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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
George C. James, Jr., Circuit Judge

Appellate Case No. 2015-001554
Common Pleas Case No.: 2010-CP-28-01197

US Bank National Association Successor
Trustee to LaSalle Bank National Association,
as Trustee under the Pooling and Servicing
Agreement, dated as of April 1, 2002, among
Asset Backed Funding Corporation, Litton Loan
Servicing LP and LaSalle Bank National Association,
ABFC Asset Backed Certificates, Series 2002-SB-1.....Respondent,

v.

Kelley Burr, FIA Card Services, N.A., Discovery
Bank, Issuer of the Discover Card, Unifund CCR
Partners, Defendants,

Of Whom Kelley Burr isPetitioner.

RESPONDENT'S BRIEF

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May 8, 2017

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STATEMENT OF ISSUES

- 1) Did the Court of Appeals correctly affirm the circuit court's dismissal of Petitioner's counterclaims and defenses based solely on an alleged failure to evaluate Petitioner for a HAMP loan modification as moot where Petitioner was subsequently evaluated for and offered a loan modification?
- 2) Did the Court of Appeals correctly affirm the circuit court's dismissal of Petitioner's counterclaims and defenses pursuant to Rule 12(c), SCRCPP, where Petitioner admitted in her pleadings she had not provided the financial documents needed to evaluate her for a HAMP loan modification?
- 3) Did the circuit court correctly dismiss Petitioner's counterclaims for failure to prosecute pursuant to Rule 41(b), SCRCPP, where Petitioner took no action on those counterclaims for nearly two years while she continued to refuse to respond to requests for the necessary financial documents or to the offer for a loan modification?

STATEMENT OF THE CASE

This is a mortgage foreclosure action based on a payment default in May 2009 in which the borrower asserted counterclaims and defenses based solely on her lender's alleged failure to evaluate her for a HAMP loan modification despite her admitted failure to provide the financial documentation requested by her lender to conduct that HAMP evaluation. These HAMP claims and defenses remained pending for nearly two years with the borrower taking no action to pursue them. During that time, this Court issued its Administrative Order regarding foreclosure intervention, and the lender again requested the financial documentation needed to evaluate the borrower for a potential loan modification. Again, the borrower did not respond. Despite the lack of complete financial documentation, the lender nevertheless conducted a modification evaluation and offered the borrower a loan modification. Again, the borrower did not respond.

The subsequent dismissal of the borrower's HAMP counterclaims and defenses is the subject of this appeal.

On or about October 31, 2001, Kelley Burr ("Petitioner") executed a note in the principal amount of \$100,800.00, and, to secure the note, a mortgage ("Mortgage") encumbering the real property located at 1128 Bayview Drive, Lugoff, South Carolina, 29078 ("Property"). (App'x p. 105.) Petitioner failed to make the payment due May 5, 2009, and all monthly payments due thereafter. (App'x 104-07.)

As a result, U.S. Bank National Association as successor trustee to LaSalle Bank National Association, as Trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB1 ("U.S. Bank"), filed a summons and complaint against Petitioner on November 1, 2010, seeking foreclosure of the Mortgage ("Complaint"). (App'x pp. 102-08.) U.S. Bank waived its right to a deficiency judgment in the Complaint. (App'x p. 106.) The Complaint alleged that although U.S. Bank was a participant in the Home Affordable Modification Program ("HAMP"), Petitioner was not eligible for a HAMP modification because she failed to provide U.S. Bank with the documents necessary to apply for a HAMP modification requested by U.S. Bank. (App'x p. 104.)

Petitioner filed an Answer and Counterclaims on December 20, 2010. (App'x pp. 109-16.) Petitioner admitted she could not afford the monthly payments and needed a modification to lower her payment amount but expressly acknowledged she did not provide U.S. Bank with all of the required financial documents requested by U.S. Bank to evaluate her loan for a HAMP modification. (App'x p. 111-12, ¶¶ 14, 16, 17.) Despite Petitioner's admitted failure to provide the documents necessary for U.S. Bank to evaluate her loan for a HAMP modification, Petitioner

asserted counterclaims and defenses against U.S. Bank based entirely on its alleged failure to evaluate her for a HAMP modification. (App'x pp. 111–14.)

Specifically, Petitioner pleaded the following identical defenses and counterclaims: unclean hands, breach of contract, fraud and misrepresentation in the inducement, unfair trade practices, *in pari delicto*, and “residential home.” (App'x pp. 111–14.) In support of these counterclaims and defenses, Petitioner alleged U.S. Bank represented “she would be taken care of not losing her residential home *so long as* she participated in [HAMP].” (App'x 110) (emphasis added). Although Petitioner “agree[d] to participate in [HAMP],” she admitted she did “not provide certain financial documents” requested by U.S. Bank “to facilitate the reconsideration of the mortgage.” (App'x 111) Petitioner nevertheless alleged U.S. Bank “did not conduct a fair, reasonable, comprehensive analysis nor reconsideration of her home mortgage payment amount problem.” (App'x p. 110-11.) Petitioner did not allege that U.S. Bank promised her a loan modification even if she were to fail to participate in the HAMP process or promise her any particular modification terms or payment amounts. On February 24, 2011, U.S. Bank answered and asserted various defenses to the counterclaims. (App'x p. 119).

On May 2, 2011, Chief Justice Toal of the South Carolina Supreme Court issued an Administrative Order titled In re: Mortgage Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011) (“Administrative Order”). The Administrative Order imposed an automatic stay of foreclosures of owner-occupied dwellings.¹ Id. at 211, 720 S.E.2d at 909. The Administrative Order also required foreclosure plaintiffs to provide an opportunity to borrowers in owner-occupied foreclosure actions to be evaluated for any available loss mitigation options offered by

¹ While the Administrative Order’s stay prevented U.S. Bank from proceeding with its foreclosure action, it did not affect Petitioner’s ability to pursue her counterclaims against U.S. Bank. In re: Mortgage Foreclosure Actions, 396 S.C. at 211, 720 S.E.2d at 909.

the foreclosure plaintiff. Id. These foreclosure plaintiffs were required to notify borrowers of this right to “foreclosure intervention.” Id. If, within thirty (30) days of receiving the notice of foreclosure intervention, a defendant failed, refused, or voluntarily elected not to participate with the foreclosure intervention process, which included providing “all documents and records required to be submitted by the Mortgagor to evaluate eligibility for foreclosure intervention,” the foreclosure action could proceed upon certification of that fact from the plaintiff’s attorney. Id. at 212–13, 720 S.E.2d at 909.

Pursuant to the Administrative Order, U.S. Bank served Petitioner’s then-counsel with a notice of right to foreclosure intervention on July 25, 2011. (App’x pp. 154, 172–75.) Upon Petitioner’s counsel’s request, U.S. Bank resent the same notice on August 9, 2011. (App’x p. 133.) At the latest, Petitioner had until September 8, 2011, to respond. (App’x p. 134.)

From August 19 to September 21, 2011, counsel for the parties communicated regarding the status of Petitioner’s documents and records for foreclosure intervention. (App’x p. 134.) On September 26, 27, and 29, 2011, a paralegal in U.S. Bank’s counsel’s office left voicemails with Petitioner’s then-counsel regarding the status of the outstanding documents needed to evaluate Petitioner for foreclosure intervention. (App’x p. 134.) On October 4, 2011, U.S. Bank’s counsel continued its attempts to gather the necessary information from Petitioner and gave a final deadline of October 14, 2011, to provide U.S. Bank with the requested documentation. (App’x pp. 134.) However, Petitioner never provided any documents or records. (App’x p. 134.)

As a result, on October 27, 2011, U.S. Bank filed a Certification of Mortgagor Noncompliance, certifying pursuant to the Administrative Order and Rule 11 of the South Carolina Rules of Civil Procedure that Petitioner “failed, refused, or voluntarily elected not to

participate” in the foreclosure intervention process. (App’x pp. 133–34.)

Following the Certification, on November 23, 2011, Petitioner’s then-counsel provided incomplete and partially illegible documents to initiate a modification review. (App’x 138–39, 154–56.) On January 10, 2012, based on the incomplete information provided, U.S. Bank sent Petitioner’s counsel a loan modification proposal with a response deadline of January 31, 2012. (App’x pp. 127–29, 156–57.) Although U.S. Bank’s counsel attempted to follow up with Petitioner’s then-counsel several times, neither Petitioner nor her counsel ever responded to the modification proposal. (App’x pp. 127–29, 156–57.)

On April 18, 2012, U.S. Bank filed a Motion to Dismiss Counterclaims and Strike Defenses (“Motion”), which is the subject of this appeal. (App’x pp. 126–42.) The Motion sought dismissal of Petitioner’s counterclaims on two grounds: (1) Petitioner failed to prosecute her claims and, therefore, they should be dismissed pursuant to Rule 41(b) of the South Carolina Rules of Civil Procedure; and (2) Petitioner could not be granted the relief she sought and, therefore, her claims should be dismissed as moot or pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure. (App’x pp. 126–31.) The Motion also sought to strike Petitioner’s identical defenses pursuant to Rule 12(f) of the South Carolina Rules of Civil Procedure. The Motion explains that although Petitioner’s counterclaims and defenses are based solely on U.S. Bank’s alleged failure to evaluate Petitioner for a loan modification, Petitioner failed to provide information for her loan modification evaluation both before and after the foreclosure action was filed or to respond once a loan modification was offered. (App’x pp. 126–31.)

A hearing on the Motion was held on September 13, 2012. (App’x p. 150.) At the hearing, U.S. Bank’s counsel presented arguments on the two grounds for dismissal of the

counterclaims. (App'x pp. 158–61.) First, as to dismissal under Rule 41(b), in addition to failing to provide the necessary documents for the loan modification review or to respond to the loan modification offer, Petitioner “ha[d] not engaged in any other action to proceed with her counterclaims” and had “done no discovery, no motions” since the counterclaims were filed almost two years earlier on December 20, 2010. (App'x p. 160.) Second, as to dismissal pursuant to Rule 12(c) and/or the mootness doctrine, Petitioner had failed to provide the documents required for a loan modification evaluation or to respond to the offered loan modification. (App'x p. 161.) In response, Petitioner’s new counsel admitted that Petitioner “didn’t pay the attention to settlement negotiations that maybe ought to have been paid.” (App'x p. 162.)

In an order filed October 1, 2012 (“Oct. 2012 Order”), the circuit court granted U.S. Bank’s Motion and dismissed Petitioner’s counterclaims on two grounds: (1) failure to prosecute pursuant to Rule 41(b), SCRCP, and (2) the doctrine of mootness and/or Rule 12(c), SCRCP. (App'x pp. 95–98.) First, the circuit court found that Petitioner had been given “abundant opportunity to litigate” but had failed to prosecute her counterclaims. (App'x pp. 96–97.)

Second, the circuit court found that Petitioner’s claims were moot because the circuit court could not render a judgment on the claims which would have any practical effect given that U.S. Bank had already offered Petitioner the primary relief she sought – to be evaluated for a loan modification. (App'x pp. 97–98.) The circuit court did not discuss Rule 12(c), SCRCP, in its substantive analysis but cited it in the final sentence of its Oct. 2012 Order. (App'x p. 98.) The circuit court presumably agreed with U.S. Bank’s argument that dismissal of Petitioner’s counterclaims was warranted pursuant to Rule 12(c) to the extent it was evident from the face of the pleadings that Petitioner had not provided the documents requested by U.S. Bank to consider

her for a loan modification. (App'x p. 111.) Accordingly, the circuit court could not render a judgment against U.S. Bank that would have any practical effect, and U.S. Bank was entitled to judgment on the pleadings. (App'x p. 98.)

Finally, the circuit court also struck Petitioner's defenses, which were identical to her counterclaims. Although the basis for this action was not made explicit in the Oct. 2012 Order, this action was inherently based on Rule 12(f), SCRCF, which allows for the striking of insufficient defenses. Rule 12(f) was the basis upon which U.S. Bank moved to strike Petitioner's defenses and was cited by the circuit court in the final sentence of its Oct. 2012 Order – the only sentence in the Oct. 2012 Order which addressed Petitioner's affirmative defenses. (App'x p. 98.)

Petitioner filed a Motion to Reconsider and supporting Memorandum on October 12, 2012. (App'x pp. 143–49.) The circuit court denied this motion on October 16, 2012. (App'x p. 99.)

Petitioner filed a Notice of Appeal on October 31, 2012. The Court of Appeals affirmed the circuit court's decision in an unpublished opinion issued February 25, 2015 ("Feb. 2015 Order"). (App'x pp. 1–3.) The Court of Appeals based its decision on two grounds. (App'x p. 3.) First, the Court of Appeals held the circuit court was correct to dismiss Petitioner's defenses and counterclaims as moot because Petitioner had already been offered the relief sought and, thus, a judgment in her favor would have no practical effect on the controversy. (App'x p. 3.)

Second, the Court of Appeals affirmed dismissal of Petitioner's counterclaims and defenses because Petitioner failed to provide U.S. Bank with the requested documents for the modification process both before and after the initiation of the foreclosure action. (App'x p. 3.) The Court of Appeals appeared to review the dismissal of the counterclaims and affirmative

defenses pursuant to Rule 12(c), which was converted to a Rule 56 summary judgment motion to the extent the circuit court considered any matters beyond the pleadings. (App'x p. 3.) Presumably, the Court of Appeals grounded its reasoning in Rule 12(c) with respect to Petitioner's conduct prior to the foreclosure action as reflected on the face of the pleadings and Rule 56(c) with respect to Petitioner's conduct subsequent to the initiation of the foreclosure action. (App'x p. 3.) The Court of Appeals declined to address any remaining issues, such as failure to prosecute, because it found these two grounds to be dispositive. (App'x p. 3.)

Petitioner filed a petition for rehearing en banc on March 12, 2015, (App'x pp. 4–18), which the Court of Appeals denied by order dated June 18, 2015. (App'x pp. 31–32.) Petitioner filed a Petition for Writ of Certiorari and supporting Memorandum on July 20, 2015, which this Court granted by order dated March 7, 2017. (Order Granting Cert., March 7, 2017.)

Petitioner filed her brief on April 6, 2017. (Petitioner's Brief, April 6, 2017, hereinafter, "Brief.") This brief follows. For the reasons stated herein, this Court should affirm the lower courts' dismissal of Petitioner's counterclaims and striking of her affirmative defenses.

ARGUMENT

Because the lower courts were correct to dismiss Petitioner's counterclaims and strike her affirmative defenses, this Court should affirm the dismissal. This Court may affirm the dismissal upon any ground appearing in the record. Rule 220(c), SCACR; I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). There are several grounds, each of which alone is sufficient, to affirm the dismissal of Petitioner's counterclaims and defenses in this matter.

First, the circuit court and Court of Appeals were correct to dismiss Petitioner's counterclaims and defenses as moot because Petitioner received the loan modification evaluation which she sought and, therefore, a judgment in her favor would have no practical effect on the

controversy.

Next, it was apparent on the face of the pleadings that Petitioner had not provided the financial documents requested by U.S. Bank necessary to evaluate her for a HAMP loan modification and, therefore, dismissal of her counterclaims and defenses, each of which was based solely on U.S. Bank's alleged failure to complete the HAMP evaluation, was appropriate pursuant to Rules 12(c) and 12(f), SCRCF. It was likewise apparent that Petitioner's failure to provide the necessary documents continued after the foreclosure action began and that Petitioner failed to respond to the loan modification offer she ultimately received and, therefore, the Court of Appeals' reliance on Rule 56(c) to affirm the dismissal of Petitioner's claims and defenses was also proper.

Finally, the circuit court also correctly dismissed Petitioner's counterclaims based on failure to prosecute pursuant to Rule 41(b), SCRCF, because Petitioner failed to take any action to pursue her counterclaims for nearly two years while she continued to ignore U.S. Bank's requests for financial documents to complete her modification evaluation or U.S. Bank's ultimate offer of a loan modification. This Court should affirm for all, or any, of these reasons.

I. The Court of Appeals properly affirmed the circuit court's decision to dismiss Petitioner's counterclaims and defenses as moot.

The Court of Appeals properly affirmed the circuit court's dismissal of Petitioner's counterclaims and defenses based on mootness, which alone is sufficient to dispose of Petitioner's counterclaims and defenses against U.S. Bank. (App'x pp. 1-3.) Petitioner incorrectly argues the Court of Appeals erred in affirming the circuit court's dismissal based on the mootness doctrine because U.S. Bank failed to plead mootness and further argues there is no factual support in the record on which to base this decision. (Brief 22-30.) However, U.S. Bank was not required to plead mootness and the record factually supports dismissal based on

mootness. Accordingly, the dismissal of Petitioner's counterclaims and defenses as moot should be affirmed.

A. U.S. Bank was not required to plead mootness.

Petitioner erroneously argues U.S. Bank was required to plead mootness in order for the lower courts to dismiss Petitioner's counterclaims and defenses as moot. However, it is a basic principle of Article III that "a judicial case or controversy must remain 'extant at all stages of review, not merely at the time the complaint is filed.'" United States v. Juvenile Male, 564 U.S. 932, 936, 131 S. Ct. 2860, 2864 (2011) (internal citations omitted). A lack of a justiciable controversy means that any moot claims are insufficient as a matter of law. Holden v. Cribb, 349 S.C. 132, 135, 137–38, 561 S.E.2d 634, 636–38 (Ct. App. 2002). Justiciability, whether the litigation presents an active case or controversy, is a threshold inquiry for any court. Id. at 137, 561 S.E.2d at 637 (quoting Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 861, 864 (1996)). The concept of justiciability encompasses ripeness, mootness, and standing. Holden, 349 S.C. at 137, 561 S.E.2d at 637 (citing Jackson v. State, 331 S.C. 486, 490 n.2, 489 S.E.2d 915, 917 n.2 (1997)). To satisfy the Article III case or controversy requirement, a litigant must have suffered some "actual injury that can be redressed by a favorable judicial decision." Iron Arrow Honor Soc'y v. Heckler, 464 U.S. 67, 70, 104 S. Ct. 373, 375 (1983). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy." Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (citing Mathis v. S.C. State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). Accordingly, a claim must be dismissed as moot "when the claimant receives the relief he or she sought to obtain through the claim." Friedman's, Inc., 290 F.3d at 197 (citing Broughton v. North Carolina, 717 F.2d 147, 149 (4th Cir. 1983)).

The Constitution commands that the court determine whether an Article III case or controversy is before it regardless of whether the issue has been properly raised by the parties. U.S. Const. art. III, § 2; Carolina Alliance for Fair Emp't v. South Carolina Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999). Thus, U.S. Bank was not required to plead mootness as a defense or argue that the pleadings failed to state a claim for that reason because mootness, as a threshold issue, may be raised *sua sponte*. See Friedman's, 290 F.3d at 197 (holding the issue of mootness may be raised *sua sponte*).

B. There are sufficient facts in the record on which the lower courts correctly based their decision to dismiss Petitioner's counterclaims and defenses for mootness.

Petitioner next argues that the factual record is insufficient to support dismissal of her counterclaims and defenses as moot. The record contains sufficient facts upon which the lower courts could properly base their decision to dismiss Petitioner's counterclaims and defenses as moot. Each of Petitioner's counterclaims and defenses is premised on U.S. Bank's failure to evaluate her for a HAMP loan modification (App'x pp. 111–12, 115.) The record, however, is replete with evidence that U.S. Bank did in fact offer Petitioner this opportunity before the foreclosure action began and later through the foreclosure intervention process mandated by the Administrative Order. (See App'x pp. 104, 126–31, 133–34, 137–39, 141–42, 154–61, 164–65.) The pleadings themselves demonstrate that Petitioner admittedly failed to provide the documents necessary for U.S. Bank to complete the HAMP modification evaluation she sought in her counterclaims and defenses. Moreover, despite Petitioner's repeated unresponsiveness and failures to provide U.S. Bank with the requested documentation which continued after the foreclosure action began, U.S. Bank sent Petitioner a modification proposal by mail and email on January 10, 2012. (App'x pp. 128, 158.) Neither Petitioner nor her counsel ever responded. (App'x pp. 128–29.) These facts are reflected in the Certificate of Mortgagor Noncompliance

(App'x 133-35); Motion (App'x pp. 126-31); the emails attached to the Motion (App'x pp. 132-41); statements made to the circuit court by U.S. Bank's prior counsel, Carmen Thomas ("Ms. Thomas"); and Petitioner's counsel during the September 13, 2012, hearing on the motion (App'x pp. 154-60, 164-65). Thus, Petitioner received the exact relief she sought – an evaluation for a loan modification. As a result, the Court's preservation of Petitioner's counterclaims would have no practical effect on the existing controversy. See Friedman's, Inc., 290 F.3d at 197 (noting that the case is moot where petitioner receives precisely the same relief requested in action).

Petitioner argues that the aforementioned evidence merely reflects "arguments" of U.S. Bank's counsel, which is allegedly insufficient to demonstrate that U.S. Bank evaluated and offered Petitioner a loan modification. (Brief 29-30.) U.S. Bank's statements through its counsel, however, are exactly the type of factual showing intended to verify noncompliance under the Administrative Order. The Administrative Order specifically requires that the mortgagee's attorney "certify" to the Court whether the mortgagor failed, refused, or voluntarily elected not to participate in the foreclosure intervention process. In re Mortgage Foreclosure Actions, 396 S.C. at 212-13, 720 S.E.2d at 910. Pursuant to the Administrative Order, by filing the Certification of Mortgagor Noncompliance and proceeding with the foreclosure action, Ms. Thomas properly "represent[ed] to the Court that the Mortgagee has fully complied with all provisions of this Order" and certified that Petitioner "failed, refused, or voluntarily elected not to participate." Id. The Motion and Certification of Mortgagor Noncompliance, which were properly submitted, signed by Ms. Thomas, and carried the weight and reliability of Rule 11, SCRCF, are more than sufficient under the Administrative Order to demonstrate to the Court that Petitioner failed to provide the requested financial information and subsequently failed to

respond to U.S. Bank's modification proposal. (App'x pp. 126–31.) Indeed, Petitioner's counsel admitted during the September 13, 2012, hearing that he did not doubt the veracity of Ms. Thomas's statements and that Petitioner did receive "settlement negotiations" from U.S. Bank. (App'x pp. 164, 168.) Thus, there are more than enough facts in the record, including Petitioner's own concessions, to demonstrate that Petitioner already received the same relief requested in her Answer and Counterclaims, which renders her counterclaims and defenses moot. Curtis, 345 S.C. at 567, 549 S.E.2d at 596; Friedman's, Inc., 290 F.3d at 197. Accordingly, this Court should affirm the lower courts' dismissal of Petitioner's counterclaims and defenses based on the mootness doctrine.

C. The HAMP loan modification program, the sole basis for Petitioner's counterclaims and defenses, has now expired.

The recent expiration of the HAMP program is an additional ground upon which this Court may affirm dismissal of Petitioner's counterclaims and defenses. In reviewing Petitioner's appeal, "the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered." Patterson v. State of Alabama, 294 U.S. 600, 607, 55 S. Ct. 575, 578 (1935). Petitioner acknowledges in her own Brief that a subsequent change in the law or facts can render a claim moot. (Brief 23 (referencing Occupy Columbia v. Haley, 922 F. Supp. 2d 524, 530 (D.S.C.), aff'd, 738 F.3d 107 (4th Cir. 2013).) Here, HAMP expired by its own terms on December 31, 2016, and new applications for loan modifications are no longer accepted.² Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, div. O, tit. 7, sec. 709(b) (2015).

² U.S. Bank was unable to raise this argument in previous briefs because the HAMP expiration of December 31, 2016, had not yet taken place. However, mootness may be raised at any time, Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.23 (1997), and the Court must consider any change, either in fact or law, in the event that the change moots the justiciable controversy. Patterson, 294 U.S. at 607, 55 S. Ct. at 578.

Petitioner's counterclaims and defenses were based entirely on a purported failure to evaluate her loan for a HAMP modification. (App'x pp. 110–12, 115.) Petitioner admittedly failed, however, to submit the documents necessary to enable U.S. Bank to evaluate Petitioner for a HAMP modification while the HAMP program was in effect. (App'x pp. 111, 155.) As a result of the program's expiration on December 31, 2016, it is now impossible for any court to render a judgment requiring a HAMP evaluation in this matter. Consolidated Appropriations Act, 2016, div. O, tit. 7, sec. 709(b); see Friedman's, Inc., 290 F.3d at 197 (noting that when circumstances change from the time the suit is filed "so that the appellate court can no longer serve the intended harm-preventing function or has no effective relief to offer," the controversy must be dismissed as moot). Given that HAMP's intervening expiration has made it impossible for this Court to grant effectual relief for Petitioner, her counterclaims and defenses fail to raise an actual, justiciable controversy and are properly dismissed as moot. Curtis, 345 S.C. at 567, 549 S.E.2d at 596.

II. The Court of Appeals properly affirmed the circuit court's decision to dismiss Petitioner's counterclaims and defenses pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure.

While mootness is sufficient to dismiss both Petitioner's counterclaims and defenses entirely, the Court of Appeals also relied on a second ground in affirming the circuit court's dismissal of Petitioner's counterclaims and defenses. Specifically, "[b]efore and after U.S. Bank's foreclosure action, Burr did not provide the documents requested by U.S. Bank, which made U.S. Bank unable to complete the loan modification offered to Burr." (App'x p. 2) (emphasis added). Petitioner incorrectly argues that the Court of Appeals made this determination without relying on any rule, statute, or other law that permits dismissal of her defenses. (Brief 30–31.) Petitioner further argues that the Court of Appeals improperly

converted U.S. Bank's motion into one for summary judgment in reaching this conclusion. (Brief 16–19.) Petitioner is mistaken on both accounts, and this Court may affirm the dismissal of Petitioner's counterclaims and defenses pursuant to Rule 12(c), Rule 12(f), and/or Rule 56 of the South Carolina Rules of Civil Procedure.

A. Petitioner admits in the pleadings she failed to provide the documents requested by U.S. Bank needed for a HAMP modification evaluation and, therefore, her counterclaims and defenses based on U.S. Bank's alleged failure to evaluate her for a HAMP modification were properly dismissed pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure.

With respect to Petitioner's conduct before the initiation of U.S. Bank's foreclosure action on October 29, 2010, sufficient facts in the pleadings support dismissal of Petitioner's counterclaims and defenses pursuant to Rule 12(c). Motions for judgment on the pleadings under Rule 12(c) will be sustained if the pleadings are so defective that taking all the facts alleged in the pleadings as admitted, no cause of action or defense is stated. Lydia v. Horton, 343 S.C. 376, 380, 540 S.E.2d 102, 105 (Ct. App. 2000), rev'd on other grounds, 355 S.C. 36, 583 S.E.2d 750 (2003). "The Rule 12(c) motion admits the well pleaded facts in the complaint and the court must take those well pleaded factual allegations as true." Fireman's Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 236, 394 S.E.2d 855, 856 (Ct. App. 1990).

By Petitioner's own admissions, the "pleadings" in this case consist of the Complaint, Answer and Counterclaims, and reply to the counterclaims. Rule 7(a), SCRCF. (Brief 25.) Limiting the Court's review to these documents, sufficient evidence demonstrates that Petitioner's counterclaims and defenses are defective and subject to dismissal pursuant to Rule 12(c). As stated in the Complaint, prior to its initiation of the foreclosure action, U.S. Bank attempted to engage in the evaluation process required by HAMP, but Petitioner "did not provide all necessary documents after those documents had been requested." (App'x p. 104.) Petitioner's Answer and Counterclaims confirmed this noncompliance, admitting that Petitioner

failed to provide U.S. Bank with all of the requested documents, including certain income statements. (App’x p. 111.) Given that the pleadings demonstrate Petitioner’s failure to provide the requested documents necessary to evaluate her loan for a HAMP modification, the lower courts properly relied on Rule 12(c) in dismissing Petitioner’s counterclaims and defenses which are based solely on U.S. Bank’s purported failure to complete the HAMP evaluation.

B. To the extent the Court of Appeals treated a portion of the circuit court’s order as a grant of summary judgment, such conversion was either proper or harmless error.

With respect to Petitioner’s conduct after U.S. Bank’s foreclosure action, Petitioner contends that the Court of Appeals erred in treating the circuit court’s dismissal of her counterclaims and defenses as a grant of summary judgment. (Brief 16.) Rule 12(c) provides that “[i]f, on motion for judgment on the pleadings, matters outside the pleadings are presented... the motion shall be treated as one for summary judgment....” Rule 12(c), SCRPC. Petitioner suggests that her actions after U.S. Bank’s initiation of the foreclosure action necessarily related to events reflected outside of the pleadings – for example, the Certificate of Noncompliance issued October 26, 2011 – and by considering those events, the Court of Appeals improperly affirmed the circuit court’s decision using the standard for summary judgment based on “arguments of counsel” rather than affidavits or testimony. (Brief 16–22.) To the extent the Court of Appeals reviewed the Motion with respect to Petitioner’s conduct after the foreclosure action under the Rule 56 standard, it was either appropriate or harmless error.

There is sufficient evidence in the record to affirm dismissal of Petitioner’s counterclaims and defenses pursuant to Rule 56, SCRPC. A party seeking summary judgment must establish the absence of a triable issue of fact by the record properly before the Court. Standard Fire Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 422, 392 S.E.2d 460, 462 (1990). Petitioner contends that the only evidence offered by U.S. Bank in support of the Motion is the

“arguments” of counsel, which, according to Petitioner, is not part of the record before the Court under Rule 56(e). (Brief 21.) Petitioner is incorrect for several reasons.

First, as discussed above, the Motion, Certification of Mortgagor Noncompliance, and associated documents are not merely “arguments” of counsel. As previously mentioned, U.S. Bank’s statements through its counsel are exactly the type of factual showing intended to verify noncompliance under the Administrative Order. Rather, by filing the Certification and proceeding with the foreclosure action against Petitioner, U.S. Bank’s counsel certified to the circuit court that U.S. Bank complied with the foreclosure intervention process and was unable to offer Petitioner a modification based on her failure to provide the necessary documents. In re Mortgage Foreclosure Actions, 396 S.C. at 213, 720 S.E.2d at 910. (App’x pp. 126–41.) The Administrative Order does not require any Affidavit or testimony to this effect and accepts the attorney’s certification as sufficient to establish the borrower’s failure to participate in foreclosure intervention. Indeed, U.S. Bank provided the exact verification contemplated by this Court and required under the Administrative Order. Id. Any “arguments” made by Ms. Thomas at the September 13, 2012, hearing simply reiterated the facts contained in the Motion and Certification of Mortgagor Noncompliance. (App’x pp. 153–61.) Further, all representations by Ms. Thomas were made pursuant to Rule 11, SCRPC. Second, Petitioner’s counsel provided further evidence of Petitioner’s noncompliance, admitting in the September 13, 2012, hearing that Petitioner “didn’t pay the attention to settlement negotiations that maybe ought to have been paid,” (App’x p. 162), and stating in the Brief that Petitioner’s former counsel “failed to do a good job (or much of a job at all) in participating in settlement negotiations with U.S. Bank.” (Brief 11.) Because the Certification of Mortgagor Noncompliance was sufficient to demonstrate to the Court that Petitioner’s failure to provide the necessary documents continued

after the foreclosure action began, the Court of Appeals' reliance on Rule 56(c) to affirm the dismissal of Petitioner's claims and defenses was proper.

If this Court were to find that the Court of Appeals should not have relied on the Certification of Mortgagor Noncompliance to grant summary judgment on Petitioner's counterclaims and defenses to U.S. Bank based on Petitioner's conduct after the foreclosure action began, such reliance would be harmless error as there were other valid grounds as discussed herein upon which to properly affirm the circuit court's dismissal. Judgment will not be reversed for insubstantial errors not affecting the result. Bass v. Gopal, Inc., 384 S.C. 238, 245, 680 S.E.2d 917, 920 (Ct. App. 2009), aff'd, 395 S.C. 129, 716 S.E.2d 910 (2011) (referencing Jensen v. Conrad, 355 S.E.2d 291, 293, 292 S.C. 169 (Ct. App. 1987)). "Alleged errors which the record conclusively shows could not have affected the decision and judgment work no prejudice and constitute no ground for reversal." Banister v. Lollis, 183 S.C. 218, 190 S.E. 511, 513 (1937). When, on consideration of the whole record, the judgment is plainly right, the court will not reverse for errors of law which did not affect the merits. White v. S.C. Dep't of Health & Env'tl. Control, 392 S.C. 247, 257, 708 S.E.2d 812, 817 (Ct. App. 2011). Regardless of whether the Court of Appeals looked outside of the pleadings with respect to Petitioner's conduct after the initiation of the foreclosure action, the Court of Appeals would have reached the same result – dismissal of Petitioner's counterclaims and defenses – and thus, any partial conversion of the Motion into one for summary judgment, if error, would have been harmless and does not warrant reversal of the lower courts.

C. The circuit court properly struck Petitioner's defenses pursuant to Rule 12(f) of the South Carolina Rules of Civil Procedure.

The Court may affirm the lower courts' dismissal of Petitioner's defenses based on any ground found by either the circuit court or Court of Appeals. Rule 220(c), SCACR; Law v. S.C.

Dep't of Corr., 368 S.C. 424, 439–40, 629 S.E.2d 642, 651 (2006). While the Court of Appeals properly dismissed Petitioner's defenses based on mootness, Rule 12(c), and Rule 56 as discussed above, the circuit court also struck Petitioner's defenses pursuant to Rule 12(f), SCRCPP, thereby providing this Court with additional grounds upon which it may affirm the dismissal of Petitioner's defenses.

Pursuant to Rule 12(f), the Court “may order stricken from any pleading any insufficient defense of any redundant, immaterial, impertinent or scandalous matter.” Rule 12(f), SCRCPP. Motions to strike under Rule 12(f) are largely within the discretion of the circuit court. Robinson v. Code, 384 S.C. 582, 585, 682 S.E.2d 495, 496 (Ct. App. 2009) (citing Brown v. Coastal States Life Ins. Co., 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975)). The grant of a motion to strike will not be reversed except for an abuse of discretion or error of law. Robinson, 384 S.C. at 585. In ruling on a motion to strike under Rule 12(f), the question is “whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded.” Alladin Plastics, Inc. v. Wintenna, Inc., 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990). When facts bearing on the sufficiency of the challenged defenses are clear and undisputed, trial on the merits is not required to determine the sufficiency of those defenses as a matter of law. Mayes v. Paxton, 313 S.C. 109, 115, 437 S.E.2d 66, 69 (1993). The Court's review under Rule 12(f) is not limited to the pleadings. Rule 12(f), SCRCPP.

Rule 12(f) was the original basis upon which U.S. Bank moved to strike Petitioner's defenses and the basis upon which the circuit court granted this request, as evidenced by the final sentence of the Oct. 2012 Order, which cited Rule 12(f) and U.S. Bank's affirmative defenses. (App'x p. 98.) The circuit court noted that Petitioner's defenses against U.S. Bank, which are identical to her counterclaims, are based on U.S. Bank's alleged failure to “conduct a fair,

reasonable, comprehensive analysis’ and ‘reconsideration of her home mortgage amount problem.’” (App’x p. 96.) The circuit court then proceeded to discuss Petitioner’s failure to submit her information for a modification review, U.S. Bank’s “attempts to work with [Petitioner],” and Petitioner’s failure to respond to U.S. Bank’s modification offer. (App’x pp. 97–98.) All of these facts provided proper grounds upon which the circuit court could strike Petitioner’s defenses pursuant to Rule 12(f). (App’x p. 98.) Accordingly, the Court should affirm the circuit court’s proper striking of Petitioner’s defenses based on Rule 12(f).

III. The circuit court properly dismissed Petitioner’s counterclaims based on failure to prosecute.

Petitioner admits the Court of Appeals affirmed the circuit court’s dismissal of Petitioner’s counterclaims and defenses based on the doctrine of mootness, rather than failure to prosecute.³ (Brief 11.) Petitioner incorrectly suggests, however, that the Court of Appeals did so only because it could not affirm on the basis that Petitioner failed to prosecute her claims. (Id.) Indeed, the Feb. 2015 Order does not decide, and expressly declined to address, whether Petitioner failed to prosecute her claims. (App’x 1–3.) However, dismissal of Petitioner’s counterclaims for failure to prosecute was proper, and this Court may affirm on this ground.

An action may be dismissed for failure to prosecute upon a party’s motion or *sua sponte* by the trial court as part of its inherent power to manage its own affairs. Rule 41(b), SCRPC; Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 211–12, 493 S.E.2d 826, 832 (1997) (citing Small v. Mungo, 254 S.C. 438, 442, 172 S.E.2d 802, 803 (1970) (“[I]t is within the inherent power of the court to dismiss an action for failure to prosecute.”)); 24 Am. Jur. 2d Dismissal,

³ Petitioner’s “Statement of Issues” suggests the Court of Appeals did in fact base part of its decision on failure to prosecute, stating, “Did the Court of Appeals err in affirming the circuit court’s decision to strike and dismiss Petitioner’s defenses and counterclaims for failure to prosecute...?” (Brief 1.) However, the Court of Appeals declined to address the issue of Petitioner’s failure to prosecute her claims in its Feb. 2015 Order. (App’x 1–3.)

Discontinuance and Nonsuit 48 (1983) (“Such power is deemed to be necessarily vested in trial courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases.”). Rule 41(b), SCRC, governs dismissals for failure to prosecute and states that a party may move for dismissal of an action “[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court.” Rule 41(b), SCRC. This applies to counterclaims, cross-claims and third party claims. Crestwood Golf Club, 328 S.C. at 211, 493 S.E.2d at 832.

Generally, dismissal for failure to prosecute is appropriate where there is a clear record of delay and some showing of indifference to the rights of the defendant. McComas v. Ross, 368 S.C. 59, 62–63, 626 S.E.2d 902, 904 (Ct. App. 2006). In McComas v. Ross, South Carolina adopted the four-factor analysis used by the Fourth Circuit for dismissals under Rule 41(b). Id. at 63, 626 S.E.2d at 904–05 (citing Hillig v. Comm’r of Internal Revenue, 916 F.2d 171, 174 (4th Cir. 1990)) (applying the Fourth Circuit’s four-factor test). First, the reviewing court must consider the plaintiff’s degree of personal responsibility. McComas, 368 S.C. at 63, 626 S.E.2d at 904. Second, the court must consider the amount of prejudice caused to the defendant by the delay. Id. Third, the court must address whether “the record indicate[s] a drawn out history of deliberately proceeding in a dilatory fashion.” Id. Finally, the court must determine if the trial court considered less drastic sanctions than dismissal. Id.

Dismissals for failure to prosecute under Rule 41(b) are within the discretion of the trial court judge and will not be disturbed on appeal absent a clear showing of an abuse of discretion. Id. at 62, 626 S.E.2d at 904 (citing Mungo, 254 S.C. at 442, 175 S.E.2d at 804). “An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions.” Kiriakides v. Sch. Dist. of Greenville Cnty., 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) (quoting Layman v. State, 376 S.C. 434, 444, 658

S.E.2d 320, 325 (2008)).

A. Petitioner failed to take any action to advance her counterclaims for almost two years.

Petitioner's blatant failure to take any steps to advance her counterclaims falls within the traditional purview of Rule 41(b). Petitioner filed her answer and counterclaims on December 20, 2010, (App'x pp. 109–115), and had not taken any action with respect to her claims at the time of the hearing on U.S. Bank's Motion almost two years later on September 13, 2012. (App'x pp. 160–61.) While the Administrative Order stayed U.S. Bank's foreclosure action against Petitioner for six months from the Order's issuance in May 2011 to the filing of the Certification of Mortgagor Noncompliance in October 2011, the Order did not prevent Petitioner from moving forward on her counterclaims against U.S. Bank at any time. (App'x p. 169.) Yet, Petitioner left her counterclaims untouched for almost two years, declining to serve any discovery, file any motions, or take any action in advancing the litigation of her claims, (App'x pp. 160–61), all the while continuing to maintain possession of the Property without making any payments towards her mortgage. (App'x p. 159–60.)

With respect to Petitioner's degree of personal responsibility under the McComas four-factor test, Petitioner was solely responsible for pursuing her claims. The Administrative Order did not stay Petitioner's claims against U.S. Bank. (App'x p. 169.) Petitioner had no excuse to delay in litigating her claims against U.S. Bank, but nevertheless declined to serve any discovery, file any motions, pursue any sort of mediation, or take any action to move her claims forward. (App'x pp. 160–61.) With respect to prejudice caused to the defendant, U.S. Bank has not only expended time and resources before and since the filing of Petitioner's counterclaims, but as a result of Petitioner's delay, the Property has continued to remain in Petitioner's possession without any payment to U.S. Bank since her default eight years ago and may have been

deteriorating for the duration of that time. (App’x pp. 104–07, 157, 160.) See Georganne Apparel, Inc. v. Todd, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990) (finding prejudice where the action had been filed two and one-half years prior and the defendants had incurred thousands of dollars in legal fees). The record indeed demonstrates a history of proceeding in a dilatory fashion, and during the almost two years of delay, Petitioner not only neglected her counterclaims, she frustrated any efforts by U.S. Bank to advance the litigation process by remaining unresponsive to communications from U.S. Bank regarding her potential loan modification and ignoring repeated requests for the documents necessary to provide Petitioner with the very relief requested in her counterclaims. (App’x pp. 127–29, 132–141; Brief 11.)

As evidenced by the record and Petitioner’s complete indifference to U.S. Bank’s rights, there is no viable sanction less drastic than dismissal. While Petitioner argues that U.S. Bank cannot use the Administrative Order “as a club with which to strike a foreclosure defendant,” Petitioner likewise should not be allowed to use the Order as a shield to drag out a proper foreclosure action for eight years and prolong her use of the Property after default. (Brief 33.) U.S. Bank has not used the Administrative Order as a “club;” to the contrary, U.S. Bank voluntarily waived its right to a deficiency judgment in this foreclosure action (App’x p. 106), attempted numerous times to communicate with Petitioner regarding the modification process to avoid foreclosing on the Property (App’x pp. 126–131), gave Petitioner additional time to submit her materials despite the deadline set forth in the Administrative Order (App’x pp. 126–131), and ultimately offered Petitioner a loan modification to which she failed to respond. These efforts did not incentivize Petitioner to resolve this litigation efficiently or move forward with her counterclaims and, thus, it is hard to imagine any other course of action that could possibly do so. “There is a limit beyond which the court should allow a litigant to consume the time of the

court and to prolong unnecessarily time, effort, and costs to defending parties.” Georganne Apparel, Inc. v. Todd, 303 S.C. 87, 92, 399 S.E.2d 16, 19 (Ct. App. 1990). After almost eight years of delays, Petitioner is well-beyond that limit. Consequently, this Court should affirm the circuit court’s decision to dismiss Petitioner’s counterclaims based on her failure to prosecute those counterclaims. This reason alone is sufficient to affirm dismissal of Petitioner’s counterclaims for failure to prosecute pursuant to Rule 41(b), SCRCF.

B. Petitioner failed to participate in the foreclosure intervention process.

In addition to Petitioner’s failure to litigate her claims against U.S. Bank for almost two years, Petitioner also failed to fulfill her obligations pursuant to the foreclosure intervention process. Petitioner alleges the circuit court abused its discretion in dismissing Petitioner’s counterclaims pursuant to Rule 41(b) because Petitioner’s conduct did not amount to a failure to prosecute, but rather a failure to participate in settlement negotiations. (Brief 15.) Petitioner further argues that the Administrative Order “did not require [Petitioner] to do anything,” and, as a result, she did not fail to comply with the Order. (Brief 13.) Petitioner’s narrow interpretation of Rule 41(b) undermines both the spirit of Rule 41(b) and the purpose of the Administrative Order.

The foreclosure intervention process established by the Administrative Order is not merely voluntary “settlement negotiations,” as Petitioner contends. (Brief 13–15.) Rather, the foreclosure intervention required by the Administrative Order is a mandatory “process to ensure that lenders and eligible homeowners have an opportunity for meaningful discussion about possible settlement options.” South Carolina Judicial Dep’t, Frequently Asked Questions (FAQ) in South Carolina Master-in-Equity Court, South Carolina Judicial Dep’t. 9–10 (2011), <http://www.sccourts.org/selfhelp/FAQMIE.pdf> (2011). This process was imposed to reduce the workload on courts and reduce the number of unresolved foreclosure actions. In re Mortgage

Foreclosure Actions, 396 S.C. at 210, 720 S.E.2d at 905. Indeed, the Administrative Order states that the large number of unresolved foreclosure actions was the result of a breakdown of loss mitigation efforts caused by communication issues between the lender-servicers and debtors, and it attempted to ensure that foreclosure actions do not proceed “without regard to ongoing loss mitigation efforts by the parties.” Id. at 210, 720 S.E.2d at 908.

Just as lenders were required to provide notice of the foreclosure intervention process to borrowers in cases subject to the Administrative Order, borrowers were required to provide whatever financial information the lender required if they wanted to be considered for loss mitigation options. See In re Mortgage Foreclosure Actions, 396 S.C. at 212, 720 S.E.2d at 909 (noting that, in order to proceed with the loss mitigation process, the mortgagor must provide the mortgagee “all documents and records required to be submitted by the Mortgagor to evaluate eligibility for foreclosure intervention”). In fact, the Administrative Order allows for sanctions where the borrower fails to attempt to reach a foreclosure intervention agreement in good faith. Petitioner incorrectly states that dismissal is not an available remedy for failure to comply with the Administrative Order (Brief 15), but dismissal is authorized, as are any other sanctions within the court’s discretion: “In the event the Court determines that any party to the foreclosure action, or their acting agent, has failed to comply with the terms of this order, or has not attempted to reach an agreement for foreclosure intervention in good faith, the Court may, in its discretion, impose such sanctions as it determines to be reasonable and just under the circumstances....” In Re Mortgage Foreclosure Actions, 396 S.C. at 214, 720 S.E.2d at 910.

Rule 41(b) works in tandem with the Administrative Order, providing a mechanism by which the courts can “control and efficiently manage an ever-expanding docket.” Don Shevey & Spires, Inc. v. Am. Motors Realty Corp., 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983). As such,

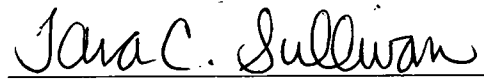
the foreclosure intervention process is more analogous to mediation proceedings in counties that mandate alternative dispute resolution prior to trial to manage and control overcrowded dockets. See Hopkins v. Harrell, 352 S.C. 517, 574 S.E.2d 747 (Ct. App. 2002) (affirming dismissal for failure to participate in mandatory mediation).

Petitioner's counterclaims are based solely on U.S. Bank's purported failure to evaluate her for a loan modification. (App'x pp. 110–12, 115.) Petitioner's Answer and Counterclaims admit she failed to submit all necessary information for review (App'x p. 111), and this failure to provide information continued after the foreclosure action was commenced such that U.S. Bank has been unable to implement any modification pursuant to the Administrative Order. (App'x pp. 127, 178). Because Petitioner repeatedly failed to take the necessary steps to pursue a modification under the foreclosure intervention process, the circuit court did not abuse its discretion in dismissing for failure to prosecute Petitioner's counterclaims based on a purported failure to evaluate Petitioner's loan for a modification. (App'x 96–97.) Accordingly, the dismissal of Petitioner's counterclaims should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should affirm the lower courts' dismissal of Petitioner's counterclaims and defenses in this matter.

Respectfully submitted,



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May 8, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
George C. James, Jr., Circuit Judge

Appellate Case No. 2015-001554
Common Pleas Case No. 2010-CP-28-1197

RECEIVED

MAY 11 2017

S.C. SUPREME COURT

U.S. Bank National Association Successor trustee to LaSalle Bank National Association, as trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB-1,

Respondent,

v.

Kelley Burr; FIA Card Services, N.A.; Discovery Bank, Issuer of the Discover Card; Unifund CCR Partners; Defendants

Of Whom Kelley Burr is the

Petitioner.

PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Respondent's Brief in the above-referenced case has been served by U.S. Mail, postage-paid, on the 8th day of May 8, 2017, on the following:

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