. Ins. Co., 251 S.C. 56,
159 S.E.2d 921 (1986) 3

State v. 192 Coin-Operated Video Game Machs., 338 S.C. 176,
525 S.E.2d 872 (2000) 13

State v. Colf, 332 S.C. 313, 504 S.E.2d 360 (Ct. App. 1998),
aff'd as modified, 337 S.C. 622, 525 S.E.2d 246 (2000) 18

Swindler v. Swindler, 355 S.C. 245, 584 S.E.2d 438 (Ct. App. 2003) 12

Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402,
563 S.E.2d 109 (Ct. App. 2002) 7

Turner v. South Carolina Dep't Environ. Control, 377 S.C. 540,
661 S.E.2d 118 (Ct. App. 2008) ..... *passim*

Valley Nat'l Bank v. Chaim, 984 N.Y.S.2d 635, 2013 WL 565173 10
Weston v. Kim's Dollar Store, 385 S.C. 520, 684 S.E.2d 769
(S.C. Ct. App. 2009), *aff'd as modified*, 399 S.C. 303, 731 S.E.2d 864 (2012) 13

Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373 (4th Cir. 2006) 19

Wyeth v. Levine, 555 U.S. 555, 129 S.Ct. 1187,173 L.E.2d 51 (2009) .....

STATUTES

12 U.S.C. § 25 12

12 U.S.C. § 37 8

12 U.S.C. § 215 ..... *passim*

15 U.S.C. § 812 17

15 U.S.C. § 813 17

15 U.S.C. § 1692 ..... 17, 19

18 U.S.C. § 2510 11

N.C. Gen. Stat. Ann. § 53C-7-205 (West) 9

Rule 208, SCACR 14

Rule 217, SCACR 14

Rule 220, SCACR 14

Rule 704, SCRE 6

S.C. Code Ann. § 36-1-201 4

S.C. Code Ann. § 36-3-103 ..... 4, 17

S.C. Code Ann. § 36-3-119 12

S.C. Code Ann. § 36-3-201 ..... *passim*

S.C. Code Ann. § 36-3-203 ..... *passim*

S.C. Code Ann. § 36-3-301 ..... 1, 17

S.C. Code Ann. § 36-3-302 14

S.C. Code Ann. § 36-3-602 14

S.C. Code Ann. § 37-1-301 20

S.C. Code Ann. § 37-2-104 20

S.C. Code Ann. § 37-2-106 20

S.C. Code Ann. § 37-2-701 18

S.C. Code Ann. § 37-3-104 20

S.C. Code Ann. § 37-4-104 18

S.C. Code Ann. § 37-5-108 20

OTHER AUTHORITIES

James F. Flanagan, *South Carolina Civil Procedure* (2d ed. 2012) 7

Jean Toal, *Appellate Practice in South Carolina* 2d. (SC Bar 2002) 15

Kurt Eggert, *Foreclosing on the Federal Power Grab: Dodd-Frank, Preemption, and the State Role in Mortgage Servicing Regulation*, 15 Chap. L. Rev. 171 (2011) 1

I. Introduction.

This complaint was brought by the Plaintiff in part to enforce the terms of his loan. Wells Fargo, time and again, has characterized Bentrim as unwilling to pay when it is undisputed the Wells Fargo refused (after an admitted accounting error) to accept payments tendered from Bentrim from December 2008 through January 2010. [R. 1418, R. 1299].

Now, Wells Fargo seeks to redefine "default" as "failure to pay amounts not due," and "failure to pay payments refused." Likewise, the Wells Fargo argues the Court should define "holder" as a 'general label' ... because if *it* is not the holder, so it argues, then "the unspoken result is that the Note is unenforceable by anyone." Bentrim submits that Respondent's position is untenable.

In reality, Wells Fargo must attempt to claim the title of a 'holder' – no matter how tenuous or specious the legal or factual basis to make the claim – because otherwise it cannot overcome the genuine issues of material fact it has failed to "demonstrate the purpose of delivery of the note to it in order to qualify as the person entitled to enforce"[1] to qualify as a non-holder in possession with rights to enforce under S.C. Code Ann. § 36-3-301(ii). Doing so would require it to answer whether it exposed Bentrim to dual liability on his loan since 2006 to a holder in due course.

Ultimately, the Court should also look at the strange juxtaposition of parties this case:

- It is the bank claiming a Negotiable Instrument is only enforceable as a contract between the original lender and borrower.

[1] Report of the Permanent Editorial Board for The Uniform Commercial Code, "Application of the Uniform Commercial Code to Selected Issues Related to Mortgage Notes," page 6 dated November 14, 2011 by the American Law Institute.

- It is the bank claiming a sale and securitization of a Negotiable Instrument, absent negotiation, renders it unenforceable.

- It is the homeowner, not the bank, who argues the Uniform Commercial Code applies to Negotiable Instruments.

- It is the bank asserting records demonstrating a sale and transfer of the note are invalid.

- It is the homeowner who has produced, *based on personal knowledge of the loan servicing and accounting record,* expert testimony refuting unsubstantiated theories by the bank that no sale and transfer of the Note occurred.

- It is the bank, not the homeowner who is unable to offer any expert testimony to refute the servicing records and the application of the Uniform Commercial Code.

For the reasons set forth herein, this Court should reject Wells Fargo's arguments and reverse the Master.

II. ARGUMENTS WHY 12 U.S.C. § 215e IS INAPPLICABLE.

A. Genuine Issues of Material Fact Preclude 12 U.S.C. § 215e Application.

It is a bedrock principle of summary judgment procedure in this State that the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the non-moving party. *Sauner v. Pub. Serv. Auth. of S.C.,* 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003); *Montgomery v. CSX Transport, Inc.*, 376 S.C. 37, 53-54, 656 S.E.2d 20, 29 (2008). Under *Hancock v. Mid–South Mgmt. Co.,* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009), "the non-moving party is only required to submit a *mere scintilla* of evidence in order to withstand a motion for summary judgment." Moreover, any fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good as direct evidence if it is equally as convincing to the trier of the facts. *Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 79-80, 735 S.E.2d

650, 658 (2012); *St. Paul Fire & Marine Ins. Co. v. Am. Ins. Co.*, 251 S.C. 56, 59–60, 159 S.E.2d 921, 923 (1968).

Contrary to Wells Fargo's position, this appeal has nothing to do with the fact that Wachovia Bank, N.A. merged with Wells Fargo Bank, N.A. effective March 20, 2010. Rather, the whole appeal turns on what happened to the Bentrim Note on November 29, 2006.

According to Wells Fargo, nothing much happened at all on November 29, 2006 except the sale of a "beneficial interest" in the Bentrim Loan by Wachovia to a subsidiary (the reason for which is never explained), with the request that any corporate formality or separate corporate structure between Wachovia and the subsidiary ignored by the Court. To side with Wells Fargo, then, this Court must accept as unchallenged and entirely true Wells Fargo's factual position, buried in footnote 7 on page 15 of its Brief, stating that although "Wachovia sold a beneficial interest in the loan to its wholly-owned subsidiary, The Money Store Service Corporation," nevertheless "the undisputed facts in the record demonstrate that Wells Fargo and its predecessor entities have held the Note at all times and the Note itself was never transferred."

Bentrim, however, would point to the following facts and law which stand in complete contravention of Wells Fargo's position. If the Court of Appeals gives credence to these facts, and the logical inferences therefrom – which Bentrim submits this Court is obligated to do – then it cannot uphold the grant of summary judgment:

(a). Respondent's witness Timothy Wakefield testified that a 100% beneficial interest in the Bentrim loan was sold by Wachovia to TMS Service Corp. effective

November 29, 2006; Appellant's CPA expert Clifton Boddiford testified that this transaction constitutes a "sale" absolute. [R. 1294, R. 1108-1109, 1111-1112].

(b). Notwithstanding Respondent's arguments to the contrary, at the time of the sale, Wachovia also unequivocally **transferred** the Bentrim Note to TMS Service Corp., Inc. and made transfer warranties in Section #4 of the Pooling and Servicing Agreement [Sealed App. R 1320-1350]. This begs the question why would Wachovia enter into a PSA with TMS Service Corp, Inc., in which it disclaims any obligation except as a custodian, if it was not transferring legal possession to TMS Service Corp., Inc. of the Notes subject to the PSA? The fact that PSA shows where the then-holder (Wachovia) declared its intent to voluntarily transfer a note without negotiation, giving the transferee (TMS Service Corp.) possession via the servicing agreement meets all the tests of a transfer. S.C. Code Ann. §§ 36-3-103(a); 36-1-201(14); 36-3-203.

(c). Obviously, Respondent has not shown and cannot show any authority that allows a National Bank to enforce a note in its own name, as a "holder," when the note has been lawfully transferred to a non-National Bank subsidiary. This is the central factual and legal dispute between the parties.

(d). More importantly, there is no evidence offered by Respondent that TMS Service Corp., Inc. ever made a voluntary and intentional transfer of possession of the Bentrim Note back to Wachovia/Wells Fargo – which is necessary to meet the definition of "delivery" and therefore transfer under UCC Article 3. *Estate of Barr v. Carson*, 300 S.C. 171, 173, 386 S.E.2d 791, 793 (Ct. App. 1989); S.C. Code Ann. §§ 36-3-103(a); 36-1-201(14); 36-3-203. It bears repeating that transfer is not about the receiving or accepting an instrument, but the manner in which the instrument is given/delivered. *Id.* When

combined with the fact that the Note is unindorsed (and therefore cannot have been negotiated back either), there is a huge failure of proof on the part of Respondent that Wachovia was the holder at the time of the 2007 and 2009 foreclosure suits.

(e). This conclusion is further supported by the fact that the Bentrim Note completely disappears from the Wachovia-Wells Fargo vault records from May, 2002 to February, 2013, with no proof offered as to whether it was with a Wachovia attorney (or the dates it was purportedly with a Wachovia attorney) other than unsupported, impermissible argument of counsel. [R. 1309-1310, Sealed App. R 1433-1445]. The fact that the copy of the Note attached to the LNA which Ms. Thomas certified as a *"true, correct and substantial copy of the lost or destroyed Note"* materially differed from the Note which Wells Fargo exhibited to the Court which had two barcodes on it, is also significant in that it means all during the time Respondent claimed to have the original note, it was not exhibiting an actual copy of the true original, but another copy altogether – leading to the inference that Respondent could never could lay its hands on a true original until February, 2013 and therefore was not in possession until then. [R. 1115-1118; R. 1119-1146].

(f) Appellant is accordingly entitled to an inference that Respondent cannot prove Wachovia was in possession of the Bentrim note at the time of the Wells Fargo merger [nor for that matter at the time of the 2007 and 2009 foreclosure suits, or even at the inception of the counterclaim] – rendering its 12 U.S.C. § 215e argument moot.

(g) If the Court of Appeals believes probative the fact TMS Service Corp., Inc. was a subsidiary of Wachovia (which Bentrim deems irrelevant since it had separate corporate existence from Wachovia, as the PSA goes to great lengths to describe) [R. 1309-

1310; Sealed App. R.1320-1350], then the Kita Affidavit shows that at some point – how or when has never been adduced in discovery – the Bentrim Note was owned by a Real Estate Management Investment Conduit (REMIC) Trust. [R. 1098-1101]. Bentrim would therefore be entitled to the inference that at some point, ownership and possession was vested in that non-Bank subsidiary REMIC Trust, which would require proof of some voluntary transfer back to Respondent, which is obviously missing. Interestingly, Respondent never explains the role of Pool 794.

(h). The Lost Note Affidavit of Tracy Thomas, upon which Respondent places so much emphasis, is therefore unreliable. She averred in the Lost Note Affidavit that the Note had never been "pledged, assigned, transferred, hypothecated or otherwise disposed of" – which she confirmed in her deposition – and Appellant is entitled to an inference that her testimony is incorrect. [R. 1285, R. 850, p. 110]. Ms. Thomas also conceded in her deposition she did not consult the ACLS Servicing Records in preparing her affidavit." [R. 843-849]. In any event, how can Wachovia/Wells Fargo lose a note it had no right to possess? Again, there is absolutely no evidence in the record that the Note was ever voluntarily and intentionally transferred back to Respondent at any point after the transfer from Wachovia to TMS Service Corp, Inc.

(i). The Wakefield Affidavit submitted by Wells Fargo is silent on the issue of Pool 794, and does not explicitly state that the Note was still in the possession of TMS Service Corp. at the time of a putative merger of that entity into The Money Store.

When all the foregoing facts, and inferences from them, are viewed in the light most favorably to Bentrim, the issue of 12 U.S.C. § 215e is rendered moot because there is a genuine issue of fact that Wachovia neither lawfully owned or possessed the Note at

the time of the Wells Fargo merger. Bentrim is further entitled to the inference that Wachovia did not lawfully own or possess the Bentrim Note at the time of the 2007 and 2009 foreclosure actions, either. The fact that the documentary evidence supports Bentrim's version of events, while Respondent argues against the documentary evidence, only further substantiates the weakness of Respondent's argument.

Additionally, Wells Fargo urges the Court to ignore the affidavits of Bentrim's two experts, Casimira Kita (who developed the ACLS servicing software used by Wachovia before 2010) and Clifton Boddiford (a South Carolina CPA with expertise in banking matters), on the grounds that they offer mere "opinions." This request, however, conflicts with well-established South Carolina law.

In *Montgomery v. CSX Transport, Inc.,* 376 S.C. 37, 53-54, 656 S.E.2d 20, 29 (2008), the South Carolina Supreme Court made it clear that in ruling on a summary judgment motion, "a court must consider *everything* in the record-pleadings, depositions, interrogatories, admissions on file, affidavits, etc." *See also* James F. Flanagan, *South Carolina Civil Procedure* 454 (2nd ed.1996) ("Affidavits are the principal means of bringing information before the court in a motion for summary judgment."). It is entirely proper to submit expert testimony by means of affidavits – including in banking cases. *Robertson v. First Union National Bank*, 350 S.C. 339, 351-352, 565 S.E.2d 309, 315-316 (Ct. App. 2002). Moreover, contrary to Wells Fargo's unsupported assertions, an expert's otherwise admissible "opinion" is not inadmissible simply because it embraces the ultimate issue to be decided by the trier of fact. Rule 704, SCRE; *see also Knoke v. South Carolina Dep't of Parks, Rec. & Tourism,* 324 S.C. 136, 478 S.E.2d 256 (1996).

In the instant case, Respondent never moved to exclude the affidavits of Boddiford and Kita, nor did the Master exclude them [which would have been an abuse of discretion had he done so following *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 412, 563 S.E.2d 109, 114 (Ct. App. 2002) (holding it was an abuse of discretion to bar expert testimony of witness with sufficient familiarity with the issues raised in the case)]. As such, their testimony – basically that the "participation interest" agreement was a sale no matter how Wells Fargo tries to couch it [R. 1108-1114] or that documents produced by Wells Fargo show that the Bentrim loan was owned by a REMIC Trust at some point [R.1098-1101] – not only substantiate genuine issues of material fact in opposition to Wells Fargo's version that the note was never sold or transferred, but also form the basis for the inferences of fact that: (i) Wachovia sold and transferred the note years before the Wells Fargo merger; (ii) Wachovia did not have possession or ownership of the Note at the inception of the 2007 and 2009 suits; and (iii) Respondent cannot even prove legal or physical possession at the inception of the counterclaim.

Bentrim also submits that almost every reported case cited by both Appellant and Respondent, there is expert testimony (usually offered by the party seeking to enforce) showing how the instrument was negotiated or transferred. *See e.g., Bank of America, N.A. v. Draper*, 405 S.C 214, 746 S.E.2d 478 (Ct. App. 2013). Here, it is Bentrim who produces such experts, not Wells Fargo. His experts, thus, should be heard. Respondent's reliance on *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994) is inapplicable and misplaced. *Shupe* is not an expert witness case nor a case in which there are affidavits competing with the movant's version of events. In *Shupe,* the trial court granted summary judgment on a third-party beneficiary claim to insurance proceeds, where the non-moving

party filed no counter-affidavit and could not produce a contract of insurance. The facts of *Shupe* are simply inapplicable in the appeal at bar.

B. 12 U.S.C. § 215e Does Not Apply to Non-National Bank Subsidiaries.

In Appellant's Brief, Bentrim argued that 12 U.S.C. § 215e cannot apply in a factual situation where it is alleged that The Money Store merged into Wachovia (if that is in fact the case, as there is no evidence the Office of the Comptroller of the Currency approved such a merger). "If [a] respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct." *Turner v. South Carolina Dep't Environ. Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008). In any event, under 12 U.S.C. § 37, the National Bank Act is inapplicable to a non-National Association subsidiary.

C. Wells Fargo Miscites Authority as to How 12 U.S.C. § 215e Operates.

Wells Fargo incorrectly cites numerous cases for the proposition that a transfer of an unindorsed note via a 12 U.S.C. § 215e merger automatically makes a successor bank a holder. Even a cursory review of these cases, contrary to Wells Fargo's argument, shows that, in fact, they do not hold that a successor bank is a "holder" simply because of the merger.

The lead case cited by Wells Fargo, *In re Yopp*, 217 N.C. 489, 497, 720 S.E.2d 769, 774 (N.C. Ct. App. 2011), concerns an attempt by a successor bank to enforce a promissory note. In that case, the plaintiff originally executed a Deed of Trust which was secured by a promissory note to Chevy Chase Bank. *Id.*, 720 S.E.2d at 770. That note was then transferred to a successor bank that began foreclosure proceedings – to which the plaintiff objected to on the grounds that the successor was not the holder of the note. *Id.* The *Yopp*

court ruled the successor was "'substituted for' and had 'all the rights and powers of the transferring institution.'" *Id.,* 720 S.E.2d at 775 (citing N.C. Gen. Stat. Ann. § 53C-7-205). Thus, the *Yopp* Court found that the successor bank was "a non-holder in possession with the rights to enforce" – i.e., because there was a transfer via the merger, the successor bank was not a holder. *Id.; see also Smathers v. Smathers*, 239 S.E.2d 637, 638 (N.C. Ct. App. 1977)("holding that despite evidence of voluntary transfer of promissory notes and the plaintiff's possession thereof, the plaintiff was not the holder of the note under the UCC as the notes were not drawn, issued, or indorsed to her, to bearer, or in blank."). Accordingly, *In re Yopp* reaches the opposite conclusion for which Respondent cites it.

Moreover, in *In re Yopp* the North Carolina Court of Appeals was explicit that mere "production of an original note at trial does not, in itself, establish that the note was transferred to the party presenting the note with the purpose of giving that party the right to enforce the instrument." *Id.,* 720 S.E.2d at 774 (citing *Connolly v. Potts*, 306 S.E.2d 123, 125 (N.C. Ct. App. 1983). This stands in opposition to the significance Respondent places on exhibiting the original to note to Judge Scarborough starting in 2013 (as well as begs the question of why the original note has a different bar code than all the copies previously exhibited to the Court) [R. 1115-1118; R. 1119-1146].

Similarly, in *Berkshire Bank v. Hartford Club*, 158 Conn. App. 705 (Conn. App. Ct. 2015), the Connecticut Court of Appeals rejected the notion that a successor to a bank automatically became a holder by virtue of a merger. In that case, the defendant executed a mortgage secured by a promissory note to the Connecticut Bank and Trust Company ("CBT"); CBT then merged with a successor bank that commenced a foreclosure action against the defendant. *Id.* at *4. "[T]he note at issue [was] payable to CBT or order, and it

was not endorsed to the order of the "plaintiff." *Id.* The *Berkshire Bank* court found that the successor was not the holder of the note "because the note was not payable to bearer or to an identified person who [was] the person in possession of the note." *Id.* The successor "was a nonholder in possession of the instrument who had the rights of a holder (CBT) as the 'transferee' by merger." *Id.*

Thus, the *Berkshire Bank* decision – as in *In re Yopp* – actually supports Bentrim's contention that any transfer of an unindorsed note under a 12 U.S.C. § 215e merger (assuming the note is still in the possession of the original bank) simply makes the successor bank "a nonholder in possession of the instrument" and not a holder. *Id.* The other cases cited by Wells Fargo appear to be inapplicable because they do not pertain to negotiable instruments [*e.g., Premier Bank v. Daigle*, 599 So. 2d 503 (La. App. 1992); *Valley Nat'l Bank v. Chaim*, 984 N.Y.S.2d 635, 2014 WL 565173 (N.Y. Super. Ct. Jan. 13, 2014; *In re Rodriguez*, No. 11-BK-18847-RGM, 2015 WL 403968 (E.D. Va. Jan. 29, 2015)].

D. Bentrim's Position is Consistent with General Principles of Statutory Construction.

General principles of statutory construction further support Bentrim's argument against the Respondent's interpretation of 12 U.S.C. § 215e and underscore the true holdings of *In Re Yopp* and *Berkshire Bank.* When construing federal statutes, the South Carolina Supreme Court has turned to the same concepts of statutory construction as it does when analyzing state statutes. *See Jennings v. Jennings*, 401 S.C. 1, 7, 736 S.E.2d 242, 244-245 (2012). In *Jennings*, Justice Hearn analyzed the federal Stored Communications Act, 18 U.S.C. §2510 and wrote:

> "Statutory construction must begin with the language of the statute. In interpreting statutory language, words are generally given their common

> and ordinary meaning. Where the language of the statute is unambiguous, the Court's inquiry is over, and the statute must be applied according to its plain meaning (internal citations omitted)."

Id., 401 S.C. at 7, 736 S.E.2d at 244-245.

With respect to 12 U.S.C. § 215e, the key phrase is "all rights, franchises and interests ... shall be ***transferred*** to and vested in the consolidated national banking association (emphasis added)." In the context of a negotiable promissory note, the plain and ordinary meaning of transfer or transferred is defined under the UCC as "deliver[y] by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." S.C. Code Ann. § 36-3-203(a). Whatever definition is given for transfer, however, it is certainly not the same as negotiation under S.C. Code Ann. § 36-3-201 as Respondent urges.

Consequently, when the key action in 12 U.S.C. § 215e ("transferred") is construed according to its plain and ordinary meaning, an unindorsed promissory note in the possession of a bank at the time of a merger is transferred to a successor bank within the meaning of § 36-3-203(a) and not negotiated under § 36-3-201 – which is consistent with the purposes of the UCC. *See also* S. C. Code Ann. § 36–3–119(2) (1976) (stating a note remains subject to the terms of Article 3 irrespective of the occurrence of any other transaction); *Swindler v. Swindler*, 355 S.C. 245, 251, 584 S.E.2d 438, 441 (Ct. App. 2003).

Thus, statutory construction of 12 U.S.C. § 215e results in the same conclusion reached in *Berkshire Bank* and *In re Yopp,* which only further illustrates Wells Fargo's erroneous legal interpretation of the National Bank Act. Because a non-holder in possession must prove its chain of transfers – which Respondent cannot and will not do –

the Court of Appeals should not allow Respondent to cast itself as a holder when it has no basis to do so under 12 U.S.C. § 215e.

E. 12 U.S.C. § 215e Does Not Preempt UCC Article 3.

Bentrim agrees with Wells Fargo that there is no issue of federal preemption, which should end any further inquiry into the matter. *See McCall v. Finley,* 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). Unfortunately, having conceded preemption is not implicated in this appeal, however, Wells Fargo nevertheless claims it *would* be applicable. The law, however, does not support Wells Fargo's contention. "Courts should not lightly infer preemption." *City of Casey v. Norfolk Southern*, 391 S.C. 395, 409, 688 S.E.2d 136, 144 (2011). In fact, it is one of the two touchstones of preemption jurisprudence "that courts should begin with a presumption against preemption." *Priester v. Cromer*, 401 S.C. 38, 43, 736 S.E.2d 249, 252 (2012). In applying the US Constitution's Supremacy Clause, courts "start with the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress. *Weston v. Kim's Dollar Store*, 385 S.C. 520, 526, 684 S.E.2d 769, 772 (Ct. App. 2009) *affirmed as modified* 399 S.C. 303, 731 S.E.2d 864 (2012). "In the interest of avoiding unintended encroachment on the authority of the states, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption; thus, preemption will not lie unless it is the clear and manifest purpose of Congress. *Quigley v. Rider*, 357 S.C. 477, 483, 593 S.E.2d 476, 479 (Ct. App. 2003).

Turning to the National Bank Act itself, we see that Congress specifically states that only state consumer protection codes are preempted, and only to the extent they do not

meet the test articulated in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996); 12 U.S.C.§ 25b. Consequently, there is no evidence of preemptive purpose in the National Bank Act. *See Quigley*, 357 S.C. at 483, 593 S.E.2d at 479 (holding that evidence of preemptive purpose is sought in the text and structure of the statute at issue). Limited preemption by the National Bank Act is consistent with long-standing authority. *See* Kurt Eggert, *Foreclosing on the Federal Power Grab: Dodd-Frank, Preemption, and the State Role in Mortgage Servicing Regulation*, 15 Chap. L. Rev. 171 (2011). Moreover, there is nothing explicit or implicit in the National Bank Act which would indicate Congress's intent to occupy the field of negotiable instruments, nor that there is anything in UCC Article 3 would conflict with the purposes of the Act – and compliance with both statutes is not impossible. *Cf. State v. 192 Coin-Operated Video Game Machs.*, 338 S.C. 176, 525 S.E.2d 872 (2000) (declining to find federal statute nullified state anti-gambling statutes since compliance with both was possible); *see also* OCC Interpretive Letter # 1005 in which the OCC agrees that federal banking laws do not preempt the Uniform Commercial Code.

6. Appellant Does Not Seek to Nullify UCC Article 3.

The argument that Bentrim is attempting to nullify the Note or UCC Article 3 is absurd. Nowhere does Bentrim claim the Note is unenforceable – his principle contention is that Wachovia could not enforce the note in 2007 and 2009 when it claimed to be the holder of the note (which is an unfair and deceptive trade practice), and also that Wells Fargo has not yet proven at this time that it could enforce now as part of its foreclosure counterclaim. Bentrim does not seek a windfall; he merely wants to protect himself from being railroaded out of his house on a dubious claim by a non-PETE which would not protect him from later liability by a true PETE. He has never been adjudicated to be in

default – as Wells Fargo concedes. All the attempts to cast him as the villain in this appeal is simply misdirection by Respondent.

III. Other Issues Abandoned by Wells Fargo

A. Applicability of *Draper*

In Respondent's Brief, Wells Fargo expressly states that the holding in *Bank of America, N.A. v. Draper*, 405 S.C 214, 746 S.E.2d 478 (Ct. App. 2013), has no applicability to the appeal at bar. (Resp. Brief p. 9)("[f]or the purposes of this appeal, Wells Fargo is not relying on the *Draper* holding as an additional sustaining ground."). It should be noted that Wells Fargo also failed to request that the Court affirm for any ground appearing in the record on appeal, pursuant to Rules 208(b)(2) and 220(c), SCACR. Bentrim agrees with Wells Fargo that the Master did not rely on *Draper* in his ruling. Thus, Bentrim submits that Wells Fargo has affirmatively waived the applicability of *Draper* as an additional sustaining ground; in other words, by its own request, Wells Fargo's status as a "servicer" is irrelevant to whether it is a person entitled to enforce under S.C. Code Ann. § 36-3-602(a).

While Appellant can find no South Carolina authority dealing with this precise situation (i.e., where a respondent refuses to argue the applicability of a potential alternate sustaining ground), he believes it is consistent with precedent to treat the Respondent's express *rejection* of an alternate sustaining ground as an abandonment of the issue in the same manner it would be an abandonment if it failed to raise the issue at all. *See I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419–20, 526 S.E.2d 716, 723 (2000)(recognizing that a respondent may abandon an additional sustaining ground by failing to raise it in the appellate brief); *Grier v. AMISUB of South Carolina*, Inc., 397 S.C. 532, 540, 725 S.E.2d 693, 698 n. 2 (2012)(finding that when a respondent does not

identify a specific additional sustaining ground it abandons it); *accord Alexander v. Houston*, 403 S.C. 615, 620, 744 S.E.2d 517, 520 n.4 (2013)(holding "we are reticent to invoke an alternative sustaining ground where the ground is not raised in the appellate brief").

Accordingly, Bentrim withdraws his request that this Court overrule *Draper* at this time and joins Wells Fargo in asking that the holding in *Draper* not be applied in the instant appeal; this request is consistent with the judicial principle that a court usually should refrain from deciding unnecessary questions[2]. *I'on*, 338 S.C. at 419, 526 S.E.2d 723.

B. Holder in Due Course

The Master ruled that Wells Fargo was a Holder in Due Course. [R. 7]. In his Statement of Issues on Appeal, Bentrim contested the same and thoroughly briefed the reasons why the Master was in error. By contrast, Respondent's brief offers no argument in support of a finding that it is a holder in due course within the meaning of S.C. Code Ann. § 36-3-302(a). "If [a] respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct." *Turner v. South Carolina Dep't Environ. Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008); *First Union Nat'l Bank v. FCVS Communications*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct.App.1996) *reversed on other grounds,* 328 S.C. 290, 494 S.E.2d 429 (1997). Accordingly, Bentrim urges that the Court treat Wells Fargo's failure

[2] Although Wells Fargo contends it is "unusual" to ask the Court of Appeals to reverse one of its own decisions, nothing precludes the Court of Appeals from doing so. Rule 217, SCACR; Toal, APPELLATE PRACTICE IN SOUTH CAROLINA 2D., p. 222 (SC Bar 2002)("[t]he attorney is always free to argue his brief for the overruling of precedent."). Since *Draper* is a moot issue, however, there is no need for the Court to address it. *See McCall v. Finley,* 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct.App.1987) ("[W]hatever doesn't make any difference, doesn't matter.").

to respond as a confession that Bentrim has correctly analyzed the "holder in due course" issue and reverse the Master's ruling with respect to the same.

C. Holder by Issue/ Holder by Negotiation

In his Appellant's Brief, Bentrim extensively argued that Wells Fargo was not a person entitled to enforce by virtue of either issue [S.C. Code Ann. §§ 36-3-201(21; 36-3-201(a)] or negotiation [S.C. Code Ann. §§ 36-3-201(21); 36-3-201(b)] – i.e., that the Court of Appeals should reverse the Master on the grounds that Wells Fargo cannot ever be a "holder" of an unindorsed (and therefore un-negotiated) negotiable promissory note that was issued to First Union National Bank. In Respondent's Brief, however, Wells Fargo offers no counter-argument that it was a holder other than by operation of 12 U.S.C. § 215e – an alternate supporting ground. "If [a] respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct." *Turner*, 377 S.C. at 547, 661 S.E.2d at 121. Thus, Bentrim urges that the Court treat Wells Fargo's failure to respond as a confession that Bentrim's position is correct that Wells Fargo is not a holder by virtue of issue or negotiation, and to reverse the Master's ruling accordingly.

D. Master's Local "Rule of Thumb" for Enforcement

Appellant argued that the Master had created a personal "rule of thumb" system of enforcement that found Wells Fargo was entitled to enforce the Note – not only at the time of the 2007 and 2009 foreclosure suits against Bentrim, but also in the foreclosure counterclaim in the current case – based entirely on the fact that Wells Fargo exhibited physical possession of the Note at the time of the hearing. Wells Fargo failed to offer any argument in support of the Master's legal conclusion that makes possession alone the

deciding factor in enforceability – which violates the prohibition on a trial court altering or changing the terms of UCC Article 3. *Becker v. Nat'l Bank & Trust Co.*, 222 Va. 716, 720, 284 S.E.2d 793, 795-796 (Va. 1981); Official Comment 1 to S.C. Code Ann. § 36-3-201. Once again, this should be treated as a confession that Bentrim's legal position is correct and that the Master erred in his general approach to determining enforceability based on possession at the time of trial. *Turner*, 377 S.C. at 547, 661 S.E.2d at 121. More to the point, it illustrates that Wells Fargo can only offer a single, alternate sustaining ground – the erroneous 12 U.S.C. § 215e argument – in support of the Master's ruling.

e. **Wells Fargo Not a Person Entitled to Enforce Through Transfer.**

The Master further ruled that "even if Wells Fargo was not the holder, it would still qualify as a 'person entitled to enforce' as defined in S.C. Code Ann. § 36-3-301;" i.e., a "non holder in possession." As Bentrim illustrated, a "non-holder in possession" must prove it received the rights of a holder via transfer. S.C. Code Ann. §§ 36-3-301(ii); 36-3-203(b) & Official Comment; 36-3-103(13). Wells Fargo offers one conclusory footnote that – by virtue of application of 12 U.S.C. § 215e – Wells Fargo would also be a non-holder in possession. (Resp. Br. p. 9, n. 5). *Glasscock, Inc. v. U.S. Fid. & Guar. Co.,* 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."); *State v. Colf,* 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998), *aff'd as modified,* 337 S.C. 622, 525 S.E.2d 246 (2000) ("An issue is also deemed abandoned if the argument in the brief is merely conclusory."). *See First Sav. Bank v. McLean,* 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting that when a party fails to cite supporting authority or when the argument is simply a conclusory statement, the party is deemed to

have abandoned the issue on appeal). Accordingly, Bentrim submits that the conclusory fashion in which Wells Fargo contends it is also a non-holder in possession constitutes an abandonment of the issue. *See In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001).

IV. SUMMARY JUDGMENT ISSUES

F. Fair Debt Collection Practices Act.

Respondent claims its status as a servicer precludes it from liability under 15 USC § 1692. However, Bentrim asserts that Wells Fargo designed, complied and furnished deceptive forms to collect and foreclose to include loan servicing history, pleadings and counterfeit notes. *Id.* at § 812(a). If proven, regardless of whether they are not a debt collector, a Defendant is liable under the Act to the same extent. *Id.* at §§ 812(b), 813.

Further, Courts have repeatedly found that mortgage foreclosure is separate from loan servicing and therefore under the purview of 15 USC 1692: "While the Seventh Circuit has not considered this exact issue, however, so far all courts of appeals have held that 'mortgage foreclosure is debt collection under the Act. Lawyers who meet the general definition of a `debt collector' must comply with the FDCPA when engaged in mortgage foreclosure. And a lawyer can satisfy that definition if his principal business purpose is mortgage foreclosure or if he `regularly' performs this function.'" *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 464 (6th Cir. 2013); *see also Wilson v. Draper & Goldberg, P.L.L.C.,* 443 F.3d 373, 376 (4th Cir. 2006) (rejecting argument that a debt ceased to be a debt under the FDCPA once foreclosure proceedings were commenced and holding that defendant attorney's "actions surrounding the foreclosure proceeding were attempts to collect that debt"); *Kaltenbach v. Richards*, 464 F.3d 524, 529 (5th Cir. 2006) (subjecting attorney defendant to general requirements of FDCPA in action involving foreclosure,

explaining that "a party who satisfies § 1692a(6)'s general definition of a 'debt collector' is a debt collector for the purposes of the entire FDCPA even when enforcing security interests"); *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1217 (11th Cir. 2012) (holding that non-judicial foreclosure actions fell within the general definition of debt collection under the FDCPA: "The fact that the letter and documents relate to the enforcement of a security interest does not prevent them from also relating to the collection of a debt within the meaning of § 1692e."); *Cf. Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 234 (3d Cir. 2005) (finding attorney defendants' actions of filing suit to enforce a lien on plaintiff's property fell within the general definition of debt collection)."

Specifically, Bentrim alleges that the Respondent and counsel all acted as debt collectors and conspired under 15 USC § 1692j to make it appear Wachovia and Wells Fargo was the true creditor by claiming to be the Note holder since 2006.

G. Consumer Protection S.C. Code § 37-5-108.

Again, the Respondent asks the Court to accept its definition of a consumer loan based solely on its belief. Respondent fails to cite code or case law in support of its assertion. *See Broom v. Jennifer J.,* 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) ("Issues raised in a brief but not supported by authority may be deemed abandoned and not considered on appeal."). However, in its painstaking attempt to reveal the mechanics of the refinance of Bentrim's loan in 2002, it admits nearly $30,000 of his existing home equity line (a consumer loan as defined under 37-3-104) was modified and consolidated into the new loan. S.C. Code 37-5-108 applies to a consumer credit transaction (see S.C. Code Ann. § 37-5-108(1)). "Consumer credit transaction" means a consumer credit sale (Section 37-2-104) **or consumer loan (Section 37-3-104) or a refinancing or**

consolidation thereof, a consumer lease (Section 37-2-106), or a consumer rental-purchase agreement (Section 37-2-701). S.C. Code Ann. § 37-1-301(11)(emphasis added).

Appellant would rely on his Initial Brief for the remaining causes of action.

CONCLUSION

Fundamentally, this case impacts whether South Carolina Courts will require banks strictly to adhere to UCC Article 3, or whether banks will be able to skirt the law without repercussion. Based on the foregoing arguments and citation to authority, the Court should reject Respondent's argument that it is a "holder" under 12 U.S.C. § 215e and completely reverse the Master's Order.

Respectfully submitted,

Robert B. Varnado (S.C. Bar # 0007850)
Alexis M. Wimberly (S.C. Bar # 101611)
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Charleston County Master in Equity

APPELLATE CASE NO. 2014-002590

BRENT E. BENTRIM , ...Appellant

v.

WELLS FARGO BANK, N.A.,..... Respondent

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

Robert B. Varnado (S.C. Bar # 0007850)
Alexis M. Wimberly (S.C. Bar # 101611)
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant

Other Counsel of Record:
Charles M. Baker III, Esquire
S. Sterling Laney III, Esquire
John C. Hawk IV, Esquire
WOMBLE CARLYLE SANDRIDGE & RICE, LLP
P.O. Box 999
Charleston, SC 29402
Attorneys for Respondent

April 4, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Charleston County Master in Equity

APPELLATE CASE NO. 2014-002590

BRENT E. BENTRIM , ...Appellant

v.

WELLS FARGO BANK, N.A.,..... Respondent

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Appellant's ***Final Reply Brief*** in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid to the following:

Charles M. Baker III, Esquire
S. Sterling Laney III, Esquire
John C. Hawk IV, Esquire
WOMBLE CARLYLE SANDRIDGE & RICE, LLP
P.O. Box 999
Charleston, SC 29402
Attorneys for Respondent

Robert B. Varnado (S.C. Bar # 0007850)
Alexis M. Wimberly (S.C. Bar # 101611)
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant

April 4, 2016