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 BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On April 25, 2011, the Appellant Brent E. Bentrim ("Bentrim" or "Appellant"), a homeowner in Charleston County brought a *pro se* action against the Respondent, Wells Fargo Bank, NA ("Wells Fargo" or "Respondent") asserting that Wells Fargo "engaged in fraudulent, deceptive and dishonest trade practices that are prohibited by statute and regulation in the servicing" of his loan. [R. 28-36]. The gravamen of Bentrim's Complaint is that the Respondent's debt collection and foreclosure activities were subject to the consumer protection laws of South Carolina which prohibit unfair and deceptive practices.

The same month – in April, 2011 – Respondent entered into a consent agreement with its federal regulator, the Office of the Comptroller of the Currency ("OCC"), wherein Wells Fargo admitted it was deficient in regards to mortgage loan servicing and foreclosures – to include filing foreclosure actions when accounts were current, as well as foreclosing without authority to do so. [R 1176-1210].

On December 13, 2011, Respondent moved to amend its Answer and assert a Counterclaim in which it defended its actions the successor by merger to the original Note payee, First Union National Bank ("FUNB"), claiming an "alleged loan contract as a complete bar and defense to this action." [R.41-55]. Wells Fargo failed to attach a copy of the original Note. [*Id.*]. For well over a year, Wells Fargo refused to produce the original instrument or account for its whereabouts.

On December 10, 2013, in Wells Fargo's Answer and Counterclaims to Bentrim's Amended Complaint, Wells Fargo recognized the Note was not made in favor of the Respondent, but instead to FUNB. [R. 84-111]. Wells Fargo answered with affirmative defenses of holder and owner, i.e., a "self-servicer", and Counterclaim. [*Id.*]

This case is not about the enforceability of the Appellant's obligations under the Note *per se*, but whether Respondent had the legal right to enforce the Note as its owner and holder after November 2006. Appellant contends that under South Carolina law, the production of the Note in January 2013 fails to prove Wells Fargo was in possession of the Note after November 2006 or that is has the right to enforce the Note now.

On March 12, 2002, Appellant executed *inter alia* a Negotiable Promissory Note ("Note") in the amount of $182,700 for the First Union National Bank ("FUNB") ARM/HELOC payable to "First Union National Bank or order," along with a mortgage, a First Union Adjustable Rate Disclosure Statement and other closing documents. [R 1115]. This loan was (and remains) in **second** place on Appellant's home located at 10 Nicholson Street, Charleston, South Carolina 29407. [*Id.*]

Respondent's records show that Appellant's Note was sold on November 29, 2006 for $174,504.20 to an unknown "pool" investor. The sale was not revealed to Appellant until late 2011. [R 1382]. The name of the purchaser was not revealed until 2014, immediately prior to the summary judgment hearing [R. 1294-1298]. The purported sale documents were not produced until 2015. [R. 1309-1318].

On September 5, 2007, Respondent filed a Summons and Complaint and *Lis Pendens* in its own name, case number 07-CP-10-3933, styled *Wachovia Bank, National Association successor by merger to First Union National Bank v. Brent E. Bentrim, et al.*, in which it specifically represented to the Court that it was the holder of the Note and otherwise averred to the Master in Equity that it had the sole and exclusive right to foreclose on the Note. [R. 706-738, ¶¶ 17, 18]. In the Fair Debt Collection Practices Notice appended

thereto, Respondent averred that it was the creditor to whom the debt is owed. [R. 714]. This case was dismissed on December 21, 2007. [R. 25].

Once again, on July 30, 2009, Respondent – in its own name – filed another Summons and Complaint and *Lis Pendens*, case number 09-CP-10-4700, styled *Wachovia Bank, National Association s/b/m to First Union National Bank v. Brent E. Bentrim, et al.* [R. 739-757]. Once again, Wachovia Bank stated that it was the holder of the Note. [R. 733 ¶ 13 – R. 744 ¶ 1] and otherwise averred to the Master in Equity that it had the sole and exclusive right to foreclose on the Note. [*Id.*]. In the Fair Debt Collection Practices Notice appended thereto, Wachovia Bank, N.A. again averred that it was the creditor to whom the debt is owed. [R. 746].

The 2009 Foreclosure case was dismissed by the Charleston County Master in Equity on July 7, 2010 under certain restrictions – one of which specifically required Respondent to provide Appellant with a calculated payoff prior to refilling a claim under the Note and mortgage. [R. 26]. At no time during the pendency of either the 2007 suit (07-CP-10-3933) or the 2009 suit (09-CP-10-4700) – or during the period between the two actions – did Respondent advise the Court that it did not own the Note.

Prior to the dismissal of the 2009 suit, Wachovia merged with Wells Fargo Bank, N.A. ("Wells Fargo") effective March 20, 2010. Thereafter, Wells Fargo continued to assert that Bentrim was in default and even reported that there was a successful foreclosure against him.

Despite repeated attempts to work with Respondent, Appellant ultimately filed the instant action on April 25, 2011, alleging causes of action against Respondent for

mishandling his loan; fraudulent, unfair and deceptive conduct; improper debt collection practices; and misapplication of principle and interest. [R. 28-36].

Respondent answered on May 27, 2011 without filing a counterclaim. [R. 37-40]. Over six months later, on December 13, 2011, Respondent moved to amend its Answer to assert a Counterclaim for enforcement of the Note which was granted by the Charleston County Court of Common Pleas on April 25, 2012 and served May 8, 2012. [R. 41-54].

In the Counterclaim, Respondent asserts that the Note had been issued and delivered to it; that it had the right to foreclose because demand had been made allowing Bentrim the right to cure his default; and that Bentrim had failed to comply. [*Id.*]. Significantly, Respondent neither pled possession of the Note nor attached a copy to its Counterclaim. Bentrim timely replied the Counterclaim on September 11, 2012, denying the Note was payable to Wells Fargo, that any such demand was ever made, that he was in default or that Respondent was the holder. [*Id.*]

During this same time period, Respondent was sued by the Attorney General of South Carolina [along with 48 other Attorneys General and the United States government] for, among other things, Wells Fargo's unfair and deceptive practices under the South Carolina Consumer Protection Code by asserting 'holder' status in debt collection and foreclosure actions when it was not the holder. Respondent settled with the state for nearly $30 million by entering into a Consent Order to avoid criminal prosecution. [R. 1211-1284].

In initial discovery requests to Wells Fargo served in 2011, Bentrim requested that Wells Fargo admit whether it had ever sold the Bentrim Note and/or had ever acted as a

"servicer;" Wells Fargo expressly denied both. [R. 441-443, ¶¶ 1, 2, 4, 6, 14; R. 445 ¶ 1]. Those discovery responses have never been supplemented.

At a hearing on October 5, 2011, when Appellant moved to compel production of the original Note, counsel for Wells Fargo argued that a copy would suffice because: *"This note is a portfolio note. It's not securitized - a securitized loan."* [R. 763]. The Note produced by Wells Fargo was taken from the closing attorneys' file, which Wells Fargo argued was sufficient in lieu of the original.

After additional demands were made for the original Note, on April 3, 2012, Wells Fargo submitted a Lost Note Affidavit ("LNA") dated February 7, 2012 [R. 1285-1293] signed by Vice President Tracy M. Thomas as well as a "copy" [R. 1289-1282, 1139-1142] of the Note certified as a *"true, correct and substantial copy of the lost or destroyed Note."* [R. 1287, ¶8]. No other documents or records were attached to the Affidavit. Affiant Thomas further stated "that Wells Fargo Bank, NA as successor by merger to Wachovia Bank, NA, successor by merger to First Union National Bank has not pledged, assigned, transferred, hypothecated or otherwise disposed of the Note." [R. 1286 ¶ 5]. Thomas further testified that she had personal knowledge that Wells Fargo was the present holder and owner of the Note. [R. 1286 ¶6.C].

Ms. Thomas would later testify the original Note was purportedly found and returned to the Wells Fargo's vault on February 27, 2012, [R. 852 p. 119:14] some six (6) weeks prior to providing Bentrim with the same [R. 1115-1118], and such discovery was not provided until February 2013! Ms. Thomas claimed that when the Note first arrived in the vault in 2002, a barcode was placed upon it and then was imaged into a system call CLPR. [R. 848 p. 104: 9-16]. Prior to January 2013, however, none of the "copies" of the

Note that were produced had a barcode in this or any previous litigation.

Wells Fargo also produced an ACLS History Card Report on November 8, 2011. [R. 1355-1414]. On November 29, 2006 an entry is clearly marked "Loan Sold to Pool" which contradicted the LNA. [R. 1382; R. 1286]. Despite evidence on the ACLS History Card print out to the contrary, Ms. Thomas testified repeatedly that the Bentrim Note was **never** sold but she then admitted to **never** even looking at Wachovia Bank NA's servicing records contained in ACLS. [R. 840, p 72: 6-23].

This matter was referred to Judge Scarborough, Charleston County Master-In-Equity on or about November 13, 2012. [R. 23].

In March 2013, Wells Fargo admitted its conduct in regards to the 2009 action financially harmed Bentrim. [R. 1299-1305].

On December 10, 2013, the Respondent filed an Amended Answer and Counterclaim to assert "Wells Fargo Bank, successor by merger to Wachovia Bank, NA as successor by merger to First Union National Bank, ***is now*** the owner and holder of the Note and Mortgage and therefore is the real party in interest entitled to bring this action against Appellant." [R. 84, 106 ¶ 172].

The evidence on the record from the LNA, however, was that Respondent lost an unstamped Note and that the Note had never been transferred, sold, etc. [R. 1286, ¶ 5]. In the 2007 and 2009 suits, Respondent was trying to enforce an unstamped Note, as a holder, via successor by merger to Wachovia Bank, NA – ignoring the evidence that the Bentrim Note was sold on November 26, 2006. [R. 706-738, 739-757, 1320-1350].

Assuming Wells Fargo's assertion in its December 10, 2013 Amended Answer and Counterclaim that it "***is now*** *the owner and holder of the Note and Mortgage*" is true, this

arguably constitutes an admission by Wells Fargo that it was not the owner and holder of the Note and Mortgage at the commencement of this action, nor during the 2007 and 2009 suits. [R. 106, ¶ 172].

After it filed the Amended Counterclaim, Wells Fargo then announced that it had located the Note. Significantly, the copy of the note attached to the LNA [R. 1289-1292], 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. [R.1115-1118].

At a hearing on February 10, 2014, which largely focused on discovery that would prove or disprove a sale, counsel for Wells Fargo exhibited to the Master the original Note [R. 1115-1118] but was adamant that there was never a sale:

> *"...we say we never sold the Note. We were the owner and holder through First Union, Wachovia and Wells Fargo. I know they disagree with that, but that is our position."* [R. 895:8-11]
>
> *"Your Honor, as I have told [Appellant's counsel], I can't prove a negative."* [R.921:14-15]
>
> *"Your Honor, we have the original note. There is no allonge to it. There is no assignment of the mortgage. We have the public record. We've seen, you know, so there is no other evidence of a sale. And he's like I want to see all the documents evidencing a sale because this says there's a sale. I have to have somebody explain what that is, but there are no other documents that I have relating to a sale because our position is there was not a sale. We were always the owner and holder of the note."* [R.922:19 – R923:2]

The Court then made the following ruling, as established in the March 5, 2014 Order:

> *"Within (30) days of the hearing on this motion, WFB, NA shall produce all records in its possession, custody or control relating in any way to the sale, repurchase, transfer, assignment, delivery or hypothecation of the Notes or Mortgages associated with the subject loan to any third-party, including but*

not limited to supporting documentation noted on the ACLS History Card at 11/29/06 and then the repurchase on 05/13/10." [R. 15].

It bears repeating that the so-called "Original Note" is not identical to the prior versions presented to Appellant, further calling into question how Respondent could have been in possession of the "Original Note" prior to January, 2013. [[R.1115-1118; R. 1119-1142WF 223-226, R. 706-738, R 739-757, R.106].

When Appellant moved for sanctions for failure to comply with the March 5, 2014 Order, another hearing took place on April 28, 2014. Once again, counsel for Wells Fargo was adamant there was no sale:

"Your Honor, Wells Fargo and its predecessors have always been the holder of this Note. We got it. It hadn't been endorsed. It hadn't been sold to anybody." [R. 965: 22-25]

"We sold a participation interest in the note, but the note itself was not sold. We've got it."[Tr. 966:1-4]

"We believe and we intend to show Your Honor today that we in good faith produced everything Your Honor ordered." [Tr. 967:11-12]

"As we've said, we have the original note. It's not endorsed." [R. 1015:5-6]

"There's simply no standing to challenge whether or not, you know, the loan was sold, because that doesn't have anything to do with Mr. Bentrim." [Tr. 1015: 10-13]

"But a participation interest which is different than selling the note, was sold to The Money Store. And those are internal accounting documents that say sale when it's really not a sale of the note and mortgage itself." [Tr. R. 1025:7-11]

Based on these assurances, the Court declined to sanction Wells Fargo. The Court did make the following ruling from the bench, however:

"Now here is what I am going to do. I am going to make Wells Fargo counsel here provide me with a full accounting. I want the whole record of

what has transpired on that account. I will review it. I will do that, because that's what he's asking for." [R 1026.14]

On May 7, 2014, Wells Fargo's counsel submitted a letter enclosing the documents responsive to the Court's request for the full accounting. Importantly, Wells Fargo also included the Participation Interest Agreement with this explanation:

> *"As you are aware, the Court's March 5 Order (the "Order") requires Wells Fargo to produce records relating to the 'sale, repurchase, transfer, assignment, delivery or hypothecation of the Notes or Mortgages.' Wells Fargo believes that the referenced documents related to The Money Store are not responsive to the Order because they do not evidence a sale, repurchase, transfer, assignment delivery or hypothecation of the Note and Mortgage."* [R. 1309-1310]

The next hearing was held June 9, 2014 on the parties' Cross-Motions for Summary Judgment and a Motion To Reconsider (alter or amend) a ruling in a discovery Order dated May 14, 2014 in which the Court held (in Section 5 thereof): "*Wells Fargo holds the original Note, and the Note is made payable to its predecessor in interest, First Union Nation Bank."* [R. 4]. Basically, Appellant argued that by stating Wells Fargo 'holds' the Note, the Court was ruling Wells Fargo was a holder, when it could not qualify for the same as a matter of law. [R. 148-151].

Five days prior to the June 9, 2014 hearing, Wells Fargo produced the affidavit of Wells Fargo vice president Matthew Wakefield which conceded that *"the beneficial interest of the Bentrim loan was sold for fair market value to TMS Service Corp., Inc. on or about November 29, 2006."* [R. 1294-1298]. Wells Fargo's counsel proceeded to argue at the hearing that there was no outright sale, but just an interest: *"Well, an interest in the Note was sold. I think that is an important distinction."* [R. 1051, 2:3]. Significantly, Appellant submitted the Third Affidavit of Clifton Boddiford, CPA and the Second Affidavit of Casimira Kita which both conclusively established by expert testimony that

the Bentrim loan ultimately belonged to a Real Estate Mortgage Investment Conduit ("REMIC") Trust identified as Pool 794. [R.1115-1116 and 1110-11102]. Additionally, Appellant filed a Supplemental Memorandum with exhibits on July 23, 2014. [R. 481-520].

The Master issued his Order on October 28, 2014. [R. 7-10]. In Section 4 he granted summary judgment on several causes of action and in Section 1, he specifically ruled that:

> "*Wells Fargo is the holder of the Note as a matter of law and a holder in due course of the Note as a matter of law. Further, 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.* [R..7]

Appellant filed a second Motion to Reconsider on November 13, 2014. [R. 521]. Due to the fact it was a motion to reconsider a ruling on a prior Motion to Reconsider, Appellant served the instant Appeal on November 28, 2014. [R. 122] .On November 13, 2014, Appellant also moved for reconsideration of Section 4 of the Order, which had not previously been reconsidered. [R. 591]. A hearing on Appellant's Motion to Reconsider Section 4 of the October 28, 2014 Order was held on January 12, 2015. Appellant's Motion was denied as evidenced in the Master's January 26, 2015 Order. [R. 13]. In a second order of that same date, however, the Master did compel Wells Fargo to produce the records transmitted to the court for *in camera* review [R. 15]. Wells Fargo complied with the Order on February 3, 2014 by transmitting vault records [Sealed App. R 1433-1445], and on February 12, 2014 by sending an incomplete Participation Interest Agreement (incomplete due to the absence of the Exhibit which would prove if the Bentrim Loan was contemplated in the document). [Sealed App. R 1320-1350]. Appellant filed a Notice of Appeal with regards to this Order on or about March 2, 2015 [R. 121]. At a hearing on March 5, 2015, the Master declined to conduct any further action on the case. He did state:

"I think the whole thing is caught up in that holder language. It is or it is not." [R. 1097: 15-17]

The Court of Appeals consolidated these two appeals by an Order dated March 26, 2015.

STANDARD OF REVIEW

When reviewing motions for summary judgment the Court of Appeals applies the same standard that governs the trial court; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose,* 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); Rule 56(c), SCRCP. In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.,* 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). 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."

STATEMENT OF ISSUES ON APPEAL

I. Is the Master's Order of October 28, 2014 governed by errors of law and/or are the genuine issues of material fact that would preclude summary judgment?

II. Is the holding of *Bank of America, N.A. v. Draper*, 405 S.C 215, 746 S.E.2d 478 (Ct. App. 2013) sufficient under these facts and as a valid legal precedent to be an alternate sustaining ground for the Master's Order of October 28, 2014?

ARGUMENT I

Bank of America v. Draper Should Not Be Deemed Alternate Grounds to Affirm the Master.

Throughout this case, Bentrim has consistently argued for the application of what *should* be a simple and universally-recognized principle: in order for a party to have standing to enforce a negotiable instrument in its own name, that party must be a holder or have the rights of a holder at the time it seeks enforcement. S.C. Code Ann. §§ 36-3-301; 36-1-201(20). Applying this principle, Bentrim contends that at the time Respondent brought the 2007 and 2009 foreclosure cases against him, Respondent *knew* it was not the holder of the Note, nor had the rights of a holder, but that in its court filings and proceedings Respondent nevertheless intentionally and deceptively claimed to be the owner and holder anyway – thereby misleading both the Court and Bentrim. In fact, Bentrim contends, at all relevant times Respondent was merely a loan servicer/collector – a status that Respondent went to great lengths to conceal.

Accordingly, Bentrim filed his first-party action against Respondent seeking to impose liability, *inter alia*, for Respondent's unfair, deceptive, fraudulent and anti-consumer conduct as a loan servicer arising out of both the 2007 and 2009 foreclosure proceedings. The gravamen of his suit, basically, is that a loan servicer cannot lie to South

Carolina courts and consumers and claim to be a "holder" and "owner" of negotiable instruments when it is not.

Bentrim has excellent cause to believe he is on solid ground, because in 2011 and 2012 Respondent admitted in consent orders entered into with the both the federal government and the South Carolina Attorney General, respectively, that it had committed unsafe, unsound and fraudulent loan servicing practices, in violation of South Carolina law, for precisely the same kind of loan servicing conduct. [R. 1176-1210, 1211-1284]. Along with other loan servicers, Wells Fargo paid millions and millions of dollars in fines and penalties, and promised both Congress and the State of South Carolina that it would clean up its act by reviewing all its foreclosure actions. [*Id.*].

As demonstrated by the facts outlined in the Statement of the Case above, Respondent has not changed its ways with respect to Bentrim. Unfortunately, Respondent's conduct has been further compounded by the error of the Charleston County Master in Equity ("Master") who ruled that not only has Wells Fargo enforcement rights on its current foreclosure counterclaim, but also held that Respondent the right to enforce in both 2007 and 2009 as well, thereby gutting a large part of Bentrim's case. In section II of this brief, Appellant will show how the Master's ruling is guided by errors of law.

But, in light of the Court of Appeals' ability under Rule 220(c), SCACR to affirm under any reason appearing in the record on appeal, Bentrim must address the potential applicability of *Bank of America v. Draper*, 405 S.C 215, 746 S.E.2d 478 (Ct. App. 2013) *cert. denied.* Even though the Master did not rely on *Draper* in the Order on appeal, Appellant believes Wells Fargo will argue *Draper's* application as an additional, sustaining ground and that the Court of Appeals will be tempted to apply *Draper* in the instant case.

A. The Fundamental Error of *Draper*.

For the reasons set forth below, Appellant contends that not only should the Court of Appeals decline to extend *Draper* to the appeal at bar, but that it should overrule the case entirely. This is because there is a fatal flaw in *Draper*: while the *Draper* Court correctly cites S.C. Code Ann. §§ 36-3-301 and 36-3-120(21) as binding authority, **it completely ignores these statutes and uses inapplicable common law principles to override the UCC and/or change their definitions.** Had it properly restricted its analysis to these UCC Article 3 provisions, the *Draper* Court would have been compelled to reach the inescapable conclusion that:

(i) Bank of America's predecessor had negotiated the Note, by indorsement in blank, rendering it a bearer instrument. S.C. Code Ann. § 36-3-109(c); § 36-3-205(b) ("When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed"); *Schneider v. Deutsche Bank Nat. Trust Co.*, 572 F.Appx. 185, 189-190 (4th Cir. 2014);

(ii) Because Bank of America was no longer in possession of the Note, it could never be the "holder" as a matter of law by the absence of possession; thus no matter what "evidence" was submitted, Bank of America was improperly allowed holder status under S.C. Code Ann. §§ 36-1-201(21), 36-3-201; 36-3-203(b); and

(iii) Because the original instrument was "missing" or "lost" despite having been negotiated in bearer form, Bank of America was required to prove why the Note was lost in order to prove its rights to enforce. S.C. Code Ann. §§ 36-3-309; 36-3-203(b).

Accordingly, the *Draper* Court should have reversed summary judgment and remanded the action for a complete overhaul. It didn't. Why? **Because the *Draper* Court fell into the classic error of confusing ownership (assignment) with delivery of possession (transfer/negotiation).** In order to achieve this result, the *Draper* Court relied on common law principles which it was precluded from doing under the doctrine of displacement. It also fundamentally altered UCC definitions which is absolutely forbidden. Finally, it ignored precedent directly on point that would have prevented the holding.

B. The *Draper* Court Disregards the Doctrine of Displacement.

Article 3 of the UCC governs actions to enforce negotiable instruments. *Swindler v. Swindler*, 355 S.C. 245, 251, 584 S.E.2d 438, 440-441 (Ct. App. 2003); S.C. Code Ann. § 36-3-102(b); *see also Midfirst Bank, SSB v. C.W. Haynes & Co., Inc.*, 893 F.Supp. 1304, 1312 n.3 (D.S.C. 1994). While the *Draper* Court never expressly spells out that the case involves a negotiable promissory note, that fact can be deduced by inference from its application of law. *Draper* 405 S.C. at 217, 746 S.E.2d at 489. Accordingly, the *Draper* Court was required to apply UCC Article 3 in its analysis. *Swindler*, 355 S.C. at 251, 584 S.E.2d at 440-441.

Our Supreme Court has repeatedly and unequivocally held that the doctrine of "displacement" applies in the context of the UCC. *Hitachi Electronic Devices (USA), Inc. v. Platinum Technologies, Inc.*, 366 S.C. 163, 170, 621 S.E.2d 38, 41 (2005); *Flavor–Inn, Inc. v. NCNB Nat'l Bank of S.C.*, 309 S.C. 508, 511, 424 S.E.2d 534, 536 (Ct. App. 1992)(citing *Equitable Life Assurance Society of U.S. v. Okey*, 812 F.2d 906, 908-909 (4th Cir. 1987)). Under the principle of displacement, "[o]nly where the UCC is incomplete does the common law provide applicable rules." *Hitachi*, 366 S.C. at 170, 621 S.E.2d at 41.

The official comment to S.C. Code Ann. § 36-1-103 provides the underpinning for displacement when it succinctly states: "[t]herefore, while principles of common law and equity may supplement provisions of the Uniform Commercial Code, they may not be used to supplant its provisions, or the purposes and policies those provisions reflect, unless a specific provision of the Uniform Commercial Code provides otherwise. In the absence of such a provision, the Uniform Commercial Code preempts the principles of common law

and equity that are inconsistent with either its provisions or its purposes and policies." *See also* S.C. Code Ann. § 36–1–103. Recently in *In Re Estate of Rider*, the Supreme Court further elaborated on displacement when it explained that "the UCC provisions were created to provide a uniform method of resolving issues in order to promote liquidity and finality, to be supplemented by (not thwarted by) the rules of agency and other applicable laws." 407 S.C. 386, 398, 756 S.E.2d 136, 143 (2014)(citing with approval *Psak, Graziano, Piasecki & Whitelaw v. Fleet National Bank*, 915 A.2d 42, 45 (N.J. 2007)("the UCC displaces the common-law where reliance on the common law would thwart the purposes of the UCC")). In the *Okey* case, *supra*, the Fourth Circuit Court of Appeals clearly elucidates that under South Carolina law, the principle of displacement directly applies in the context of Article 3. 812 F.2d at 908-909.

Turning back to *Draper*, we see that its analysis relies on the common law axiom that "an assignee stands in the shoes of its assignor" and the holding in *Ballou v. Young*, 42 S.C. 170, 176, 20 S.E. 84, 85 (1894)("[t]he transfer of a note carries with it a mortgage given to secure payment of such note."). *Draper* 405 S.C. at 220, 746 S.E.2d at 481. Both these concepts are based on <u>*ownership*</u> and are therefore displaced. **Ownership is irrelevant in determining enforcement rights under UCC Article 3.** Official Comment 1 to S.C. Code Ann §36-3-203 explains: "[t]he right to enforce and instrument and ownership of an instrument are two different concepts" and "[o]wnership rights in instruments may be determined by principles of the law of property, independent of Article 3, which do not depend on whether the instrument was transferred under Section 2-303."

An instrument is a reified right to payment represented by the instrument itself. *Id.* For the *Draper* Court to establish enforcement based on common law ownership principles

is erroneous; enforceability is absolutely, comprehensively and irrevocably displaced by the UCC. *See* S.C. Code Ann. §§ 36-3-201 ("Negotiation"); 36-3-203 ("Transfer of Instrument; rights acquired by Transfer"); 36-3-301 ("Person Entitled to Enforce Instrument"); 36-3-302 ("Holder in Due Course"); 36-3-303 ("Value and Consideration"); 36-3-305 ("Defenses and Claims in Recoupment"); 36-1-201 ("General Definitions"); 36-3-103 ("Definitions [for Article 3]").

These statutory sections, taken together, represent a complete structure for defining, analyzing and determining transfer, possession, delivery and enforceability of negotiability; as a whole, they displace, preempt and supplant the common law of assignment in the realm of UCC Article 3 enforcement. *See* S.C. Code Ann. § 36–1–103 and Official Comment; *Rider*, 407 S.C. at 398, 756 S.E.2d at 143; *Hitachi*, 366 S.C. at 170, 621 S.E.2d at 41; *Okey*, 812 F.2d at 908-909. Thus, by finding enforcement rights using the common law of ownership, *Draper* has completely disregarded the doctrine of displacement and thwarted the purpose of UCC Article 3. *Id.* The example of "X" and "Y" at the end of Official Comment 1 to S.C. Code Ann §36- 3-203 explains why.

Moreover, *Draper* ignores controlling precedent. The South Carolina Court of Appeals, in *Rosemond v. Campbell*, has previously rejected the application of 'an assignee stands in the shoes of its assignor' when a negotiable instrument is involved. 288 S.C. 516, 523, 343 S.E.2d 641, 645 (Ct. App. 1986)("[t]he common law rule that an assignee has no greater rights than his assignor is subject to an important exception in the case of a negotiable instrument."). *Rosemond* is still good law but its holding was disregarded in *Draper*. *Id.* Moreover, in *Northwestern Bank v. Neal,* 271 S.C. 544, 248 S.E. 2d 585 (1978), the South Carolina Supreme Court held *that a separate agreement may not be used*

to contradict the unambiguous terms of the note. This is critical. Third parties may not contract to evade the requirements of UCC Article 3.

The *Draper* Court's error is further highlighted by its citation to S.C. Code Ann. § 36–3–203(b) for the proposition that an assignee transfers all rights to an assignor even in an Article 3 setting. *See Draper* 405 S.C. at 220, 746 S.E.2d at 481 ("transfer of an instrument vests in the transferee any rights the transferor had"). Transfer is a specifically defined term of art under the UCC that has nothing to do with ownership. S.C. Code Ann. §§ 36-3-103(b); 36-3-203. Transfer requires a voluntary delivery of *possession* of the instrument, not assignment of rights. *Id.* §§ 36-3-103(a); 36-1-201(15). Possession of the instrument ***moves*** the instrument under UCC Article 3. Ownership is totally irrelevant and likewise contractual rights have no application because assignment does not move possession – it simply conveys rights. For *Draper* to treat assignment and transfer as functionally equivalent thwarts the purpose of the UCC by ignoring the requirements of possession and delivery. *Hitachi*, 366 S.C. at 170, 621 S.E.2d at 41. The fact that a holder in due course receives more rights than the transferor only further illustrates the basic error in *Draper*, i.e. within the arena of negotiable instruments an assignor does not stand in the shoes of an assignee. S.C. Code Ann § 36-3-302; *Rosemond*, 288 S.C. at 523, 343 S.E.2d. at 645.

Appellant would cite to the Virginia Supreme Court, which correctly states the law that an entity does not become a "holder" when it takes possession by mere assignment. *Yeskolski v. Crosby*, 253 Va. 148, 153, 480 S.E.2d 474, 476 (1997); *Strickler v. Marx*, 246 Va. 384, 389, 436 S.E.2d 447, 450 (1993); *Becker v. Nat'l Bank & Trust Co.*, 222 Va. 716, 720, 284 S.E.2d 793, 795-96 (1981). To become a "holder" the entity must take possession

through indorsement and delivery. *Yeskolski v. Crosby*, 253 Va. 148, 153, 480 S.E.2d 474, 476 (1997); *Strickler v. Marx*, 246 Va. 384, 389, 436 S.E.2d 447, 450 (1993); *Becker v. Nat'l Bank & Trust Co.*, 222 Va. 716, 720, 284 S.E.2d 793, 795-96 (1981). In *Becker,* the Virginia Supreme Court specifically articulated that when a bank received notes by mere assignment, not indorsement, the bank was not a "holder" and thus could not "negotiate" the notes. *Becker*, 222 Va. at 720, 284 S.E.2d at 795-796 ("[t]he UCC does not permit this sort of alteration of the meaning of the inviolable terms 'due negotiation' and 'holder in due course'). This ruling is consistent with the law of South Carolina. *See* S.C. Code Ann. § 36-3-203 Official Comment 1 (clearly establishing enforcement and ownership are separate and distinct concepts).

The *Draper* Court further violates the principle of displacement when it held that because a servicer has a "pecuniary interest" in a loan – arising out of "contractual rights" and duties – it has standing as a real party in interest in a UCC enforcement action. *Draper* 405 S.C. at 222, 746 S.E.2d at 482. For this proposition, *Draper* cites three U.S. Bankruptcy Courts' opinions that found that a servicer had sufficient standing to move for **relief of the automatic stay** – *In Re Woodberry*, 383 B.R. 373, 379 (Bankr.D.S.C. 2008); *In re Neals,* 459 B.R. 612, 617 (Bankr.D.S.C. 2011) and *In Re Buretto*, 2008 WL 8895361 (Bankr.D.S.C. 2008). These Bankruptcy cases are of no utility.

First, in each of these cases, the standing is conferred for the specific and limited purpose of seeking to lift the automatic stay in Bankruptcy Court – which is distinct from enforcing a negotiable instrument. In other words, they are limited to the realm of Bankruptcy or can be rationalized as allowable as "presentment" under S.C. Code Ann. § 36-3-501 [which can be made on behalf of a person entitled to enforce, as opposed to the

actual action for enforcement, which can only be made by the PETE]. *See* S.C. Code Ann. § 36-3-301; S.C. Code Ann §36- 3-203 Official Comment 1.

Second, because the Bankruptcy cases apparently fall into the same error of "contract/ownership = transfer/negotiation" they should be ignored as erroneous. The mere fact that parties have entered into a Pooling and Servicing Agreement is also of no effect whatsoever in making the servicer a PETE. *See Northwestern Bank v. Neal,* 271 S.C. 544, 248 S.E. 2d 585 (1978); *see also In Re Smoak*, 461 B.R. 510, 519 (Bankr.S.D. Ohio 2011) (holding that a Pooling and Servicing Agreement "may establish ownership, but does not define the holder or other "person entitled to enforce" the Note under the Ohio UCC"); Official Comment to S.C. Code § 36-1-102(3)(private parties cannot change defined terms under the UCC); *cf. Burch v. Ashburn*, 295 S.C. 274, 278, 278, 368 S.E.2d 82, 84 (Ct. App. 1988)(holding that a separate agreement "may not be used to contradict the unambiguous terms of the note. And the terms of a separate agreement which is not intended to affect the note at all may not be used to defeat enforcement according to its own tenor, even though the note and the agreement arise from the same transaction" [citations omitted]).

Consequently, to the extent *Draper* can be read for the proposition that a servicer has standing to enforce a negotiable instrument in its own name, as a real party in interest, by virtue of some "pecuniary interest" – rather than by establishing it is a PETE under § 36-3-301, with the right to enforce by issue, negotiation or transfer pursuant to §§ 36-3-105(a), 36-3-201(a) or 36-3-203 – then *Draper* has violated the principle of displacement and thwarted the purpose of UCC Article 3. *See* S.C. Code Ann. § 36–1–103 and Official Comment; *Rider*, 407 S.C. at 398, 756 S.E.2d at 143; *Hitachi*, 366 S.C. at 170, 621 S.E.2d at 41; *Okey*, 812 F.2d at 908-909. Servicers should not get a "servicing exemption" from

following Article 3; UCC statutes should be applied equally and impartially to all litigants, and not be rewritten or ignored to favor lender/servicers.

C. The *Draper* Court Has Altered UCC Definitions.

Article 3 of the UCC provides a comprehensive set of rules governing the obligation of parties on negotiable promissory note, including how to determine who may enforce those obligations and to whom those obligations are owed. S.C. Code Ann. § 36-3-102; *see also In Re Veal,* 450 B.R. 897, 910 (9th Cir. Bankr. App. Pan. 2011). It is a fundamental concept under the UCC that private parties cannot change the meaning of terms defined by the UCC. *See* Official Comment to S.C. Code Ann. § 36-1-102(3); cf. S.C. Code Ann. §36-3-119(1); *see also* Official Comment to S.C. Code Ann. § 36-1-102(d)("[t]he meaning of the statute itself must be found in its text, including its definitions, and in appropriate extrinsic aids; it cannot be varied by agreement"). As discussed above, "[t]he UCC does not permit ... alteration of the meaning of the inviolable terms 'due negotiation' and 'holder in due course." *Becker v. Nat'l Bank & Trust Co.*, 222 Va. at 720, 284 S.E.2d at 795-796; Official Comment 1 to S.C. Code Ann. § 36-3-203 (clearly establishing enforcement and ownership are separate and distinct concepts). "In particular, the UCC does not permit contracting parties to "vary" the provision governing the definition of negotiable instruments and their negotiation." *In re Walker*, 466 B.R. 271 (Bankr.E.D. Penn. 2012).

As conclusively established above, the *Draper* Court has effectively changed the definition of "transfer" by making it entirely synonymous with common law principles of ownership, rather than UCC concepts of possession and delivery. *See Draper* 405 S.C. at 220, 746 S.E.2d at 481; S.C. Code Ann. § 36-3-203(b). It also changed the definition of

holder by conferring holder status not by negotiation, but by "a series of mergers and transfers." Consequently, the violation of inviolable terms in the UCC – even if unintentional – is another serious error that destroys *Draper's* precedential and legal value. *See Becker v. Nat'l Bank & Trust Co.*, 222 Va. at 720, 284 S.E.2d at 795-796; Official Comment 1 to S.C. Code Ann. § 36-3-203. When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory construction are not needed and the court has no right to impose another meaning. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Furthermore, a statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. *Sloan v. S.C. Bd. of Physical Therapy Examiners*, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006). Courts should consider not merely the language of the particular clause being construed, but the clauses' meaning in conjunction with the whole purpose of the statute and the policy of the law. *Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997).

The *Draper* Court cited the right law, then ignored it. It gives servicers a "pass" they are not entitled to have. It thwarts legislative intent. Its application violates due process. It is simply wrong. *Draper* cannot be saved. It cannot be fixed.

D. The Negative Impact of *Draper* When Taken to its Logical Conclusion.

When *Draper* is taken to its logical conclusion, it becomes clear that any entity (e.g., a loan originator, depositor, REMIC Trust, etc.) that knows it is not a PETE under S.C. Code § 36-3-301 can overcome this defect simply delegating enforcement to a servicer via assignment – in direct contravention of UCC Article 3. Worse, because *Draper* defines a servicer so broadly as to include "a person who makes or holds the loan if the same person

also services the loan," a lender which simply calls itself a "self-servicer" avoids the requirements of § 36-3-301. The best evidence that this concern is real is that this is precisely what Wells Fargo asserts – i.e., since Bentrim has argued that Respondent was a merely a servicer at the time it attempted to enforce the Note in 2007 and 2009, then under *Draper* those enforcement attempts were somehow valid (never mind the fact Respondent misled the court and Bentrim in those two foreclosure actions, or agreed with the OCC and our Attorney General in binding consent orders that it lacked the right to do so, and has continued to take the position it is the owner and holder by unbroken possession despite direct evidence to the contrary). [R. 1176-1210, 1211-1284].

The ultimate nightmare scenario is that an unscrupulous or careless lender – e.g., one that has negotiated an instrument away to a third person, or otherwise cannot account for the transfers of a note – will use *Draper* to absolve itself of its unscrupulous and/or careless conduct. Bentrim submits there is more than ample evidence in the record that this is exactly what Wells Fargo is attempting to do in the instant case, and has done it before. *See, e.g., In Re Veal,* 450 B.R. 897 (9th Cir. Bankr. App. Pan. 2011)(where Wells Fargo and its Servicer simultaneously sought to enforce a negotiable instrument in the Bankruptcy Court). The Bentrim case is not isolated, as evidenced by the consent findings of the OCC and Attorney General Consent Orders. [R. 1176-1210, 1211-1284].

E. The Potential for Double Exposure under *Draper.*

Draper is a real problem because when a servicer can evade the requirements of UCC Article 3, the homeowner is not only subject to double payments, but is completely and utterly defenseless against a Holder in Due Course – who in South Carolina can obtain a deficiency judgment against the homeowner. In *Adams v. Madison Realty &*

Development, Inc., 853 F.2d 163, 168 (3rd Cir. 1988), the Third Circuit Court of Appeals stressed that from the maker's standpoint: "it becomes essential to establish that the person who demands payment of a negotiable note, or to whom payment is made, is the duly qualified holder. Otherwise, the obligor is exposed to the risk of double payment, or at least to the expense of litigation incurred to prevent duplicative satisfaction of the instrument. These risks provide makers with a recognizable interest in demanding proof of the chain of title." *Id.*; *see also In Re Veal,* 450 B.R. 897, 920 (9th Cir. Bankr. App. Pan. 2011)("the primary purpose of the real party in interest doctrine is to ensure ... mistaken payments due not occur.").

Mr. Draper faces a very real threat that a Holder in Due Course could appear on the scene any minute bearing the original bearer instrument with proof it was acquired for value and without knowledge of defect. This is a real possibility because the trial court never required Bank of America to produce or even account for the loss of the original. If a Holder in Due Course did appear to enforce the Draper note, Mr. Draper would have no defense that he made payment to Bank of America (including the loss of his house by judicial sale). *See* S.C. Code Ann. §§ 36-3-302, 3-305; *Rosemond,* 288 S.C. at 523, 343 S.E.2d. at 645. The Holder in Due Course would be entitled to a deficiency judgment against him in South Carolina if the security was gone or insufficient to cover the obligation. *See e.g., American General Financial Services, Inc. v. Brown,* 376 S.C. 580, 658 S.E.2d 99 (2008)(cited for the general proposition the right to a deficiency judgment is provided by statute); S.C. Code Ann. § 29-3-660 (2007). In *Bank of Miami v. Florida City Express, Inc.*, 367 So. 2d 683 (Fla. Ct. App. 1979) the Court summed up the problem best when it held: "Florida City Express, Inc., the maker of negotiable promissory notes,

must pay twice because the Bank of Miami, **a holder in due course, was not paid once**" and "[o]ur holding is based on the long familiar, universal rule ... that a holder in due course takes and holds a negotiable instrument free of all defenses of which he is not on notice. And it is very clear that this rule includes the defense of discharge or payment (emphasis added)." *Id.*

By giving a servicer a "pass" on the rigorous but fair requirements of Article 3 simply because it is a servicer – either for itself or for a third-person – the *Draper* Court leaves homeowners exposed and defenseless to deficiency judgments if a Holder in Due Course later appears. The fact a court allowed enforcement and foreclosure by a non-PETE servicer is not a defense to a Holder in Due Course.

"Financial institutions, noted for insisting on their customers' compliance with numerous ritualistic formalities, are not sympathetic petitioners in urging relaxation of an elementary business practice. It is a tenet of commercial law that `[h]oldership and the potential for becoming holders in due course should only be accorded to transferees that observe the historic protocol.'" *Adams,* 853 F.2d at 169 (3rd Cir. 1988) (citation omitted).

F. If the Court will not Overrule or Limit *Draper*, It Does Not Apply.

Even if the Court will not overrule or limit *Draper*, there are several cogent reasons why it does not apply in this specific case, either as a matter of law or because of genuine issues of material fact.

(1) *Wells Fargo has Admitted It Cannot Foreclose as a Servicer.*

The Respondent has admitted it was deficient "in the mortgage servicing and foreclosure processes" in regards to whether foreclosures complied with federal and state laws, whether foreclosures occurred when grounds for foreclosure were not present, such as when loans were performing, and whether any errors, misrepresentations or other deficiencies resulted in financial injury to borrowers. [R. 1176-1210]. The Respondent has admitted the conduct is in violation of SC Title 37 resulting in unfair, unlawful and deceptive practices under Title 39 and the admission has been fully adjudicated. It has admitted to its regulator and the South Carolina Attorney General that it cannot foreclose in its own name if it is merely the servicer.

(2) *No Standing Where there is Securitization.*

"A threshold inquiry for any court is the determination of justiciability, i.e., whether the litigation presents an active case in controversy. 'No justiciable controversy is presented unless the [defendant] has standing to maintain the action.'" *Lennon v. South Carolina Coastal Council,* 330 S.C., 414, 415, 498 S.E.2d 906, 906 (Ct. App. 1998) (citations omitted).

"If a loan is securitized, the real party in interest is the trustee of the securitization trust...." *LaSalle Bank N.A. v. Nomura Asset Capital Corp.,* 180 F.Supp.2d 465, 469-71 (S.D.N.Y.2001); *La-Salle Bank N.A. v. Lehman Bros. Holdings, Inc.,* 237 F.Supp.2d 618, 631-34 (D. Md.2002)). If a trustee possesses "customary powers to hold, manage, and

dispose of assets," then that trustee is a real party in interest. *Navarro Sav. Ass'n v. Lee,* 446 U.S. 458, 464, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980). Here, the Kita and Bodiford Affidavits establishes a genuine issue of material fact that the Bentrim loan was securitized and owned by a REMIC Trust identified as "Pool 794" [R. 1098-1114]. Based on the foregoing, *Draper* should not confer standing when a negotiable instrument is securitized because the true party in interest is the REMIC Trustee. *Id.*

(3) *Waiver*.

Wells Fargo did not assert a counterclaim in its original Answer [R. 37-40]. Its counterclaim was obviously compulsory; accordingly, it has waived its right to enforce the Note even if *Draper* applies. Rule 13(a), SCRCP ("A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."); *Crestwood Golf Club, Inc. v. Potter,* 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997) (explaining that if a compulsory counterclaim is not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action). Based on this rule, at a minimum the Court should deny enforcement rights on the current counterclaim.

(4) *Equitable Issues.*

The Statement of the Case fully establishes the contradictory and shifting legal position taken by Wells Fargo during the pendency of these proceedings. Respondent's formal position in this case, through its pleadings, discovery and testimony, is that is the owner and holder of the note via unbroken successor-by-merger. Yet the Wakefield

Affidavit establishes the untruthfulness of this proposition. [R. 1294-1298]. Wells Fargo's unclean hands should preclude it from receiving the benefit of *Draper*. The "unclean hands doctrine" precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010) *aff'd as modified*, 404 S.C. 421, 746 S.E.2d 35 (2013).

ARGUMENT II

The Master's Order of October 28, 2014 Erroneously Found Wells Fargo is a Person Entitled to Enforce in Contravention of the UCC.

In the October 28, 2014 Order, the Master concluded "that Wells Fargo is the holder of the Note as a matter of law and a holder in due course of the Note as a matter of law" and "[f]urther, even if Wells Fargo is not the holder, it would still qualify as a 'person entitled to enforce' as defined in S.C. Code Ann. § 36-3-301." [R.7-8]. Accordingly, the Master granted summary judgment on Plaintiff's seventeenth cause of action for declaratory judgment [R. 9]. This ruling is consistent with the Master's many oral pronouncements on this issue [R. 1060, pp. 73-74, 76; R. 1063, p. 5; R. 1096 8]. The Master articulated his thought-process in another action, while the counsel for the litigants at bar were in the courtroom, as follows:

> *'As long as he is in possession of that [note] or his client's in possession of that note, they have the right to enforce it. Talk to the lawyer in the back room [Varnado] and he might not agree with me either, but he's got that on appeal. You all might turn me out wrong, but it's like raising children. You have to be consistent.'*

[R. 1094, pp. 14-15]. Thus, we have a situation where the Master admits to a rule of thumb that focuses entirely on physical possession without regard to the actual requirements of UCC Article 3. This is not only erroneous but raises grave due process concerns.

The threshold question for any court examining the applicability of UCC Article 3 is to determine if the instrument is negotiable. *Swindler v. Swindler*, 355 S.C. 245, 250, 584 S.E.2d 438, 440 (Ct. App. 2003). To be a negotiable instrument a writing must: be signed by the maker; contain an unconditional promise or order to pay a sum certain in money ***and no other promise, order, obligation or power given by the maker except as authorized by this chapter***; be payable on demand or at a definite time; and be payable to order or to bearer. S.C. Code Ann. § 36-3-104(1). Appellant submits that the Note, by its own title as well as its own terms, meets the definition of § 36-3-104(1).

"An instrument is a reified right to payment. The right is represented by the instrument itself. The right to payment is transferred by delivery of possession of the instrument 'by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.'" *See* Official Comment 1 to S.C. Code Ann. § 36-3-203, ¶ 3; S.C. Code Ann. § 36–3–602(a) ("[A]n instrument is paid to the extent payment is made by or on behalf of a party obliged to pay the instrument, and to a person entitled to enforce the instrument."). Under S.C. Code Ann. § 36–3–602(a):

> "Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 36–3–309 or 36–3–418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

The Ninth Circuit's Bankruptcy Panel, in the important decision of *In re Veal*, 450 B.R. 897 (B.A.P. 9th Cir. 2011), succinctly explains:

> "A thorough understanding of the concept of a "person entitled to enforce" is key to sorting out the relative rights and obligations of the various parties to a mortgage transaction. In particular, the person obligated on the note—a "maker" in the argot of Article 3 (See UCC § 3-103(a)(7))—must pay the

> obligation represented by the note to the "person entitled to enforce" it. UCC § 3-412. Further, if a maker pays a "person entitled to enforce" the note, the maker's obligations are discharged to the extent of the amount paid. UCC § 3-602(a). Put another way, if a maker makes a payment to a "person entitled to enforce," the obligation is satisfied on a dollar for dollar basis, and the maker never has to pay that amount again. *Id. See also* UCC § 3-602(c). ... [i]f, however, the maker pays someone other than a "person entitled to enforce"— even if that person physically possesses the note the maker signed—the payment generally has no effect on the obligations under the note. The maker still owes the money to the "person entitled to enforce," and, at best, has only an action in restitution to recover the mistaken payment. *See* UCC § 3-418(b)."

450 B.R. at 910.

A holder is defined under S.C. Code Ann. §§ 36-1-201(21) as a "**a person who is in possession** of a document of title or an instrument or a certificated investment security **drawn, issued, or indorsed to him or to his order or to bearer or in blank** (emphasis added)." *See* S.C. Code Ann. § 36-1-201(20). The foregoing statutes must be read along with S.C. Code Ann. § 36–3–201(a) ('[n]egotiation' means a transfer of possession ... of an instrument by a person other than the issuer to a person who thereby becomes the holder") and Official Comment 1 thereto ("[n]egotiation occurs as a result of the voluntary transfer of an instrument to another person who becomes the holder as a result of the transfer"), as well as S.C. Code Ann. § 36–3–203(a)("[a]n instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument") and 3-203(b)("...if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder ...").

When all these provisions are analyzed together, it becomes obvious that in order to qualify as a 'person entitled to enforce' that PETE must have possession of the instrument by: (1) issue, (2) negotiation or (3) transfer.

Accordingly, in order for Respondent to be a 'person entitled to enforce' a note either as a holder or with the rights of a holder – whether at the inception of the counterclaim or at the within 2007 and 2009 foreclosure cases – Respondent must show possession by issue, negotiation or transfer at each junction. S.C. Code Ann. §§ 36-1-201(21); 36-3-301. Appellant submits Respondent cannot meet the first two requirements as a matter of law at any point [i.e., not now, nor in 2007 and 2009], nor can it factually prove the third at any point, either.

A. Wells Fargo Is Not a Person Entitled to Enforce through Issue.

Here, the named payee on the note is First Union National Bank, not Wells Fargo. [R. 1115]. Because it is not the identified payee, Wells Fargo cannot claim holder status on the grounds that the note was "drawn" or "issued" to it. *See Draper,* 405 S.C. at 222; 746 S.E.2d at 482; *accord Rosemond v. Campbell*, 288 S.C. 516, 524, 343 S.E.2d 641, 646 n.4 (1986)(holding the owner of finance company not entitled to holder status when named payee on the note was the finance company not him). Thus, Respondent is not a holder by issue. S.C. Code Ann. §§ 36-1-201(21)(A); 36-3-201(a).

B. Wells Fargo not a Person Entitled to Enforce Through Negotiation.

There are no indorsements on or attached to the Note (i.e., no allonges) which means there is no evidence in the record on appeal that the Note has ever been negotiated – either in blank or to an identified person. [R. 1115-1146]. It is axiomatic that negotiation requires indorsement. S.C. Code Ann. § 36-3-201(b)("[i]f an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder"). Consequently, if there is no indorsement, then there has been

no negotiation. *Id.* In *Negotiable Instruments Under the Uniform Commercial Code*, Professors Hart and Willier elaborate on this concept:

> "The first requirement of being a holder is possession of the instrument. However, possession is not necessarily sufficient to make one a holder. . . . The payee is always a holder if the payee has possession. **Whether other persons qualify as a holder depends upon whether the instrument initially is payable to order or payable to bearer, and whether the instrument has been indorsed." (footnotes omitted). Accordingly, a third party must prove both physical possession *and* the right to enforcement through either a proper indorsement or a transfer by negotiation."**

Frederick M. Hart & William F. Willier, *Negotiable Instruments Under the Uniform Commercial Code*, § 12.02(1) at 12-13 to 12-15 (2012)(*emphasis added*). Likewise, the Texas Court of Appeals has held that "an instrument not in the possession of the original holder is not properly indorsed, then the person in possession of it does not have the status of a holder." *Martin v. New Century Mortg. Co.*, 377 S.W.3d 79, 84 (Tex. App. 2012). Thus, as a matter of law, this fact precludes Wells Fargo from asserting holder status by virtue of negotiation. S.C. Code Ann. §§ 36-1-201(21)(B); 36-3-201(a).

The Master has erred because he has elaborated a personal, "rule of thumb" system of enforcement that confers holder status based entirely on current physical possession of the Bentrim note. [R. 1060, pp. 73-74, 76; R. 1063, p. 5; R. 1096 8]. Not only is the erroneous in its application of UCC Article 3, but because it gives a new definition of holder that is at odds with the definition provided in 1-201(21)(B), the Master has run afoul of the prohibition on a trial court altering or changing the terms of UCC Article 3. *See Becker v. Nat'l Bank & Trust Co.*, 222 Va. 716, 720, 284 S.E.2d 793, 795-96 (1981); *see also* Official Comment 1 to S.C. Code Ann. § 36-3-201. The Master thereby creates enforcement rights that are unique to Charleston County and disregards the legislative

intent of the General Assembly. Homeowners suffer as lenders are allowed to enforce without having actually having to follow the law.

It should be further noted that Wells Fargo has continually pleaded that its right to enforcement is exclusively based on the proposition that it is a holder by virtue of successor-by-merger from FUNB/Wachovia to Wells Fargo. (R, 106, ¶ 172; *Cf.,* R. 48-53]. Yet even if this were true – which is it not – Wells Fargo could not qualify as a holder by virtue of "successor-by-merger" without showing an indorsement. S.C. Code Ann. § 36-1-201(20). To the extent Wells Fargo is relying on some theory of unbroken ownership (which is invalid), then it runs headlong into the same error into which the *Draper* Court fell– i.e., relying on an improper understanding of the UCC which is either displaced or impermissibly alters the definitions in the UCC. *Rider*, 407 S.C. at 398, 756 S.E.2d at 143; *Becker*, 222 Va. at 720, 284 S.E.2d at 795-96.

There is no indorsement; therefore there has been no negotiation; consequently Respondent is not the holder and could not enforce as a holder in 2007, 2009 or today. The Master did not apply the UCC but his own local rule. For this reason, the Master should be reversed.

C. Wells Fargo Is Not a Person Entitled to Enforce through Transfer.

As has become clear, negotiation is separate and distinct from the concept of transfer; a transferee cannot be a holder, but may receive enforcement rights via transfer. S.C. Code Ann. §§ 36-3-201, -203; Official Comment 1 to § 36-3-203.

What most distinguishes a "holder" from a "non holder in possession" is not enforceability *per se*; it is that a "non-holder in possession" must prove it has the rights of a holder before it can enforce. See S.C. Code Ann. §§ 36-3-308(b), 36-3-301(ii). This

contrasts with the rebuttable presumption of enforceability enjoyed by a holder enjoys. S.C. Code Ann. § 36-3-308(b); *see also RMS Residential Props., LLC v. Miller*, 32 A.2d 307, 321-322 (Conn. 2011). The Official Comments to S.C. Code Ann. § 36-3-203(b) provide crystal clear guidance:

> *"Subsection (b) states that transfer vests in the transferee any right of the transferor to enforce the instrument "including any right as a holder in due course." If the transferee is not a holder because the transferor did not indorse, the transferee is nevertheless a person entitled to enforce the instrument under Section 3-301 if the transferor was a holder at the time of transfer. Although the transferee is not a holder, under subsection (b) the transferee obtained the rights of the transferor as holder.* ***Because the transferee's rights are derivative of the transferor's rights, those rights must be proved. Because the transferee is not a holder, there is no presumption under Section 3-308 that the transferee, by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it. Proof of a transfer to the transferee by a holder is proof that the transferee has acquired the rights of a holder.*** *At that point the transferee is entitled to the presumption under Section 3-308. (emphasis added)."*

In other words, a "non holder in possession" must prove the transaction in order to enjoy enforcement rights. S.C. Code Ann. § 36-3-301(ii); Section 3-203 Official Comment. "Prove" with respect to a fact means the burden of establishing the fact. S.C. Code Ann. § 36-3-103 (13). "Burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence. S.C. Code Ann. § 36-1-201(8). Under Section 1-201(31), the Court can make no assumption of fact in regards to Wells Fargo's obtaining a transfer of the Note through any predecessor by presenting evidence that would support its non-existence.

Appellant would point to the Maryland Court of Appeals' decision in *Anderson v Burson*, 424 Md. 232, 35 A.3d 452 (2011) as persuasive in this matter. As here, the

Anderson Court was tasked with analyzing the enforceability of an unindorsed security where the transferee argued the primacy of physical possession. *Id.* The *Anderson* Court ruled that: '[a] non-holder in possession [and] cannot rely on possession of the instrument alone as the basis to enforce it." *Id.* at 248-49, 35 A.3d at 462. Rather, *Anderson* continued, '[t]he transferee's rights to enforce the instrument derives from the transferor (because by the terms of the instrument, it is not payable to the transferee),' those rights must be proved. *Id.* 'The transferee does not enjoy the statutorily provided assumption of the right to enforce the instrument that accompanies a negotiated instrument, and so the transferee 'must account for possession of the unendorsed instrument by proving the transaction through which the transferee acquired it'" *Id.* at 249.

Similarly, the New Mexico Supreme Court, in *Bank of New York v. Romero*, 320 P.3d 1 (N.M. 2014) ruled that: "[p]ossession of an unindorsed note made payable to a third party does not establish the right of enforcement, just as finding a lost check made payable to a particular party does not allow the finder to cash it." 320 P.3d at 7. Likewise, the Texas Court of Appeals has held that: "[a] person not identified in a note who is seeking to enforce it as the owner or holder must prove the transfer by which he acquired the note." *Leavings v. Mills*, 175 S.W.3d 301, 309 (Tex. App. 2004). The Oklahoma Supreme Court follows in similar fashion stating that "without holder status and therefore the presumption of a right to enforce, the possessor of the note must demonstrate both the fact of the delivery and the purpose of the delivery of the note to the transferee in order to qualify as the person entitled to enforce." *U.S. Bank, N.A. v. Alexander*, 280 P.3d 936, 941 (Okla. 2012).

Importantly, the Texas Court of Appeals has also ruled that a genuine issue of material fact is created when there is an unexplained gap in the note's chain of transfer.

Leavings v. Mills, 175 S.W.3d 301, 309 (Tex. App. 2004) (citing *First Gibraltar Bank, FSB v. Farley*, 895 S.W.2d 425, 428-29 (Tex. App. 1995), *writ denied* (Aug. 1, 1995)).

This brings us to an important point. While Wells Fargo has changed its story so many times that is hard to credit what is true and what is false, the LNA and the testimony of Tracy Thomas are conclusive that Wells Fargo did lose the note. [R. 1285. R. 854. P. 125]. Since Wells Fargo has placed nothing in the record explaining the whereabouts of the Note while it was lost, and the Court cannot provide a factual basis in a summary judgment motion, then there is at least a scintilla of evidence that Wells Fargo cannot meet its obligation to show its chain of transfer. S.C. Code Ann. § 36-3-203(b) and Official Comment; *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." *Cobb v. Benjamin,* 325 S.C. 573, 581 n. 2, 482 S.E.2d 589, 593 n. 2 (Ct. App. 1997) ("[W]here there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record."). This contention is also supported by the fact that (a) Wells Fargo has turned over grossly incomplete vault records and (b) prior to January, 2013, every Note copy produced by Respondent from 2007 forward lacked a specific vault bar-code found on the Original; the inferences from both these facts is that Respondent was not only not in possession of the Original but cannot and will never be able to account for its whereabouts (*e.g., if Respondent was in possession of the original from 2006-2013, why would it produce a copy of the Note pulled from the closing attorney's file and not a copy with the Note with same vault bar-code found on the original? Why would it wait until January, 2013 to produce*

the Original at all?). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 468, 581 S.E.2d 496, 501 (Ct. App. 2003); *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 468, 581 S.E.2d 496, 501 (Ct. App. 2003); *Hall v. Fedor,* 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002).

Moreover, Respondent has produced a Pooling and Servicing Agreement which – if valid – can be deemed a transfer of the Note from Wachovia to TMS Service Corp. Inc. [R. 1309-1310; Sealed App. R 1320-1350]. It should be noted that Bentrim is not falling prey to the error of confusing ownership with enforcement, but recognizes that such agreements <u>can</u> effect transfers if so included. *See In re Veal*, 450 B.R. at 897 (referencing the application of UCC 1-201(b)(35) and 9-203). The Pooling & Servicing Agreement, while incomplete, is an area that Bentrim should be allowed discovery because it was withheld from him while the Master considered summary judgment; likewise, the scintilla of fact, or inference, that Respondent transferred the Note to a third-party should be sufficient to defeat summary judgment. *In re Veal* at 897; *Redwend*, 354 S.C. at 468, 581 S.E.2d at 501; *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803. The Affidavits of Kita and Bodiford, which show the Loan was owned by REMIC Trust known as Pool 794 is, likewise, an a valid ground to see if a transfer took place; this additional scintilla of fact, or inference therefrom, is likewise enough to overcome the grant of summary judgment. *Id.* [R. 1098-1107].

The Master has let the Respondent ignore its obligation to prove all transfers. The Respondent takes the position Appellant is not entitled to this information. Respondent should not be allowed such latitude at the Court of Appeals and the grant of summary judgment as to both the Declaratory Judgment cause of action and the finding that be reversed outright; moreover, on remand, the Court of Appeals should instruct the Master to compel Respondent to prove its chain of transfers. *Leavings v. Mills*, 175 S.W.3d at 309; *U.S. Bank, N.A. v. Alexander*, 280 P.3d at 941; S.C. Code Ann. § 36-3-301(ii).

D. 12 U.S.C.A. § 215(a)-(e) Has No Applicability.

At the June 6, 2014 hearing, Defendant cited *CFS, LLC v. Bank of America*, 962 N.E.2d 151 (Ind. Ct. App. 2012) for the proposition that when Wachovia merged with Wells Fargo on March 20, 2010, Wells Fargo automatically became the holder of the Bentrim note by action of 12 U.S.C.A. § 215(a)-(e). This federal statute speaks for itself – when two ***banks*** merge, the property rights of each are transferred to the successor entity. To the extent this is a an issue of ownership, not delivery of possession and transfer under the UCC, it has no applicability to the instant case.

In any event, there is at least a scintilla of evidence, and therefore a genuine issue of material fact – created by the Wakefield, Kita and Bodiford Affidavits, and the Pooling & Servicing Agreement – that Respondent if transferred the note to a third-party [i.e., TMS Service Corp., Inc. – a non bank] effective November 26, 2009, there was no possession or enforcement right to transfer from Wachovia to Wells Fargo at the time of the merger. [R. 1098-1107; R. 1309-1310; Sealed App. R 1320-1350].

The second reason is that the statute would not apply to TMS Service Corp., either. Not only is TMS Service Corp. not a qualifying national or state bank under 12 U.S. Code

Chapter 2, but Wakefield averred that it and its corporate parent dissolved. [R. 1294]. Thus, there was no merger. There is an even bigger point to be made here. Because the Bentrim note is a negotiable instrument, it is governed exclusively by UCC Article 3. *See Swindler v. Swindler*, 355 S.C. 245, 584 S.E.2d 438, 440-441 (2003)(finding that Article Three governs a note secured by a mortgage on real property); *see also Midfirst Bank, SSB, v. C.W. Haynes & Co.*, 893 F. Supp. 1304, 1312 n. 3 (D.S.C.1994) ("Article Three of the UCC controls transfers of negotiable instruments, and the mortgage notes are clearly negotiable."). Thus, Wells Fargo cannot rely on 12 U.S.C.A. § 215(a)-(e) to "bootstrap" into holder qualification as a matter of law – not even taking into account the factual defects in this argument. Thus, 12 U.S.C.A. § 215(a)-(e) does not supplant, preempt or trump Article 3. It does not qualify a successor bank as a "holder" if the successor cannot demonstrate the requirements of sections 1-201(20) and 3-203(c). At best, 12 U.S.C.A. § 215(a)-(e) would be applicable to the concept of "transfer" under S.C. Code Ann. §§ 36-3-201, -203.

This is supported by the holding in *CFS, LLC*, where the Indiana Court of Appeals clearly applied that state's version of Section 3-301 of the UCC. 962 N.E.2d at 153, n.2. It never ruled that Bank of America was automatically a holder by virtue of 12 U.S.C.A. § 215(a)-(e) – only that **under those particular facts** Bank of America had enforcement rights under Section 3-301. *Id.* The facts of *CFS, LLC* are not duplicated here. What distinguishes the instant case from *CFS, LLC* is the undeniable fact that (a) Wachovia sold 100% of the Bentrim loan on November 26, 2006 – years before it merged with Wells Fargo ***with evidence that a transfer took place at the time of the sale***; (b) there is no evidence Wachovia or Wells Fargo has rights to transfer at the time of the Wachovia-Wells

Fargo merger. [R. 1098-1107; 1309-1310; Sealed App. R 1320-1350]. *In Re Veal* at 897; *Redwend*, 354 S.C. at 468, 581 S.E.2d at 501; *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803. Certainly more discovery needs to be done, as the transfer to TMS Service Corp., Inc. was sprung on Appellant at the last minute and there is little in the way of documentation. *Baughman v. Am. Tel. & Tel. Co.,* 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)("summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.");

Moreover, even if 12 U.S.C.A. § 215 permits or contemplates a transfer of enforcement rights under UCC Article 3, it cannot create holder rights where none existed – which was Respondent's argument. The best it could do is possibly make Respondent a "non holder in possession" and' as established above' Respondent has not (and likely cannot) prove the chain of transactions necessary in order to enjoy enforcement rights. S.C. Code Ann. § 36-3-301(ii); Section 3-203 Official Comment. ["Prove" with respect to a fact means the burden of establishing the fact. 36-3-103 (13) "Burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence. 36-1-201(8)]. Under Section 36-1-201(31), the Court can make no assumption of fact in regards to Wells Fargo's obtaining a transfer of the Note through any predecessor by presenting evidence that would support its non-existence. Based on the foregoing, the Court of Appeals should reverse the Master in Equity on the ruling that Wells Fargo qualifies as a holder to the extent it is predicated on 12 U.S.C.A. § 215(a)(e).

E. Wells Fargo Is Not a Holder in Due Course.

The Master in Equity ruled that Wells Fargo was a "holder in due course" under S.C. Code Ann. § 36-3-302(a). [R. 7]. Essentially, a holder in due course is a bona fide purchaser for value. One legal text explains the concept as follows:

> A holder in due course must meet five requirements. The first is meeting the requirements for becoming a holder. UCC § 3-302(a). Second, the instrument must not be obviously forged, altered, or otherwise suspicious looking. UCC § 3-302(a)(1). Third, the holder must have taken the instrument for value. UCC § 3-302(a)(2)(i). Fourth, the holder must have taken the instrument in good faith. UCC § 3-302(a)(2)(ii). Finally, the prospective holder in due course must have taken the instrument without notice that the instrument has certain types of problems. UCC § 3-302(a)(2)(iii), (iv), (v), and (vi).

Michael D. Floyd, *Mastering Negotiable Instruments: UCC Articles 3 and 4 and Other Payment Systems*, Carolina Academic Press (2008). There is a sixth requirement under S.C. Code Ann. § 36-3-302(a), that a holder in due course also take the instrument without notice of any claim to the instrument described in Section 3-306. Under the circumstances presented, there can be no reasonable or legal analysis which can support the lower court's ruling that Respondent qualifies as a holder in due course. First, Respondent never pleaded it was a Holder in Due Course. [R. 706-757; 2012 R. 41-54, R. 84-111].

Second, there is no proof in the record that after Respondent sold the Bentrim loan to TMS Service Corp. on November 26, 2006, that Respondent ever paid value when it purportedly reacquired it in 2010. *Id.* at § 36-3-302(a)(2)(i). Mr. Wakefield's affidavit claims the Note was repurchased in May, 2010 – nearly 18 months before Wells Fargo interposed the Counterclaim, but he fails to attach any records to substantiate the May 1St merger between The Money Store, LLC and TMS Service Corp as well as the purported distribution to Wells Fargo Bank, NA. [R. 1294-1298; 1309-1310; Sealed App. R 1320-

1350].

Third, while the Master in Equity seems to ground his ruling on holder in due course entirely on Wells Fargo's physical possession of the note, on the assumption that it was maintained via a transfer from a successor in interest, S.C. Code Ann. § 3-302(c) precludes a party taking an instrument as a successor in interest from qualifying as a holder in due course. Therefore even if Wells Fargo Bank, NA acquired the Note via succession from a party other than Wachovia Bank, NA, it cannot be a holder in due course. *Id.* at § 36-3-302(c)(iii). It cannot 'wash away' its liabilities through the reacquisition of the note; it is prohibited from ever being a holder in due course. *See* S.C. Code Ann. § 36-3-203, cmt 2.

Fourth, to be a holder in due course, Wells Fargo would have to admit its foreclosure actions in 2007 and 2009 were invalid because the November 29, 2006 'transfer' of 100% of the Bentrim Loan to TMS Service Corp. was made after a foreclosure suit (2005) and at a time Wachovia Bank claimed Bentrim was in arrears – which would be notice of a defect which bars holder in due course status. S.C. Code Ann. § 36-3-302(a).

Finally, there is a large and unresolved issue which demonstrates the illogic of the trial court's ruling. If Wells Fargo is truly a "holder in due course," and has always been a holder in due course, then in the October 28, 2014 Order the trial court should have dismissed all Appellants' first-party causes of action and all his affirmative defenses, rather than just some causes of action. A holder in due course, other than in relation with the Obligor and Obligee, takes an instrument free from claims on it as well as personal defenses of the Obligor.

Thus, on these facts, the Master's ruling that Wells Fargo is a holder in due course goes against concepts of commercial reasonableness and fair dealing. It in essence is a

finding that Bentrim cannot sustain his complaint against Wells Fargo for any actions of its predecessor, Wachovia Bank, NA. Thus, the Court has ruled, lacking any legal basis and in contravention of the summary judgment standard, that the foreclosure should go through (as Bentrim has no defenses) ***and*** that Bentrim's first-party claims must fail even though the Defendant cannot show holder status at the inception of the 2007 and 2009 suits that form the basis of his claims. Based on the foregoing, the Court of Appeals should reverse the Master in Equity on the ruling that Wells Fargo qualifies as a holder in due course with all the privileges and immunities provided under S.C. Code Ann. §§ 36-3-305. -306, -307 and -308.

SECTION III – OTHER SUMMARY JUDGMENT RULINGS

A. Consumer Protection Code Cause of Action.

The Master erred in granting summary judgment to Wells Fargo on Bentrim's cause of action for violation of the South Carolina Consumer Protection Code, S.C. Code Ann. § 37-3-101 *et seq*. "The Consumer Code applies to consumer loans that are defined as "loan[s] made by a person regularly engaged in the business of making loans" in which the debt is for personal, family or household purposes and that it is payable in two or more installments." S.C. Code Ann. § 37-3-104. *In re Brown*, 270 B.R. 43, 51 (Bankr. D.S.C. 2001).

Under the terms of the Note:

> *"EVENTS OF DEFAULT: I will be in default under this Note if any of the following events occur: (1) failure to make a payment as required under the Note; (2) The prospect of payment, performance, or realization by you on my collateral is significantly impaired; or (3) if I fail to perform any term(s) of any Mortgage which secures payment of the Note.*
>
> *REMEDIES ON DEFAULT: If this is a consumer credit transaction which is payable in two or more installments and I fail to make any payment within*

10 days of its due date, you will give me one opportunity to cure the payment default by making the payment, if (1) I do not cure within 20 days, (2) I am ever late with payment again, or (3) the prospect of payment or realization of collateral is significantly impaired, you may demand that this loan be paid immediately."

Since the Note's own language says it is a consumer credit transaction, then "[t]he parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument." *In re Estate of Holden*, 343 S.C. 267, 275-276, 539 SE 2d 703, 708 (2000).

Pursuant to S.C. Code Ann. § 37-1-301(11), it is clear that Bentrim loan is a consumer credit transaction. "Consumer Credit Transaction" means a consumer credit sale (§ 37-2-104) or consumer loan (§ 37-3-104) or a refinancing or consolidation thereof, a consumer lease (§ 37-2-106), or a consumer rental-purchase agreement (§ 37-2-701). *See* S.C. Code Ann. § 37-1-301(11). The 2002 transaction consolidated and refinanced a portion of an existing consumer loan with First Union National Bank into this loan. [*See* R. 1307, Line 105]. Moreover, in the 2009 foreclosure case, Respondent pled that "[t]he Mortgage ... constitutes a valid second lien on the Property" [R.709 ¶ 7]. "Consumer loan" is defined except as provided in Section 37-3-105, "consumer loan" is a loan made by a person regularly engaged in the business of making loans in which: (a) the debtor is a person other than an organization; (b) the debt is incurred primarily for a personal, family, or household purpose; (c) either the debt is payable in installments or a loan finance charge is made; and (d) either the principal does not exceed twenty-five thousand dollars or the debt is secured by an interest in land. Further, the Respondent was placed on notice by the S.C. Department of Consumer Affairs as well as the Attorney General that its investigation

in regards to the Bentrim loan was underway in October 2010, so notice under 37-5-108(6) was met. [R. 1211-1284]. *Redwend*, 354 S.C. at 468, 581 S.E.2d at 501; *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803.

B. Fraud & Related Causes of Action.

This Court should overrule the Master's grant of summary judgment on Bentrim's causes of action sounding in fraud. While the Master did not articulate his reasoning in granting summary judgment, the Respondent's principal argument for each was that that Bentrim's Amended Complaint failed to make meet the requirements Rule 9(b), SCRCP ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.") Appellant submits that the Amended Complaint goes on at length for approximately 60 paragraphs detailing with specificity the facts underlying the fraud-based claims. In addition, each of the challenged cause of actions references these factual paragraphs and Bentrim testified at length about these matters in his deposition. Appellant alleges a continuing and ongoing fraud on the part of the Respondent – including claiming holder status in the 2007 and 2009 foreclosure actions; representing to Bentrim that it was the owner of his mortgage when it was not; the misleading and fraudulent Lost Note Affidavit; the attempt to pass off copies of the Note from the real estate closing file as the Note; and repeated averments that the Bentrim Loan had not been sold – which was only admitted at the eleventh hour. Moreover, the Complaint details how Respondent provided false and misleading fraudulent and misleading account statements to Bentrim. All pleadings shall be so construed as to do substantial justice to all parties." Rule 8(f), SCRCP; *see also Russell v. City of Columbia,* 305 S.C. 86, 89, 406 S.E.2d 338,

340 (1991)(holding to ensure substantial justice to the parties, the pleadings must be liberally construed). "[T]echnical, restrictive or outmoded requirements of Code Pleading are not necessarily required [under the SCRCP]." *Gaskins v. S. Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App.2000). Professor Flanagan has noted: "[a] survey of the pleading cases decided after the adoption of the rules in 1985 suggests that the courts do not demand hyper factual pleadings." *See* James F. Flanagan, *South Carolina Civil Procedure 2d*, p. 65, n. 17 (S.C. Bar 2012). With reference to Rule 9(f), Professor Flanagan has opined that some generality may be acceptable. *Id.* p. 75, n. 6. In any event, the fact the Master has allowed causes of action for UTPA and breach of contract with fraudulent intent, but not for fraud, constructive fraud or fraudulent misrepresentation, shows that there are genuine issues of material fact. *Redwend*, 354 S.C. at 468, 581 S.E.2d at 501; *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803.

C. Slander of Title Cause of Action.

The Court reverse the granting of summary judgment on the cause of action for slander of title. In its court filings, Respondent mischaracterizes Appellant's slander of title cause of action – which goes beyond the mere filing of a *lis pendens*, and includes allegations regarding diminished value in the eyes of third parties, including the inability to refinance and inability to sell the property. In *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 204, 723 S.E.2d 597, 603 (Ct. App. 2012), the Court of Appeals allowed a slander of title claim to proceed against a lender. The *Solley* majority also specifically ruled that: "[r]ecording a mortgage that is a nullity should be considered a false statement derogatory to Solley's title." 723 S.E.2d at 606. The pleadings and discovery in this case, as well as legal argument over whether Wells Fargo is a PETE on the current counterclaim,

or had the right file the 2007 and 2009 actions, raise genuine issues of material fact that preclude summary judgment at this time. It is indisputable that Wells Fargo sold 100% of the note on November 29, 2006 (R. 1294-1129) but specifically told Bentrim in 2008 that it held the mortgage [R. 574-575]. The new party, if appropriate, was on notice to record.

Accordingly, there is a genuine issue of material fact that Wells Fargo slandered the Appellants property interest in 10 Nicholson Street, precluding him from selling, refinancing, etc., when he had a right to possess the property in fee at the time. This theory would need to be tested by additional discovery, which is a further ground to deny summary judgment on the conversion cause of action at this time. *Baughman,* 306 S.C. at 112, 410 S.E.2d at 543; *Redwend*, 354 S.C. at 468, 581 S.E.2d at 501; *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803.

D. Conversion Cause of Action.

This Court should overrule the Master's grant of summary judgment on Bentrim's conversion cause of action as an error of law. A plaintiff claiming conversion may prevail based upon a showing of unauthorized detention of property, after demand. The plaintiff must show either title or right to possession of the property at the time of conversion. Money may be the subject of conversion if it is capable of being identified, and there may be conversion of determinate sums even though specific coins and bills are not identified. *Mullis v. Trident Emerg. Phys.*, 351 S.C. 503, 570 S.E.2d 549, 551 (Ct. App. 2002); *Oxford Fin. Cos. v. Burgess,* 303 S.C. 534, 539, 402 S.E.2d 480, 482 (1991). In *Regions Bank v. Schmauch*, 345 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003), the Court of Appeals held that conversion "may arise by some illegal use or misuse ... of another's personal property (emphasis added)." Respondent would cite to *Owens v. Andrews Bank*

& Trust Co., 265 S.C. 490, 496, 220 S.E.2d 116, 119 (1975) for the general proposition that there can be no conversion where there is a mere obligation to pay a debt and "where there is merely the relationship of a debtor and creditor, an action based on conversion of the funds representing the debt is improper." However, the UCC provides that an action for conversion may be brought "... when a bank ... obtains payments with respect to the instrument from a person not entitled to enforce the instrument or receive payment." S.C. Code Ann. § 36-3-420; *cf. Halifax Corp. v. Wachovia Bank*, 268 Va. 641, 659, 604 S.E.2d 403, 411 (2004). Accordingly, the applicability of *Owens* is displaced as a matter of law. *In re Estate of Rider*, 407 S.C. 386, 398, 756 S.E.2d 136, 143 (2014).

Additionally, there are genuine issues of material facts surrounding the issue of conversion which preclude summary judgment. The Wakefield affidavit which purports to show the Note was sold on November 29, 2006 and the PSA produced at the eleventh hour explode the concept that there was only a debtor-creditor relationship. [R. 11194-1198; R. 1294-1298; 1309-1310; Sealed App. R 1320-1350]. So does the affidavit of Appellant's expert Ms. Kita who has testified that the Bentrim loan was owned by a REMIC Trust. [R. 1101]. Yet during this time Respondent specifically told Bentrim (in 2008) that it owned the mortgage [R. 547-548]. Moreover, Respondent brought the 2007 and 2009 foreclosure actions claiming holder status which it cannot establish as a matter of law or fact, as set forth in Section II herein. Notwithstanding the foregoing, additionally, Wells Fargo has repeatedly denied that it was in a third-party servicing relationship and has repeatedly averred that it kept and every payment it collected from Bentrim. [R. 441-442].

Viewing these facts and inferences in the light most favorable to Bentrim, because Bentrim is only obligated to pay a PETE, there is a genuine issue as to whether Wells Fargo dispossessed him all sums paid to Respondent after November 29, 2006. S.C. Code Ann. § 36-3-412. If there is a question of whether Respondent was a PETE after November 29, 2006, and in the absence of any evidence in the record establishing an ongoing third-party servicing relationship (particularly one between Wells Fargo and the REMIC Trust Pool 794), then there is a genuine question that Respondent is liable under S.C. Code Ann. § 36-3-420.

Finally, because the Master has denied full documentary discovery, and additional depositions need to be taken, the incompleteness of discovery on this issue is further ground to deny summary judgment on the conversion cause of action at this time. *Baughman,* 306 S.C. at 112, 410 S.E.2d at 543; *Redwend*, 354 S.C. at 468, 581 S.E.2d at 501; *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803.

E. Implied Covenant of Good Faith and Fair Dealing Cause of Action.

This Court should overrule the Master's grant of summary judgment on Bentrim's cause of action for breach of the implied covenant of good faith and fair dealing as an error of law. The South Carolina Uniform Commercial Code provides: "[e]very contract or duty within this act imposes an obligation of good faith in its performance or enforcement." S.C. Code § 36-1-203; *see also* S.C. Code § 36-1-201(b)(20). This statutory authority exists independent of case law. The Order is silent on why the Court granted summary judgment on the good faith and fair dealing cause of action, but Respondent advanced the case of *RoTec v. Encompass Services, Inc.* 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004). [R. 266-267]. Insofar as *RoTec* did not analyze the applicability of § 1-203, Plaintiff

submits that this claim based on statute should be preserved and Wells Fargo's motion for summary judgment on this issue should be denied. As established above, the principal of displacement is also impacted. *In re Estate of Rider*, 407 S.C. 386, 398, 756 S.E.2d 136, 143 (2014). Wells Fargo offers no citation to authority for the proposition that Judge Dennis' ruling of November 20, 2012 bars any claim which touches on contract.

Moreover, by allowing the cause of action for breach of contract to stand, there is no sound basis for the Master to grant summary judgment on the implied covenant cause of action. *Redwend*, 354 S.C. at 468, 581 S.E.2d at 501; *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803.

F. Civil Conspiracy Cause of Action.

This Court should overrule the Master's grant of summary judgment on Bentrim's cause of action for conversion based on genuine issues of material fact and/or incomplete discovery resulting in a premature ruling. "[I]n order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987); *accord Cowburn v. Leventis*, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (2005); *Pye v. Estate of Fox*, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006). Here, the Wakefield affidavit (produced a mere four days before the hearing) establishes that TMS Service Corp – an independent, separate corporation – purportedly owned the note; the Kita Affidavit establishes an issue of fact that Pool 794 owned the note; obviously, since Wells Fargo only revealed this fact in the last four days before the hearing, more discovery is needed and summary judgment would be inappropriate at this time on the issue of willfulness.[R.

1194-1198, R. 1101, R 1309-1310; Sealed App. R 1320-1350]. Debt collectors, including law firms, can also be deemed co-conspirators. Attorneys' fees incurred in defending the instant counter-claim would be cognizable special damages, as established in discovery responses, as well as damage to credit as identified in the pleadings and depositions. [R. 73, ¶ 65; R. 80, ¶ 120]. Notwithstanding the foregoing, because Appellant has been denied full documentary discovery, the incompleteness of discovery on this issue is further ground to deny summary judgment on the civil conspiracy cause of action at this time. *Baughman,* 306 S.C. at 112, 410 S.E.2d at 543; *Redwend*, 354 S.C. at 468, 581 S.E.2d at 501; *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803.

G. Fair Debt Collection Practices Act Cause of Action.

There are genuine issues of material fact that as to whether Respondent – acting as a debt collector, not in collecting its own loans -- used "instrumentalit[ies] of interstate commerce or the mails ... who regularly collects or attempts to collect, directly or indirectly, debts owed, or due or due another." 15 U.S.C.A. § 1692a. Thus, it was error for the Master to grant Wells Fargo summary judgment on Bentrim's Fair Debt Collection Practices Act cause of action. Wells Fargo argued that "the only evidence before this Court is that Wells Fargo was at all times collecting a debt in its own name and servicing its own debt." [R. 273 ¶ a]. Yet there are genuine issues of material fact it was servicing for a third-party or parties. *Redwend*, 354 S.C. at 468, 581 S.E.2d at 501; *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803; [R. 1194-1198, R. 1101, R 1309-1310; Sealed App. R 1320-1350].

CONCLUSION

This Court should reverse its ruling in *Bank of America v. Draper* and decline to extend its holding to this case as an alternate ground to sustain the Master. This Court

should also reverse the Master on his summary judgment rulings in Sections 1 and 4 of the October 28, 2015 Order, and specifically find that Respondent is not currently a holder and/or holder in due course, nor was it a holder or holder in due course in the 2007 and 2009 foreclosure suits. On remand, this Court should require the Respondent to prove its chain of transfers.

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The Honorable Mikell R. Scarborough
Charleston County Master in Equity

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CERTIFICATE OF COUNSEL

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

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Appellant's ***Final 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:

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