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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Mikell R. Scarborough, Master-In-Equity

Appellate Case No. 2016-001054

HSBC Bank USA, National Association, as Trustee for  
the Holders of the Deutsche ALT-A Securities, Inc.  
Mortgage Loan Trust, Mortgage Pass-Through  
Certificates Series 2007-OA4, assignee of Bank of  
America N.A., successor by merger to BAC Home  
Loans Servicing L.P., f/k/a Countrywide Home Loans  
Servicing, Inc., ..... Appellant,

v.

Clifford L. Ryba; Beverly Ryba; Regions Bank;  
First Federal Savings and Loan Association of  
Charleston; Citibank (South Dakota) N.A., and  
Carol Garfield Goldberg ..... Defendants,

Of whom Carol Garfield Goldberg is the ..... Respondent.

INITIAL BRIEF OF RESPONDENT

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## STATEMENT OF THE ISSUES ON APPEAL

The Appellate Courts Rules require a concise and direct statement as to each issue on appeal.<sup>1</sup> The Initial Brief of the Appellant does not include a statement of the issues on appeal. “Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.”<sup>2</sup> If the Court discerns an extraordinary circumstance, the Respondent responds to the arguments made in the Appellants’ brief as follows:

- I. A mortgage foreclosure is an action in equity. The Appellant failed to prove entitlement to holder in due course status and stands in the shoes of Countrywide which facilitated, turned a blind eye to, and profited from the scheme to defraud the Respondent of her property. This Court should affirm the Master’s denial of foreclosure.
- II. All issues and arguments must first be presented to the lower court. Issues and arguments not raised and ruled on by the lower court are not preserved for appellate review.
  - A. For the first time on appeal the Appellant argues the Respondent lacked standing under the Uniform Commercial Code to raise fraud as a defense to the foreclosure. This Court should decline to consider the issue because it was not raised and ruled on by the Master-In-Equity.
  - B. For the first time on appeal the Appellant argues a loan servicer automatically has holder in due course status and can foreclose a mortgage free from all claims and defenses. This Court should decline to consider the issue because it was not raised and ruled on by the Master-In-Equity.

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<sup>1</sup> Rule 208(b)(1)(B), SCACR.

<sup>2</sup> *Id.*

## SUMMARY OF THE ARGUMENT

A mortgage foreclosure is an action in equity. Courts of equity protect those of whom undue advantage has been taken, abhor a wrong without a remedy, and will look beneath the rigid rules of law to do substantial justice. The Respondent was an inexperienced, single mother desperately trying to save her home. She turned to a licensed mortgage broker for help. Instead of helping her, he helped himself to the \$150,000.00 equity in her home. The Master did not foolishly fashion a remedy to assist or punish either party, he ruled the Appellant failed to prove they paid value for the note and mortgage without notice and, therefore, stood in the shoes of Countrywide which had constructive notice of the fraud perpetrated to obtain title to the Respondent's property. The Master gave the parties every opportunity to raise issues and present evidence. The Appellant now seeks to raise new issues that were not raised or ruled on by the Master. This Court should decline to consider the new issues not preserved for appellate review. This Court should affirm the Order denying foreclosure because the Master did substantial justice based on the issues raised and the evidence presented, or not presented, by the parties.

## STATEMENT OF THE CASE

Appellant's two paragraph Statement of the Case does not include all proceedings necessary to an understanding of the appeal. In addition to the proceedings included in the Appellant's Brief, the Respondent would include the following:

On August 29, 2008, the Respondent filed a complaint alleging fraud against Clifford and Beverly Ryba and First Rate Mortgage, L.L.C. (Complaint, Case No. 08-CP-10-4970 filed 8/29/08). At the same time she filed a *lis pendens* giving statutory notice of her claim. (*Lis pendens* filed 8/29/08).

On October 27, 2011, Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing, L.P., alleged the mortgage was assigned to them on September 15, 2011 and filed this foreclosure action. (Complaint, Case No. 11-CP-10-7885, dated 10/27/11).

On April 29, 2014, Bank of America filed a motion for partial summary judgment. (Motion for Partial Summary Judgment dated 4/29/14).

The Appellant, HSBC Bank USA, National Association, as Trustee for the Holders of the Deutsche ALT-A Securities, Inc. Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-OA4, assignee of Bank of America N.A., successor by merger to BAC Home Loans Servicing L.P., f/k/a Countrywide Home Loans Servicing, Inc., alleged the mortgage was assigned to them by Bank of America on May 21, 2012 and moved to be substituted as the plaintiff. (Motion for Substitution). The motion to substitute was granted. (Order Granting Substitution).

In their memorandum in support of their motion for partial summary judgment the Appellant argued they paid value for the note and mortgage without notice and, therefore, were holders in due course not subject to the Respondent's claim or defense of fraud. (Memorandum in Support of Partial Summary Judgment). In her memorandum in opposition the Respondent argued the Appellant was not

entitled to holder in due course status. (Respondent's Memorandum in Opposition). After the hearing, the Appellant filed a supplemental memorandum in support of the motion arguing they were entitled to the protection of the shelter rule. (Appellant's Supplemental Memorandum). The Master ruled material questions of fact remained and denied partial summary judgement. (Order Denying Foreclosure filed 6/22/15).

The foreclosure was heard before the Master on March 24, 2015. At the conclusion of the testimony, the Respondent moved for a directed verdict on the ground the Appellant failed to prove it had given value for the note and mortgage. (Transcript, p. \_\_\_). The Master issued his Order denying foreclosure. (Order Denying Foreclosure filed June 6/22/15).

Appellant filed for motion to alter, amend, or reconsider or for a new trial. (Motion to Alter, Amend, or Reconsider or for a New Trial filed 7/6/15). Appellant's motion was granted in part and denied in part. (Order Denying in Part and Granting in Part filed 4/20/16).

The Appellant timely filed Notice of Appeal. (Notice of Appeal).

## FACTS

The Respondent was an inexperienced, single mother desperately trying to save her home located at 34 Tarleton Drive, Charleston, South Carolina that she inherited from her grandfather. She mortgaged the property because she was adopting a child and her husband wanted to open a restaurant.<sup>3</sup> Subsequently, her

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<sup>3</sup> The statement of the facts is taken from the unappealed factual findings in the Master's Order denying foreclosure.

husband was incarcerated, his restaurant closed, and the Respondent was left with insufficient income to pay the mortgage. She obtained a short term loan to keep up the payments but needed to secure long term refinancing. She mentioned her situation to Clifford Ryba, a licensed mortgage broker with First Rate Mortgage, LLC., who said he could help save her home.

The Respondent met with Ryba at First Rate Mortgage, LLC. She answered questions as he filled out what she presumed was a mortgage loan application. Ryba later told her she could not qualify for a mortgage loan even with a co-signor. Ryba proposed the Respondent deed her home to him so he could obtain a mortgage in his name, lease the home back to her for an amount equal to the new mortgage payments, and she would have the right to repurchase the home by reimbursing him for his costs. Respondent testified she was an inexperienced borrower and relied upon Ryba because he was a licensed mortgage broker who worked for a mortgage brokerage firm. She did not know the proposed scheme had all the earmarks of recasting prohibited under the laws regulating mortgage brokers.

Ryba took care of everything assuring the Respondent would not be represented by a real estate agent or attorney in the lease or buy and sell agreements. Ryba prepared a Residential Lease Agreement on August 12, 2005 leasing the property he did not own yet back to Respondent for a monthly rent of \$850.00. (Defendant's Exhibit 2). Paragraph 14 of the lease agreement drafted by Ryba said "[t]enant is owner." The Respondent understood her rent would be used to pay the new mortgage Ryba would obtain in his name. Ryba prepared an Agreement to Buy

and Sell the property for \$205,000.00 on August 16, 2005. The Respondent understood that was the amount needed to satisfy her existing mortgage and pay closing costs for the new mortgage. (Tr. ). The balance owing on the Respondent's existing mortgage, including interest and fees, was \$199,689.75. (Defendant's Exhibit 5). The Respondent signed a deed conveying her property to Ryba and his wife on August 31, 2005. (Defendant's Exhibit 4). The Respondent did not receive anything from the closing for the \$150,000.00 equity in her home. The closing attorney testified he would not have closed the loan if he had known of Ryba's fraudulent representations.

On the day of closing, Ryba and his wife obtained a mortgage loan from Countrywide in the principal amount of \$163,500.00. (Defendant's Exhibit 6). The mortgage application was handled by Ryba and his employer, First Rate Mortgage, LLC. The proceeds of the loan, together with a second mortgage of unknown origin in the amount of \$20,857.00 and cash from borrower in the amount of \$21,199.11, were used to satisfy the Respondent's outstanding mortgage as shown by the HUD Settlement Statement. (Defendant's Exhibit 15). Whatever personal funds Ryba may have contributed were more than reimbursed when on October 11, 2005 Ryba and his wife obtained a second mortgage on the property from Regions Bank in the amount of \$100,000.00. Respondent had no knowledge of this mortgage. Seven months later, on May 9, 2006, Ryba and his wife refinanced the Regions Bank second mortgage increasing it to \$115,000.00. (Exhibit \_\_). Respondent had no knowledge of this refinancing.

Ryba and his wife refinanced the Countrywide mortgage on May 2, 2007 increasing it to \$172,000.00. (Defendant's Exhibit 10). Prior to this refinance, Regions Bank agreed to subordinate its second mortgage. (Defendant's Exhibit 6). Respondent had no knowledge of this refinancing. This was the "no doc," negative amortization subprime mortgage loan sought to be foreclosed in this case.

The mortgage application was again handled by Ryba and his employer, First Rate Mortgage, LLC. (Defendant's Exhibit 14). Michael Ward who was called by the Appellant to verify the loan documents, testified Countrywide relied upon First Rate Mortgage, LLC, to gather and submit complete and accurate information but also testified the loan was a "no doc" loan, meaning Countrywide did not require the information on the loan application be verified or documented. The application was not signed until the day of the closing. The loan application disclosed Ryba was an employee of First Rate Mortgage, LLC. The year Ryba acquired the property was left blank. The loan application disclosed Ryba did not live on the property. Although the property was described as an investment, the application and appraisal showed the property was rented for a net monthly loss at substantially less than fair market value. The closing attorney testified the entire \$171,445.01 net proceeds of the mortgage, after payment of the broker fee, title insurance, and closing costs, were all paid to Countywide. (Defendant's Exhibit 15). The appraisal showed the property was worth \$375,000.00. (Defendant's Exhibit 17). Instead of helping the Respondent refinance her home, Ryba helped himself to the \$150,000.00 equity she had in home.

The Respondent testified Ryba demanded she increase her rent payments from \$850.00 to \$1,600.00 a month and, when she refused, he tried to have her evicted from the property. Realizing she had defrauded the Respondent retained counsel and stopped the eviction proceedings. She paid the taxes on the property when Ryba failed to and a delinquent tax notice was posted on her front door. Ryba hired a real estate agent to sell the home who put a “lock box” on her front door and for sale signs in the yard which she removed. The Respondent filed a Complaint, Case No. 08-CP-10-4970, against the Rybas and First Rate Mortgage, LLC, alleging various causes of action, including fraud and recasting. (Defendant’s Exhibit 18). At the same time, Respondent filed a *lis pendens* giving statutory notice of the alleged fraud and her claim to the property. (Defendant’s Exhibit 19).

Ryba did not just become delinquent on the note and mortgage, he stopped paying altogether and filed for bankruptcy. The Respondent intervened in the bankruptcy and Ryba and his wife transferred ownership of the property back to her by quick claim deed on October 26, 2012.

#### ARGUMENT

In an appeal from an action in equity, the appellate court may find facts in accordance with its own view of the evidence.<sup>4</sup> This broad scope of review, however, does not require an appellate court to disregard the findings below or to ignore the fact the trial judge was in a better position to assess credibility.<sup>5</sup> Nor does it relieve

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<sup>4</sup> Lowcountry Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct.App.2008).

<sup>5</sup> Pinckney v. Warren, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001).

the Appellant of convincing the appellate court the trial judge committed error in his findings.<sup>6</sup>

I. A mortgage foreclosure is an equitable action. The Appellant failed to prove entitlement to holder in due course status and, therefore, stood in the shoes of Countrywide which facilitated, turned a blind eye to, and profited from the scheme to defraud the Respondent of her property. This Court should affirm the Master's denial of foreclosure.

A mortgage foreclosure is an action in equity.<sup>7</sup> Courts of equity protect those of whom undue advantage has been taken,<sup>8</sup> abhor a wrong without a remedy,<sup>9</sup> and will look beneath the rigid rules of law to seek substantial justice.<sup>10</sup> The decision to grant equitable relief is in the discretion of the trial judge.<sup>11</sup> The Master did not foolishly fashion a remedy to assist or punish either party, he ruled the Appellant failed to prove they paid value for the note and mortgage without notice and, therefore, stood in the shoes of Countrywide which had constructive notice of the fraud perpetrated to obtain title to the property mortgaged. The Master ruled on the issues raised and the evidence presented, or not presented, by the parties.

The issues were framed by the parties. Both the Bank of America and the Appellant argued in their motion for partial summary judgement they paid value

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<sup>6</sup> *Id.* at 387–88, 544 S.E.2d at 623.

<sup>7</sup> Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997).

<sup>8</sup> Smother's v. U.S. Fidelity and Guar. Co., 322 S.C. 207, 470 S.E.2d 858 (S.C. App. 1996).

<sup>9</sup> State ex rel. Daniel v. Strong, 185 S.C. 27, 192 S.E.671 (1937).

<sup>10</sup> *Id.*

<sup>11</sup> First Union Nat. Bank of S.C. v. Soden, 333 S.C. 554511 S.E.2d 372 (S.C. App. 1998).

without notice for the note and giving them holders in due course status not subject to the Respondent's claim or defense of fraud. They argued:

In South Carolina, a purchaser may assert a plea in equity of a bona fide purchaser for value, without notice of defect in his title, by showing (1) he has actually paid in full the purchase money (giving security for the payment is not sufficient, not is past indebtedness a sufficient consideration); (2) he purchased and acquired the legal title, or the best right to it; and (3) he purchased bona fide; *i.e.*, in good faith and with integrity of dealing, without notice of a lien or defect.

(Memorandum in Support of Motion for Partial Summary Judgment dated April 29, 2014). The Respondent filed a memorandum in opposition and argued neither Bank of America nor the Appellant were holders in due course. (Respondent's Memorandum in Opposition to Motion for Partial Summary Judgment). After the hearing, Appellant switched gears and filed a supplemental memorandum arguing they were entitled to the protection of the shelter rule because their predecessor in title, Countrywide, paid value without notice when it funded the mortgage loan. The Master ruled material questions of fact remained and denied summary judgment.<sup>12</sup> (Order Denying Foreclosure filed 6/22/15). One matter that troubled the Master was the refinancing of the property four times over two years. The Master requested the Appellant produce evidence regarding lending standards for multiple refinancing of property over a short period of time at the trial. (Order Denying Foreclosure, p. 19).

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<sup>12</sup> Handcock v. Mid-South Management Co., Inc., 673 S.C. 801, 381 S.E.2d 326 (2009).

The trial was heard before the Master beginning on March 24, 2015. The Master ruled the Appellant was the holder of the note and mortgage because it produced the original documents. The Master ruled the mortgage was filed in accordance with § 30-7-10, S.C. Code Anno., 1976, and, therefore, valid as to subsequent purchasers for value without notice. This ruling was consistent with issues raised by and the South Carolina case law cited by both parties.<sup>13</sup> The Master turned to the issues thus presented.

The foreclosure was originally brought by Bank of America which alleged the mortgage was assigned to them on September 15, 2011. (Plaintiff's Exhibit 8). The complaint was amended to substitute the Appellant which alleged the mortgage was assigned to them by Bank of America on May 21, 2012. (Plaintiff's Exhibit 6). The Master commented about the time and effort spent by the Court and the parties arguing the motion for partial summary judgement based on these assignments. (Order Denying Foreclosure, pp. 3 – 4). At trial, however, Michael Ward who was called to verify the documents, switched gears again and testified the mortgage was actually assigned to the Appellant as part of a securitization agreement on June 1, 2007. The Master expressed his frustration:

If the trial testimony is to be believed, then the two prior assignments recorded in the RMC Office, referenced in pleadings, and relied upon in arguments before this Court were either the product of incompetence, the result of a total lack of accurate record keeping, or a complete sham. This Court is charged with the difficult task and responsibility of deciding cases affecting the lives of

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<sup>13</sup> Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006); S.C. Tax Commn. v. Belk, 266 S.C. 539, 543, 225 S.E. 2d 177, 179 (1976); Smith v. Faust, 107 S.C. 37, 92 S.E. 24 (S.C. 1917).

citizens whose homes are being foreclosed. Of necessity, the Court must rely on the accuracy of the documents submitted. The Court emphasizes a mortgage foreclosure is an action in equity and a party seeking to foreclose a mortgage must come before the Court with clean hands. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997); Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (2010). The inconsistent testimony causes the Court to have great concern about the accuracy and reliability of the documents the [Appellant] relies upon.

(Order Denying Foreclosure, p. 5). Not sure which theory of case to believe, the Master ruled on the assignments and the securitization agreement separately. The Master ruled the assignments were made after the Respondent had filed her *lis pendens* giving statutory notice of her claim<sup>14</sup> and after the note and mortgage were in default.<sup>15</sup> The Master further ruled Bank of America purchased Countrywide in a bulk sale not in the ordinary course of business.<sup>16</sup> The problem with the securitization agreement was Michael Ward did not bring a copy with him to be introduced into evidence. When asked what Countrywide received for the note and mortgage as part of the securitization agreement, Ward testified he did not know. (Tr. ).

At the close of the testimony, Respondent moved for a directed verdict on the grounds the Appellant had failed to prove it had paid value for the note and mortgage. (Tr. p. \_\_\_\_). In response to the motion, the Appellant represented the missing securitization agreement recited consideration and moved to reopen the case to allow

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<sup>14</sup> § 30-7-10, S.C. Code Anno., 1976.

<sup>15</sup> § 36-3-302(1)(c), S.C. Code Anno., 1976.

<sup>16</sup> § 36-3-302(3)(c), S.C. Code Anno., 1976.

introduction of the agreement. (Tr. p. \_\_\_\_). The Master did not rule on the motion but instructed the Appellant to provide a copy of the agreement to the Respondent. The Master offered to allow the Appellant to file a brief and to request a further hearing before ruling on the motion. (Transcript, p. \_\_\_\_). No brief was filed and no hearing was requested. In his Order denying foreclosure the Master ruled, "As to the claim the [Appellant] became the holder of the note on June 1, 2007 pursuant to an agreement that was not introduced into evidence, the Court is unconvinced. The [Appellant] did not introduce a copy of the agreement, and, other than representations of counsel, the Court has no way of knowing who the agreement was between, what the terms of the agreement were, or whether it included the subject note and mortgage."<sup>17</sup> (Order Denying Foreclosure, p. 7). The Master found the Appellant failed to prove it was a bona fide purchaser of the note and mortgage for value. (Order Denying Foreclosure, p. 6).

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<sup>17</sup> A copy of the securitization agreement was produced to Respondent's counsel and latter to the Court as an exhibit to the Appellant's motion to alter, amend, or reconsider or for a new trial. In his Order granting in part and denying in part the Appellant's motion, the Master ruled, "The Court has reviewed the PSA agreement and finds it was an agreement between ACE Securities Corp., as the depositor, Wells Fargo Bank, N.A., as the master servicer and securities administrator, Clayton Fixed Income Services, Inc., as the credit risk manager, and the Plaintiff, HSBC Bank USA, National Association, as the Trustee. Countrywide was not a party to the PSA agreement. Nowhere does the PSA agreement say what, if anything, or when Countrywide was paid for the subject note and mortgage. The Schedule of Loans included with the PSA agreement does include the subject note and mortgage but it does not say what, if anything, Countrywide was paid for the subject note and mortgage. Whatever mutual promises and covenants or other "good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged" that may have been exchanged between the parties to the PSA agreement, that consideration would not have flowed to Countrywide who was not a party to the agreement."

Finding the Appellant failed to prove it was a bona fide purchaser for value did not end the inquiry. Under the issues raised by the parties the Appellant further argued its predecessor in interest, Countrywide, was a holder in due course entitling the Appellant to the protection of the shelter rule.<sup>18</sup> The holder in due course and shelter rules facilitate financial transactions by shielding holders of negotiable instruments from claims and defenses when they pay value without notice or purchase the instrument from someone who did. Fraud, undue influence, or duress perpetrated by a third person without the instigation, procurement, knowledge or consent of the mortgagee will generally not affect the mortgage.<sup>19</sup> Conversely, knowledge of a fraud by the mortgagee can affect a mortgage. This was implicit in the South Carolina case of Ex parte Mercer<sup>20</sup> in which it was alleged a property owner mortgaged property he previously agreed to sell. This issue was whether the purchaser, who had paid the purchase price and built a home on the property, could intervene in the foreclosure action on the ground the mortgagee had actual notice of the purchaser's rights.<sup>21</sup> The Court ruled the trial judge did not abuse his discretion in denying intervention because the evidence failed to prove the mortgagee knew of the prior sale or the purchaser's claim to the property. The rule is consistent with

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<sup>18</sup> Manship v. Newsome, 188 S.C. 6, 198 S.E.428 (1938); Smith v. Faust, 107 S.C. 37, 92 S.E.2d 24 (1917); Liberty Loan Corp. of Darlington v. Mumford, 283 S.C. 134, 322 S.E.2d 17 (S.C. App. 1984).

<sup>19</sup> Wicklein v. Kidd et al, 149 Md 412, 131 A 780 (1926); Green & Densmore v. Scrange, 19 Iowa 461 (1865); Moore v. Fuller et al, 6 Or 272 (1877).

<sup>20</sup> Ex parte Mercer, 125 S.C. 33 (S.C. 1924)

<sup>21</sup> *Id.* at 34.

the statutory rule a holder not in due course takes subject to all valid claims on the part of any person.<sup>22</sup>

The Master ruled Countrywide's funding of the mortgage constituted the payment of value but, in order to be a holder in due course, Countrywide had to have paid value without notice. The Master ruled the mortgage was entered into before the Respondent filed her *list pendens* eliminating statutory notice. The Master turned his attention to the mortgage transaction itself to see whether there was evidence Countrywide had notice of the fraud committed by Ryba to obtain title to the Respondent's property.

The Master ruled Countrywide had notice Ryba was an employee of the loan broker, the "no doc" loan applied for was a negative amortization subprime loan, the date Ryba acquired the property had been left blank, and the property described as an investment was rented at a significant net monthly loss below fair market value. Countrywide also had notice the property had been financed and refinanced four times over two years. The Master had specifically requested information from the Appellant regarding lending standards for multiple refinancing of property over a short period of time but none was provided at trial. The Master ruled, while none of these facts known to Countrywide may have been enough considered individually, taken together they were sufficient to have put Countrywide on further inquiry. (Order Denying Foreclosure, p. 19).

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<sup>22</sup> § 36-3-306, S C. Code Anno., 1976.

The Master then ruled if an inquiry had been diligently conducted, Countrywide would have discovered the underlying fraudulent scheme.<sup>23</sup> (Order Denying Foreclosure, p. 20). The Master ruled Countrywide had constructive notice of the fraud and was, therefore, not a holder in due course. The Appellant, willing to take the risk associated with Countrywide's subprime loans, stood in Countrywide's shoes.

The Appellant argues the Master's withdrawal his ruling on agency in his Order granting in part and denying in part the Appellant's post-trial motion absolves Countrywide of any notice of the fraud. After finding Countywide had constructive notice of the fraud, the Master ruled, as an alternative sustaining ground, notice was also imputed to Countrywide because Ryba was its agent under South Carolina case law.<sup>24</sup> The Appellant filed a motion to alter, amend, or reconsider on the ground notice is not imputed to the principal from an agent committing fraud for his own benefit.<sup>25</sup> (Motion to Alter, Amend, or Reconsider or for a New Trial filed 7/6/15). After considering the issue raised by the Appellant, the Master withdrew imputed

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<sup>23</sup> City of Greenville v. Washington Am. League Baseball Club, 205 S.C. 495, 32 S.E.2d 777 (1945); O'Leary-Payne v. R.R. Hilton Head, II, Inc., 371 S.C. 340, 638 S.E.2d 96 (S.C. App. 2006).

<sup>24</sup> See: F. Patrick Hubbard and Robert L. Felix, The South Carolina Law of Torts, 2<sup>nd</sup> Ed., SC Bar/CLE, p. 635 (1997); Restatement (Second) of Agency, § 1; Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Gold & Yatch Club, 310 S.C. 132, 1465 – 146; 425 S.E.2d 764, 773 (S.C. App. 1992).

<sup>25</sup> Charleston Library Society v. Citizens & Southern Nat'l Bank, 201 S.C. 447, 23 S.E.2d 362 (1942); Mauldin Furniture Galleries, Inc. v. Branch Banking & Trust Co., 2012 U.S. Dist. LEXIS 121140, 2012 WL 3680426 (D.C.S.C. Aug. 27, 2012) citing Crystal Ice Co. v. First Colonial, 273 S.C. 306, 257 S.E.2d 496 (1979).

notice based on agency as an additional sustaining ground but did not disturb his ruling Countrywide had constructive notice of the fraud.

The Master ruled based on the issues raised and the evidence presented, or not presented, by the parties. The Master's Order denying foreclosure concludes by saying:

The Court wishes to take this opportunity to state this is a very fact specific case. It involved a licensed mortgage broker and his company engaging in a fraudulent and illegal scheme called recasting from which they profited. It involves Countrywide, now a defunct mortgage company, the [Respondent] aptly described as a poster child for the mortgage loan abuses that led to the largest financial crisis of our generation. And, it involves a financial institution willing to take the risk of Countrywide's suspect mortgages. Denying foreclosure under the facts of this case does not endanger the legal underpinnings of our financial system. It is well founded under existing South Carolina law and is consistent with the public policy that holds those who facilitate or turn a blind eye to or are willing to assume the risk should be held responsible rather than the victims of fraud and illegal activity. The Court is mindful of the [Appellant's] argument the [Respondent] would receive a windfall if foreclosure is denied. The [Respondent's] property, however, remains subject to the Regions Bank mortgage in the principal amount of \$115,000.00 that has also been unpaid since May of 2011 and subject to foreclosure by them. With accumulated interest, late fees, and probable attorney fees, any windfall to the Respondent is likely to be minimal. The facts and circumstances regarding the Regions Bank may be entirely different from this case and nothing contained in this Order should be interpreted as binding in any foreclosure action they may bring.

(Order Denying Foreclosure, p. 23 – 24). Further balancing the scales of justice it is noted the Appellant is left with its action in law on the note against the perpetrators of the fraud and whatever recourse they may have under the title insurance

purchased as part of the mortgage closing or credit swaps purchased as part of the securitization agreement. This Court should affirm the Master's denial of the equitable remedy of foreclosure because the Master did substantial justice.

II. All issues and arguments must first be presented to the lower court. Issues and arguments not raised and ruled on by the lower court are not preserved for appellate review.

“[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.<sup>26</sup> In order for an issue to be properly preserved for appeal, it must have been both raised to and ruled upon by the trial court.<sup>27</sup>

The Appellant did not raise the issue the Respondent lacked standing under the Uniform Commercial Code to raise her claim or defense of fraud or that a loan servicer automatically has holder in due course status and can foreclose a mortgage free from all claims and defenses in its motion for partial summary judgment, at trial, or in its post-trial motion. The Master never ruled on either of these issues in his Order denying foreclosure or his Order denying in part and granting in part

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<sup>26</sup> *E.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”); *Long v. Dunlap*, 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); *Gaffney v. Peeler*, 21 S.C. 55 (1884); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court).

<sup>27</sup> *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23–24, 602 S.E.2d 772, 779–780 (2004).

Appellant's post-trial motions. The Appellant improperly seeks to raise new issues for the first time on appeal.

- A. For the first time on appeal the Appellant argues the Respondent lacked standing under the Uniform Commercial Code to raise fraud as a defense to the foreclosure. This Court should decline to consider the issue because it was not raised and ruled on by the Master-In-Equity.

Appellant's argument II asserts "[t]he removal of fraud from the master's order renders the holder in due course argument irrelevant" but the argument made is the Respondent lacked standing to raise her claim or defense of fraud under § 36-3-305(a)(1)(iii), S.C. Code Anno., as amended July 1, 2009. Not only was this provision of the Uniform Commercial Code not raised below, it would not have been applicable if it had been raised because the Editor's Note to the 2008 amendments to Part 3 of the code do not apply to transactions before the effective date of the act, July 1, 2008.<sup>28</sup> The mortgage sought to be foreclosed in this action was entered into on May 7, 2007. The Code provision in effect at the time of this mortgage provided a holder not in due course took the instruction subject to all valid claims on the part of any person.<sup>29</sup> The issue the Respondent lacked standing to assert her claim or defense of fraud under the Uniform Commercial Code was not raised before or ruled upon by the Master. This Court should decline to consider the issue because it was not preserved for appellate review.

- B. For the first time on appeal the Appellant argues a loan servicer automatically has holder in due course status and can foreclose a mortgage free from all claims and defenses. This Court should decline

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<sup>28</sup> See: Editor's Notes, §§ 4.A and 4.B at the beginning of Part 3, § 36-3-301, et seq., S.C. Code Anno., 2015 Supp.

<sup>29</sup> § 36-3-306, S.C. Code Anno., 1976.

to consider the issue because it was not raised and ruled on by the Master-In-Equity.

Appellant's argument III asserts "[t]he requirement that Appellant be a holder in due course is irrelevant to whether a loan servicer can foreclose" but the argument made is, since South Carolina case law recognizes a loan servicers have standing to foreclose a mortgage,<sup>30</sup> a loan servicer automatically has holder in due course status and can foreclose free of all claims and defenses. Neither the South Carolina Court of Appeals in *Draper* nor the bankruptcy courts in the cases relied on by the Appellant ever ruled loan servicers automatically have holder in due course status entitling them to foreclose free of all claims and defenses. This issue was never raised before or ruled upon by the Master. This Court should decline to consider the issue because it was not preserved for appellate review.

### CONCLUSION

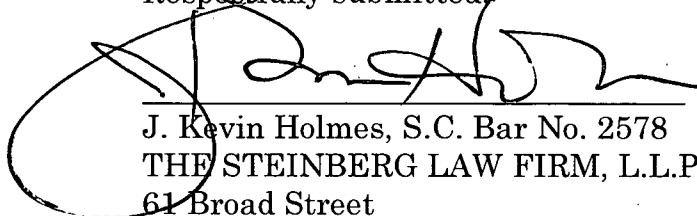
The Master did not foolishly try to assist or punish either party. He ruled based on the issues raised and the evidence presented, or not presented, by the parties. His denial of the equitable remedy of foreclosure in this one case will not cause the collapse of the financial markets. Lenders like Countrywide who profited selling subprime mortgage loans already did that. The substantial justice sought in this case involved a desperate mother who fell victim to a corrupt mortgage broker who used Countrywide's subprime mortgage system that was blinded by greed to steal the Respondent's equity in her home. The Master applied the South Carolina

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<sup>30</sup> Bank of Am., N.A. v. Draper, 405 S.C. 214, 746 S.E.2d 478 (S.C. App. 2013.,

law cited by the parties. When the Appellant argued they were holders in due course based on the assignments, the Master ruled the assignments relied upon were made after the Respondent filed her *lis pendens*, after the note and mortgage were in default, and after Bank of America bought Countrywide in the bulk fire sale of the century. When the Appellant introduced the surprise evidence at trial it received the note and mortgage as part of a securitization agreement, the Master ruled they cast doubt on the accuracy and reliability of their records. When the Appellant argued they were entitled to the protection of the shelter rule, the Master ruled Countrywide was not a holder in due course because it had constructive notice of the underlying fraud. When the Appellant failed to bring a copy of the securitization agreement to introduce into evidence, when the Master bent over backwards and gave them a chance to submit a brief and request a hearing to reopen the case but the Appellant did neither. When the agreement was finally attached as an exhibit to the Appellant's post-trial motion, The Master ruled it failed to show what or when any value had been or would be paid to Countrywide for the note and mortgage. The Master was left with changing theories of the case, questionable documents, and missing evidence and, in his discretion, denied the equitable remedy of foreclosure. This Court should affirm the Master's Order denying foreclosure because Master did substantial justice based on the issues raised and the evidence presented, or not presented, by the parties. This Court should decline to consider the two new issues the Appellant seeks to raise on appeal because they were neither raised to nor ruled upon by the Master and, therefore, not preserved for appellate review.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Kevin Holmes", is written over a horizontal line. The signature is fluid and cursive, with a large initial "J" and "H".

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Charleston, South Carolina

13 day of January, 2017.

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January 13, 2017

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


**RECEIVED**  
JAN 17 2017  
SC Court of Appeals

Re: HSBC Bank of USA, et al. v. Clifford L. Ryba, et al.  
Appellate Case No: 2016-001054

Dear Ms. Kitchings:

Enclosed for filing please find the original and one (1) copy of the Respondents' Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Proof of Service. By copy of this letter, we are serving copies of the same on Appellants' counsel of record with.

Sincerely,



J. Kevin Holmes  
Email: kholmes@steinberglawfirm.com  
Direct Fax: (843) 722-1190

JKH/jkh  
Enclosures

cc: Michael J. Anzelmo, Esquire  
Erica G. Lybrand, Esquire  
Benjamin Goldberg, Esquire  
Carol G. Goldberg

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**  
JAN 17 2017  
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Mikell R. Scarborough, Master-In-Equity

Appellate Case No. 2016-001054

HSBC Bank USA, National Association, as Trustee for  
the Holders of the Deutsche ALT-A Securities, Inc.  
Mortgage Loan Trust, Mortgage Pass-Through  
Certificates Series 2007-OA4, assignee of Bank of  
America N.A., successor by merger to BAC Home  
Loans Servicing L.P., f/k/a Countrywide Home Loans  
Servicing, Inc., ..... Appellant,

v.

Clifford L. Ryba; Beverly Ryba; Regions Bank;  
First Federal Savings and Loan Association of  
Charleston; Citibank (South Dakota) N.A., and  
Carol Garfield Goldberg ..... Defendants,

Of whom Carol Garfield Goldberg is the ..... Respondent.

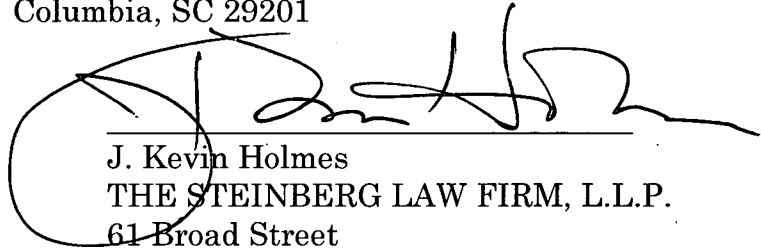
PROOF OF SERVICE

I, J. Kevin Holmes, attorney for the Respondent, certify that I deposited a  
copy of the Initial Brief to the Respondent and Respondent's Designation of Matter  
to be Included in the Record on Appeal in the U.S. Mail, postage prepaid, address to  
the following attorneys of record:

Michael J. Anzelmo, Esquire  
Nelson Mullins

Post Office Box 11070 (29211-1070)  
Columbia, SC 29201

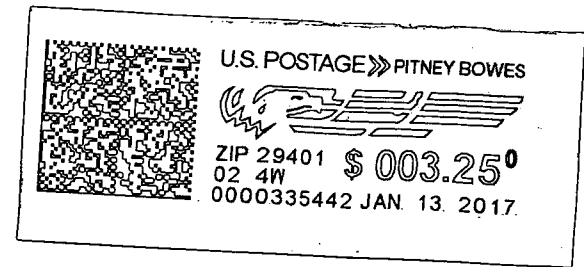
Erica G. Lybrand, Esquire  
Rogers, Townsend & Thomas, PC  
1221 Main Street, 14<sup>th</sup> Floor  
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A handwritten signature in black ink, appearing to read "J. Kevin Holmes", is written over a horizontal line. The signature is fluid and cursive.

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13 day of January, 2017



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**RECEIVED**

JAN 17 2017

**SC Court of Appeals**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
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