

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable Richard L. Booth, Sumter County Master-in-Equity

Case No. 2015-000349
Trial Court Case No. 2010-CP-43-00823

RECEIVED
FEB 29 2016
SC Court of Appeals

Wells Fargo Bank, N.A.,

Respondent,

v.

Delores Prescott and Wells Fargo Financial Bank (SD), Defendants,

Of Whom Delores Prescott is the Appellant.

RECORD ON APPEAL VOLUME I

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~~REDACTED~~
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JUN 23 2017

S.C. SUPREME COURT

Delores Prescott, Appellant
10 Skytop Gardens, Apt. 23
Parlin, NJ 08859

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Order of January 9, 2015

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Wells Fargo Bank, N.A.,

RECORDED

2015 JAN 13

PM 2:55

BEFORE THE MASTER IN EQUITY
THIRD JUDICIAL CIRCUIT

JAMES C. CAMPBELL

CLERK OF COURT

SUMTER COUNTY, S.C.

Civil Action No. 2010-CP-43-00823

Plaintiff,

vs.

Delores Prescott and Wells Fargo
Financial Bank (SD),

Defendants.

ORDER

Before the Court are two motions: (1) Wells Fargo Bank, N.A.'s Motion for Summary Judgment; and (2) Wells Fargo's Motion to Strike Delores Prescott's Amended Answer and Counterclaims. The parties fully briefed the issues presented in these motions, and the Court heard oral argument on these motions on November 19, 2014. During that hearing, the Court requested additional briefing from the parties, which was provided.

The Court has fully and carefully considered all of the evidence presented, all written submissions by the parties, and all arguments of counsel. Because there does not appear to be any disputed material fact, and because Wells Fargo is entitled to judgment on all claims and potential counterclaims as a matter of law, the Court grants summary judgment in Wells Fargo's favor.

BACKGROUND

I. Proceedings before the Circuit Court

Based on the evidence presented and arguments of counsel, the following facts are not disputed. This case involves the foreclosure of a note and mortgage that was



secured by real property in Sumter County. Wells Fargo filed its foreclosure complaint on April 16, 2010, which Ms. Prescott answered on May 17, 2010. In her answer, Ms. Prescott did not assert any counterclaims. Wells Fargo is the holder of the note, as it has presented the original note to the Court, and is the servicer of the loan as well.

B. Proceedings before the Bankruptcy Court

Following the close of pleadings, Ms. Prescott commenced voluntary Chapter 13 bankruptcy proceedings in the District of South Carolina. In those proceedings, she responded "NONE" when asked to disclose all "contingent or unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims." Summary of Schedules at 7 (Dkt. No. 8 in *In re Prescott*, Case No. 10-5552-dd (Bankr. D.S.C. Aug. 15, 2010)) ("*In re Prescott I*"). Ms. Prescott further conceded in her bankruptcy proceedings that Wells Fargo was a creditor with a loan secured by a mortgage on the property at issue in this case. *Id.* at 11. She declared both of these facts to be "true and correct" under penalty of perjury. *Id.* at 31.

The Honorable David R. Duncan, United States Bankruptcy Court Judge, ultimately dismissed that bankruptcy matter because Ms. Prescott had not proposed plan that complied with Chapter 13's requirements. Order (Dkt. No. 29 in *In re Prescott I* (Jan. 19, 2011).)

Ms. Prescott then filed a second voluntary Chapter 13 bankruptcy case on March 28, 2011. In her second bankruptcy case, Ms. Prescott again conceded that:

- (1) She did not have any counterclaims to pursue; and
- (2) Wells Fargo was a secured creditor with a mortgage on her property in Sumter County.



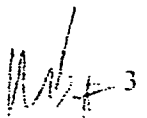
Summary of Schedules at 13 (no counterclaims) and 17 (Wells Fargo is a secured creditor) (Dkt. No. 1 in *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. Mar. 28, 2011)) ("*In re Prescott I*"). Just as before, Ms. Prescott swore to both of these facts under penalty of perjury. *Id.* at 36.

On April 11, 2011, Wells Fargo filed a claim in Ms. Prescott's second bankruptcy proceeding in which it claimed a secured debt of over \$80,000. Wells Fargo's Proof of Claim (Claim No. 3-1 in *In re Prescott II* (Apr. 11, 2011).) Ms. Prescott did not file any objection to this claim.

During the second bankruptcy matter, Wells Fargo moved for relief from the automatic stay that attaches to bankruptcy proceedings so that it could prosecute its foreclosure claim. Motion for Relief from Automatic Stay (Dkt. No. 26 in *In re Prescott II* (Dec. 9, 2011).) As proof of its security interest, Wells Fargo provided the Bankruptcy Court with the same note and mortgage upon which its foreclosure claim is based. *Id.* at 8-17.

In response, Ms. Prescott "certified" the validity of Wells Fargo's factual assertions, conceded that Wells Fargo was a secured creditor, and stated that she is "behind on payments due on this loan," while requesting time to "catch up on payments." Answer to Motion for Relief from Stay (Dkt. No. 27 in *In re Prescott II* (Dec. 22, 2011).) The Bankruptcy Court ultimately granted Wells Fargo's request and held that Ms. Prescott was "in default" of her payments to the bank. Order Granting Relief from Stay (Dkt. No. 35 in *In re Prescott II* (Sept. 26, 2012).)

On June 17, 2013, Ms. Prescott proposed to amend her Chapter 13 plan to abandon her interest in the property that secured Wells Fargo's debt:

 3

The Debtor moves to Amend the confirmed Chapter 13 plan due to abandon interest in property located at 6365 Saxton Rd., Rembert, SC 29128 to Wells Fargo Home Mortgage. Wells Fargo Home Mortgage received relief from stay in September 2012.

Motion to Modify Chapter 13 Plan at 1 (Dkt. No. 39 in *In re Prescott II* (June 17, 2013))

(errors in original). She further verified the effect of this abandonment:

6. Surrender of property: The debtor will surrender the following property upon confirmation of the plan. The order confirming plan shall terminate the automatic stay as to that property: Wells Fargo Home Mortgage; 6365 Saxton Rd., Rembert, SC 29128. Any creditor affected by this provision may file an itemized proof of claim for any unsecured deficiency within a reasonable time after the surrender of the property.

Id. at 6.

On July 17, 2013, Judge Duncan issued an order confirming the Chapter 13 plan with the modifications proposed by Ms. Prescott. Order Confirming Plan and Resolving Motions (Dkt. No. 43 in *In re Prescott II* (July 17, 2013).)

C. Proceedings Upon Return to Circuit Court

Two months after Judge Duncan confirmed a Chapter 13 plan with Ms. Prescott's proposed amendments, Ms. Prescott moved for leave to file an amended answer and counterclaims for breach of the South Carolina Consumer Protection Code, the South Carolina Unfair Trade Practices Act, and for breach of a fiduciary duty. The Court granted that motion on December 2, 2013.

However, instead of filing such an amended pleading, Ms. Prescott filed a motion on January 3, 2014, to dismiss the complaint in its entirety. The basis for Ms. Prescott's motion was a newfound argument that Wells Fargo was not actually a secured creditor entitled to foreclose on this property. In opposing that motion, Wells Fargo identified the same representations from Ms. Prescott to the Bankruptcy Court that are recited above

WFS# 4

and argued that Ms. Prescott cannot legally avoid foreclosure—particularly when she has already abandoned her interest in this property.

After a hearing, the Court denied Ms. Prescott's motion to dismiss by order dated April 17, 2014. Less than three weeks later, Wells Fargo moved for summary judgment based on the same arguments it used to defeat Ms. Prescott's motion to dismiss.

On August 25, 2014, after Wells Fargo's motion for summary judgment had been pending for nearly four months, Ms. Prescott filed an amended answer and—for the first time—asserted counterclaims against Wells Fargo. Wells Fargo moved to strike this filing.

On November 19, 2014, the Court heard arguments regarding Wells Fargo's motions. Both Wells Fargo and Ms. Prescott were represented by counsel. At the close of that hearing, the Court orally ruled that the doctrines of res judicata and collateral estoppel compel the following results: (1) the parties' loan agreement is enforceable, (2) Ms. Prescott is in default on that note, and (3) Ms. Prescott's counterclaims fail as a matter of law. Additionally, the Court requested further briefing on whether Ms. Prescott could collaterally attack the mortgage through an unclean hands affirmative defense and regarding the legal effect of Ms. Prescott abandoning the property during her bankruptcy proceedings.

The parties have now fully briefed the issues, and Wells Fargo's motions are ripe for decision.

STANDARD OF REVIEW

Rule 56(c), SCRCP, provides that summary judgment should be issued when the evidence collectively shows that "there is no genuine issue as to any material fact and

W/F 5

that the moving party is entitled to judgment as a matter of law." A party opposing summary judgment "may not rest upon the mere allegations or denials of his pleading," but instead "must set forth specific facts showing there is a genuine issue for trial." *Id.* 56(c). Courts are clear that "[t]he purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

DISCUSSION

The Court finds that Wells Fargo is entitled to summary judgment on both its foreclosure claim and regarding Ms. Prescott's counterclaims and defenses because a party cannot make a representation to a court to induce it to rule one way, and then make the opposite representation to a different court to achieve a different outcome. This prohibition is a cornerstone of res judicata, judicial estoppel, and overall fairness.

Judicial estoppel is designed to protect the integrity of the courts by preventing a party from taking "a position in conflict with one earlier taken in the same or related litigation." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). In order for this doctrine to apply, a party must attempt to mislead the court by taking two "totally inconsistent" positions in litigation, and it must benefit in some way from a court adopting the party's first representation. *Cothran v. Brown*, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004).

Likewise, res judicata is designed to ensure that an issue or claim that was or could have been resolved in prior litigation is not subject to re-litigation. Three elements are necessary for res judicata to attach: (1) the parties or their privies must be the same as in prior litigation; (2) the subject matter must be the same as in prior litigation; and

WFS #6

(3) there must be a prior adjudication by a court of competent jurisdiction. *Pye v. Aycock*, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (Ct. App. 1997).

Here, after this case was commenced, and after she had answered Wells Fargo's complaint, Ms. Prescott represented to the Bankruptcy Court that:

- (1) She owed a debt to Wells Fargo that was secured by the same property at stake in this foreclosure action;
- (2) She did not have any viable counterclaims to assert against Wells Fargo;
- (3) She was behind on her payments to Wells Fargo; and
- (4) She abandoned her interest in the subject property when the Bankruptcy Court confirmed the Chapter 13 plan.

These assertions and concessions make judgment proper in Wells Fargo's favor on its claim and on Ms. Prescott's counterclaims and defenses.

I. Wells Fargo's Foreclosure Claim

Regarding Wells Fargo's foreclosure claim, a party who admits a debt owed in bankruptcy proceedings is barred from later disputing that debt. *See, e.g., Celli v. First Nat'l Bank*, 460 F.3d 289, 295-96 (2d Cir. 2006) ("In summary, we hold that the Chapter 13 bankruptcy confirmation order is res judicata with respect to the debtor's and the Trustee's post-confirmation attempt to avoid a confirmed, recorded lien on the debtor's property where the lien was claimed by FNB at the outset of the bankruptcy proceedings and included by the debtor in his plan."); *Mbazira v. Litton Loan Servicing, LLP*, Case No. 10-11831-FDS, 2011 U.S. Dist. LEXIS 85271, at *10-11 (D. Mass. July 27, 2011) ("Other courts that have considered post-confirmation attacks on the validity of secured claims have likewise rejected these efforts. . . . Although the matter is typically viewed as a question of res judicata rather than judicial estoppel, several courts of appeals have held

WJ# 7

debtors estopped from challenging the status of secured claims after confirmation.”); *In re Gilbert*, No. 08-84618, 2010 WL 2026520, at *1 (Bankr. N.D. Ga. Mar. 1, 2010) (explaining that a debtor’s decision to surrender property during a bankruptcy proceeding “bars the debtor from maintaining possession of the collateral and from contesting the right of the creditor to foreclose on the property”).

Because Ms. Prescott affirmed her secured debt to Wells Fargo, conceded that she had missed payments, never disputed any of Wells Fargo’s statements about that debt to the Bankruptcy Court, and affirmatively abandoned her interest in the property during bankruptcy proceedings as part of an amendment to her Chapter 13 plan, she is estopped from disputing Wells Fargo’s entitlement to foreclose its lien. Accordingly, Wells Fargo is entitled to judgment as a matter of law on its foreclosure claim.¹

Ms. Prescott argues that those concessions should not prevent her from being able to assert an affirmative defense of unclean hands to Wells Fargo’s foreclosure claim because judicial estoppel operates to bar a litigant from asserting inconsistent facts before different tribunals, but does not apply when a party only presents differing legal theories. The Court disagrees with Ms. Prescott’s argument.

Ms. Prescott’s attempt to present an unclean hands affirmative defense is predicated upon facts that were known by Ms. Prescott at the time she made her bankruptcy filings, but that she never disclosed to the Bankruptcy Court. She could have disclosed these facts in her bankruptcy petitions and filings before that Court, but she did

¹ In opposing summary judgment, Ms. Prescott filed an affidavit in which she attempted to create a disputed material fact by contradicting her sworn statements and representations to the Bankruptcy Court. The Court rejects such posturing to create a sham issue of material fact. *See, e.g., Dunes W. Golf Club, LLC v. Town of Mt. Pleasant*, 401 S.C. 280, 311, 737 S.E.2d 601, 617 (2012) (noting parenthetically that “a party cannot take inconsistent positions in an attempt to create a sham issue of material fact”).

WJH 8

not. Instead, she represented that the parties' note and mortgage were valid and enforceable and that Wells Fargo was a secured creditor. Accordingly, res judicata and judicial estoppel prevent Ms. Prescott from asserting a different position before this Court by way of an affirmative defense that is based on facts contrary to those that she asserted during the bankruptcy proceedings.

II. Ms. Prescott's Counterclaims

Ms. Prescott's counterclaims are likewise barred by res judicata and collateral estoppel. Courts are clear a party who does not disclose the existence of a claim on its bankruptcy schedules is precluded from later bringing that claim. *See, e.g., Whitten v. Fred's, Inc.*, 601 F.3d 231, 241 (4th Cir. 2010) ("Judicial estoppel has often been applied to bar a civil lawsuit brought by a plaintiff who concealed the existence of the legal claim from creditors by omitting the lawsuit from his bankruptcy petition."), *overruled in unrelated part by Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013); *Sprowl v. Pfizer, Inc.*, Case No. 8:08-cv-3316-RBH, 2010 U.S. Dist. LEXIS 30939, at *15 (D.S.C. Mar. 30, 2010) ("[U]pon review, it appears to the court that Plaintiff may actually be judicially estopped from bringing this suit based on Plaintiff's failure to amend his bankruptcy petition to disclose his potential legal claims.").

Ms. Prescott affirmatively stated "NONE"—on two different occasions—when asked by the Bankruptcy Court to disclose all counterclaims she could pursue. As a result, all of Ms. Prescott's counterclaims are barred as a matter of law, irrespective as to whether they are timely asserted under Rule 15, SCRCP. Summary judgment is therefore appropriate in Wells Fargo's favor on Ms. Prescott's counterclaims, and the Court likewise denies as moot Wells Fargo's motion to strike.

WFS #9

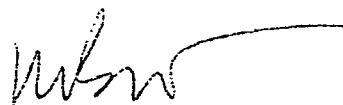
CONCLUSION

The doctrines of judicial estoppel and res judicata are designed to preserve the integrity of the judicial process, to conserve public and private resources by avoiding relitigation of previously-decided issues, and to give parties finality and certainty in judgments. Ms. Prescott's post-bankruptcy arguments in this case run counter to each of these principles and are barred by these doctrines.

For the reasons explained above, the Court grants summary judgment in Wells Fargo's favor on its claim and Ms. Prescott's counterclaims and affirmative defenses. The only issues remaining for resolution are the sum owed to Wells Fargo on its foreclosure claim and whether the mortgage should be reformed to correct an apparent typographical error regarding the legal description of the property, both of which shall be resolved at a damages hearing to be held at a time appointed by the Court after consultation with the parties.

AND IT IS SO ORDERED.

1/9, 2015
Sumter, South Carolina



The Honorable Richard L. Booth
Sumter County Master-In-Equity

Order of April 17, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER)
RECORDED)
2014 APR 22 AM 11:32)
JAMES C. CAMPBELL)
CLERK OF COURT)
SUMTER COUNTY, S.C.)

IN THE COURT OF COMMON PLEAS

CASE NO. 2010-CP-43-00823

Wells Fargo Bank, N.A.,)

Plaintiff)

Vs.)

Delores Prescott and Wells Fargo)
Financial Bank (SD))

Defendants.)

ORDER

Individual Defendant in this matter previously filed and served a Motion to Dismiss the Complaint of the Plaintiff based on Rule 12(b) of the South Carolina Rules of Court. The basis of the Motion was that the Plaintiff failed to state facts sufficient to constitute a cause of action.

A hearing was held before me on April 9, 2014 attended by counsel for Plaintiff and for Individual Defendant. Both parties submitted briefs to the Court prior to the hearing. At the hearing, counsel for the Individual Defendant sought to advance arguments that went beyond the mere content of the pleadings in this matter and I determined that the hearing would not be enlarged nor treated as one for summary judgment pursuant to Rule 56.

After reviewing the arguments of counsel and the pleadings, I find that the Complaint of the Plaintiff does state facts sufficient to constitute a cause of action and therefore Defendant's Motion should be denied.

IT IS THEREFORE ORDERED that the Motion of Individual Defendant to dismiss the
Complaint of the Plaintiff shall be and hereby is denied.

Dated 4/17, 2014



Richard L. Booth, Master in Equity
For Sumter County

Order of December 2, 2013

STATE OF SOUTH CAROLINA **RECORDED** IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

2013 DEC -4 AM 11:13

CASE NO: 2010-CP-43-00823

Wells Fargo Bank, N.A.,

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Plaintiff,

vs.

Order

Delores Prescott; Wells Fargo
Bank, (SD)

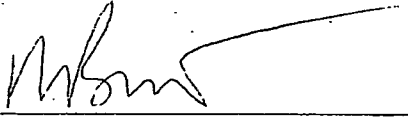
Defendants.

This comes before me upon Defendant Delores Prescott's motion to amend her answer. A hearing was held before me attended by counsel for Plaintiff and Defendant Prescott. Based on the arguments and citations of the parties thereat, I am of the opinion that in the furtherance of justice Defendant Prescott's motion should be granted for the purpose of allowing her to plead affirmative defenses, compulsory counterclaims and cross claims as to the parties to this lawsuit and the matters alleged in the complaint, and also to maintain any third party-complaint she deems necessary. I am not granting her leave to maintain any permissive counterclaims which she may maintain through separate action.

It is therefore

ORDERED: That Defendant Delores Prescott is granted leave to amend her answer to plead affirmative defenses as to the matters alleged in the complaint of the Plaintiff, to maintain compulsory counterclaims and cross claims as to the parties to this lawsuit, and also to maintain any third party complaint as she deems proper.

December 2, 2013


Richard L. Booth
Master in Equity

Complaint
April 15, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

C/A NO.: _____

Wells Fargo Bank, N.A.,

RECORDED

Plaintiff,

2010 APR 16 PM 3:07

COMPLAINT

vs.

**JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.**

(Non-Jury)

Delores Prescott and Wells Fargo Financial
Bank (SD),

**FORECLOSURE
OF REAL ESTATE
MORTGAGE and REFORMATION OF
MORTGAGE**

Defendant(s).

(Deficiency Judgment Waived)

The Plaintiff above named, complaining of the Defendant(s) herein alleges that:

1. Plaintiff, Wells Fargo Bank, N.A., is a business entity duly authorized to conduct business in the State of South Carolina.
2. Upon information and belief, the Defendant Delores Prescott is a resident and citizen of the County of Sumter, State of South Carolina, and Defendant Wells Fargo Financial Bank (SD) is a business entity and is duly authorized to conduct business in the State of South Carolina.
3. The real property hereinafter described, that is the subject of this action, is situated and located in the County of Sumter, State of South Carolina, and this Court has proper jurisdiction over the subject matter and the parties of this action.
4. Heretofore, on June 24, 2003, Delores Prescott (hereinafter "Borrower") made, executed, and delivered to Watermark Financial Partners, Inc. (hereinafter "Lender") a certain Note in writing (hereinafter "Note"), wherein and whereby Delores Prescott promised to pay to Watermark Financial Partners, Inc., the principal sum of \$81,301.00, together with interest at the rate of 6.5% per annum on the unpaid balance; said principal and interest being payable in monthly installments thereafter until the said Note is fully paid.
5. In order to secure the payment of said Note, the said Delores Prescott (hereinafter "Mortgagor"), did on the same date, to wit, June 24, 2003, make, execute, and deliver to

B&S No.: 10-08577

Record On Appeal

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Mortgage Electronic Registration Systems, Inc. as nominee for Watermark Financial Partners, Inc., its successors and assigns, a certain mortgage (hereinafter "Mortgage") securing the below described real property, including any and all improvements to the property, located in the County and State aforesaid (hereinafter "Property"):

All that certain, parcel or lot together with the improvements thereon situate, lying and being in the Rafting Creek Township, County of Sumter, State of South Carolina, consisting of 1.0 acre as shown on a plat prepared by J. Henry Walker, III, P.L.S Dated December 8, 1998 and recorded in the records of the Sumter County Register of Deeds Office in Plat Book 98 at Page 1395. Said lot being bounded and measuring as follows: On the northeast by lands now or formerly of Woodmont Associates, Inc., and measuring thereon 213.70 feet; on the southeast by lands now or formerly of Florence N. Kendrick and measuring thereon 225.36 feet; on the southwest by a sixty-six foot (66) right-of-way and Saxton Road and measuring thereon 220.44; and on the northwest by lands now or formerly of Simpson-Saxton Estate and measuring thereon 183.15 feet. Be all said measurements a little more or little less and according to said plat. This being the property more commonly known as 6365 Saxton Road, Rembert, South Carolina.

Being the same property conveyed to Delores Prescott by deed from Florence N. Kendrick, dated 12/18/1998 recorded 12/22/1998 in deed book page 727/481.

Parcel Number: 086-00-02-031

• Property Address: 6365 Saxton Rd, Rembert, SC 29128

6. On July 1, 2003, said Mortgage was recorded in the Sumter County Registry in Mortgage Book 896 at Page 70. Thereafter the Mortgage was assigned to the Plaintiff herein.
7. The Mortgage evidences and secures the repayment of money advanced by the Lender to, or on behalf of, the Mortgagor(s) and constitutes a valid purchase money, first lien on the Property.
8. As required by an Administrative Order issued by the South Carolina Supreme Court dated May 22, 2009, the Plaintiff states that this loan is owned or guaranteed by Fannie Mae, or it is owned or guaranteed by FHLMC, or the Servicer has signed an agreement to participate in the Home Affordable Modification Program ("HMP"); however, Plaintiff alleges upon information and belief, that this loan is not eligible for modification under the HMP because this loan type is not eligible for HMP modification.
9. Due to inadvertent error and mistake, the legal description in the Mortgage contains a typographical error. The legal descriptions on these instruments reference "Plat Book 98

at Page 395," while the correct reference is "Plat Book 98 at Page 1395." The legal description contained in the Mortgage should be reformed to recite the correct reference, which comports with public record, and this reformation should relate back to the date of their recording.

10. Any notice required by the terms of the Mortgage or by State or Federal law has been given to the applicable defendant(s) prior to the commencement of this action.
11. In and by the terms of said Note and the Mortgage securing the same, it is provided, among other things, that on failure to pay any installment of either principal or interest or any portion thereof when due, or if any of the conditions and requirements in the mortgage securing the same not be complied with, then the whole principal sum and accrued interest shall at the option of the legal holder thereof become at once due and payable without notice, and collectible by foreclosure.
12. In and by the terms of the said Note it is further provided that the maker thereof shall pay all collection costs including reasonable attorneys fees if the said Note be placed in the hands of an attorney for collection after default.
13. Plaintiff waives its right to a deficiency judgment as to any defendant for amounts due on the herein described note and mortgage.
14. The installments of principal and interest falling due from and after December 1, 2009, have not been paid although demand for the payment thereof has been made and the Plaintiff, as holder of the said Note and Mortgage, has and does hereby elect to declare the entire balance of said principal and interest due and payable at once; that there is now due and owing and unpaid upon the said Note and Mortgage the full and just principal sum of \$74,380.97, together with interest at the rate of 6.5% per annum from the date of the last payment, together with reasonable attorneys fees for the collection thereof and the costs of this action. Plaintiff may be forced to pay sums for taxes, insurance and costs for securing the property, which sums, according to the terms of the Mortgage, should be added to the amount of the debt.
15. Upon information and belief, said information having been obtained from the records of

Sumter County, South Carolina, the Defendant(s) below named has/have or may claim to have some interest in or lien upon the Property by virtue of the matters and things herein below alleged, to-wit:

- A. The Defendant, Wells Fargo Financial Bank (SD), has or may claim to have some interest in the Property by virtue of mortgage given by Delores Prescott, to Wells Fargo Financial Bank (SD) in the original principal amount of \$200,000.00, which mortgage was recorded in the Sumter County Registry on April 11, 2003 in Mortgage Book 884 at Page 138. Said mortgage, pursuant to a valid and binding Subordination Agreement, recorded in the Register of Deed's Office, Sumter, SC, in Book 896 at Page 77, on July 1, 2003, is junior and subordinate to the Plaintiff's mortgage and should be removed from title to the Property upon the completion of a properly held foreclosure sale of the Property.

WHEREFORE, Plaintiff prays judgment that:

1. The Mortgage be reformed as described above and the reformation relate back to the date of its recording.
2. The amount due upon the said Note and Mortgage held by the Plaintiff be ascertained and determined under the direction of this Court, together with attorney's fees and costs of this action.
3. Appoint a Receiver to collect the rents, issue, profits or designated sums from the mortgagor(s), and/or the grantee(s) of the mortgagor(s), and/or tenant(s) occupying or exercising control over the mortgaged premises and hold the same subject to the further order of this Court.
4. Plaintiff's Mortgage be declared a valid purchase money, first lien and that Plaintiff have judgment of foreclosure for the amount so found to be due and owing thereon, together with any taxes or insurance premiums which may be due or which may be or have been paid by Plaintiff, together with attorney's fees and for the costs of this action.
5. The Property be sold according to law and the practice of this Court, the equity of redemption be barred and that the proceeds of sale be applied as follows:

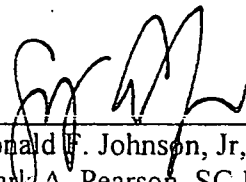
First, to the costs and expenses of the within action and said sale;

Second, to the payment and discharge of the amount due on Plaintiff's Note and Mortgage, together with attorney's fees as aforesaid; and

Third, the surplus, if any, be distributed according to law;

6. For such other and further relief as may be just and proper.

FURTHER, in the event the successful bidder (at the time of this foreclosure sale) is other than the Defendant(s) in possession herein, the Sheriff of Sumter County will be ordered and directed to eject and remove from the premises the occupants of the property sold, together with all personal property located therein, and put the successful bidder or his assigns in full, quiet and peaceable possession of said Property without delay, and to keep the successful bidder or his assigns in such peaceable possession.



Ronald F. Johnson, Jr, SC Bar #16931
Mark A. Pearson, SC Bar #15926
Brian L. Campbell, SC Bar #74521
Suzanne E. Brown, SC Bar #76440
Jason L. Branham, SC Bar #72902
Brock & Scott, PLLC
3800 Fernandina Road, Suite 110
Columbia, SC 29210
Phone 888-726-9953 Fax 866-676-7658
Attorneys for Plaintiff

Dated: 4 / 15 / 10
Wilmington, North Carolina

Answer

May 17, 2010

RECORDED

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Wells Fargo Bank, N.A.,

Plaintiff,

Delores Prescott and Wells Fargo Financial
Bank (SD),

Defendant (s).

2010 MAY 18 PM 2:49

IN THE COURT OF COMMON PLEAS

JAMES C. CAMPBELL
CLERK OF COURT NO: 10-CP-43-823
SUMTER COUNTY, S.C.

ANSWER TO COMPLAINT AND

AFFIRMATIVE DEFENSES

FORECLOSURE OF REAL ESTATE

MORTGAGE and REFORMATION OF
MORTGAGE

I, the Defendant, Delores Prescott, answers the Plaintiff's claim as follows:

1. I agree, Plaintiff, Wells Fargo Bank, N.A. ("Wells Fargo Home Mortgage") is a business entity duly authorized to conduct business in the State of South Carolina.
2. I, the Defendant, am a resident and citizen of the County of Sumter, State of South Carolina since February 2001.
3. I agree, the real property hereinafter described, that is the subject of this action, is situated and located in the County of Sumter, State of South Carolina, and this Court has proper jurisdiction over the subject matter and the parties of this action.
4. I admit that I signed a Note and Mortgage.
5. I am without sufficient knowledge as to whether the Plaintiff is the lawful holder of the Note or the Mortgage. The said Note (hereinafter "Mortgage") upon information and belief, did on May 14, 2002, make and deliver to Mortgage Electronic Registration Systems, Inc. ("MERS"), a Delaware corporation, as "nominee" for Principal Residential

Mortgage, Inc., an IOWA corporation, it's successors and assigns, a certain Mortgage, said Mortgage is recorded in the State of SC, County of Sumter Book/Vol/liber 841 on page 1999. Therefore, I deny the allegation.

6. Based on information and belief, said Mortgage is recorded in the Sumter County Registry of Deeds State of South Carolina in Book 896 at Page 70 to Watermark Financial Partners Inc. on July 1, 2003. I am without knowledge as to whether the Plaintiff is the lawful holder of the Note or the Mortgage as there is no documentation or recordation of the month, date or year of Assignment to Plaintiff. Therefore, I deny the allegation.
7. Based on information and belief, said Mortgage is recorded in the Sumter County Registry of Deeds State of South Carolina in Book 896 at Page 70 to Watermark Financial Partners Inc. on July 1, 2003. I am without knowledge as to whether the Plaintiff is the lawful holder of the Note or the Mortgage as there is no documentation or recordation of the month, date or year of Assignment to Plaintiff. Therefore, I deny the allegation.
8. Plaintiff alleges that this loan is not eligible for a modification under the HMP because this loan type is not eligible for HMP modification. I am without knowledge and information of the HMP guidelines. Plaintiff did not disclose the HMP/FHA-HAMP guidelines to Defendant prior to Defendant entering into and signing a "Special Forbearance" Agreement June 2009. Therefore, I deny the allegation.
9. Plaintiff states, "Due to inadvertent error and mistake, the legal description in the Mortgage contains a typographical error. The legal descriptions on these instruments reference "Plat Book 98 at Page 395." I am without knowledge if the Plaintiff is the

lawful holder of the Mortgage ("Security Instrument") to make legal demands to correct said reference to the legal description contained in "Schedule A" of said Mortgage to comport with public record, and demand that reformation should relate back to the date of their recording July 1, 2003. Therefore, I deny the allegation.

10. Defendant received from the Plaintiff a "Monthly Mortgage Statement" with a statement date of January 15, 2010 with a total payment due of \$1,927.17. February 12, 2010 Plaintiff drafted and mailed a "Special Forbearance" to Defendant." April 12, 2010, Plaintiff sent Defendant another "Special Forbearance" Agreement. Therefore, I deny the allegation.
11. I am without sufficient knowledge as to whether the Plaintiff is the lawful holder of the Note or the Mortgage there is no documentation or recordation of the month, date or year of Assignment to Plaintiff recorded in the Sumter County Registry of Deeds State of South Carolina. Therefore, I deny the allegation.
12. I am without sufficient knowledge as to whether the Plaintiff is the lawful holder of the Note or the Mortgage there is no documentation or recordation of the month, date or year of Assignment to Plaintiff recorded in the Sumter County Registry of Deeds State of South Carolina. Therefore, I deny the allegation.
13. I am without sufficient knowledge as to whether the Plaintiff is the lawful holder of the Note or the Mortgage there is no documentation or recordation of the month, date or year of Assignment to Plaintiff recorded in the Sumter County Registry of Deeds State of South Carolina. Therefore, I deny the allegation.
14. I am without sufficient knowledge as to whether the Plaintiff is the lawful holder of the Note or the Mortgage there is no documentation or recordation of the month, date or year

of Assignment to Plaintiff recorded in the Sumter County Registry of Deeds State of South Carolina. Therefore, I deny the allegation.

15. Upon information and belief, Wells Fargo Financial Bank (SD), has no claim to any interest in the said Property. The documents on file at the Sumter County Registry of Deeds, State of South Carolina appear to have been altered. The credit card installments have been satisfied. I deny the allegation.

AFFIRMATIVE DEFENSES

WHEREFORE, Defendant, Delores Prescott, requests Motion to Dismiss for Failure to State a Claim for which relief can be granted and respectfully shows:

1. The Sumter County Registry of Deeds record in Book 896 at Page 70 reflects that Watermark Financial Partners, Inc. was the holder of certain mortgage of real estate. There is no evidence in the record that Mortgage Electronic Registration Systems, Inc. ("MERS") held the Mortgage/Note or Security Instrument or that Watermark Financial Partners, Inc. gave MERS the authority to transfer the Mortgage/Note or Security Instrument to Plaintiff. MERS could not transfer the Mortgage, Note, or Security Instrument, therefore the language in the assignment of "certain mortgage of real estate" purporting to transfer [the] "certain mortgage of real estate" to MERS is ineffective. MERS, notwithstanding its claimed status as "nominee" for Watermark Financial Partners, Inc. dated June 24, 2003 and recorded on July 1, 2003 in the Sumter County Registry in Book 896 at Page 70 under the Mortgage/Note or Security Instrument or Assignment, cannot transfer the Mortgage/Note or Security Instrument as it has no legal authority to do so, and thus any party seeking to foreclose based on a MERS assignment is seeking to do so without proper legal standing as it is not the real party in interest as to

the Mortgage/Note or Security Instrument or Assignment and as the foreclosing party must be in actual possession and ownership of both the Mortgage/Note and the Security Instrument/Deed of Trust in order to be legally entitled to seek foreclosure.

2. According to the Sumter County Registry of Deeds state of South Carolina, there is no documentation, recordation of the Assignments of the Mortgage/Note/Security Instrument or Deed of Trust to Plaintiff, its successors and assigns. Therefore, based on information and belief, I, Defendant, Delores Prescott challenge Plaintiff's foreclosure rights because of undocumented and unrecorded assignments of the Notes underlying the Mortgage/Note/Security Instrument or Deed of Trust.
3. Plaintiff fails to meet all conditions precedent necessary to commence a foreclosure action. It should be noted that when a loan is sold in the secondary market, the bank is no longer the owner of the note and mortgage. However, the bank's rights under the mortgage are not automatically assigned to the investors. In order to assign such rights, an assignment of mortgage is necessary.
4. Plaintiff has failed to comply with the Farmers Home Administration (FHA) pre-foreclosure requirements.

- a. **WHEREAS**, the loan is insured by the ¹Department of Housing and Urban Development. ²The loan is in default. ³The lender must mail a special notice to homeowner by the end of the second month of delinquency "How to avoid foreclosure."
⁴Before three monthly payments are due and unpaid lender must make a reasonable effort to hold face-to-face meetings with borrower to determine if there is any way to work out a solution to foreclosure. [the nearest Wells Fargo Home Mortgage office is in Fort Mills, South Carolina under 200 miles]. ⁵Lender must wait until at least three payments are due and paid in order to begin the foreclosure process. To date, I, Delores Prescott,

Defendant has not met with anyone or spoken to anyone person directly or face-to-face regarding the status of the mortgage.

5. There is no proof in the Foreclosure Complaint that the Plaintiff is the real party in interest. Plaintiff has not demonstrated the circumstances under which it purportedly received an interest in the Note and Mortgage.
6. The original Mortgage was not with the plaintiff and upon information and belief, Plaintiff is not the party in interest.
7. Plaintiff has breached its duty to act in good faith and fair dealings with respect to the servicing of the subject Note and Mortgage.
 - a. **WHEREAS**, Plaintiff gives confusing information. What Defendant is told on the telephone conflicts with the information received in writing. For example, Defendant was told on the telephone that while in review for a modification the house will not be placed in foreclosure and that the collection calls and any documents Defendant may receive are “part of the process.” To date, Plaintiff has no real person responsible or accountable for the loan file. Defendant has experienced talking to 6 to 7 different customer service representatives in one day trying to get answers to questions such as who is the investor, what type of modification is being considered, and why is it taking so long?
8. Plaintiff has overstated and exaggerated the amount that is owed, by not applying all payments directly to the default amount but instead applying payments as “Unapplied,” by including attorney fees, legal fees, late charges and other predatory fees and charges not authorized by the terms of the subject Note or Mortgage.

9. The original Lender, MERS, Wells Fargo Bank, N.A., Wells Fargo Home Mortgage, Well Fargo Financial Bank(SD) has violated the Truth in Lending Act ("TILA") 15 U.S.C. 1601 et seq by failing to provide proper disclosures.

a. **WHEREAS**, on June 2009 Defendant was not more than 30 days delinquent in monthly Mortgage payments. However, Defendant was making monthly mortgage payments before the 3^{0th} of the month due to loss of employment October 2008. Based on information and belief the Plaintiff, Mortgage Electronic Registrations Systems, Watermark Financial Partners, Inc., Wells Fargo Financial Bank (SD) [an affiliate of Plaintiff] and its successors and assigns have violated the Truth In Lending Act ("TILA") by failing to provide proper disclosures regarding Defendants options for an Home Affordable Modification Plan (HAMP) or Home Modification Plan (HMP). The creditor must deliver TILA disclosures to each person whose ownership interest in a dwelling is subject to the security interest, and each such person has the right to rescind. 12 C.F.R. 226.2(a)(11), 226.15(a) and (b), 226.17(d), 226.23(a)(1).

10. Plaintiff did not disclose to Defendant that the "loan type" was not eligible for a "HMP" or "FHA-HAMP" loan modification, nor did Plaintiff disclose to Defendant that unemployment compensation cannot be used as "income" when applying for a "HMP" or FHA-HAMP modification. On or about June 2009, Plaintiff offered Defendant the first out many "Special Forbearances" with out disclosing the options available to Defendant under said guidelines.

WHEREAS, Plaintiff, did on December 2009 and April 2010 issue a Special Forbearance ("Agreement") to Defendant which states in said Agreement:

"We have good news about the above reference loan. Our goal is simple. We want to ensure that you have every opportunity to retain your home. Based on our telephone conversation and the financial information you provided, we would like to offer you a Special Forbearance Agreement ("Agreement")".

"Upon successful completion of the Agreement [trial period] your loan will not be contractually current. Since the installments may be less than the total outstanding payments and fees. Any outstanding payments and fees will be reviewed for a loan modification. If approved for a loan modification, based on investor guidelines, this will satisfy the remaining past due payments on your loan and we will send you a loan modification agreement. An additional contribution may be required". None of the Agreements mailed to Defendant state what the loan type is, who the investor is or what the guideline are to qualify for an Affordable Home Modification.

11. Plaintiff, Mortgage Electronic Systems, Inc. , Wells Fargo Financial Bank (SD) [an affiliate of Plaintiff] violated various provisions of the Home Ownership Equity Protection Act (HOEPA) pursuant to 15 USC 1639 et seq. by failing to make proper disclosures and committing intentional predatory lending by including prohibited terms. These violations provide an extended three year right to rescission and enhanced monetary damages for the Defendant.
12. Plaintiff forced Defendant into this default status. Defendant had been told by various representatives that no other payments could be made while on a "Special Forbearance" Plan.
13. **FURTHERMORE**, it appears that the Mortgage on file with the State of South Carolina, Sumter County Registry of Deeds for said Mortgage and Note has been with Watermark Financial Partners, Inc. and Defendant, Wells Financial Fargo Financial Bank (SD) [affiliate of Plaintiff] have been altered.
 - a. **WHEREAS**, the Open End Real Estate Mortgage ("Credit Card Agreement") alleged by Wells Fargo Financial Bank (SD) in the amount of \$200,000 is false.

On or about March 2003, the market value of said property was appraised at approximately \$66,000. The credit card loan has been satisfied.

- b. The mortgage note prepared and brought to Defendant's home located in Sumter County, South Carolina was issued, signed, notarized by Michael H. Warren, however, page 6 of 6 of the agreement has been altered to make it appears as if the transaction was initiated in State of South Carolina, "York" County.

WHEREFORE, Defendant prays judgment that:

1. Plaintiff request for said Mortgage to be reformed as described in complaint and the reformation relate back to the date of recording be denied. It should be noted that when a loan is sold in the secondary market, the bank is no longer the owner of the note and mortgage. However, the bank's rights under the mortgage are not automatically assigned to the investors. In order to assign such rights, an assignment of mortgage is necessary.
2. Plaintiff's Complaint to Mortgage be declared an invalid purchase money, first lien and that foreclosure for the amount so found to be due be dismissed with prejudice.
3. Reinstatement of Mortgage loan. Demand lender [Plaintiff] to provide reinstatement figure and an explanation of how it is determined.
4. The Defendant, Wells Fargo Financial Bank (SD) produce the "original" [not reproduction] of Open End Real Estate Mortgage.
5. The Defendant, Wells Fargo Financial Bank (SD) produce the "original" "fair market" value/appraisal performed on the home on or about March 2003.
6. The Defendant, Wells Fargo Financial Bank (SD) be declared an invalid purchase money, of alleged interest in said Mortgage/Note and property.

7. Plaintiff produce all "Original" documents [not reproduction] of said Mortgage/Note/Security Instruments and Assignments to Plaintiff to include all origination, transfers, recordation dates of said Mortgage/Note/Assignment/Security Instrument and the date (s) recorded with South Carolina, Sumter County Registry of Deeds.
8. Mortgage Electronic Registration Systems, Inc. (MERS) "Nominee" for Watermark Financial Partners, Inc. Produce the original documents giving MERS the authority to transfer the Mortgage/Note or Security Instrument to Plaintiff and other Assignees. To include all dates of Mortgage/Note/Security Instrument transfers and all Assignments.
9. Declare MERS claim or interest in the Mortgage/Note/Security Instrument invalid.
10. Defendant request that all late charges, attorney fees and penalties be waived dating back to June 2009.
11. Defendant request that mortgage be brought current as restitution for violation in Truth and Lending Act.
12. Declare that Plaintiff remove any all reference of foreclosure from Defendant's credit report.

FURTHER, Defendant requests 12 months to secure a permanent full time job and have the under payments added to said mortgage, spread over a period that is agreeable to both Defendant and Plaintiff. If the new job is at a pay lower than or equal to unemployment compensation of \$326 per week, Defendant be eligible to apply for a mortgage modification to reduce payments.

- a. Declare that Plaintiff respond to Defendant's modification request within 30 days of receipt of documents necessary to secure a permanent modification.

- b. Declare that Plaintiff assign to Defendant a face-to-face representative and a direct telephone number of said representative to handle all transactions regarding said modification.

Delores Prescott May 17th 2010
Delores Prescott, Defendant Date

DEMAND FOR TRIAL BY JURY

TAKE NOTICE, that Defendant, Delores Prescott, demands a Trial by Jury on all issues.

Delores Prescott May 17th 2010
Delores Prescott, Defendant Date

CERTIFICATE OF SERVICE

A copy of this Answer was served upon Plaintiff's subscribers Ronald F. Johnson, Jr., SC Bar #16931, Mark A. Pearson, SC Bar #15926, Brian L. Campbell, SC Bar #74521, Suzanne E. Brown, SC Bar #76440, Jason L. Branham, SC Bar #72902 at the following address Brock & Scott, PLLC, 3800 Fernandina Road, Suite 110, Columbia, SC 29210 by Priority United Parcel Service. This 17th day of May, 2010, and by ordinary U.S. Mail upon the Defendant Wells Fargo Financial Bank, (SD) P O Box 5943, Sioux Falls, SD 57117-5943, listed on the records of Sumter County, South Carolina Registry of Deeds in Book 896 at Page 77.

Delores Prescott May 17th 2010
Delores Prescott, Defendant Date

Hardship Affidavit

May 17, 2010

RECORDED

STATE OF SOUTH CAROLINA 2010 MAY 18 PM 2:48 COURT OF COMMON PLEAS

COUNTY OF SUMTER

JAMES C. CAMPBELL
CLERK OF COURT

Wells Fargo Bank, N.A.,

SUMTER COUNTY, S.C.

HARDSHIP AFFIDAVIT

EXPLANATIONS

Plaintiff,

10-CP-43-823

Delores Prescott and Wells Fargo Financial
Bank (SD),

Defendant.

October 2008 I became unemployed. Prior to being unemployed I earned a salary of approximately \$1,076.80 per week. South Carolina weekly unemployment compensation maximum is \$326.00 per week with an additional \$25.00 stimulus.

For a period of one year I, Defendant has asked Plaintiff for an Affordable Home Modification. I was current with my mortgage payments prior to signing the 1st "Special Forbearance" Agreement June 2009. which forced me into the situation I am currently in with my mortgage loan.

1. I have been unemployed and/or under employed since October 2008. I have been placed on several "special forbearance" plans. I have honored all of the instructions given to me by the Wells Fargo Bank, N.A. Bank call center staff.
2. My first request an Affordable Home Loan Modification was approved and countered for a 6 month reduced payment moratorium starting June 30, 2009 and paying through October 20, 2009 the amount of \$200.00 per month with a balloon payment of approximately \$2,850 due November 20, 2009.
 - a. Please note that prior to this arrangement I was not behind with my mortgage, however, I was making my payments late [past the grace period]. Before signing the "Special Forbearance", I specifically asked each and every staff member I spoke with at Wells Fargo Bank, N.A. what would happen if I was unable to find work and not make the balloon payment.
 - b. I was told to contact Wells Fargo Bank, N.A. 30 days prior to the balloon payment. I did, October 2009. I sent in all documents requested: proof of income, another hardship letter and monthly budget. I was told to continue to make the \$200.00 monthly payments until I heard otherwise. I did.
3. Early December 2009 I received a notice stating that I broke the "Special Forbearance" agreement, therefore, I was not eligible for any further assistance. I did not. Upon speaking with a Wells Fargo representative, I was told to send in a letter stating the above. By this time I had a temporary job making \$11.00 an hour, \$40 more a week than unemployment compensation.

4. Therefore, I was placed on a 2nd forbearance agreement between myself and Wells Fargo signed in late December of 2009. The agreement indicated that I was to make 3 trial payments beginning January 15, 2010 in the amount of \$642.39, February 15, 2010 \$642.39 and March 15, 2010 \$642.39 and that the loan would be reviewed for a final modification upon receipt of March 15, 2010 payment. My regular monthly mortgage payments are \$642.50.
5. I mailed a certified check for \$3,200 requesting that it be applied to the January 15, 2010, February 15, 2010 and March 15, 2010 payment and the remainder be applied to the outstanding balance. Therefore, my home loan should have been reviewed for a final modification as stated in the December 2009 agreement.
6. However, instead my loan was reviewed and approved for a 3rd forbearance. A 6 month reduced payment moratorium starting March 1, 2010 and paying through August 1, 2010 the amount of \$560 per month with a balloon payment of approximately \$3,175 due September 1, 2010. The agreement stated that after this 6 month trial period the loan would be considered for a permanent modification by another review of expenses and income and if loan qualifies for a permanent modification, the amount due may be able to be capitalized into loan.
7. I had questions regarding the 3rd "special forbearance." February 26, 2010 I responded to Wells Fargo Bank, N.A through Neighborhood Assistance Corporation of America (NACA) as follows:
 - a. "This agreement should be effective April 1, 2010. I have paid the March 15, 2010 payment as per my previous agreement with Wells Fargo which was effective January 15, 2010, February 15, 2010 and March 15, 2010. Please revise this agreement to begin April 1, 2010 at \$560.00 per month. A bulk check was mailed in the amount of \$3,200 and cashed by Wells Fargo for the agreed terms of the prior forbearance."
 - b. I did not sign the 3rd offer because prior to coming to NACA I was on a trial plan for 3 months that went through March 15, 2010 with Wells Fargo Bank, N.A. So when I came through NACA there should not have been another payment due in March if Wells Fargo Bank, N.A. were going to put me on another plan the payment should have started April 1, 2010.
 - c. Wells Fargo Bank, N.A. did not respond to my inquiry of February 26, 2010 regarding the matter.
8. I received a Foreclosure notice on Sunday April 18, 2010. The papers were filed with the Sumter County court on April 16th, 2010 and signed by Wells Fargo Bank, N.A. or Representative on April 15th, 2010.

9. I received in the mail a "Special Forbearance" dated April 12, 2010 to begin making payments of \$563.05 effective May 12th, 2010, June 12th, 2010 and July 12th, 2010.
10. The agreement states that I would be considered for a permanent modification after this trial period. Please note, the agreement that I signed in December 2009 stated the same, however, no permanent modification has occurred with or without employment.
11. I called Wells Fargo regarding the Foreclosure Notice. I was told that there is "no sale date" and as long as I make the payments per the agreement I would be fine. How is it possible for Wells Fargo Bank, N.A. to send me to Foreclosure the same time they initiate another agreement without even notifying me of their intent to do so?
12. Through this request, I am asking my servicer to help me by: Capitalizing the amount due in the loan and reduce my interest rate so that I would be able to make my monthly mortgage payments based on my weekly unemployment compensation of \$326 per week.
13. On a daily basis I am seeking employment to which I am accustomed. However, the job market is not good in South Carolina.
 - a. October 2010 I will be unemployed or underemployed for 2 years. I am hopeful that the job market will change and I will be able to find adequate employment in South Carolina.
 - b. I have a Bachelors of Business Administration Degree: Healthcare Management with 28 years experience. I am confident that the market will pick back up. However, the current economy is demonstrates differently.
14. My Mortgage is my first priority above and beyond any other expenditures. I have cut back as much as I can. I am monitoring the electric closely, I have cut back on food, I have reduced the phone and Internet usage. I am unable to reduce the high interest on my car loan. However, I need reliable transportation to find work.
15. April 2010 a NACA representative disclosed to me that because I have an FHA loan and I cannot be reviewed for a permanent modification while receiving unemployment compensation. This disclosure was never conveyed to me by Wells Fargo Bank, N.A. otherwise, I would not have signed the "Special Forbearance" June 2009 [the reason why I am in this situation] I would have continued to pay my mortgage as I had been.

16. To save my home, on a temporary basis, I am forced to seek employment outside of the state of South Carolina, until I am offered or considered for permanent or temporary employment in South Carolina.

Daleus Probert
May 17, 2010

Motion to Amend Answer and Counterclaim

September 20, 2013

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Wells Fargo Bank, N.A

Plaintiff,

vs

Delores Prescott and Wells Fargo
Financial Bank (SD)

Defendants.

IN THE COURT OF COMMON PLEAS

2010-CP-43-0823

MOTION TO AMEND ANSWER
AND COUNTERCLAIM

NOW COMES, the Defendant, Delores Prescott, only, by and through her attorney, and hereby moves this Court for an Order granting this Defendant leave to amend her Answer and Counterclaim, as set forth in the proposed Amended Answer and Counterclaim attached hereto and incorporated by reference herein as [Exhibit A].

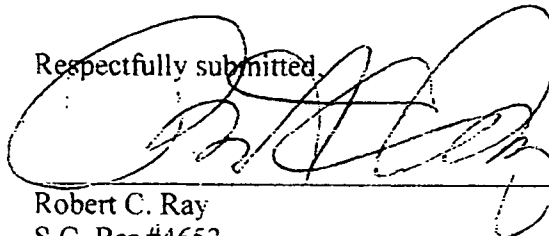
1. Plaintiff, Wells Fargo Bank, N.A (hereinafter "Plaintiff") filed a foreclosure Complaint on April 16, 2010.
2. Defendant Delores Prescott (hereinafter "Prescott") acting *pro se* answered the Complaint herself on May 18, 2010.
3. On March 28, 2011 Prescott went into Chapter 13 Bankruptcy, thereby automatically staying the foreclosure action.
4. On March 14, 2013, Prescott employed Robert C. Ray of the Greenville Bar. On that same date, counsel filed a Notice of Appearance and Substitution of Counsel.
5. Soon after Prescott hired counsel, Plaintiff changed its counsel to Womble, Carlyle, Sandridge & Rice of Greenville, S.C. and representatives of the law firm contacted Prescott's counsel.
6. Prescott's attorney has been negotiating Prescott's Amended Answer and Counterclaim with Plaintiff's new attorney since April 2, 2013.

7. Prescott seeks leave of the Court to file her Amended Answer and Counterclaim, a copy of which is attached.
8. The basis of Prescott's plea to the Court is newly discovered facts, equity and the fact that justice will not be done unless the Court can hear her Amended Answer and Counterclaim.
9. Because discovery remains open, and no trial date has yet been scheduled, the Plaintiff will not be prejudiced by Prescott's filing an amended answer.
10. Counsel for Prescott has requested the Plaintiff to consent to the Amended Answer and Counterclaim, but the Plaintiff refused to do so.

WHEREFORE, counsel for Defendant Prescott, respectfully requests that the Court grant the Defendant's motion for leave to amend and to allow the Defendant to amend her answer to assert the newly discovered issues and for such other further relief in favor of the Defendant as the Court deems just and appropriate.

By:

Respectfully submitted,



Robert C. Ray
S.C. Bar #4653
Attorney for Defendant, Delores Prescott
306A Mills Avenue
Greenville SC 29605
Office: 864-233-4555
Fax: 864-232-9730

Greenville, SC
September 20, 2013

[Attachment A]

Amended Answer and Counterclaim

September 20, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	2010-CP-43-0823
	)	
	)	
	)	AMENDED ANSWER and
	)	COUNTERCLAIM
Wells Fargo Bank, N.A.	)	
	)	(NON-JURY TRIAL)
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Delores Prescott and Wells Fargo	)	
Financial Bank (SD)	)	
Defendants.	)	

TO: Bryan L. Campbell, Esq., Suzanne E. Brown, Esq., Jason L. Branham, Esq., Chad Burgess, Esq., J. Marshall Swails, Esq., Sarah B. Oliver, Esq., J. Martin Page, Esq., Brook Dangerfield, Esq., Marc S. Asbill, Esq., January N. Taylor, Esq., Travis E. Menk, Esq., and Mark A. Pearson, Esq., Brock & Scott, PLLC, Attorneys for Plaintiff:

Defendant, Delores Prescott, is a single female. For the purpose of this Answer and Counterclaim she will hereinafter be referred to as "Prescott". The Plaintiff, Wells Fargo Bank, N.A., upon information and belief, is a corporation duly authorized to do business, and doing business, in the State of South Carolina. The Plaintiff will hereinafter be referred to as "Wells".

Subsequent to the time Prescott filed her Answer, she has discovered new information she was unaware of when she filed her Answer. She seeks the Court's permission to amend her original Answer to include these pertinent facts and Exhibits.

Until March 14, 2013, Prescott acted *pro se* in regard to her Answer of the Complaint. On that date, Prescott employed Robert C. Ray of the Greenville Bar to represent her. The following is the Amended Answer and Counterclaim of Prescott after she obtained counsel.

FOR A FIRST DEFENSE

1. Each and every allegation of the Complaint not hereinafter specifically, admitted, modified or explained is denied and strict proof demanded thereof.
2. Paragraphs 1, 2, 3, and 4 of the Complaint are admitted upon information and belief.
3. As to the allegations of Paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 14 and 15 and Prescott is without sufficient knowledge or information to form a belief as to the truth of the allegations of these paragraphs and, therefore, they are denied.
4. Further answering, until determination by the Court of the rights, duties and obligations of all herein, Prescott should not be required to make payments on a Note and Mortgage as to which it remains to be determined whether they are enforceable and to what extent.

FOR A SECOND DEFENSE (Unclean Hands)

5. Each and every allegation contained in the foregoing paragraphs is repeated as if fully re-alleged herein to the extent consistent with this defense.
6. Plaintiff's Complaint is barred by the doctrine of unclean hands.

FOR A THIRD DEFENSE (Duress and Fraud)

7. Each and every allegation contained in the foregoing paragraphs is repeated as if fully re-alleged herein to the extent consistent with this defense.
8. Plaintiff's Complaint is barred on the grounds that the alleged note and mortgage at issue are void because they were obtained by duress or fraud.

FOR A FOURTH DEFENSE
(Fraud and Misrepresentation)

9. Each and every allegation contained in the foregoing paragraphs is repeated as if fully re-alleged herein to the extent consistent with this defense.
10. Plaintiff's Complaint is barred on the ground that the alleged note and mortgage at issue are void due to the Plaintiff's fraud and misrepresentation.

FOR A FIFTH DEFENSE
(Illegality)

11. Each and every allegation contained in the foregoing paragraphs is repeated as if fully re-alleged herein to the extent consistent with this defense.
12. The agreements upon which Plaintiff bases some or all of its causes of action are illegal and/or unenforceable under South Carolina law and public policy.

FOR A SIXTH DEFENSE
(*In Pari Delicto*)

13. Each and every allegation contained in the foregoing paragraphs is repeated as if fully re-alleged herein to the extent consistent with this defense.
14. Plaintiff's claims are barred, in whole or in part, by the doctrine of *in pari delicto*, which provides that a Plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing.

STATEMENT OF FACTS

15. On June 27, 2001, Prescott entered into a construction loan for her new home with Carolina Mortgage (See Exhibit "A"). The construction loan was converted to a permanent loan when Prescott entered into a mortgage with Cardinal Mortgage on August 31, 2001 (See Exhibit "B"). Cardinal Mortgage sold Prescott's loan to

Principal Mortgage on September 17, 2001 (See Exhibit "C"). In late Spring, 2003, Prescott received an unsolicited call from Watermark Financial Partners, Inc., offering to refinance Prescott's mortgage and take it from an APR of 7.5% to 6.5%.

16. On June 24, 2003, a gentleman came to Prescott's house in Rembert, S.C. (Sumter County). The gentleman said he was there to execute the refinance of Prescott's mortgage. The gentleman never represented himself to be an attorney. At the time, Prescott did not have an attorney. The gentleman had Prescott's friend, Curtis Deloatche, witness Prescott's signature. The gentleman did not sign or seal the document as a notary while he was there. Since this was a refinance, Prescott had 72 hours during which she could rescind the transaction. Because she felt uneasy about the conduct of the gentleman, Prescott called Watermark and cancelled the transaction. This would have invalidated the subject mortgage. However, the subject mortgage (See Exhibit "D") was recorded on July 1, 2003, in Mortgage Book 896 at Page 70 which memorialized the transaction. A number of things were wrong with this document:

- (a) The document was recorded as a first mortgage and not a refinance. Additionally, Prescott is informed and believes the initials on the document are not her initials;
- (b) The document shows the mortgagee is MERS, and not Watermark;
- (c) The document ignores the fact Prescott's prior version of this mortgage (then with Principal Mortgage) had been assigned to MERS on September 17, 2001 (not recorded until May 14, 2002) (See

Exhibit "C"). The bylaws of MERS (described further in this Counterclaim) do not give MERS any power to transfer any mortgage. The only way a mortgage in MERS can be moved out of MERS is if it is paid off;

- (d) The person who notarized the mortgage ("Michael H. Warren") did not announce himself as an attorney. As a matter of fact he did not sign or seal the document with his notary seal when the documents were signed. When the document was filed in Sumter County, the notary crossed out Sumter County and wrote in York County (see **Exhibit "D")**. Also, the "Return to Address" had been changed from Watermark Financial Partners, Inc. to General American Corporation First Mortgage Recording Department (see **Exhibit "E")**. Because the Rules of Professional Ethics in South Carolina require disclosure by an attorney, it must be assumed the gentleman was not an attorney. The lack of the presence of an attorney violated the South Carolina law regarding the presence of attorneys at real estate closings. The law is enunciated in *State of South Carolina v. Buyers Service Company*, 357 S.E. 2d 15 (S. C. 1986). In that opinion, the Court said: "[w]e are convinced that real estate and mortgage loan closings should be conducted only under the supervision of attorneys, who have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of this court. Again, protection of the public is of paramount concern."

- (e) Prescott rescinded the transaction and her \$496.93 check for her down payment was withdrawn. Later, when Prescott was in her first bankruptcy, no mortgage company made a claim for either the check or the mortgage; and
- (f) The mortgage company altered the mortgage after the closing and the County in which the document was witnessed was altered to York County. The "Return To Address" on the first page of the mortgage was altered to General American Corporation First Mortgage Department without Prescott's knowledge or permission; .
It is unknown how Wells became the owner of Prescott's mortgage.
Once again, the mortgage was in MERS and there is absolutely no way MERS could transfer the mortgage to Wells.
- (g) On March 21, 2003, Prescott opened a line of credit with Wells on her house in the amount of \$16,000. This amount was paid off by Prescott on August 10, 2009. In the complaint, Wells claims Prescott owes a mortgage (the line of credit) of \$200,000 to Wells. Prescott is informed and believes Wells used a copy of Prescott's signature to create the document (See Exhibit "F") showing Prescott owes Wells \$200,000 and signed the documents on March 31, 2003, when in fact, the \$16,000 loan transaction took place on March 21, 2003 (see Exhibit "G").

APPLICABLE LAW

17. Although the assignment by MERS purports to convey the "Mortgage, together with the Note executed" by Prescott to Wells, MERS' contractual relationship

with lenders is such that the lender retains the note, the debt thereby represented, and the right to collect the debt.

18. The Member, at its own expense, shall promptly, or as soon as practicable, cause MERS to appear in the appropriate public records as the mortgagee of record with respect to each mortgage loan that the Member registers on the MERS System. MERS shall serve as mortgagee of record with respect to all such mortgage loans solely as a nominee, in an administrative capacity, for the beneficial owner or owners thereof from time to time. MERS shall have no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans. [emphasis added]¹

In the case just referred to, *Mortgage Electronic Registration Systems, Inc. v. Nebraska Department of Banking and Finance*, *infra*, which MERS initiated to avoid having to pay fees levied in the State of Nebraska against mortgage bankers, MERS represented to the Court and/or the Court found:

MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.

MERS . . . does not own the promissory notes secured by the mortgages and has no right to payments made on the notes. MERS explains that it merely

¹ *Mortgage Electronic Registration Systems, Inc. v. Nebraska Department of Banking and Finance*, 270 Neb. 529, 704 N.W. 2d 784, 787.

“immobilizes the mortgage lien while transfers of the promissory notes and servicing rights continue to occur.”[emphasis added]

To execute a MERS Mortgage, the borrower conveys the mortgage to MERS, who is acting as a contractual nominee. MERS becomes the recorded grantee; however, **the lender retains the note and servicing right**. The lender can then sell that note and servicing rights on the market and MERS records each transaction electronically on its files. When the mortgage loan is repaid, MERS, as agent grantor, conveys the property to the borrower.... MERS does not take applications, underwrite loans, and make decisions on whether to extend credit, collect mortgage payments, hold escrows for taxes and insurance, or provide any loan servicing functions whatsoever. MERS merely tracks the ownership of the lien and is paid for its services through membership fees charged to its members.

MERS does not acquire “any loan or extension of credit secured by a lien on real property.” MERS does not itself extend credit or acquire rights to receive payments on mortgage loans. Rather, the *lenders retain the promissory notes* and servicing rights to the mortgage, while **MERS acquires legal title to the mortgage for recordation purposes**. MERS serves as legal title holder *in a nominee capacity*, permitting lenders to sell their interests in the notes and servicing rights to investors without recording each transaction. But, simply stated, **MERS HAS NO INDEPENDENT RIGHT TO COLLECT ON ANY DEBT BECAUSE MERS ITSELF HAS NOT EXTENDED CREDIT, AND NONE OF THE MORTGAGE DEBTORS OWE MERS ANY MONEY.**[emphasis added]

19. MERS initiated the Nebraska litigation and prevailed in it. Therefore, it is judicially estopped to disavow the positions it advanced during the litigation process there or to avoid the finds and conclusions articulated by the Nebraska Court.²²³
20. The representation by Suzanne E. Brown, VP of MERS, assigning Prescott’s Note and Mortgage to WELLS “**for valuable consideration**” is diametrically opposed to the way MERS operates, as described in the Nebraska case. In fact, Suzanne E. Brown is an attorney with the law firm of Brock and Scott hired by the Plaintiff

² *State v. McCull*, 364 S.C. 205, 612 S.E. 2d 453 (S.C. App., 2005); *Hawkins v. Bruno Yacht Sales, Inc.* 353 S.C. 31, 577 S.E. 2d 202 (S.C., 2003).

(see Exhibits "H"). Upon information and belief [Exhibit H] shows the signature of Suzanne E. Brown on the Foreclosure Complaint. Her signature is also on the Assignment of Mortgage to Wells as VP of MERS which is dated April 15, 2010. The Assignment of Mortgage was not filed with Sumter County until May 17, 2010. Prescott's answer was due on May 17, 2010. Prescott had no way of knowing about the document when she filed her answer. The document was purported to be a genuine "Assignment of Mortgage" and presented to the Court as such. Because the document was false, Wells did not have the necessary documentation to foreclose.

21. As evidenced by the text of the Nebraska decision, MERS does not acquire the notes or the debts thereby represented for, or without, consideration. It has neither the right nor the obligation to service the debts represented by the notes and/or secured by the mortgages. As its sole source of revenue "MERS is compensated for its services through fees charged to participating MERS members."³
22. Furthermore, the principal/agent (nominee) relationship between its members and MERS is such that the "close-connectedness doctrine" would prevent MERS from qualifying as a holder in a due course without notice, even if it did acquire some ownership interest in the debt.⁴

³ *Mortgage Electronic Registration Systems, Inc. v. Nebraska Department of Banking and Finance*, 270 Neb. 529, 704 N.W. 2d 784, 786.

⁴ *Midfirst Bank, SSB v. C.W. Haynes & Co., Inc.* 893 F.Supp. 1304 (1994). *1318-1319 (D.S.C., 1994): "A transferee does not take an instrument in good faith when the transferee is so closely connected with the transferor that the transferee may be charged with knowledge of an infirmity in the underlying transaction."

23. Although there is implicit in the assignment a suggestion that the process through which MERS "acquires" a mortgage qualifies it as a holder in due course and protects it from defects in transactions which preceded the acquisition, the assignment does not state whether MERS even sees (much less examines for impropriety) the mortgage, the note, or any of the loan documents. However, the MERS method of operation, as reported in its contracts with its "members" and as found by the Nebraska Court, would indicate that it doesn't. Certainly, there is no reason for it to do so, since it has nothing invested in the transaction and will receive payment from its members irrespective of any defect in the transaction. Consequently, any implication to the contrary in the assignment would be disingenuous if not an outright misrepresentation.

**FOR A SEVENTH DEFENSE AND BY WAY OF
COUNTERCLAIM**

(Violation of the South Carolina
Consumer Protection Code, S.C. Code Ann. §37-10-102)

24. Each and every allegation contained in the foregoing paragraphs is repeated as if fully re-alleged herein to the extent consistent herewith.
25. In regard to the refinance, the lenders made no effort whatsoever to determine Prescott's attorney preference in the transaction referred to in the Complaint. Instead, Watermark and Wells set up a closing without properly informing Prescott of her right to choose or providing her any opportunity to give them her preference.
26. The failure to ascertain the Prescott' preference as to legal counsel prior to closing is a violation of South Carolina Code §37-10-102.
-

27. Prescott has been damaged by the failure to ascertain their preference as to legal counsel prior to closing in an amount of actual damages to be determined, plus the total amount of the loan finance charge, double the amount of the excess loan finance charge or other charges or fees paid by the Prescott, and statutory damages.
28. Upon information and belief, this violation of the South Carolina Consumer Protection Code by Defendants entitles the Prescott to not less than one thousand five hundred (\$1,500.00) dollars and not more than seven thousand five hundred (\$7,500.00) dollars, and attorney fees for each violation.

FOR AN EIGHTH DEFENSE AND BY WAY OF COUNTERCLAIM

(Violation of the South Carolina Consumer Protection Code, as
Unconscionable Conduct
S.C. Code Ann. §37-10-108)

29. Each and every allegation contained in the foregoing paragraphs is repeated as if fully re-alleged herein to the extent consistent herewith.
30. If the court finds as a matter of law that Prescott's transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct, the Court may refuse to enforce the agreement, or part of the agreement, or transaction that the court determines to have been unconscionable at the time it was made, or enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result; or rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement.

31. If the Court finds Plaintiff's conduct to be unconscionable, the Court's award may be: (a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge; (b) not more than double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party; and (c) attorney's fees and costs.

FOR A NINTH DEFENSE AND BY WAY OF COUNTERCLAIM
(Breach of Fiduciary Duty, Negligence)

32. Each and every allegation contained in the foregoing paragraphs is repeated as if fully re-alleged herein to the extent consistent herewith.
33. Wells, then known as Wells Fargo Financial Bank (SD), acted as an agent of Prescott when she took out a line of credit in the amount of \$16,000.
34. As Prescott's agent, Wells owed Prescott a duty of fidelity and other fiduciary duties of good faith and fair dealing.
35. Wells breached such duties to Prescott and acted in a negligent, grossly negligent, reckless, willful, and wanton manner and in a manner characterized by disloyalty, bad faith, and unfair dealing in one or more of the following particulars:
- (a) Prescott entered into an "OPEN END REAL ESTATE MORTGAGE" for a line of credit in the amount of \$16,000.00 with Wells' predecessor, Wells Fargo Financial Bank (SD), on March 21, 2003. Within a reasonable time thereafter, Prescott paid off the line of credit and closed the account.
- (b) When the Complaint was filed on April 16, 2010, Wells alleged not only that the line of credit was still open, but incredibly now alleged the amount owed was \$200,000. To back up its story, Wells referred to a document allegedly signed by

Prescott on March 31, 2003 and recorded April 11, 2003, in the amount of \$200,000.00 (See Exhibit "F"). Upon information and belief, Prescott not only did not sign the document in "Exhibit "F", but had never seen the document until it appeared when the Complaint was filed. At the time, Prescott's house was not worth \$80,000 and the house was encumbered with the mortgage. Prescott signed documents which pertained to the "Open End Real Estate on March 21, 2003. Prescott had the Right to Rescind until March 25, 2003 (see Exhibit "G") which proves in fact, the contract was open on March 21, 2003 and not March 31, 2003.

36. Wells was acting as Prescott's agent when it offered her a line of credit in the amount of \$16,000. Thereafter, Wells filed for record an "OPEN END REAL ESTATE MORTGAGE" but in the amount of \$200,000, rather than \$16,000. Wells knew, or should have known, this mortgage had a falsified price; did not contain Prescott's real signature and was not what she bargained for.
37. As a direct and proximate result of the actions and breaches of duties by Wells, Prescott suffered actual damages in an amount to be determined.
38. The conduct of Wells was sufficiently malicious, willful, wanton, reckless, grossly negligent, and/or outrageous to entitle Prescott to punitive damages in an amount to be determined by the finder of fact.

FOR A TENTH DEFENSE AND BY WAY OF COUNTERCLAIM
(LACK OF STANDING)

39. Each and every allegation contained in the foregoing paragraphs is repeated as if fully re-alleged herein to the extent consistent with these pleadings.
40. Prescott is informed and believes Wells does not have standing to bring this foreclosure action. To have standing, one must be a real party in interest.

41. Wells could not be assigned Prescott's note because:
- (a) Prescott rescinded the refinance and the mortgage would have reverted to another mortgagee;
 - (b) the refinance was invalid because, upon information and belief, it was not conducted by an attorney; and
 - (c) MERS cannot assign a mortgage in compliance with its own rules of operation.
 - (d) A "fruit of the poison tree" analogy applies: The assignment of the mortgage by an attorney from Brock and Scott saying she is "VP of MERS" is illegal unless she can prove she was a VP at MERS at the time of the transfer, but it still doesn't matter even if she was a MERS VP because mortgages in MERS cannot be transferred out without paying the mortgage off. Therefore, Wells is not a holder-in-due-course of this mortgage.
42. Additionally, if a homeowner contests a foreclosure, on either procedural or substantive grounds, the case is litigated as like a regular civil action. In order for the foreclosing party to prevail, however, it must be a holder-in-due-course. And, to be a holder-in-due-course, the foreclosing party must: (1) possess the actual note; (2) have given value for the note and taken the note in good faith; and (3) have no notice of any defect in the note, including that the note is in default. This means that if the note were transferred to the foreclosing party subsequent to the default, the foreclosing is not a holder-in-due-course.⁵ Federal Home Agency Office of Inspector General, *An Overview of the Home Foreclosure Process* (See Page 12).

43. Based on the foregoing, Prescott believes the Court should find Well's mortgage foreclosure invalid and, therefore, unenforceable; and, as a consequence the foreclosure should be dismissed. And, in the event the Court dismisses Well's mortgage foreclosure, Prescott would ask the Court to find the actions by Wells unconscionable and apply the applicable law.
44. Prescott has been damaged in an amount of actual damages to be determined, plus statutory damages, and attorney's fees and costs.

FOR A ELEVENTH DEFENSE AND BY WAY OF COUNTERCLAIM
(Unfair Trade Practices)

45. Each and every allegation contained in the foregoing paragraphs is repeated as if fully re-alleged herein to the extent consistent herewith.
46. The activities of Wells constitutes "trade or commerce" as defined by South Carolina Code § 39-5-10, et.seq., (amended).
47. The actions of Wells, above-described, constitutes unfair and deceptive acts and practices in the conduct of trade and commerce, as prohibited by the South Carolina Unfair Trade Practices Act, §39-5-10 et.seq. and are knowing and willful violations thereof.
48. Prescott would further show that the actions of Wells herein that violates the Mortgage Loan Broker's Act, as set forth herein below, constitute per se violations of the South Carolina Unfair Trade Practices Act. These actions are not permitted under any United States or South Carolina laws or regulations.
49. The actions of Wells have a real and substantial potential for repetition and is a threat to the public interest.
-

50. Prescott has suffered an ascertainable loss due to the unlawful actions of Wells and is entitled, under § 39-5-140, to recover actual damages in an amount to be proven at trial, treble said actual damages for Wells knowing and willful behavior, and an award of costs.

WHEREFORE, having fully answered Wells' Complaint, and having set forth defenses and counterclaims, Prescott respectfully requests:

- A. That Plaintiff's Complaint be dismissed with costs; and
- B. Such other and further relief as the Court deems just and proper.

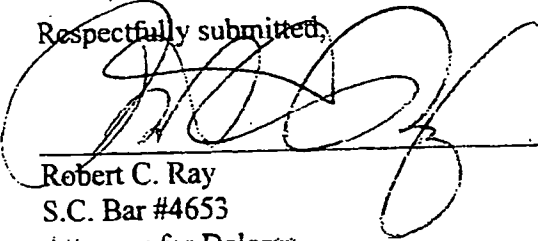
In addition, without waiving the foregoing request for relief Prescott prays for judgment under the Counterclaims, as follows:

- A. For actual damages according to proof;
- B. For compensatory damages as permitted by law;
- C. For consequential damages as permitted by law;
- D. For statutory damages as permitted by law;
- E. For punitive damages as permitted by law;
- F. For treble actual damages;
- G. For rescission;
- H. For equitable relief, including restitution;
- I. For interest as permitted by law;
- J. For Declaratory Relief;
- K. For costs; and
- L. For such other relief as is just and proper.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

By:



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Greenville, SC
September 20, 2013.

**Memorandum in Support of Defendant's Motion to Amend Answer and
Counterclaim**

November 19, 2013

RECORDED

STATE OF SOUTH CAROLINA
2013 NOV 27 PM 2:31

COUNTY OF SUMTER
JAMES C. CAMPBELL
CLERK OF COURT

Wells Fargo Bank, N.A. SUMTER COUNTY, S.C.)

IN THE COURT OF COMMON PLEAS

2010-CP-43-0823

MEMORANDUM IN SUPPORT
OF DEFENDANT'S MOTION TO
AMEND ANSWER AND
COUNTERCLAIM

Plaintiff,)

vs)

Delores Prescott and Wells Fargo)
Financial Bank (SD))

Defendants.)

Defendant Delores Prescott ("Defendant" or "Prescott") through her attorney, Robert C. Ray respectfully submits this memorandum in support of her Motion to Amend Defendant's Answer and assert Counterclaims and Crossclaims. Counsel for Prescott has requested Plaintiff to consent to the Amended Answer and Counterclaim, but the Plaintiff refused to do so.

The basis of Prescott's plea to the Court is newly discovered facts, equity and the fact that justice will not be done unless the Court can hear her Amended Answer and Counterclaim. Defendant will show unto this Court, accordingly, because discovery remains open, and no trial date has yet been scheduled, permitting the Defendant to amend her Answer, the Plaintiff will not be prejudiced.

BACKGROUND

In June 24, 2003 ("Prescott") made and executed to Watermark Financial Partners, Inc., (hereinafter "Watermark") the Subject Mortgage and Note, for the principal sum of \$81,301.00. The subject Mortgage (See Exhibit "A") was recorded in Mortgage Book 896 at Page 70, in the Office of Register of Deeds for Sumter County,

South Carolina, on July 1, 2003. Later, the subject Mortgage was assigned to ("Wells") assignee, by (MERS) assignor, on or about April 15, 2010. Upon information and belief, no public record exists showing Watermark owned Prescott's mortgage. Upon information and belief, Watermark was not authorized to do business in South Carolina at the time.

Prescott's refinance of her mortgage on June 24, 2003 was recorded as a first mortgage and not a refinance. The document shows the mortgagee is MERS, and not Watermark. The bylaws of MERS (See Prescott's proposed Amended Answer and Counterclaim) do not give MERS any power to transfer the mortgage. The only way a mortgage in MERS can be moved out of MERS is if it is paid off. The Member, at its own expense, shall promptly, or as soon as practicable, cause MERS to appear in the appropriate public records as the mortgagee of record. However, in the subject case, MERS appears as nominee and not mortgagee.

"Wells" initiated the foreclosure action on or about April 16, 2010. Defendant, acting *pro se*, answered the Foreclosure Complaint on May 18, 2010.

On March 28, 2011, Prescott filed a Chapter 13 Bankruptcy petition, thereby automatically staying the foreclosure action. On September 25, 201³~~3~~, the Bankruptcy Court lifted the Stay. On March 14, 2013, Prescott employed Robert C. Ray of the Greenville Bar. On that same date, counsel filed a Notice of Appearance and Substitution of Counsel.

The only question before the Court at this time is whether Prescott can amend her answer to the foreclosure by Wells. There are two important issues in this regard. The first issue is, in light of newly discovered evidence, counsel will amend the answer and counterclaim. The second point concerns the fact that Prescott has not been able to conduct discovery. When counsel for Prescott received Plaintiff's Memorandum, was it

learned the Plaintiff was claiming Wells Fargo Financial Bank, (SD) was a separate entity from Wells Fargo Bank, N.A. As a result of this discovery, Prescott may ask leave of Court to add a Cross Claim.

Counsel for the Plaintiff is attempting to litigate the case as a test of whether Prescott has a right to amend her answer.

I. Plaintiff argues Defendant's counterclaims for Breach of the South Carolina Consumer Protection Code are barred by the operation of the applicable statute of limitation.

According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. Babb v. Watson, 130 S. Ct. 121 (unpublished opinion) 2009. Prescott first learned of the Plaintiff's wrongful behavior in December, 2012.

In order to amend and file counterclaims, the injured party must act with reasonable diligence. Hedgepath v. AT&T, 348 S.C. 340, 355-56, 559 S.E.2d 327, 336 (2001) (quoting Dean v. Ruscon, 321 S.C. 360, 468 S.E.2d 645 (1996)). "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994). The fact that an injured party may not comprehend the full extent of the damage is immaterial. Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996).

In State ex rel. Condon v. City of Columbia, 339 S.C. 8, 19, 528 S.E.2d 408, 414 (2000), our Supreme Court instructed:

Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights... . Babb v. Watson, *supra*.

Prescott has not been guilty of 'sleeping on her rights'.

"The central requirement here is that the party defending against the new claim have sufficient notice of it, *i.e.*, 'the new claim must be 'logically related' to the *matters originally pleaded* so that the defendant is not prejudiced by the new claim asserted after the statute of limitations has expired.'" Whitfield Constr. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 223, 525 S.E.2d 888, 897 (Ct. App. 1999) (quoting James F. Flanagan, South Carolina Civil Procedure 127 (2d ed.1996)) (emphasis in original).

In federal practice, the factors to determine whether or not a claim arose out of the same conduct, transaction, or occurrence set forth in the original pleading include: (1) whether the party defending against the new claim had notice of it; (2) whether the party seeking to add the new claim will rely on the same kind of evidence offered in support of the original claim to prove the new claim; and (3) whether unfair surprise to the defending party would result if the amendment were to relate back. Id. (citing James Wm. Moore, Moore's Federal Practice § 15.19[2] (Daniel R. Coquillete, et. al., eds., 3d 1999)). Babb v. Watson, *supra*.

Plaintiff cites Matrix Fin. Serv. Corp. v. Frazer, 394 S.C. 134, alleging the affirmative defense of unclean hands does not apply because the instant facts (an attorney was not present at closing) occurred prior to Matrix. Plaintiff alleges Matrix stands for the proposition that only after this case was decided could Prescott assert the defense of 'unclean hands to void the mortgage or prevent Wells from enforcing the mortgage'. Prescott disagrees, citing Buyers Serv., 292 S.C. at 430, 357 S.E. 2d 17.

All real estate and mortgage loan closings must be supervised by an attorney. Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2003); State v. Buyers Serv. Co., 292 S.C. 426, 357 S.E.2d 15 (1987). Performing a title search, preparing title and loan documents, and closing a loan without the supervision of an attorney constitutes the unauthorized practice of law. Buyers Serv., 292 S.C. at 430-34, 357 S.E.2d at 17-19.

In Wachovia Bank v. Coffey, 398 S.C. 76, 698 S.E.2d 244 (Ct. App. 2010), Wachovia closed a home equity loan without the supervision of an attorney and later instituted foreclosure proceedings. Our court of appeals held that Wachovia, having committed the unauthorized practice of law in closing the loan without attorney supervision, came to the court with unclean hands and thus was barred from seeking equitable relief. In so holding, the court of appeals said:

The unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also to the public at large for the reason so cogently stated in Buyers:

The reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is not for the economic protection of the legal profession. Rather, it is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law.

Coffey, 389 S.C. at 76, 698 S.E.2d at 248 (citing State v. Buyers Serv. Co., 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987)).

II. Plaintiff argues Prescott is legally precluded from recovering damages on her claims for Breach of Fiduciary Duty and Negligence.

The Plaintiff's actions caused Prescott to go into bankruptcy twice. She obtained a 2nd mortgage with Wells Fargo Financial Bank (SD) in the amount of \$16,000 on March 21, 2003. Shortly thereafter, she was approached by someone, not an attorney, saying he was with Watermark Financial. He told Prescott she could refinance her mortgage. Papers were filled out in her house without an attorney present. Prescott chose to rescind the transaction within 72 hours. However, Watermark ignored her request and immediately assigned her loan to MERS on July 1, 2003. Prescott did not realize what had taken place

Additionally, upon information and belief, the Mortgage by which Plaintiff brought this foreclosure action was illegally transferred to the Plaintiff on April 15, 2010. Prescott's Mortgage had been placed into MERS by Watermark on July 1, 2003. (See **Exhibit B**) According to MER'S by-laws, the only way to take a mortgage out of MERS is to pay it off. Prescott's mortgage was not paid off. Incredibly, a member of the law firm of Brock and Scott, by the name of Suzanne E. Brown, appears on the Assignment out of MERS as the Vice President of MERS. At the very least, this is an incredible conflict of interest and illegal.

"The timing feature of section 37-10-102 imposes a **bright-line** approach which is manifestly at odds with the notion of "substantial compliance." To permit a construction of section 37-10-102 as sanctioning the lender's furnishing the borrower with the attorney preference disclosure after the application was completed would undermine the legislative purpose "**to protect borrowers.**" *Davis*, 326 S.C. at 86, 484 S.E.2d at 472; *see also McClanahan v. Richland County Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute."). [emphasis added], *King v. American General Finance, Inc.*, 384 S.C. 539, 683 S.E. 2d 478.

Plaintiff argues Prescott alleges the 2nd mortgage "contained incorrect information when it was filed" and Prescott was on notice because it was public record. Plaintiff also argues Prescott's negligence claim is barred because the 2nd mortgage was either paid off, or involved a different entity (Wells Fargo Financial Bank) and, therefore, not the Plaintiffs responsibility. Wells Fargo Financial Bank is in the Wells Fargo company "umbrella" and the servicer for the loans of Wells Fargo Bank, N.A.

Upon information and belief, the Open-End Real Estate Mortgage recorded in Sumter County, Vol 884, page 138, April 11, 2003, for \$200,000 is a forgery. (See **Exhibit C**) Prescott first learned of this bogus mortgage in December, 2012. Plaintiff argues Prescott cannot claim ignorance of its existence, nor its contents, because Prescott

was on constructive notice of this public filing. This bogus mortgage kept Prescott from obtaining employment (Prescott had been laid off) and good credit for ten (10) years. Prescott was forced to relocate to New Jersey to find gainful employment in her field.

III. Prescott is legally precluded from recovering damages on her claim for Violation of the S.C. UTPA.

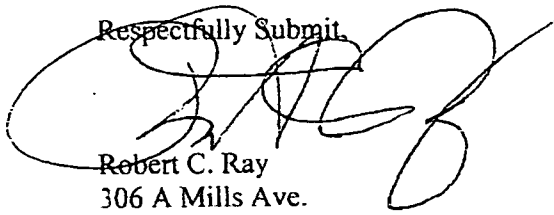
Counsel for Plaintiff argues no recovery can be had under the S.C. UTPA. However, Counsel ignores Prescott's Counterclaim that the Plaintiff (and its subsidiary) are guilty of unconscionable conduct.

S.C. Code § 37-10-105 (C) says:

If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct, the court may, in an action other than a class action: ...[penalize the guilty party].

It is important to remember that counsel for Prescott has not been able to use legal discovery. The Plaintiff is holding all the cards. Prescott would respectfully request the Court to grant her leave to amend and file Counterclaims and Cross Claims as the evidence allows.

Respectfully Submit,



Robert C. Ray
306 A Mills Ave.
Greenville, S.C. 29605
(864) 233-4555
(864) 232-9730 (fax)
S.C. Bar #4653

Greenville, SC
November, 19, 2013

Defendant's Delores Prescott's Motion to Dismiss

January 3, 2014

COUNTY OF SUMTER 2014 JAN -6 PM 3:41 2010-CP-43-0823

Wells Fargo Bank, N.A.

Wells Fargo Bank, N.A.

Plaintiff,

VS ·

Delores Prescott and Wells Fargo
Financial Bank (SD)

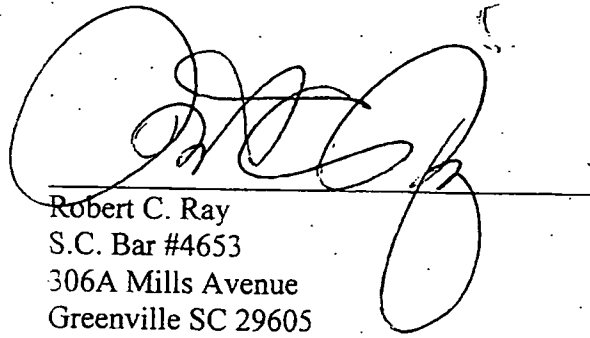
Defendants.

**TO: STERLING S. LANEY, III AND BROOKS A. HASELDEN, ESQ., WOMBLE
CARLYLE SANDRIDGE & RICE, LLP, ATTORNEYS FOR PLAINTIFF:**

YOU WILL PLEASE TAKE NOTICE that the Defendant, Delores Prescott, (hereinafter "Prescott"), by and through her undersigned counsel, will move before the Honorable Richard L. Booth, Presiding Master In Equity Judge for Sumter County, South Carolina, as soon as counsel may be heard for an Order dismissing Prescott from Plaintiff's, Wells Fargo Bank, N.A (hereinafter "Wells"), foreclosure action for failure to state facts sufficient to constitute a cause of action against Defendant Prescott pursuant to Rule 12(b)(6) SCRPC.

This motion is based upon the allegations set forth in Plaintiff "Wells" Complaint and Prescott's Argument which will be forthcoming.

[SIGNATURE PAGE FOLLOWS]



Robert C. Ray
S.C. Bar #4653
306A Mills Avenue
Greenville SC 29605
Office: 864-233-4555
Fax: 864-232-9730
E-mail: bobraylaw@gmail.com
Attorney for Delores Prescott

Greenville, SC
January 3, 2014.

Memorandum In Support of Defendant Delores Prescott's

Motion to Dismiss

January 24, 2014

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Wells Fargo Bank, N.A.,

Plaintiff,

Vs.

Delores Prescott and Wells Fargo

Financial Bank (SD),

Defendants.

RECORDED MASTER IN EQUITY COURT

2014 JAN 30 PM 12:02 2010-CP-43-0823

JAMES C. CAMPBELL

CLERK OF COURT

SUMTER COUNTY

MEMORANDUM IN SUPPORT OF

) DEFENDANT DELORES PRESCOTT'S

) MOTION TO DISMISS

**TO: STERLING S. LANEY, III AND BROOKS A. HASELDEN, ESQ., WOMBLE
CARLYLE SANDRIDGE & RICE, LLP, ATTORNEYS FOR PLAINTIFF:**

Defendant, Delores Prescott ("Prescott"), by her undersigned attorney and pursuant to SCRCP 12(b) (6), submits this Memorandum in support of her Motion to Dismiss Plaintiff's Complaint. For the reasons set forth below, it is respectfully urged that the Motion to Dismiss be granted.

BACKGROUND

1. On September 5, 2001, Delores Prescott (hereinafter referred to as "Prescott") had a permanent residential mortgage with Principal Mortgage on her residence in Rembert, Sumter County, South Carolina. Prescott's original mortgagee had been Cardinal Mortgage but Cardinal sold the mortgage to Principal.
2. In the spring of 2003, Prescott received an unsolicited call from Watermark Financial Partners, Inc., (hereinafter referred to as "Watermark") offering to refinance Prescott's mortgage at a lower rate. On June 24, 2003, a gentleman, purporting to represent Watermark, came to Prescott's home in Rembert, Sumter County, South Carolina,

3. Believing she was refinancing her Principal Mortgage loan, Prescott executed a mortgage (See Exhibit "A" Mortgage to Watermark) and note on June 24, 2003 with Watermark Financial Partners, Inc. (hereinafter "Watermark") for a principal sum of \$81,301.00. No one else was present when the paper work was signed except for Prescott's boyfriend. After the gentleman from Watermark left, Prescott read the mortgage's fine print. On the face of Watermark's documents, it stated Watermark was not licensed to do business in South Carolina (See Exhibit "B" Agreement, [pg 3]). Prescott rescinded the agreement to Watermark within 72 hours. Prescott talked to Valerie Coupe with Watermark in a phone call and told her she was mailing a rescission. Valerie Coupe acknowledged Prescott's intention to cancel the agreement made between Watermark and herself. (See Exhibit "C" Notice of Cancellation).
4. In addition to the aforesaid note, executed to Watermark on June 24, 2003, upon information and belief, officer (Kristin King) of Washington Mutual Bank, N.A. (hereinafter referred to as "Washington") signed a note to Washington from Watermark bearing Prescott's signature of the same date. (See Exhibit "D" Note to Washington, Bankr Case 11-01994-99, pps. 41-42). (Prescott has never seen the alleged note, nor signed the alleged note to Washington, until recently). There is nothing in the Sumter County Register of Deeds showing Washington as mortgagee or lender. However, Prescott subsequently received a payment book with Washington as payee.
5. An allonge, dated June 30, 2003, purports to attach to the same alleged note, dated June 24, 2003, by Prescott from Watermark to Washington which bares a photocopy of Prescott's signature. (See Exhibit "E" Allonge, Bankr Case 11-01994-99, pg. 43).
6. The subject Mortgage, executed June 24, 2003 was recorded, July 1, 2003, in Mortgage Book 896 at Page 70 of the Sumter County Register of Deeds. (See Exhibit

"F" Recorded Mortgage to Watermark) The mortgage names Watermark as the "Lender" and Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS") as the "nominee for Lender". The original note of the same day (**See Exhibit "G" Original Note**) names Watermark as the "Lender". There is no mention of MERS on the Note.

7. Upon information and belief the Mortgage recorded on July 1, 2003 and recorded in Mortgage Book 896 at Page 70 of the Sumter County Register of Deeds is not the mortgage Prescott signed in her home. The mortgage Prescott signed in her home bears:
When Recorded Mail To:

"WATERMARK FINANCIAL PARTNERS, INC., 4582 SOUTH ULSTER STREET, SUITE 300, DENVER, COLORADO 80237" Loan Number 613248830, MIN 1002033-0000019385-I (**Exhibit "A [pg 1]"**)

The recorded mortgage bears: Return To:

"General American Corporation, 300 Gulf Tower, 707 Grant St., Pittsburgh, PA. 15219, First Mortgage Recording Dept." (**Exhibit "F" [pg 1]**)

8. On April 15, 2010, Suzanne E. Brown, upon information and belief, an attorney with the law firm of Brock and Scott, (which initiated this foreclosure) executed an "Assignment of Note and Mortgage" in which she represented herself as the Vice President of MERS (assignor) purporting to assign the note and mortgage to Wells Fargo Bank, N.A. (hereinafter referred to as "Wells") (**See Exhibit "H" Assignment to Wells**).

ARGUMENT

This is a motion asking the Court to dismiss Well's foreclosure Complaint pursuant to Rule 12(b) (6). A recent South Carolina opinion which has been getting an unusual amount of national press is *Deutsche Bank National Trust Company v. Heinrich*. The Court's Order dated July 30, 2013 (**See Exhibit "I" Order**) from the Charleston County, Ninth Judicial Circuit Court of Common Pleas, (cited as *Deutsche Bank National*

Trust Company v. Heinrich, Docket No. 2011-CP-10-1060), Judge J.C. Nicholson, Jr.

states:

“filing is not the issue, but ownership of the note [is]”. ...It is clear that to have standing in ... [a] foreclosure case, Plaintiff must not only be the holder and owner of the original Note, but also the Mortgage as well. [Where] Plaintiff’s Complaint ... fails to meet.... this criteria. ...Plaintiff lacks the standing to initiate and prosecute the foreclosure, and dismissal pursuant to ... Rule 12 (b) (6) SCRCF is appropriate. The Court cited *BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 731 S.E.2d 547 (Ct. App. 2012).

Judge Nicholson’s Order cites a 1872 U. S. Supreme Court decision, *Carpenter v. Longen*, 83 U.S. 271, 21 L.Ed. 313 (1872). (See Exhibit “J”) *Carpenter*, at page 274, says:

“The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.”

The *Deutsche* ruling is based on foreclosure law from the United States Supreme Court which trumps any contrary state law which does not require the foreclosing plaintiff to own both the note and the mortgage at the time that a foreclosure complaint is filed.

In [Paragraph 6] of Plaintiff’s Complaint, Wells states:

“[o]n July 1, 2003, said Mortgage was recorded in the Sumter County Registry in Mortgage Book 896 at Page 70. Thereafter the Mortgage was assigned to the Plaintiff herein.” [Interestingly, Wells does not say when the assignment took place].

The referenced ‘assignment’ is the document (See Exhibit “H”) wherein attorney Suzanne Brown on April 15, 2010, purported to assign the mortgage and note to Wells. Attorney Brown was acting as V.P. of MERS. Wells believed the assignment would allow Wells to bring the foreclosure. The assignment doesn’t address the conflict of interest created when an attorney for Wells is also the V.P. of MERS, assigning a mortgage to Wells, so Wells could bring a foreclosure action. See, *In Re Conway*, 305 S.C. 388 (1991).

Paragraph 7 of Well's Complaint states "[t]he Mortgage evidences and secures the repayment of *money advanced by the Lender to, or on behalf of, the Mortgagor(s)* and constitutes a valid first lien". The June 24, 2003, mortgage was a refinance of the Principal mortgage loan (which Prescott rescinded). The mortgage names Watermark as the "Lender" and MERS as "Nominee". The note dated June 24, 2013, names Watermark as the "Lender" but says nothing about MERS.

Well's Complaint shows 'the devil is in the details' and why their Complaint should be dismissed.

Wells has failed to show, or even claim, that it owned both the mortgage and note on or before the foreclosure action was filed.

The simple holding is obvious and so is the reason. Merely having paperwork doesn't mean you have a legitimate claim. The Court found that the *Carpenter* case from 130 years ago stated the requirements quite plainly. The Supreme Court decision "clearly supports the notion that the Plaintiff must own the Note and Mortgage at the time the Complaint was filed." The Court was also obviously disturbed by the fact that MERS was the mortgagee but never mentioned in the note.

If your lawsuit is based upon a loan you must allege that the loan was made. *If your action is based upon acquisition of the loan you still must allege that the loan was made and that you actually paid for acquisition of the loan. Otherwise the claim is speculative and cannot invoke the jurisdiction of the Court. Without that the second requirement is impossible to meet — that you have suffered damages as a result of making the loan and the borrower not repaying it. These are not mere empty recitals. Without them, no lawsuit can continue*". [emphasis added] Neil Garfield. "South Carolina Dismisses Foreclosure Based Upon U.S. Supreme Court Decision." *Foreclosure Defense Nationwide*, 04 October 2013. <<http://www.foreclosuredefendsenationwide.com>>.

AS TO MERS AS NOMINEE

By its own document, Watermark was not a "mortgage broker" licensed to do business in South Carolina (See Exhibit "B"). In South Carolina, "[a] person may not act as a mortgage broker... without first being licensed", SC Code 40-58-30 (A).

The Mortgage recorded July 1, 2003 in Mortgage Book 896 Page 70 names Watermark as "Lender" and MERS as "nominee". Prescott subsequently made her

mortgage payments to Washington beginning in 2003. There is nothing in the Sumter County Register of Deeds showing Washington as mortgagee or lender. On April 15, 2010 Susan Brown as assignor for MERS executed an assignment from Watermark to Wells to bring this foreclosure. There is nothing in the Sumter County Register of Deeds showing Washington transferred the mortgage to Wells.

In *Deutsche*, counsel for Deutsche Bank made the familiar argument that it had possession of the original Note endorsed in blank, that the Note was a negotiable instrument under the UCC, that the Mortgage follows the Note, and that thus Deutsche Bank had established its right to foreclose. The Court disagreed, citing precedent from the United States Supreme Court's decision in *Carpenter v. Longan*, 83 U.S. 271, 16 Wall, 271, 21 L.Ed. 313 (1872). The *Deutsche* Court "clearly supports the notion that the Plaintiff must own the Note and the Mortgage to foreclose on the property." The Court determined "Plaintiff failed to show that it owned the Mortgage at the time the Complaint was filed", and also noted that the Mortgage shows MERS to be the mortgagee but that "MERS is never mentioned in the Note."

The *Deutsche* Court stated: "It is clear that to have standing in this foreclosure case; Plaintiff must not only be the holder and owner of the original Note, but also the Mortgage as well. Plaintiff's Complaint in this case fails to meet these criteria. Plaintiff lacks standing to initiate and prosecute the foreclosure and dismissal pursuant to ... Rule 12(b)(6) SCRPC is appropriate."

MERS' bylaws do not give MERS power to transfer a mortgage. According to the rules of MERS, the only way a mortgage in MERS can be moved out of MERS is if it is paid off. MERS assignments are suspect at best, and may in fact be fraudulent.

The Ninth Circuit Court of Common Pleas of Sumter County, South Carolina, found as follows:

That MERS' rights were not as they were represented to be; that MERS had no rights to collect on any debt because it did not extend any credit; none of the borrowers owe MERS any money; that MERS does not own the promissory notes secured by the mortgages; and that MERS does not acquire any loan or extension of credit secured by a lien on real property, *Mortgage Electronic Registration Systems, Inc. v. Girdvainis*, Sumter County, South Carolina Court of Common Pleas Case No. 2005-CP-43-0278 (Order dated January 19, 2006, citing to the representations of MERS and court findings in *Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance*, 270 Neb. 529, 704 NW 2d. 784).

On November 25, 2013, an opinion by the Supreme Court of Montana, cited as *Pilgeram v. Greenpoint Mortgage Funding, Inc.*, DA 12-0629, Supreme Court of the State of Montana, 2013 MT 354, concluded that MERS is not the beneficiary under the statute. The Court adopted and quoted the homeowners' argument that:

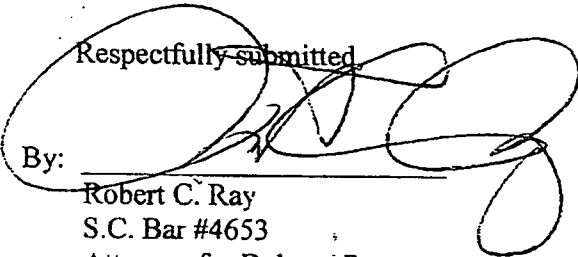
"MERS was not the lender, did not extend any credit, and is nothing more than an electronic tracking entity". Thus, the document was not, and could not have been, executed "for the benefit" of MERS.

CONCLUSION

The rule that 'a mortgage follows the note' has been repeatedly confirmed by South Carolina courts: "South Carolina recognizes the 'familiar and uncontroverted proposition' that the assignment of a note secured by a mortgage carries with it an assignment of mortgage. See, *Carpenter v. Longan*, 83 U.S. 271, 16 Wall. 271, 21 L.Ed. 313). "The note is the cow and the mortgage the tail. The cow can survive without a tail, but the tail cannot survive without the cow." *Best Fertilizers of Ariz., Inc. v. Burns*, 571 P.2d 675, 676 (Ariz. Ct. App.1977). "A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures", See *Restatement (Third) of Property: Mortgages* 5.4 (c) (1997). Not only has Wells never alleged it owned the Mortgage or Note, it cannot show that it gave valuable consideration for the same.

For the forgoing reasons, Wells lacks the standing to successfully maintain their foreclosure action against Prescott. As such, Wells' Complaint should be dismissed pursuant to Rule 12(b)(6) SCRPC.

Respectfully submitted,

By: 

Robert C. Ray
S.C. Bar #4653
Attorney for Delores Prescott
306A Mills Avenue
Greenville SC 29605
Office: 864-233-4555
Fax: 864-232-9730
E-mail: bobraylaw@gmail.com

Greenville, SC
January 24, 2014

Memorandum In Support of Defendant Delores Prescott's

Motion to Dismiss

Exhibit C

Right To Cancel

NOTICE OF RIGHT TO CANCEL

TO: DELORES PRESCOTT

YOUR RIGHT TO CANCEL

You are entering into a new transaction to increase the amount of credit provided to you. We acquired a security interest on your home under the original transaction and will retain that security interest in the new transaction. You have a legal right under federal law to cancel the new transaction, without cost, within three business days from whichever of the following events occurs last:

- (1) the date of the new transaction, which is JUNE 24, 2003; or
- (2) the date you received your new Truth in Lending disclosures; or
- (3) the date you received this notice of your right to cancel.

If you cancel the new transaction, your cancellation will apply only to the increase in the amount of credit. It will not affect the amount that you presently owe or the security interest we already have on your home. If you cancel, the security interest as it applies to the increased amount is also cancelled. Within twenty (20) calendar days after we receive your notice of cancellation of the new transaction, we must take the steps necessary to reflect the fact that our security interest on your home no longer applies to the increase of credit. We must also return any money you have given to us or anyone else in connection with the new transaction.

You may keep any money we have given you in the new transaction until we have done the things mentioned above, but you must then offer to return the money at the address below. If we do not take possession of the money within twenty (20) calendar days of your offer, you may keep it without further obligation.

HOW TO CANCEL

If you decide to cancel the new transaction, you may do so by notifying us in writing at:

WATERMARK FINANCIAL PARTNERS, INC.
4582 SOUTH ULSTER STREET, SUITE 300
DENVER, COLORADO 80237

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of JUNE 27, 2003 (or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL

Delores Prescott
Customer's Signature

Date

6/24/03

I HEREWITH ACKNOWLEDGE RECEIPT OF THIS NOTICE.

DELORES PRESCOTT

06-24-03

Date

Date

Date

Date

Memorandum In Support of Defendant Delores Prescott's

Motion to Dismiss

Exhibit D

Plaintiff's Note Filed as Proof of Claim

***In re Prescott* Case No. 11-01994-dd (Bankr. D.S.C. April 11, 2011)**

MERS Number 100203

NOTE

FHA Case No.

JUNE 24, 2003

[Date]

6365 SAXTON ROAD, REMBERT, SOUTH CAROLINA 29128

[Property Address]

1. PARTIES

"Borrower" means each person signing at the end of this Note, and the person's successors and assigns.
 "Lender" means WATERMARK FINANCIAL PARTNERS, INC. and its successors and assigns.

2. BORROWER'S PROMISE TO PAY; INTEREST

In return for a loan received from Lender, Borrower promises to pay the principal sum of EIGHTY-ONE THOUSAND THREE HUNDRED ONE AND 00/100ths Dollars (U.S.\$81,301.00), plus interest, to the order of Lender. Interest will be charged on unpaid principal, from the date of disbursement of the loan proceeds by Lender, at the rate of SIX AND ONE-HALF percent (6.500%) per year until the full amount of principal has been paid.

3. PROMISE TO PAY SECURED

Borrower's promise to pay is secured by a mortgage, deed of trust or similar security instrument that is dated the same date as this Note and called the "Security Instrument." The Security Instrument protects the Lender from losses which might result if Borrower defaults under this Note.

4. MANNER OF PAYMENT

(A) Time

Borrower shall make a payment of principal and interest to Lender on the first day of each month beginning on AUGUST 1, 2003. Any principal and interest remaining on the first day of JULY, 2033, will be due on that date, which is called the maturity date.

(B) Place

Payment shall be made at 4582 SOUTH ULSTER STREET, SUITE 300, DENVER, COLORADO 80237 or at such place as Lender may designate in writing by notice to Borrower.

(C) Amount

Each monthly payment of principal and interest will be in the amount of U.S. \$513.88. This amount will be part of a larger monthly payment required by the Security Instrument, that shall be applied to principal, interest and other items in the order described in the Security Instrument.

(D) Allonge to this note for payment adjustments

If an allonge providing for payment adjustments is executed by Borrower together with this Note, the covenants of the allonge shall be incorporated into and shall amend and supplement the covenants of this Note as if the allonge were a part of this Note. [Check applicable box.]

☐ Graduated Payment Allonge☐ Other [Specify]☐ Growing Equity Allonge

5. BORROWER'S RIGHT TO PREPAY

Borrower has the right to pay the debt evidenced by this Note, in whole or in part, without charge or penalty, on the first day of any month. Lender shall accept prepayment on other days provided that borrower pays interest on the amount prepaid for the remainder of the month to the extent required by Lender and permitted by regulations of the Secretary. If Borrower makes a partial prepayment, there will be no changes in the due date or in the amount of the monthly payment unless Lender agrees in writing to those changes.

6. BORROWER'S FAILURE TO PAY

(A) Late Charge for Overdue Payments

If Lender has not received the full monthly payment required by the Security Instrument, as described in Paragraph 4(C) of this Note, by the end of fifteen calendar days after the payment is due, Lender may collect a late charge in the amount of FOUR percent (4.000 %) of the overdue amount of each payment.

(B) Default

If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. Lender may choose not to exercise this option without waiving its rights in the event of any subsequent default. In many circumstances regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults. This Note does not authorize acceleration when not permitted by HUD regulations. As used in this Note, "Secretary" means the Secretary of Housing and Urban Development or his or her designee.

Borrower Initials

DP

(C) Payment of Costs and Expenses

If Lender has required immediate payment in full, as described above, Lender may require Borrower to pay costs and expenses including reasonable and customary attorney's fees for enforcing this Note to the extent not prohibited by applicable law. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note.

7. WAIVERS

Borrower and any other person who has obligations under this Note waive the rights of presentment and notice of dishonor. "Presentment" means the right to require Lender to demand payment of amounts due. "Notice of dishonor" means the right to require Lender to give notice to other persons that amounts due have not been paid.

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to Borrower under this Note will be given by delivering it or by mailing it by first class mail to Borrower at the property address above or at a different address if Borrower has given Lender a notice of Borrower's different address.

Any notice that must be given to Lender under this Note will be given by first class mail to Lender at the address stated in Paragraph 4(B) or at a different address if Borrower is given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. Lender may enforce its rights under this Note against each person individually or against all signatories together. Any one person signing this Note may be required to pay all of the amounts owed under this Note.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Note.



DELORES PRESCOTT (Seal)
-Borrower

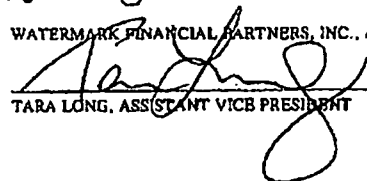
(Seal)
-Borrower

(Seal)
-Borrower

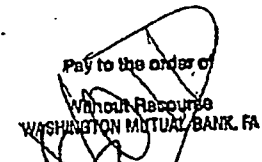
PAYABLE WITHOUT RECOURSE TO

Washington Mutual BANK FA

WATERMARK FINANCIAL PARTNERS, INC., A COLORADO CORPORATION



TARA LONG, ASSISTANT VICE PRESIDENT

Pay to the order of
Without Recourse
WASHINGTON MUTUAL BANK FA
By 

KRISTINA KING
OFFICER



LOAN #1: [REDACTED] LOAN #2: [REDACTED] SEQ#: [REDACTED] SOUTH CAROLINA
MERS ID#: [REDACTED]

ALLONGE

This Allonge is attached to and made a part of that certain Note or Bond, or Lost Note Affidavit in lieu of that certain Note or Bond,

Dated: 6/30/03

Made By: DELORES PRESCOTT, Mortgagors/Trustors

To: WATERMARK FINANCIAL PARTNERS, INC., Mortgagee/Beneficiary

In the Amount of: \$81,301.00

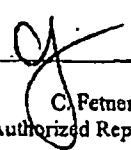
Property Address: 6365 SAXTON RD, REMBERT, SC 29128

Pay to the order of

without recourse.

Washington Mutual Bank, FA

BY: _____


C. Fetter
Its: Authorized Representative

Memorandum In Support of Defendant Delores Prescott's

Motion to Dismiss

Exhibit G

Defendant's Original Note

EX. G.

NOTE

Loan Number

FHA Case No.

JUNE 24, 2003
[Date]

6365 SAXTON ROAD, REMBERT, SOUTH CAROLINA 29128
[Property Address]

WE CERTIFY THE FOREGOING INSTRUMENT IS A
TRUE AND CORRECT COPY OF THE ORIGINAL
BY LB

1. PARTIES

"Borrower" means each person signing at the end of this Note, and the person's successors and assigns.
"Lender" means WATERMARK FINANCIAL PARTNERS, INC. and its successors and assigns.

2. BORROWER'S PROMISE TO PAY; INTEREST

In return for a loan received from Lender, Borrower promises to pay the principal sum of EIGHTY-ONE THOUSAND THREE HUNDRED ONE AND 00/100ths Dollars (U.S. \$81,301.00), plus interest, to the order of Lender. Interest will be charged on unpaid principal, from the date of disbursement of the loan proceeds by Lender, at the rate of SIX AND ONE-HALF percent (6.500%) per year until the full amount of principal has been paid.

3. PROMISE TO PAY SECURED

Borrower's promise to pay is secured by a mortgage, deed of trust or similar security instrument that is dated the same date as this Note and called the "Security Instrument." The Security Instrument protects the Lender from losses which might result if Borrower defaults under this Note.

4. MANNER OF PAYMENT

(A) Time

Borrower shall make a payment of principal and interest to Lender on the first day of each month beginning on AUGUST 1, 2003. Any principal and interest remaining on the first day of JULY, 2033, will be due on that date, which is called the maturity date.

(B) Place

Payment shall be made at 4582 SOUTH ULSTER STREET, SUITE 300, DENVER, COLORADO 80237 or at such place as Lender may designate in writing by notice to Borrower.

(C) Amount

Each monthly payment of principal and interest will be in the amount of U.S. \$513.88. This amount will be part of a larger monthly payment required by the Security Instrument, that shall be applied to principal, interest and other items in the order described in the Security Instrument.

(D) Allonge to this note for payment adjustments

If an allonge providing for payment adjustments is executed by Borrower together with this Note, the covenants of the allonge shall be incorporated into and shall amend and supplement the covenants of this Note as if the allonge were a part of this Note. (Check applicable box.)

☐ Graduated Payment Allonge

☐ Other (Specify)

☐ Growing Equity Allonge

5. BORROWER'S RIGHT TO PREPAY

Borrower has the right to pay the debt evidenced by this Note, in whole or in part, without charge or penalty, on the first day of any month. Lender shall accept prepayment on other days provided that borrower pays interest on the amount prepaid for the remainder of the month to the extent required by Lender and permitted by regulations of the Secretary. If Borrower makes a partial prepayment, there will be no changes in the due date or in the amount of the monthly payment unless Lender agrees in writing to those changes.

6. BORROWER'S FAILURE TO PAY

(A) Late Charge for Overdue Payments

If Lender has not received the full monthly payment required by the Security Instrument, as described in Paragraph 4(C) of this Note, by the end of fifteen calendar days after the payment is due, Lender may collect a late charge in the amount of FOUR percent (4.000 %) of the overdue amount of each payment.

(B) Default

If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. Lender may choose not to exercise this option without waiving its rights in the event of any subsequent default. In many circumstances regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults. This Note does not authorize acceleration when not permitted by HUD regulations. As used in this Note, "Secretary" means the Secretary of Housing and Urban Development or his or her designee.

(C) Payment of Costs and Expenses

If Lender has required immediate payment in full, as described above, Lender may require Borrower to pay costs and expenses including reasonable and customary attorney's fees for enforcing this Note to the extent not prohibited by applicable law. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note.

7. WAIVERS

Borrower and any other person who has obligations under this Note waive the rights of presentment and notice of dishonor. "Presentment" means the right to require Lender to demand payment of amounts due. "Notice of dishonor" means the right to require Lender to give notice to other persons that amounts due have not been paid.

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to Borrower under this Note will be given by delivering it or by mailing it by first class mail to Borrower at the property address above or at a different address if Borrower has given Lender a notice of Borrower's different address.

Any notice that must be given to Lender under this Note will be given by first class mail to Lender at the address stated in Paragraph 4(B) or at a different address if Borrower is given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. Lender may enforce its rights under this Note against each person individually or against all signatories together. Any one person signing this Note may be required to pay all of the amounts owed under this Note.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Note.


DELORES PRESCOTT

(Seal)

Borrower

(Seal)

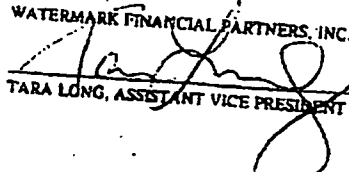
Borrower

(Seal)

Borrower

PAYABLE WITHOUT RECOURSE TO

WATERMARK FINANCIAL PARTNERS, INC., A COLORADO CORPORATION


TARA LONG, ASSISTANT VICE PRESIDENT

Memorandum In Support of Defendant Delores Prescott's

Motion to Dismiss

Exhibit H

Assignment to Wells Fargo

May 17, 2010

Prepared by and return to:
BROCK & SCOTT, PLLC
Westpark Center
3800 Fernandina Road, Suite 110
Columbia, SC 29210
File No.: 10-08577

BOOK: 1139 PAGE: 002052

FILED: 05/17/2010
RECORDED: 01:42:30 PM
REC. FEE: 7.00
STATE FEE: .00
PAGES: 2
TOTAL FEES: 7.00
VICKI H. MCCARTHY - REGISTER OF DEEDS
SUMTER COUNTY BY: R. Carter

ASSIGNMENT OF NOTE AND MORTGAGE

For valuable consideration received, the party of the first part Mortgage Electronic Registration Systems as nominee for Watermark Financial Partners, Inc. (hereinafter referred to as "Assignor"), as holder of the referenced mortgage, does hereby grant, bargain, sell, assign, transfer and set over unto the said party of the second part, Wells Fargo Bank, N.A.,* (hereinafter referred to as "Assignee"), that certain mortgage bearing the date of June 24, 2003, executed by Delores Prescott, in favor of Mortgage Electronic Registration Systems, Inc. as nominee for Watermark Financial Partners, Inc., and recorded on the date of July 1, 2003 in Official Record Book 896, at Page 70, Public Records of Sumter County, State of South Carolina.

Together with the note or obligation described in said mortgage, and monies due and those that will become due thereon.

TO HAVE AND TO HOLD the same unto the said Assignee, its heirs, legal representatives, successors and assigns forever.

WHEREAS, the undersigned Assignor has executed this Assignment of Note and Mortgage on this 15th day of April, 2010.

Mortgage Electronic Registration Systems as
nominee for Watermark Financial Partners,
Inc. Assignor

Signature: [Signature]

Suzanne E. Brown

Printed name: _____

Title: Vice President

* 3476 Stateview Blvd
Fort Mill, SC 29715

Witness signature [Signature]

THOMAS PRINCE
Printed name

Witness signature [Signature]

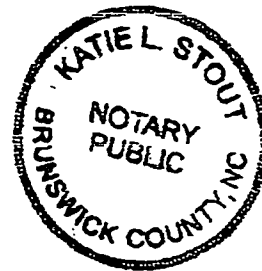
BRIAN GREEN
Printed name

THE STATE OF North Carolina
COUNTY OF New Hanover

I, Katie L. Stout

do hereby certify that the within-named Wells Fargo
Bank, N.A., by Suzanne Brown, its Vice President, personally appeared before me this 15th
day of April, 2010 and acknowledged the due execution of the foregoing
instrument.

Katie L. Stout
NOTARY PUBLIC for the state of North Carolina
My commission expires: 2/25/2014



Wells Fargo Bank's Memorandum in Opposition to Motion to Dismiss

April 4, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER)
2014 APR -7 AM 9:59)
JAMES C. CAMPBELL)
CLERK OF COURT)
SUMTER COUNTY, S.C.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Case Number: 2010-CP-43-0823

Wells Fargo Bank, N.A.,

Plaintiff,

vs.

Delores Prescott and Wells Fargo
Financial Bank (SD),

Defendants.

WELLS FARGO BANK'S MEMORANDUM
IN OPPOSITION TO MOTION TO DISMISS

Defendant Prescott asks the Court to dismiss this foreclosure case—and essentially excuse her repeated failure to pay her mortgage—based on an argument that only a party that actually owns a note and mortgage has standing to enforce the security interest. Her motion should be denied for several reasons:

- (1) Defendant's motion is untimely under Rule 12(b), SCRCF, as she filed an answer to the Complaint over three years before filing the instant motion.
- (2) Defendant should be estopped from denying the enforceability of Wells Fargo's security interest because she previously represented numerous times to the Bankruptcy Court that Wells Fargo's interest in the subject property was secured by a mortgage and was fully enforceable.
- (3) The South Carolina Court of Appeals recently rejected Defendant's exact argument regarding a party's standing to enforce a mortgage.

Each basis for denying Defendant's motion is discussed below in turn.

BACKGROUND

This case is a foreclosure action to collect on an unpaid note and mortgage. As alleged in the Complaint, on June 24, 2003, Defendant entered into a promissory note for \$81,300 with Watermark Financial Partners, its successors, and assigns. (Compl. ¶ 4.) To secure payment on

that note, Defendant also executed a real estate mortgage covering her residence in Sumter County. (Id. ¶ 5.) The mortgage identifies Mortgage Electronic Registration Systems, Inc. (“MERS”) as the nominee for Watermark, its successors, and assigns.¹ (Id.) After the note and mortgage were executed, Wells Fargo acquired the servicing rights to the loan, and Defendant began making payments to Wells Fargo in 2007. Defendant acknowledged in her Answer that Wells Fargo is the servicer of the subject loan. (Ans. ¶¶ 7–12, at 6–8.)

Defendant ultimately defaulted on her obligation under the loan agreement. (Compl. ¶ 14; Ans. ¶ 12 at page 8.) On April 16, 2010, Wells Fargo instituted this foreclosure action. Defendant filed an answer one month later, and then filed two Chapter 13 bankruptcy petitions in federal court. Defendant was represented by counsel in each of the bankruptcy actions.

In her bankruptcy filings, Defendant listed Wells Fargo as a secured creditor, acknowledged she was in arrears on her loan, and indicated she would make payments on her loan pursuant to a proposed Chapter 13 plan. Ex. A, Summary of Schedules, at 11 (Dkt. No. 8 in In re Prescott, Case No. 10-05552-dd (Bankr. D.S.C.) (filed Aug. 15, 2010); Ex. B, Summary of Schedules, at 17 (Dkt. No. 1 in In re Prescott, Case No. 11-01994-dd (Bankr. D.S.C.) (filed Mar. 28, 2011)).² Wells Fargo successfully lifted the automatic stay that attaches to bankruptcy proceedings, reactivating this case.

¹ Defendant alleges in her memorandum in support of her Motion that Watermark was not a licensed mortgage broker in the state of South Carolina at the time Prescott and Watermark entered into this transaction in 2003. Prescott Memo. In Support, p. 5. However, Defendant fails to point out that South Carolina did not require licensure of mortgage brokers until January 1, 2010. See 2009 South Carolina Laws Act 67 (S.B. 673) (titled the “South Carolina Mortgage Lending Act”), as codified, S.C. Code Ann. § 40-58-30.

² Because these materials, as well as the others attached to this brief, are part of the Bankruptcy Court’s records regarding Defendant’s cases, the Court is free to take judicial notice of them when reviewing this motion without converting it into a motion for summary judgment. See, e.g., Rule 201(b), SCRE (explaining that courts can take judicial notice of facts that are “not subject to reasonable dispute”); id. 201(f) (“Judicial notice may be taken at any stage of the

On September 20, 2013, Defendant moved to amend her answer. The Court granted that motion and gave Defendant an opportunity to plead “affirmative defenses, compulsory counterclaims and cross claims as to the parties to this lawsuit and the matters alleged in the complaint, and also to maintain any third-party complaint she deems necessary.” (Order (Dec. 2, 2013).) However, rather than file an amended answer consistent with the Court’s order, Defendant filed the instant motion to dismiss. It should be denied, and Wells Fargo should be permitted to proceed with foreclosure.

LEGAL STANDARD

Under Rule 12(b)(6), SCRPC, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action: Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). “The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.” Id. at 395, 645 S.E.2d at 247–48 (quoting Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999)). Furthermore, in considering a motion to dismiss under Rule 12(b)(6), the trial court must base its ruling solely on allegations set forth in the complaint. Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006).

proceeding.”); Sec’y of State for Defense v. Trimble Navigation Ltd., 484 F.3d 700, 705 (4th Cir. 2007) (“In reviewing the dismissal of a complaint under Rule 12(b)(6), we may properly take judicial notice of matters of public record.”); Tobin v. Bodman, Case No. 1:06-492-RBH, 2007 U.S. Dist. LEXIS 23978, at *4–8 & n.1 (D.S.C. Mar. 29, 2007) (holding that the court could consider the circumstances and resolution of a previous criminal case when ruling on a motion to dismiss without converting the motion into one for summary judgment).

ARGUMENT

- I. Defendant's motion is procedurally barred by Rule 12(b), which requires any motion filed under the rule to be made before answering a complaint.

The Court should deny Defendant's motion because it is procedurally improper under Rule 12(b), SCRCP. This case was filed in April 2010, and Defendant answered the Complaint on May 19, 2010. She did not file the pending Rule 12(b)(6) motion until January 3, 2014, over three and a half years after filing her Answer.

Defendant's present motion is simply too late. Rule 12(b) unambiguously states when a motion under the rule must be made: "A motion making any of these defenses shall be made before pleading if a further pleading is permitted [by Rule 12(a)]." Rule 12(b), SCRCP (emphasis added). The Notes accompanying Rule 12 confirm this timeline. See id. Notes (explaining that a Rule 12(b) motion "should be made before answer for early disposition of cases").

Because Defendant did not file her motion to dismiss before answering the complaint, her motion is procedurally improper under Rule 12(b). It should be denied accordingly.

- II. Because she previously affirmed the validity of Wells Fargo's security interest in the subject property to the Bankruptcy Court, Defendant should be estopped from now arguing that Wells Fargo does not have an enforceable security interest.

Defendant's motion, which attempts to challenge the enforceability of Wells Fargo's security interest on the subject property, should also be denied because she has previously affirmed in other court proceedings that Wells Fargo's security interest is fully enforceable. She cannot now seek dismissal of this case by taking a contrary factual position.

As the Court is aware, this matter was stayed for a lengthy period of time after Defendant commenced two separate Chapter 13 bankruptcy proceedings. In both, she acknowledged that

(1) Wells Fargo was a secured creditor with an enforceable mortgage on the subject property, and (2) she was in arrears on that loan. In particular:

- She represented both of these facts in her “Summary of Schedules” filings, which are sworn statements made under the penalty of perjury.³
- When Wells Fargo moved for relief from the automatic stay, Defendant affirmed that she “is behind on payments due on this loan” and requested “an agreement allowing time to catch up on payments.” She accompanied that same filing with a certification that Wells Fargo had a secured interest in the subject property, and she incorporated the same note and mortgage at issue here as proof of this fact.⁴
- To resolve Wells Fargo’s request for relief from the automatic stay, Defendant agreed to entry of a “Settlement Order” by the Bankruptcy Court. In that order, the Bankruptcy Court recognized that Defendant was in arrears on her note with Wells Fargo, and it specifically enforced against Defendant the same note and mortgage that are at issue in this case.⁵
- At the close of her bankruptcy proceedings, Defendant moved to amend her Chapter 13 plan and acknowledged that she had “abandon[ed] interest in property located at 6365 Saxton Rd., Rembert, SC 29128 to Wells Fargo Home Mortgage.” The Bankruptcy Court accepted these representations and approved Defendant’s modified plan accordingly.⁶

Despite these uniform, uncontradicted concessions made to the Bankruptcy Court over the course of nearly three years, Defendant now moves for dismissal of this case on grounds that Wells Fargo does not have the right to bring this foreclosure action. Defendant’s argument is legally flawed and should be denied for that reason as explained below. However, there is no reason for the Court to even engage in that analysis because Defendant should be estopped from

³ Ex. A, Summary of Schedules, at 11 (Dkt. No. 8 in In re Prescott, Case No. 10-05552-dd (Bankr. D.S.C.) (filed Aug. 15, 2010); Ex. B, Summary of Schedules, at 17 (Dkt. No. 1 in In re Prescott, Case No. 11-01994-dd (Bankr. D.S.C.) (filed Mar. 28, 2011)).

⁴ Ex. C, Answer to Motion for Relief from Stay, at 1, 3 (Dkt. No. 27 in In re Prescott, Case No. 11-01994-dd (Bankr. D.S.C.) (filed Dec. 22, 2011)).

⁵ Ex. D, Settlement Order, at 2 (Dkt. No. 32 in In re Prescott, Case No. 11-01994-dd (Bankr. D.S.C.) (filed Jan. 9, 2012)).

⁶ Ex. E, Motion to Modify Plan, at 1 (Dkt. No. 39 in In re Prescott, Case No. 11-01994-dd (Bankr. D.S.C.) (filed June 17, 2013)); Ex. F, Order Confirming Plan at 1 (Dkt. No. 43 in In re Prescott, Case No. 11-01994-dd (Bankr. D.S.C.) (filed July 17, 2013)).

making a complete about-face on the facts of this case simply because she is no longer in Bankruptcy Court.

South Carolina enforces the doctrines of judicial estoppel and *res judicata*, both of which are applicable here. Judicial estoppel is designed to protect the integrity of the courts by preventing a party from taking “a position in conflict with one earlier taken in the same or related litigation.” Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). In order for this doctrine to apply, a party must attempt to mislead the court by taking two “totally inconsistent” positions in litigation, and it must benefit in some way from a court adopting the party’s first representation. Cothran v. Brown, 357 S.C. 210, 215–16, 592 S.E.2d 629, 632 (2004).

Likewise, *res judicata* is designed to ensure that an issue or claim that was or could have been resolved in prior litigation is not subject to re-litigation. See Pye v. Aycock, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (Ct. App. 1997) (“The doctrine of *res judicata* bars a litigant from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.”). Three elements are necessary for *res judicata* to attach: (1) the parties or their privies must be the same as in prior litigation; (2) the subject matter must be the same as in prior litigation; and (3) there must be a prior adjudication by a court of competent jurisdiction. Id.

This case meets the elements for both of these doctrines. Defendant’s bankruptcy matters expressly involved Wells Fargo’s security interest in her property. If she thought that interest was unenforceable, as she now claims, Defendant should have disputed Wells Fargo’s interest during those proceedings. But she did not do so. Instead, she specifically affirmed—many times

over, in fact—the enforceability of Wells Fargo’s security interest, and the Bankruptcy Court incorporated her affirmation into orders approving Defendant’s Chapter 13 plan.

In short, Defendant represented to the Bankruptcy Court that Wells Fargo had an enforceable security interest in her property, and the Bankruptcy Court accepted those representations and adopted them by way of orders that resolved Defendant’s bankruptcy, which have become final. Both judicial estoppel and *res judicata* prohibit her attempt to change course now and challenge the enforceability of Wells Fargo’s security interest.

Not surprisingly, courts regularly rely on these doctrines when refusing to allow a party to dispute the enforceability of a note and lien on real property once it has conceded the issue during bankruptcy proceedings. *See, e.g., Celli v. First Nat’l Bank*, 460 F.3d 289, 295–96 (2d Cir. 2006) (“In summary, we hold that the Chapter 13 bankruptcy confirmation order is *res judicata* with respect to the debtor’s and the Trustee’s post-confirmation attempt to avoid a confirmed, recorded lien on the debtor’s property where the lien was claimed by FNB at the outset of the bankruptcy proceedings and included by the debtor in his plan.”); *Mbazira v. Litton Loan Servicing, LLP*, 2011 U.S. Dist. LEXIS 85271, at *7–11 (D. Mass. July 27, 2011) (applying judicial estoppel to reject a borrower’s challenge to the validity of a mortgage after a bankruptcy court confirmed a Chapter 13 plan that was based on the borrower’s earlier representations that the mortgage constituted a secured interest, even though the borrower based her challenge on an alleged intervening change in the law); *RTC Mortgage Trust 1995-S/N2 v. McMahon*, 225 B.R. 604, 608–10 (E.D. Va. 1997) (holding that a party’s representations affirming a note and lien during bankruptcy proceedings foreclosed it from disputing the enforceability of those same obligations during later litigation under a theory of both *res judicata* and judicial estoppel), *aff’d* 155 F.3d 560 (4th Cir. 1998).

This Court should not hesitate to follow this unbroken line of authority and reject Defendant's attempt to now challenge a security interest that she has previously conceded is fully enforceable. Accordingly, Defendant's motion should be denied for this additional procedural reason.

III. Wells Fargo is a proper party to enforce the note and mortgage.

A. South Carolina law provides that one who owns, holds, or services a loan has standing to maintain a foreclosure action.

In addition to being procedurally barred by Rule 12(b)'s timing requirements and the doctrines of judicial estoppel and *res judicata*, Defendant's motion is improper because it is legally flawed regarding who may enforce a note and mortgage. Defendant argues that Wells Fargo "lacks the standing" to enforce the note and mortgage because it "never alleged it owned the Mortgage or Note." (Def.'s Mem. in Supp. of Mot. to Dismiss at 7–8.) The South Carolina Court of Appeals recently rejected this exact argument.

In Bank of America, N.A. v. Draper, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013), reh'g denied 2013 S.C. App. LEXIS 260 (Ct. App. Aug. 27, 2013), a borrower challenged whether Bank of America had standing to commence foreclosure proceedings as the servicer, rather than the actual owner, of his note and mortgage. The master-in-equity rejected the borrower's argument, and the Court of Appeals affirmed. In doing so, the Court of Appeals specifically held that a party who holds a note or who acts as the servicer of a loan is "a real party in interest and able to initiate a foreclosure," irrespective of whether it actually owns the note and mortgage. Id. at 223, 746 S.E.2d at 482.⁷

⁷ The sole South Carolina authority on which Defendant based her motion is a circuit court order stating that a party must be the "holder and owner of the original Note" and mortgage in order to have standing to foreclose. Because that order is directly contrary to Draper's holding, Wells Fargo respectfully submits that the Court should not rely on that circuit court order.

South Carolina's federal courts have already incorporated this decision into their jurisprudence. See, e.g., Gardner v. Litton Loan Servicing LP, Case No. 9:12-1766-SB-BHH, 2013 U.S. Dist. LEXIS 168004, at *16 (D.S.C. Oct. 24, 2013) ("Most importantly, the South Carolina Court of Appeals has recently concluded that loan servicers are real parties in interest and able to initiate foreclosures." (citing Bank of Am., N.A. v. Draper, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013))), report and recommendation adopted by 2013 U.S. Dist. LEXIS 169563 (D.S.C. Nov. 26, 2013).

In this case, Wells Fargo expressly alleged in the Complaint that it is the holder of the note and mortgage. (Compl. ¶ 14.) Further, Defendant admitted Wells Fargo was the servicer on the subject loan as well. (Ans. ¶¶ 7-12, at 6-8.) Defendant also affirmed multiple times to the Bankruptcy Court that she has a secured loan with Wells Fargo. Accordingly, Wells Fargo has satisfied its pleading burden, and Defendant's motion should be denied in its entirety.

B. There is nothing improper about MERS assigning the mortgage to Wells Fargo.

In conjunction with her argument that Wells Fargo cannot enforce its security interest because it does not "own" the note and mortgage, Defendant challenges the method in which Wells Fargo received its assignment of the mortgage. According to Defendant, MERS assigning the mortgage to Wells Fargo somehow renders the mortgage unenforceable. The Court should reject this position for two fundamental reasons.

First, Defendant's entire argument is based on matters outside of the pleadings—including allegations regarding MERS's "bylaws," MERS's "rules," and the manner in which

Likewise, the circuit court order cited only a United States Supreme Court opinion from 1873 interpreting Colorado law—before Colorado was even granted statehood—as the basis for its decision. There is nothing in law or logic to suggest that such a dated, out-of-jurisdiction decision is in any way relevant to this case.

MERS assigned the mortgage to Wells Fargo in this case. (Def.'s Mem. in Supp. of Mot. to Dismiss at 5–7.) But the instant motion is to dismiss pursuant to Rule 12(b)(6), and any ruling on this motion must be based solely on the allegations set forth in the Complaint. Spence, 368 S.C. at 116, 628 S.E.2d at 874. Put simply, the allegations that Defendant has made regarding MERS are outside of the pleadings and are not properly before the Court.

Second, even taking everything Defendant has argued to be true, her argument is still contrary to governing law. There is no dispute that the mortgage identifies MERS, its successors, and assigns, as the beneficiary of the security. (Ex. E to Def.'s Mem. in Supp. of Mot. to Dismiss.) Likewise, there is no dispute that prior to this case being filed, MERS assigned the mortgage to Wells Fargo. (Ex. H to Def.'s Mem. in Supp. of Mot. to Dismiss.)⁸

This is not unusual or even subject to a legitimate challenge. Courts in South Carolina and elsewhere have routinely enforced this type of MERS-based assignment. See, e.g., Gardner, 2013 U.S. Dist. LEXIS 168004, at *13–16 (rejecting numerous arguments that MERS's involvement in the assignment of a mortgage rendered the assignment invalid); Draper, 405 S.C. at 217, 746 S.E.2d at 479 (reciting that the party that had the ability to enforce the note and mortgage had been assigned such rights by MERS); see also Taylor v. Deutsche Bank Nat'l Trust Co., 44 So. 3d 618, 622–23 (Fla. Ct. App. 2010) (holding that “the written assignment of the note and mortgage from MERS to Deutsche Bank properly transferred the note and mortgage

⁸ Even without this assignment, Wells Fargo was the holder of the mortgage at the time of foreclosure because it was the holder of the note itself. See Draper, 405 S.C. at 220, 746 S.E.2d at 481 (explaining that the assignment of a note legally carries with it the assignment of a mortgage that secures the note); Ballou v. Young, 42 S.C. 170, 176, 20 S.E. 84, 85 (1894) (“The transfer of a note carries with it a mortgage given to secure payment of such note.”). Accordingly, as a matter of law, Wells Fargo was the holder of the mortgage at the time this action was filed because Wells Fargo was the holder of the note that was secured by the mortgage.

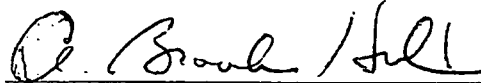
to Deutsche Bank," and concluding that "Deutsche Bank had standing to foreclose the mortgage").

Because MERS had the ability to assign its interest in the mortgage to Wells Fargo, the assignment to Wells Fargo was appropriate, and Wells Fargo has standing to foreclose the mortgage. The Court should reject Defendant's arguments to the contrary and deny her motion to dismiss.

CONCLUSION

For the reasons explained above, Wells Fargo requests that the Court deny Defendant's Motion to Dismiss and, instead, permit Wells Fargo to enforce a security interest that Defendant has already conceded is fully enforceable.

April 4, 2014
Greenville, SC



S. Sterling Laney, III (S.C. Bar No. 6933)
A. Brooks Haselden (S.C. Bar No. 78656)
Womble Carlyle Sandridge & Rice, LLP
550 South Main Street, Suite 400
Greenville, South Carolina 29601
Telephone: (864) 255-5435
Fax: (864) 239-5546
Email: bhaselden@wcsr.com

Attorneys for Wells Fargo Bank

Affidavit of Andrea Kruse

April 4, 2014

STATE OF SOUTH CAROLINA

RECORDED

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

2014 APR -9 PM 1:46

C.A. No.: 2010-CP-43-0823

Wells Fargo Bank, N.A.,

JAMES O. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Plaintiff,

**AFFIDAVIT OF
ANDREA KRUSE**

vs.

Delores Prescott and Wells Fargo
Financial Bank (SD),

Defendants.

The undersigned, being duly sworn, states as follows:

1. My name is Andrea Kruse and I am a Vice President Loan Documentation for Wells Fargo Bank, N.A. ("Wells Fargo"). Based on my review of Wells Fargo's business records, I have personal knowledge of the facts stated herein, and am authorized to make this Affidavit.

2. Wells Fargo is the holder of that certain Note (the "Note") from Delores Prescott to Watermark Financial Partners, Inc. ("Watermark"), its successors and assigns, dated June 24, 2003 pursuant to which Delores Prescott promised to pay Watermark, its successor and assigns, the principal sum of \$81,301.00 plus interest. Wells Fargo possesses the original Note, attached and affixed to which is an allonge showing a blank endorsement, which is incorporated as a part of the Note. A true and accurate copy of the Note is attached hereto as **Exhibit A**.

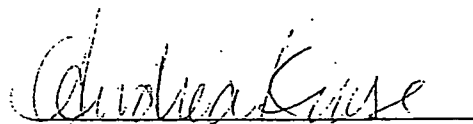
3. As is evidenced by an assignment dated April 15, 2010 and recorded in the Office of the Register of Deeds for Sumter County, South Carolina, Wells Fargo is the holder of that certain Mortgage (the "Mortgage") from Delores Prescott to Mortgage Electronic Registration System, Inc., as nominee for Watermark, its successors and assigns, which Mortgage secures

repayment of the Note. A true and accurate copy of the Mortgage is attached hereto as **Exhibit**

B. A true and accurate copy of the assignment of the Mortgage is attached hereto as **Exhibit C.**

4. Wells Fargo is the holder of the Note and Mortgage and, on April 16, 2010, the date this foreclosure action was filed, was the holder of the Note and Mortgage.

FURTHER AFFIANT SAYETH NOT

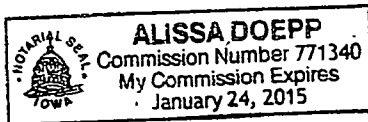


Andrea Kruse
Vice President Loan Documentation
Wells Fargo Bank, N.A.
April 4, 2014

STATE IOWA

COUNTY DALLAS

The foregoing instrument was sworn to and subscribed before me this 4th day of April, 2014, by Andrea Kruse, who is personally known to me.



NOTARY PUBLIC, State of Iowa

Affidavit of Andrea Kruse

Exhibit A

Loan Number

FHA Case No.

NOTE

JUNE 24, 2003
[Date]

6365 SAXTON ROAD, REMBERT, SOUTH CAROLINA 29128
[Property Address]

WE CERTIFY THE FOREGOING INSTRUMENT IS A
TRUE AND CORRECT COPY OF THE ORIGINAL
BY J.B.

1. PARTIES

"Borrower" means each person signing at the end of this Note, and the person's successors and assigns.
"Lender" means WATERMARK FINANCIAL PARTNERS, INC. and its successors and assigns.

2. BORROWER'S PROMISE TO PAY; INTEREST

In return for a loan received from Lender, Borrower promises to pay the principal sum of EIGHTY-ONE THOUSAND THREE HUNDRED ONE AND 00/100ths Dollars (U.S.\$81,301.00), plus interest, to the order of Lender. Interest will be charged on unpaid principal, from the date of disbursement of the loan proceeds by Lender, at the rate of SIX AND ONE-HALF percent (6.500%) per year until the full amount of principal has been paid.

3. PROMISE TO PAY SECURED

Borrower's promise to pay is secured by a mortgage, deed of trust or similar security instrument that is dated the same date as this Note and called the "Security Instrument." The Security Instrument protects the Lender from losses which might result if Borrower defaults under this Note.

4. MANNER OF PAYMENT

(A) Time

Borrower shall make a payment of principal and interest to Lender on the first day of each month beginning on AUGUST 1, 2003. Any principal and interest remaining on the first day of JULY, 2033, will be due on that date, which is called the maturity date.

(B) Place

Payment shall be made at 4582 SOUTH ULSTER STREET, SUITE 300, DENVER, COLORADO 80237 or at such place as Lender may designate in writing by notice to Borrower.

(C) Amount

Each monthly payment of principal and interest will be in the amount of U.S. \$513.88. This amount will be part of a larger monthly payment required by the Security Instrument, that shall be applied to principal, interest and other items in the order described in the Security Instrument.

(D) Allonge to this note for payment adjustments.

If an allonge providing for payment adjustments is executed by Borrower together with this Note, the covenants of the allonge shall be incorporated into and shall amend and supplement the covenants of this Note as if the allonge were a part of this Note. [Check applicable box.]

☐ Graduated Payment Allonge☐ Other [Specify]☐ Growing Equity Allonge

5. BORROWER'S RIGHT TO PREPAY

Borrower has the right to pay the debt evidenced by this Note, in whole or in part, without charge or penalty, on the first day of any month. Lender shall accept prepayment on other days provided that borrower pays interest on the amount prepaid for the remainder of the month to the extent required by Lender and permitted by regulations of the Secretary. If Borrower makes a partial prepayment, there will be no changes in the due date or in the amount of the monthly payment unless Lender agrees in writing to those changes.

6. BORROWER'S FAILURE TO PAY

(A) Late Charge for Overdue Payments

If Lender has not received the full monthly payment required by the Security Instrument, as described in Paragraph 4(C) of this Note, by the end of fifteen calendar days after the payment is due, Lender may collect a late charge in the amount of FOUR percent (4.000%) of the overdue amount of each payment.

(B) Default

If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. Lender may choose not to exercise this option without waiving its rights in the event of any subsequent default. In many circumstances regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults. This Note does not authorize acceleration when not permitted by HUD regulations. As used in this Note, "Secretary" means the Secretary of Housing and Urban Development or his or her designee.

Borrower Initials

(C) Payment of Costs and Expenses

If Lender has required immediate payment in full, as described above, Lender may require Borrower to pay costs and expenses including reasonable and customary attorney's fees for enforcing this Note to the extent not prohibited by applicable law. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note.

7. WAIVERS

Borrower and any other person who has obligations under this Note waive the rights of presentment and notice of dishonor. "Presentment" means the right to require Lender to demand payment of amounts due. "Notice of dishonor" means the right to require Lender to give notice to other persons that amounts due have not been paid.

8. GIVING OF NOTICES

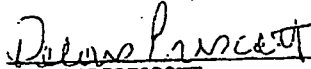
Unless applicable law requires a different method, any notice that must be given to Borrower under this Note will be given by delivering it or by mailing it by first class mail to Borrower at the property address above or at a different address if Borrower has given Lender a notice of Borrower's different address.

Any notice that must be given to Lender under this Note will be given by first class mail to Lender at the address stated in Paragraph 4(B) or at a different address if Borrower is given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. Lender may enforce its rights under this Note against each person individually or against all signatories together. Any one person signing this Note may be required to pay all of the amounts owed under this Note.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Note.



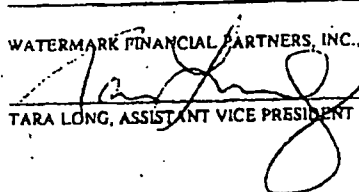
DELORES PRESCOTT (Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

PAYABLE WITHOUT RECOURSE TO

WATERMARK FINANCIAL PARTNERS, INC., A COLORADO CORPORATION



TARA LONG, ASSISTANT VICE PRESIDENT



LOAN #1: [REDACTED] LOAN #2: [REDACTED] SEQ#: [REDACTED] SOUTH CAROLINA
MERS ID#: [REDACTED]

ALLONGE

This Allonge is attached to and made a part of that certain Note or Bond, or Last Note Affidavit in lieu of that certain Note or Bond,

Dated: 6/30/03

Made By: DELORES PRESCOTT, Mortgagee/Trustee

To: WATERMARK FINANCIAL PARTNERS, INC., Mortgagee/Beneficiary

In the Amount of: \$81,301.00

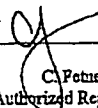
Property Address: 6365 SAXTON RD, REMBERT, SC 29128

Pay to the order of

without recourse.

Washington Mutual Bank, FA

BY: _____


C. Pether
Its: Authorized Representative

Affidavit of Andrea Kruse

Exhibit B

RECEIVED

2003 JUL -1 PM 4:39

Return To:
General American Corporation
300 Gulf Tower, 707 Grant St.
Pittsburgh, PA. 15219
First Mortgage Recording Dept.

VICKI M. MCCARTHY
REGISTER OF DEEDS
SUMTER CO., S.C.
00

Loan Number
MIN

RECORDED
VOL. 896 PG 70
SUMTER COUNTY, S.C.

(Space Above This Line For Recording Data)

FHA Case No:

MORTGAGE

THIS MORTGAGE ("Security Instrument") is given on JUNE 24, 2003. The mortgagor is DELORES PRESCOTT ("Borrower"). This Security Instrument is given to Mortgage Electronic Registration Systems, Inc. ("MERS"), (solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns), as beneficiary. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS. WATERMARK FINANCIAL PARTNERS, INC. ("Lender") is organized and existing under the laws of COLORADO, and has an address of 4582 SOUTH ULSTER STREET, SUITE 300, DENVER, COLORADO 80237. Borrower owes Lender the principal sum of EIGHTY-ONE THOUSAND THREE HUNDRED ONE AND 00/100ths Dollars (U.S.\$81,301.00). This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which provides for monthly payments, with the full debt, if not paid earlier, due and payable on JULY 1, 2033. This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the Note; (b) the payment of all other sums, with interest, advanced under paragraph 7 to protect the security of this Security Instrument; and (c) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, the following described property located in SUMTER County, South Carolina:

SEE ATTACHED EXHIBIT "A"

which has the address of 6365 SAXTON ROAD, REMBERT,
South Carolina 29128 ("Property Address");
[Zip Code]

TO HAVE AND TO HOLD this property unto MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS; forever, together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument; but, if necessary to comply with law or custom, MERS, (as nominee for Lender and Lender's successors and assigns), has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing or canceling this Security Instrument.

GMD 0190 (\$99) Page 1 of 6

RECORDING FEE: \$ 13.00
COUNTY TRANSFER FEE: \$
STATE TRANSFER FEE: \$
TOTAL FEES PAID: \$ 13.00

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. **Payment of Principal, Interest and Late Charge.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and late charges due under the Note.

2. **Monthly Payment of Taxes, Insurance, and Other Charges.** Borrower shall include in each monthly payment, together with the principal and interest as set forth in the Note and any late charges, a sum for (a) taxes and special assessments levied or to be levied against the Property, (b) leasehold payments or ground rents on the Property, and (c) premiums for insurance required under Paragraph 4. In any year in which the Lender must pay a mortgage insurance premium to the Secretary of Housing and Urban Development ("Secretary"), or in any year in which such premium would have been required if Lender still held the Security Instrument, each monthly payment shall also include either: (i) a sum for the annual mortgage insurance premium to be paid by Lender to the Secretary, or (ii) a monthly charge instead of a mortgage insurance premium if this Security Instrument is held by the Secretary, in a reasonable amount to be determined by the Secretary. Except for the monthly charge by the Secretary, these items are called "Escrow Items" and the sums paid to Lender are called "Escrow Funds."

Lender may, at any time, collect and hold amounts for Escrow Items in an aggregate amount not to exceed the maximum amount that may be required for Borrower's escrow account under the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 et seq. and implementing regulations, 24 CFR Part 3500, as they may be amended from time to time ("RESPA"), except that the cushion or reserve permitted by RESPA for unanticipated disbursements or disbursements before the Borrower's payments are available in the account may not be based on amounts due for the mortgage insurance premium.

If the amounts held by Lender for Escrow Items exceed the amounts permitted to be held by RESPA, Lender shall account to Borrower for the excess funds as required by RESPA. If the amounts of funds held by Lender at any time are not sufficient to pay the Escrow Items when due, Lender may notify the Borrower and require Borrower to make up the shortage as permitted by RESPA.

The Escrow Funds are pledged as additional security for all sums secured by this Security Instrument. If Borrower tenders to Lender the full payment of all such sums, Borrower's account shall be credited with the balance remaining for all installment items (a), (b), and (c) and any mortgage insurance premium installment that Lender has not become obligated to pay to the Secretary, and Lender shall promptly refund any excess funds to Borrower. Immediately prior to a foreclosure sale of the Property or its acquisition by Lender, Borrower's account shall be credited with any balance remaining for all installments for items (a), (b), and (c).

3. **Application of Payments.** All payments under Paragraphs 1 and 2 shall be applied by Lender as follows:

First, to the mortgage insurance premium to be paid by Lender to the Secretary or to the monthly charge by the Secretary instead of the monthly mortgage insurance premium;

Second, to any taxes, special assessments, leasehold payments or ground rents, and fire, flood and other hazard insurance premiums, as required;

Third, to interest due under the Note;

Fourth, to amortization of the principal of the Note; and

Fifth, to late charges due under the Note.

4. **Fire, Flood and Other Hazard Insurance.** Borrower shall insure all improvements on the Property, whether now in existence or subsequently erected, against any hazards, casualties, and contingencies, including fire, for which Lender requires insurance. This insurance shall be maintained in the amounts and for the periods that Lender requires. Borrower shall also insure all improvements on the Property, whether now in existence or subsequently erected, against loss by floods to the extent required by the Secretary. All insurance shall be carried with companies approved by Lender. The insurance policies and any renewals shall be held by Lender and shall include loss payable clauses in favor of, and in a form acceptable to, Lender.

In the event of loss, Borrower shall give Lender immediate notice by mail. Lender may make proof of loss if not made promptly by Borrower. Each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Lender, instead of to Borrower and to Lender jointly. All or any part of the insurance proceeds may be applied by Lender, at its option, either (a) to the reduction of the indebtedness under the Note and this Security Instrument, first to any delinquent amounts applied in the order in Paragraph 3, and then to prepayment of principal, or (b) to the restoration or repair of the damaged Property. Any application of the proceeds to the principal shall not extend or postpone the due date of the monthly payments which are referred to in Paragraph 2, or change the amount of such payments. Any excess insurance proceeds over an amount required to pay all outstanding indebtedness under the Note and this Security Instrument shall be paid to the entity legally entitled thereto.

In the event of foreclosure of this Security Instrument or other transfer of title to the Property that extinguishes the indebtedness, all right, title and interest of Borrower in and to insurance policies in force shall pass to the purchaser.

5. Occupancy, Preservation, Maintenance and Protection of the Property; Borrower's Loan Application; Leaseholds. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within sixty days after the execution of this Security Instrument (or within sixty days of a later sale or transfer of the Property) and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender determines that requirement will cause undue hardship for Borrower, or unless extenuating circumstances exist which are beyond Borrower's control. Borrower shall notify Lender of any extenuating circumstances. Borrower shall not commit waste or destroy, damage or substantially change the Property or allow the Property to deteriorate, reasonable wear and tear excepted. Lender may inspect the Property if the Property is vacant or abandoned or the loan is in default. Lender may take reasonable action to protect and preserve such vacant or abandoned Property. Borrower shall also be in default if Borrower, during the loan application process, gave materially false or inaccurate information or statements to Lender (or failed to provide Lender with any material information) in connection with the loan evidenced by the Note, including, but not limited to, representations concerning Borrower's occupancy of the Property as a principal residence. If this Security Instrument is on a leasehold, Borrower shall comply with the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and fee title shall not be merged unless Lender agrees to the merger in writing.

6. Condemnation. The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of any part of the Property, or for conveyance in place of condemnation, are hereby assigned and shall be paid to Lender to the extent of the full amount of the indebtedness that remains unpaid under the Note and this Security Instrument. Lender shall apply such proceeds to the reduction of the indebtedness under the Note and this Security Instrument, first to any delinquent amounts applied in the order provided in Paragraph 3, and then to prepayment of principal. Any application of the proceeds to the principal shall not extend or postpone the due date of the monthly payments, which are referred to in Paragraph 2, or change the amount of such payments. Any excess proceeds over an amount required to pay all outstanding indebtedness under the Note and this Security Instrument shall be paid to the entity legally entitled thereto.

7. Charges to Borrower and Protection of Lender's Rights in the Property. Borrower shall pay all governmental or municipal charges, fines and impositions that are not included in Paragraph 2; Borrower shall pay these obligations on time directly to the entity which is owed the payment. If failure to pay would adversely affect Lender's interest in the Property, upon Lender's request Borrower shall promptly furnish to Lender receipts evidencing these payments.

If Borrower fails to make these payments or the payments required by Paragraph 2, or fails to perform any other covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, for condemnation or to enforce laws or regulations), then Lender may do and pay whatever is necessary to protect the value of the Property and Lender's rights in the Property, including payment of taxes, hazard insurance and other items mentioned in Paragraph 2.

Any amounts disbursed by Lender under this Paragraph shall become an additional debt of Borrower and be secured by this Security Instrument. These amounts shall bear interest from the date of disbursement at the Note rate, and at the option of Lender shall be immediately due and payable.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender; (b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings which in the Lender's opinion operate to prevent the enforcement of the lien; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which may attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Borrower shall satisfy the lien or take one or more of the actions set forth above within 10 days of the giving of notice.

8. Fees. Lender may collect fees and charges authorized by the Secretary.

9. Grounds for Acceleration of Debt.

(a) **Default.** Lender may, except as limited by regulations issued by the Secretary in the case of payment defaults, require immediate payment in full of all sums secured by this Security Instrument if:

- (i) Borrower defaults by failing to pay in full any monthly payment required by this Security Instrument prior to or on the due date of the next monthly payment, or
- (ii) Borrower defaults by failing, for a period of thirty days, to perform any other obligations contained in this Security Instrument.

(b) **Sale Without Credit Approval.** Lender shall, if permitted by applicable law (including section 341(d) of the Garn-St Germain Depository Institutions Act of 1982, 12 U.S.C. 1701j-3(d)) and with the prior approval of the Secretary, require immediate payment in full of all sums secured by this Security Instrument if:

- (i) All or part of the Property, or a beneficial interest in a trust owning all or part of the Property, is sold or otherwise transferred (other than by devise or descent), and
- (ii) The Property is not occupied by the purchaser or grantee as his or her principal residence, or the purchaser or grantee does so occupy the Property, but his or her credit has not been approved in accordance with the requirements of the Secretary.

(c) **No Waiver.** If circumstances occur that would permit Lender to require immediate payment in full, but Lender does not require such payments, Lender does not waive its rights with respect to subsequent events.

(d) **Regulations of HUD Secretary.** In many circumstances regulations issued by the Secretary will limit Lender's rights, in the case of payment defaults, to require immediate payment in full and foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary.

(e) **Mortgage Not Insured.** Borrower agrees that if this Security Instrument and the Note are not determined to be eligible for insurance under the National Housing Act within 60 days from the date hereof, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. A written statement of any authorized agent of the Secretary dated subsequent to 60 days from the date hereof, declining to insure this Security Instrument and the Note, shall be deemed conclusive proof of such ineligibility. Notwithstanding the foregoing, this option may not be exercised by Lender when the unavailability of insurance is solely due to Lender's failure to remit a mortgage insurance premium to the Secretary.

10. Reinstatement. Borrower has a right to be reinstated if Lender has required immediate payment in full because of Borrower's failure to pay an amount due under the Note or this Security Instrument. This right applies even after foreclosure proceedings are instituted. To reinstate the Security Instrument, Borrower shall tender in a lump sum all amounts required to bring Borrower's account current including, to the extent they are obligations of Borrower under this Security Instrument, foreclosure costs and reasonable and customary attorney's fees and expenses properly associated with the foreclosure proceeding. Upon reinstatement by Borrower, this Security Instrument and the obligations that it secures shall remain in effect as if Lender had not required immediate payment in full. However, Lender is not required to permit reinstatement if: (i) Lender has accepted reinstatement after the commencement of foreclosure proceedings within two years immediately preceding the commencement of a current foreclosure proceeding, (ii) reinstatement will preclude foreclosure on different grounds in the future, or (iii) reinstatement will adversely affect the priority of the lien created by this Security Instrument.

11. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time of payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to any successor in interest of Borrower shall not operate to release the liability of the original Borrower or Borrower's successor in interest. Lender shall not be required to commence proceedings against any successor in interest or refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or Borrower's successors in interest. Any forbearance by Lender in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.

12. Successors and Assigns Bound; Joint and Several Liability; Co-signers. The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower, subject to the provisions of Paragraph 9(b). Borrower's covenants and agreements shall be joint and several. Any Borrower who co-signs this Security Instrument but does not execute the Note: (a) is co-signing this Security Instrument only to mortgage, grant and convey that Borrower's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower may agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without that Borrower's consent.

Borrower Initials DP

13. **Notices.** Any notice, to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender. Any notice to Lender shall be given by first class mail to Lender's address stated herein or any address Lender designates by notice to Borrower. Any notice provided for in this Security Instrument shall be deemed to have been given to Borrower or Lender when given as provided in this paragraph.

14. **Governing Law; Severability.** This Security Instrument shall be governed by Federal law and the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Security Instrument or the Note conflicts with applicable law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision. To this end the provisions of this Security Instrument and the Note are declared to be severable.

15. **Borrower's Copy.** Borrower shall be given one conformed copy of the Note and of this Security Instrument.

16. **Hazardous Substances.** Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property that is in violation of any Environmental Law. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property.

Borrower shall promptly give Lender written notice of any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge. If Borrower learns, or is notified by any governmental or regulatory authority, that any removal or other remediation of any Hazardous Substances affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law.

As used in this paragraph 16, "Hazardous Substances" are those substances defined as toxic or hazardous substances by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials. As used in this paragraph 16, "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

17. **Assignment of Rents.** Borrower unconditionally assigns and transfers to Lender all the rents and revenues of the Property. Borrower authorizes Lender or Lender's agents to collect the rents and revenues and hereby directs each tenant of the Property to pay the rents to Lender or Lender's agents. However, prior to Lender's notice to Borrower of Borrower's breach of any covenant or agreement in the Security Instrument, Borrower shall collect and receive all rents and revenues of the Property as trustee for the benefit of Lender and Borrower. This assignment of rents constitutes an absolute assignment and not an assignment for additional security only.

If Lender gives notice of breach to Borrower: (a) all rents received by Borrower shall be held by Borrower as trustee for benefit of Lender only, to be applied to the sums secured by the Security Instrument; (b) Lender shall be entitled to collect and receive all of the rents of the Property; and (c) each tenant of the Property shall pay all rents due and unpaid to Lender or Lender's agent on Lender's written demand to the tenant.

Borrower has not executed any prior assignment of the rents and has not and will not perform any act that would prevent Lender from exercising its rights under this Paragraph 17.

Lender shall not be required to enter upon, take control of or maintain the Property before or after giving notice of breach to Borrower. However, Lender or a judicially appointed receiver may do so at any time there is a breach. Any application of rents shall not cure or waive any default or invalidate any other right or remedy of Lender. This assignment of rents of the Property shall terminate when the debt secured by the Security Instrument is paid in full.

18. **Foreclosure Procedure.** If Lender requires immediate payment in full under Paragraph 9, Lender may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph 18, including, but not limited to, reasonable attorney's fees and costs of title evidence, all of which shall be additional sums secured by this Security Instrument.

If the Lender's interest in this Security Instrument is held by the Secretary and the Secretary requires immediate payment in full under Paragraph 9, the Secretary may invoke the nonjudicial power of sale provided in the Single Family Mortgage Foreclosure Act of 1994 ("Act") (12 U.S.C. 3751 et seq.) by requesting a foreclosure commissioner designated under the Act to commence foreclosure and to sell the Property as provided in the Act. Nothing in the preceding sentence shall deprive the Secretary of any rights otherwise available to a Lender under this Paragraph 18 or applicable law.

Borrower Initials DP

19. Release. Upon payment of all sums secured by this Security Instrument, this Security Instrument shall become null and void. Lender shall release this Security Instrument without charge to Borrower. Borrower shall pay any recordation costs.

20. Waivers. Borrower waives all rights of homestead exemption in the Property.

21. Future Advances. The lien of this Security Instrument shall secure the existing indebtedness under the Note and any future advances made under this Security Instrument up to one hundred fifty percent (150%) of the original principal amount of the Note plus interest thereon, attorney's fees and court costs.

22. Riders to this Security Instrument. If one or more riders are executed by Borrower and recorded together with this Security Instrument, the covenants and agreements of each such rider shall be incorporated into and shall amend and supplement the covenants and agreements of this Security Instrument as if the rider(s) were a part of this Security Instrument.

[Check applicable box(es)]

☐ Condominium Rider

☐ Growing Equity Rider

☐ Other [Specify]

☐ Planned Unit Development Rider

☐ Graduated Payment Rider

☐ Non-Own Occp Rider

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any rider(s) executed by Borrower and recorded with it.

Signed, sealed and delivered in the presence of:

X Curtis DeLoatche

Delores Prescott (Seal)
DELORES PRESCOTT -Borrower

Michael H. Warren

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

____ (Seal)
____ -Borrower

STATE OF SOUTH CAROLINA, SUMTER County

County ss:

Before me personally appeared the above signed witness and made oath that he/she saw the within named Borrower sign, seal, and as his/her act and deed, deliver the within written Mortgage; and that he/she with Michael H. Warren witnessed the execution thereof.

X Curtis DeLoatche

Sworn before me this 24TH day of JUNE

My Commission Expires: 5-15-2013

Michael H. Warren 2003
Notary Public for South Carolina

(Seal)



RECORDED
VOL. 896 PG 75
SUMTER COUNTY, S.C.

RECORDED
VOL. 896 PG. 76
SUMTER COUNTY, S.C.

SCHEDULE "A"

ALL THAT CERTAIN, PARCEL OR LOT TOGETHER WITH THE IMPROVEMENTS THEREON SITUATE, LYING AND BEING IN THE RAFTING CREEK TOWNSHIP, COUNTY OF SUMTER, STATE OF SOUTH CAROLINA, CONSISTING OF 1.0 ACRE AS SHOWN ON A PLAT PREPARED BY J. HENRY WALKER, III, P.L.S DATED DECEMBER 8, 1998 AND RECORDED IN THE RECORDS OF THE SUMTER COUNTY REGISTER OF DEEDS OFFICE IN PLAT BOOK 98 AT PAGE 395. SAID LOT BEING BOUNDED AND MEASURING AS FOLLOWS: ON THE NORTHEAST BY LANDS NOW OR FORMERLY OF WOODMONT ASSOCIATES, INC., AND MEASURING THEREON 213.70 FEET; ON THE SOUTHEAST BY LANDS NOW OR FORMERLY OF FLORENCE N. KENDRICK AND MEASURING THEREON 225.36 FEET; ON THE SOUTHWEST BY A SIXTY-SIX FOOT (66) RIGHT-OF-WAY AND SAXTON ROAD AND MEASURING THEREON 220.44; AND ON THE NORTHWEST BY LANDS NOW OR FORMERLY OF SIMPSON- SAXTON ESTATE AND MEASURING THEREON 183.15 FEET. BE ALL SAID MEASUREMENTS A LITTLE MORE OR LITTLE LESS AND ACCORDING TO SAID PLAT. THIS BEING THE PROPERTY MORE COMMONLY KNOWN AS 6365 SAXTON ROAD, REMBERT, SOUTH CAROLINA.

BEING THE SAME PROPERTY CONVEYED TO DELORES PRESCOTT BY DEED FROM FLORENCE N. KENDRICK, DATED 12/18/1998 RECORDED 12/22/1998 IN DEED BOOK PAGE 727/481.

TAX ID: [REDACTED]
RE: DELORES PRESCOTT

THIS DOCUMENT WAS FILED ON:

July 1, 2003 AT 4:39pm
RECORDED: VOL. 896 PG. 70

VICKI M. MCCARTHY
REGISTER OF DEEDS
SUMTER COUNTY, S.C.

Affidavit of Andrea Kruse

Exhibit C

* Prepared by and return to:)
 BROCK & SCOTT, PLLC)
 Westpark Center)
 3800 Fernandina Road, Suite 110)
 Columbia, SC 29210)
 File No.: 10-08577)

FILED, RECORDED, INDEXED
 05/17/2010 01:42:30 PM
 REC. FEE: 7.00 CO FEE: .00
 STATE FEE: .00 TOTAL FEES: 7.00
 PAGES: 2
 VICKI M. MCCARTHY - REGISTER OF DEEDS
 SUMTER COUNTY BY: R. Carter

ASSIGNMENT OF NOTE AND MORTGAGE

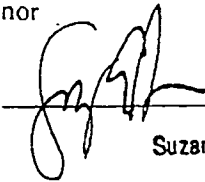
For valuable consideration received, the party of the first part Mortgage Electronic Registration Systems as nominee for Watermark Financial Partners, Inc. (hereinafter referred to as "Assignor"), as holder of the referenced mortgage, does hereby grant, bargain, sell, assign, transfer and set over unto the said party of the second part, Wells Fargo Bank, N.A., (hereinafter referred to as "Assignee"), that certain mortgage bearing the date of June 24, 2003, executed by Delores Prescott, in favor of Mortgage Electronic Registration Systems, Inc. as nominee for Watermark Financial Partners, Inc., and recorded on the date of July 1, 2003 in Official Record Book 896, at Page 70, Public Records of Sumter County, State of South Carolina.

Together with the note or obligation described in said mortgage, and monies due and those that will become due thereon.

TO HAVE AND TO HOLD the same unto the said Assignee, its heirs, legal representatives, successors and assigns forever.

WHEREAS, the undersigned Assignor has executed this Assignment of Note and Mortgage on this 15th day of April, 2010.

Mortgage Electronic Registration Systems as
 nominee for Watermark Financial Partners,
 Inc., Assignor

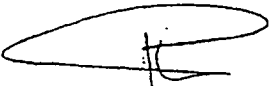
Signature: 

Suzanne E. Brown

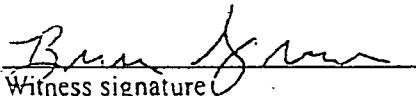
Printed name: _____

Title: Vice President

* 3476 Stateview Blvd
 Fort Mill, SC 29715


 Witness signature

THOMAS PRINCE
 Printed name

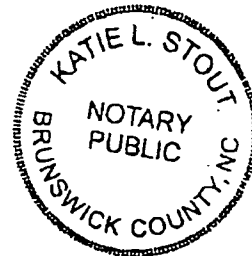

 Witness signature

BRIAN GREEN
 Printed name

THE STATE OF North Carolina
COUNTY OF New Hanover

I, Katie L. Stout, do hereby certify that the within-named Wells Fargo Bank, N.A., by Suzanne Brown, its Vice President, personally appeared before me this 15th day of April, 2010 and acknowledged the due execution of the foregoing instrument.

Katie L. Stout
NOTARY PUBLIC for the state of North Carolina
My commission expires: 2/25/2014



Plaintiff's Motion for Summary Judgment

May 5, 2014

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Wells Fargo Bank, N.A.

Plaintiff,

v.

Delores Prescott; Wells Fargo Financial Bank (SD),

Defendant(s).

IN THE COURT OF COMMON PLEAS

Civil Action No. 2010-CP-43-0823

RECORDED

2014 MAY -7 PM 1:50

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

**MOTION FOR
SUMMARY JUDGMENT**

**TO: DEFENDANT DELORES PRESCOTT AND HER ATTORNEY ROBERT C. RAY,
ESQ.**

You will please take notice that on the 10th day following the date of service hereof, Plaintiff, Wells Fargo Bank, N.A. ("Wells Fargo"), will move before the Court, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for an order granting it summary judgment on the claims pled in Plaintiff's Complaint and on the affirmative defenses and counterclaims asserted by Defendant Delores Prescott ("Prescott") in her Answer and Counterclaim to Plaintiff's Complaint. This Motion is based upon the following grounds:

1. There is no genuine issue of material fact as to whether Wells Fargo is entitled to foreclose its Mortgage covering the property that is the subject of the within action. *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 374-75, 684 S.E.2d 199, 205 (Ct. App. 2009).

a. Prescott has admitted that she signed a Note on June 24, 2003 promising to pay Watermark Financial Partners and its assigns the principal sum of \$81,300.00 plus interest. See Summary of Schedules, at 11 (Dkt. No. 8 in In re Prescott, Case No. 10-05552-dd (Bankr. D.S.C.) (filed Aug. 15,

2010); Summary of Schedules, at 17 (Dkt. No. 1 in In re Prescott, Case No. 11-01994-dd (Bankr. D.S.C.) (filed Mar. 28, 2011)).¹

- b. Prescott has admitted the existence and validity of a real estate mortgage securing the Note which covers the real property that is the subject of this action. Id.
- c. Prescott has admitted that she is in default under the terms and conditions of the subject Note and Mortgage for failing to pay the monthly payments as required under the terms of the Note and has elected to abandon the property to Wells Fargo. Id.
- d. Wells Fargo is the holder of the Note and Mortgage that are the subject of this action and is entitled to enforce those instruments. Bank of Am. v. Draper, 746 S.E.2d 478 (S.C. Ct. App. 2013).
- e. Accordingly, Wells Fargo is entitled to an order entering judgment of foreclosure against Prescott in this action.

2. Prescott failed to identify any counterclaims against Wells Fargo in connection with this action as assets of her bankruptcy estate in her Summary of Schedules filings with the United States Bankruptcy Court, which filings are also on file with this Court and incorporated herein, and accordingly, is judicially estopped from asserting any affirmative defenses to enforcement of the mortgage or purported counterclaims against Wells Fargo in this action. See, e.g., Whitten v. Fred's, Inc., 601 F.3d 231 (4th Cir. 2010); Love v. Tyson Foods, Inc., No. 10-60106, 2012 U.S. App. LEXIS 6748 at *3 (5th Cir. Apr. 4, 2012) ("Judicial estoppel is particularly appropriate

¹ These documents are on file with the Court and are part of the record in this matter, having been filed as Exhibits A and B to Wells Fargo's Memorandum in Opposition to Defendant's Motion to Dismiss.

where a party fails to disclose an asset to a bankruptcy court, but then pursues a claim in a separate tribunal based on that undisclosed asset.”).

Based on the foregoing, there is no genuine issue of material fact, and Wells Fargo is entitled to judgment as a matter of law. This motion will be supported by memoranda, the pleadings and records on file herein, and such other materials and evidence that may be submitted to the Court at or before the hearing on this motion.

Date: May 5, 2014.



S. Sterling Laney (S.C. Bar 6933)
A. Brooks Haselden (S.C. Bar 78656)
Womble Carlyle Sandridge & Rice, LLP
P.O. Box 10208
Greenville, SC 29603
Tel.: 864-255-5422
Fax: 864-255-5440
slaney@wcsr.com
bhaselden@wcsr.com

Attorneys for Wells Fargo Bank N.A.

Amended Answer And Counter Claim of Defendant Delores Prescott

(Jury Trial Demanded on the Counterclaim)

August 21, 2014

STATE OF SOUTH CAROLINA)

THE MASTER IN EQUITY COURT

COUNTY OF SUMTER)

RECORDED

Case No. 2010-CP-43-00823

Wells Fargo Bank, N.A.,)

2014 AUG 25 PM 2:29

Plaintiff,)

JAMES C. DANIELL
CLERK OF COURT
SUMTER COUNTY, S.C.

v.)

AMENDED ANSWER AND COUNTERCLAIM
OF DEFENDANT DELORES PRESCOTT
(Jury Trial Demanded on the Counterclaim)

Delores Prescott and Wells Fargo)
Financial Bank (SD),)

Defendants,)

TO: The Plaintiff, WELLS FARGO BANK, N.A., by and through counsel.

THE DEFENDANT, Delores Prescott (herein "Defendant Prescott") answers the allegations in the Complaint by respectfully alleging the following:

FOR FIRST DEFENSE

(Denial)

1. Each and every allegation of the Complaint not herein expressly admitted is denied and Defendant Prescott demands strict proof thereof.
2. The allegations of paragraph 1 of the Complaint are admitted.
3. Defendant Prescott admits so much of the allegations of paragraph 2 of the Complaint as allege that she is a citizen and resident of Sumter County, but lacks information sufficient to form a belief as to the remaining allegations of paragraph 2, and therefore denies them and demands strict proof thereof.
4. Defendant Prescott admits the allegations of paragraph 3 of the Complaint.

5. Defendant Prescott admits so much of the allegations of paragraph 4 as imports or implies that she signed and executed a note in favor of Watermark Financial Partners, Inc., for the amount and interest set forth in the Complaint.
6. Defendant Prescott admits so much of the allegations of paragraph 5 as imports or implies that on June 24, 2003, she signed and executed a mortgage in favor of Watermark Financial Partners, Inc., but denies the allegations to the extent that they import or imply that Defendant Prescott made, executed or delivered any rights in the mortgage to Mortgage Electronic Services, Inc., except as nominee for Watermark Financial Partners, Inc.
7. Defendant Prescott admits so much of paragraph 6 of the Complaint as alleges that a mortgage was recorded in the Sumter County Register of Deeds on July 1, 2003, but denies that it was the mortgage executed by Defendant on June 24, 2003, and demands strict proof thereof.
8. Defendant Prescott expressly denies the allegations of paragraph 6 of the Complaint that allege a proper or valid assignment of the note or mortgage to the Plaintiff in this action.
9. Defendant Prescott admits so much of paragraph 7 as imports or implies that the Mortgage signed by Defendant Prescott originally secured repayment of money lent by Watermark Financial Partners, Inc. The remaining allegations of paragraph 7 are denied and Defendant Prescott demands strict proof thereof.
10. Defendant Prescott admits so much of paragraph 8 of the Complaint as imports or implies that the loan is owned or guaranteed by Fannie Mae, or it is owned or guaranteed by FHLMC, or the Servicer has signed an agreement to participate in the Home Affordable Modification Program ("HAMP").

11. Defendant Prescott denies the remaining allegations of Paragraph 8 of the Complaint to the extent they import or imply that the Plaintiff lacks or lacked information sufficient to form a belief about the loan's eligibility for HMP modification, and demands strict proof thereof.
12. Defendant Prescott lacks information sufficient to form an opinion as to the allegations of paragraph 9 of the Complaint, and therefore denies them and demands strict proof thereof. To the extent the allegations of paragraph 9 of the Complaint form a legal opinion or conclusion, defendant is not required to respond but would deny any legal conclusions asserted therein.
13. Defendant Prescott denies the allegations of paragraph 10 of the Complaint and demands strict proof thereof.
14. Defendant Prescott admits so much of the allegations of paragraph 11 of the Complaint as import or imply that the Note and Mortgage permit acceleration under certain conditions. Defendant Prescott denies the remaining allegations of paragraph 11, including any suggestion that the Plaintiff is a legal holder of the Note or Mortgage.
15. Defendant Prescott admits so much of paragraph 12 of the Complaint that the Mortgage permits the collection of all costs incurred by foreclosure by judicial proceeding, including reasonable attorney's fees, but denies that all attorney's fees associated with this action are reasonable.
16. Paragraph 13 of the Complaint requires no response of Defendant Prescott.
17. Defendant Prescott denies the allegations of paragraph 14 of the Complaint, except those which require no response from the Defendant, and demands strict proof thereof.

18. Defendant Prescott denies the allegations of paragraph 15 of the Complaint to the extent they import or imply that Wells Fargo Financial Bank (SD) has or ever had an interest in the subject property. Defendant Prescott admits that a document indicating Wells Fargo Financial Bank (SD) had an interest in the property was filed in the public records of Sumter County, South Carolina.

Prelude to Counterclaims and Defenses

19. In October of 2008, Defendant Prescott became unemployed and received weekly unemployment compensation of \$326.00.

20. Defendant Prescott requested an Affordable Home Modification shortly thereafter.

21. Defendant Prescott provided all necessary financial information to Plaintiff as required by law and as requested by Plaintiff, including informing Plaintiff that she was receiving unemployment payments.

22. Plaintiff was aware that Defendant Prescott's receipt of unemployment benefits would disqualify her from receiving certain mortgage relief, including certain loan modifications.

23. Plaintiff represented to Defendant Prescott that she would be considered for a modification of her mortgage payment based on her change in circumstances and offered her a "Special Forbearance" plan, which would permit her to make reduced payments toward her loan while her modification request was being processed.

24. Defendant Prescott was not in default nor had her loan been accelerated at the time she entered the 1st Forbearance Agreement on June 9, 2009.

25. But for Plaintiff's representations regarding a modification determination, Defendant Prescott would not have stopped making her regularly scheduled payments.
26. Plaintiff intentionally and/or negligently induced Defendant Prescott's initial default in June of 2009.
27. Defendant Prescott complied with the requirements of the 1st Forbearance Agreement.
28. Plaintiff did not provide Defendant Prescott any determination on her modification request, and instead entered into a 2nd Forbearance Agreement in December of 2009, which required her to pay the amount of her original mortgage payment monthly for three months with another balloon payment.
29. Defendant Prescott made a \$3,200.00 payment by certified check which covered all three payments. Plaintiff instead applied the payment entirely to arrearages, instead of applying it under the terms of the Forbearance Agreement.
30. Plaintiff had promised in the 2nd Forbearance Agreement to make a determination on modification by March 15, 2010, but failed to do so.
31. Defendant Prescott made multiple payments to Plaintiff, which Plaintiff did not apply to the principal, interest or fees, but withheld the payments as "unapplied," in violation of the mortgage, and forbearance agreements.
32. Plaintiff knew or should have known at that Defendant Prescott was ineligible modification pursuant to Home Affordable Modification Program (HAMP), but continued to represent to Plaintiff that a determination on her eligibility would be made.

33. As a direct result of Plaintiff's misrepresentations and repeated misapplications of payments, Defendant Prescott incurred additional fees, costs and arrearages on the debt.
34. On April 12, 2010, Plaintiff issued a 3rd Forbearance Agreement to Defendant Prescott, but still never made any determination as to her modification, as was promised nine months earlier.
35. Plaintiff was fully aware of Defendant Prescott's financial status over the last nine months.
36. Defendant Prescott made a \$563.05 payment in June of 2010, under the terms of the forbearance agreement then in force. Plaintiff wrongfully withheld the payment from application until August of 2010.
37. As the result of Plaintiff's own conduct, it declared Defendant Prescott had violated the terms of the forbearance agreement, and refused, again, to provide Defendant Prescott with a modification determination.
38. Plaintiff intended for Defendant Prescott to rely on its representations that a modification was (1) possible and (2) that a determination on the modification would be made within a specified timeframe.
39. Defendant Prescott relied on Plaintiff's representations and suffered injury as a result.
40. At all times when Plaintiff made representations to Defendant Prescott, Plaintiff was aware of the true facts and failed to disclose them to Defendant Prescott.
41. Plaintiff undertook to inform Defendant Prescott of her rights to a modification and owed Defendant Prescott a duty to do so in good faith and with full disclosure.

42. The 3rd Forbearance Agreement required Defendant Prescott to pay \$563.05 a month, with an additional balloon payment.
43. Three days after sending the 3rd Forbearance Agreement, Plaintiff initiated this foreclosure action on April 15, 2010.
44. At all times prior to April 15, 2010, Plaintiff represented that it was the lawful owner and servicer of Defendant Prescott's Note and Mortgage.
45. Upon information and belief, Plaintiff was not the owner or servicer of Defendant Prescott's note and mortgage.
46. As an alternative to the allegation to paragraph 45 above, upon information and belief, Plaintiff took title to the Note and Mortgage as a bulk purchaser or by fraud.

For a Second Defense
(Unclean Hands)

47. Paragraphs 19 through 46 are hereby restated and incorporated into this Second Defense by reference.
48. Plaintiff, through its agents, has fabricated documents to create a chain of title to bring the present action.
49. Plaintiff has engaged in inequitable conduct with respect to the transactions that gives rise to the equitable remedy requested in the Complaint, and as a result, relief is barred by the doctrine of Unclean Hands.

For A Third Defense
(Fraud)

50. Paragraphs 19 through 49 are hereby restated and incorporated into this Third Defense by reference.

51. Plaintiff made material misrepresentations of fact to Defendant Prescott, which representations Plaintiff made with knowledge of their falsity or reckless disregard for their truth.

52. The misrepresentations were made with the intent that Defendant Prescott would rely on those representations.

53. Defendant Prescott did not and could not reasonably know the true facts and reasonably relied on the misrepresentations of the Plaintiff, and suffered injury as a result, including making reduced payments and accruing insurmountable arrearages as a result of entering into the 1st Forbearance Agreement.

54. Defendant Prescott had a right to rely on Plaintiff's representation because Plaintiff is in the business of making modification determinations, Defendant Prescott had engaged Plaintiff to make such a determination and Plaintiff had promised to do so.

55. Defendant Prescott would not have altered her position to her detriment but for the repeated misrepresentation that she would receive a determination on her modification eligibility.

For A Fourth Defense and By Way of Counterclaim and Set-Off
(Negligent Misrepresentation)

56. Paragraphs 19 through 55 are hereby restated and incorporated into this Fourth Defense by reference.

57. Plaintiff made material misrepresentations of fact to Defendant Prescott, which representations Plaintiff knew or should have known to be false at the time they were made.
58. Plaintiff owed a duty to Defendant Prescott to make such representations with care.
59. Plaintiff breached its duty of care by making misrepresentations,
60. Defendant Prescott did not know the true facts and reasonably relied on the misrepresentations of the Plaintiff, and suffered injury as a result, including making accruing insurmountable arrearages as a result of entering into the 1st Forbearance Agreement.
61. Defendant Prescott had a right to rely on Plaintiff's representations because Plaintiff is in the business of making modification determinations, Defendant Prescott had engaged Plaintiff to make such a determination, and Plaintiff had promised to do so.
62. Defendant Prescott would not have altered her position to her detriment but for the repeated misrepresentation that she would receive a determination on her modification eligibility.

For a Fifth Defense and By Way of Counterclaim and Set-Off
(Breach of Contract)

63. Paragraphs 19 through 62 are hereby restated and incorporated by reference to this Fifth Defense.
64. To the extent Plaintiff is a lawful successor or assign to the Mortgage Agreement, Plaintiff has breached the terms of the Agreement by misapplying funds in breach of paragraph 3 of the Mortgage Agreement.

65. Plaintiff breached the terms of terms of the Forbearance Agreements by misapplying Defendant Prescott's payments in bad faith and in violation of the terms of the Forbearance Agreements.

For a Sixth Defense and By Way of Counterclaim and Set-Off
(Breach of the Covenant of Good Faith and Fair Dealing)

66. Paragraphs 19 through 65 are hereby restated and incorporated by reference into this Sixth Defense.

67. Every contract includes an implied covenant of good faith and fair dealing. By engaging in the inequitable conduct described in paragraphs 19 through 66, Plaintiff has breached the covenant of good faith and fair dealing.

For a Seventh Defense and By Way of Counterclaim
(Reformation)

68. Paragraphs 19 through 67 are hereby restated and incorporated by reference into this Seventh Defense.

69. In light of the Plaintiff's inequitable conduct described above, Defendant is entitled to a reformation and reinstatement of the Mortgage Agreement, including the reduction or elimination of arrearages, late fees and charges resulting from Plaintiff's conduct.

For a Seventh Defense
(Not the Real Party in Interest)

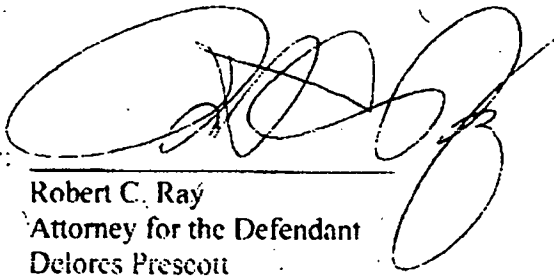
70. To the extent Plaintiff has any claim to the Note or Mortgage it was obtained by fraud or deceit.

71. As a result, Plaintiff has no right to enforce the Note or Mortgage because it is not the real party in interest.

WHEREFORE, having fully answered the Complaint, Defendant Prescott prays the court will inquire into the facts and matters alleged herein: and

- (1) Dismiss the Complaint;
- (2) Tax all costs of this defending this action to the Plaintiff;
- (3) Find for the Defendant Prescott and against the Plaintiff on the Counterclaims.
- (5) Award damages to Defendant Prescott on her Counterclaims, in an amount to be determined by the court.
- (6) Set-Off any relief to Plaintiff by any award of damages to Defendant Prescott; and
- (7) Reform and reinstate the mortgage.

Respectfully Submitted,

By: 

Robert C. Ray
Attorney for the Defendant
Delores Prescott

August 21, 2014
Greenville, South Carolina

Plaintiff's Motion to Strike or Dismiss Amended Answer and Counterclaim

September 5, 2014

RECORDED
 2014 SEP -8 PM 4:28
 STATE OF SOUTH CAROLINA)
 COUNTY OF SUMTER) BEFORE THE MASTER IN EQUITY
 JAMES C. CAMPBELL) THIRD JUDICIAL CIRCUIT
 CLERK OF COURT)
 Wells Fargo Bank, N.A. SUMTER COUNTY, S.C. Civil Action No. 2010-CP-43-00823
)
 Plaintiff,)
)
 vs.)
)
 Delores Prescott and Wells Fargo)
 Financial Bank (SD),)
)
 Defendants.)

PLAINTIFF'S MOTION TO STRIKE
 OR DISMISS AMENDED ANSWER
 AND COUNTERCLAIM

Pursuant to Rules 12(f) and 12(b)(6), SCRCP, Plaintiff moves to strike or, alternatively, dismiss Defendant Prescott's filing of August 21, 2014 entitled "Amended Answer and Counterclaim." The grounds for this motion include:

(1) Defendant Prescott's filing is improper because the Court has not authorized, nor has Plaintiff consented to, her attempt to amend her pleadings to assert new claims after this case has been pending for over four years, as required by Rule 15(a), SCRCP. Additionally, it is manifestly unjust for Defendant Prescott to wait until after Plaintiff filed for summary judgment to suddenly indicate that she has previously-undisclosed counterclaims.

(2) Any attempt to assert new claims at this late hour would be futile, as courts are clear that parties are judicially estopped from bringing claims post-bankruptcy that were not disclosed during bankruptcy proceedings. *See, e.g., Sprowl v. Pfizer, Inc.*, Case No. 8:08-cv-03316-RBH, 2010 U.S. Dist. LEXIS 30939, at *15 (D.S.C. Mar. 30, 2010) ("[U]pon review, it appears to the court that Plaintiff may actually be judicially

estopped from bringing this suit based on Plaintiff's failure to amend his bankruptcy petition to disclose his potential legal claims.").

(3) Moreover, the three-year statutes of limitations set forth in South Carolina Code § 15-3-530 have expired for each of the counterclaims Defendant Prescott is attempting to allege.

(4) Finally, Defendant Prescott's purported counterclaims individually fail on their face:

- **Fraud and Negligent Misrepresentation:** Defendant Prescott alleges that Plaintiff misled her regarding her ability to modify her loan back in 2010. As South Carolina's federal court recently held, such allegations do not give rise to these tort claims. See *Weber v. Bank of Am. NA*, Case No. 0:013-cv-01999-JFA, 2013 U.S. Dist. LEXIS 128863, at *15-19 (D.S.C. Sept. 10, 2013) (dismissing pursuant to Rule 12(b)(6) claims for negligent misrepresentation and detrimental reliance where a borrower alleged that she had suffered damages resulting from a bank's representations about a loan modification).
- **Breach of Contract:** Defendant Prescott's claim for breach of contract is nothing more than an allegation that Plaintiff has misapplied payments to her account. This issue should be addressed at the damages phase of the foreclosure hearing, not as a time-barred standalone claim.
- **Breach of the Covenant of Good Faith and Fair Dealing:** This is not recognized as an independent cause of action in South Carolina. See *Rotec Servs. v. Encompass Servs.*, 359 S.C. 467, 472-73, 597 S.E.2d 881, 883-84 (Ct. App. 2004) ("Therefore, we conclude that the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract.").
- **Reformation:** A court can only reform a contract where there is "clear and convincing evidence" of a "mutual mistake" by the parties. *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 51, 747 S.E.2d 178, 186 (2013). This remedy is not intended to be used as Defendant Prescott suggests to rewrite a contract to something other than that which the parties actually intended. See *id.* ("Reformation is the remedy by which writings are rectified to conform to the actual agreement of the parties." (quoting *Crosby v. Protective Life Ins. Co.*, 293 S.C. 203, 206, 359 S.E.2d 298, 300 (Ct. App. 1987))). Defendant Prescott has not alleged any type of "mutual mistake."

Plaintiff hereby incorporates all filings, documents, arguments, and authorities asserted in its pending Motion for Summary Judgment into this Motion. This Motion shall be supported by exhibits, written memoranda, arguments of counsel, and all other submissions permitted by the Court. Finally, Plaintiff requests that the Court consider this Motion concurrently with Plaintiff's pending Motion for Summary Judgment.

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

By: 

S. Sterling Laney, III
S.C. Bar No. 6933
P.O. Box 10208
Greenville, South Carolina 29603
864-255-5422

M. Todd Carroll
S.C. Bar No. 74000
1727 Hampton Street
Columbia, South Carolina 29201
803-454-6504

Attorneys for Plaintiff

September 5, 2014
Columbia, South Carolina

Affidavit

Delores Prescott

November 15, 2014

STATE OF SOUTH CAROLINA **RECORDED** THE COURT OF COMMON PLEAS

COUNTY OF SUMTER 2014 NOV 19 PM 1:36 Case No. 2010-CP-43-00823

Wells Fargo Bank, N.A., JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Plaintiff,

v.

Delores Prescott and Wells Fargo
Financial Bank (SD),

Defendants,

AFFIDAVIT
(Delores Prescott)

The Affiant, Delores Prescott, being duly sworn states the following:

1. My names is Delores Prescott. I reside in Sumter County, South Carolina. I am over 18 years of age, of sound mind and make this affidavit of my own free will.
2. In 2003, I signed a mortgage agreement with Watermark Financial Partners, LLC, at my home in Sumter, South Carolina.
3. The following week, a different mortgage document was filed in the Sumter County Register of Deeds, which had been materially altered from the document I signed.
4. In 2008, I lost my job and feared that I would not be able to fulfil my obligations under the note and mortgage.
5. I notified Wells Fargo of my change in income and requested assistance. Wells Fargo agents and employees advised me that I would not qualify for refinancing or a reduction in interest because my loan was current.
6. In February of 2009, I was advised by telephone that I would be considered for refinancing if I defaulted on my loan and reapplied for refinancing in March of 2009.

7. In March of 2009, I submitted a hardship letter in accordance with the instructions received from agents and employees of Wells Fargo, and commemorating the advice I received from them. Exhibit A.

8. Prior to March of 2009 I had made all payments on my note and mortgage and had no accumulated arrearage.

9. Beginning in June of 2009, and continuing through 2010, I entered into a series of "Forbearance Agreements," with the Wells Fargo. Agents and employees of Wells Fargo repeatedly represented to me that if I successfully completed the payments outlined in the agreements that I would be considered for a loan modification.

10. I had informed Wells Fargo agents that I was on public assistance in 2009. Exhibit A. Wells Fargo never informed me that I was ineligible for FHA home loan modifications because I was on public assistance.

11. Wells Fargo continued to represent that it would make a determination about my eligibility to receive a home loan modification during 2010. See Exhibit B.

12. Despite my completion of payments under the terms of these agreements, Wells Fargo never made a determination on my loan refinance or modification for over a year.

13. Beginning in early 2010, Wells Fargo started withholding and misapplying my payments to create false arrearages and penalties on my account, to create the illusion that I was not complying with the forbearance agreements.

14. For example, and without limitation, I paid Wells Fargo \$3,200.00 on January 4, 2010. Wells Fargo failed to apply the payment to any outstanding balance and principal, and instead, held the money as "unapplied funds." Exhibits C and D.

15. The balance and arrearages were only owed because of the new payment schedule designed and encouraged by Wells Fargo, and they only remained unpaid because Wells Fargo refused to apply my payments to my account.

16. The January 2010 payment should have been sufficient to fully reinstate the security instrument under Paragraph 10 of the mortgage.

17. In June of 2010, I made payments to Wells Fargo under the forbearance Agreement then in force for payments in June and July. Exhibit E.

18. Wells Fargo the received payments or before June 10, 2014, and the second on or about June 18, 2010. Exhibit F.

19. Wells Fargo cashed the money order on June 12, 2010, but refused to apply the payments as is shown on my statement dated August 5, 2010. Exhibit G.

20. Wells Fargo's misapplication of payments prolonged the default originally encouraged by Wells Fargo and increased fees and costs which would be added to my account balance, thereby further prohibiting me from curing the default.

21. I had sought advice from Wells Fargo and relied on the information provided by Wells Fargo, as a result, my account was in arrears for the first time and I was in jeopardy of losing my home.

22. I informed agents and employees of Wells Fargo of both my financial status and I relied on the advice provided by Wells Fargo in 2009 and 2010.

23. As a result of Wells Fargo's encouragement to enter default, its subsequent misrepresentations regarding refinancing and misapplications of payments, I was unable to bring my account current and was forced to file for bankruptcy.

24. At all relevant times in this litigation, I have maintained that the foregoing facts have resulted in my default, and that Wells Fargo's conduct was illegal and inequitable, including describing the foregoing facts in my correspondence, affidavits and pleadings, which I hereby reaffirm as true and accurate statements, and incorporate into this affidavit by reference. Exhibits H and I.

25. I believe I am entitled to relief from Wells Fargo's foreclosure action based on Wells Fargo's illegal and inequitable conduct.

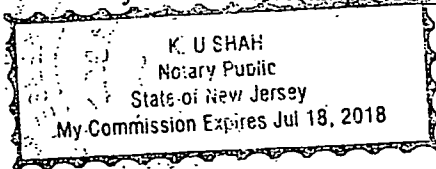
Further the Affiant Sayeth Not:

Delores Prescott
Delores Prescott

Sworn to and Subscribed Before Me
This 15th day of November, 2014.

10.866
Notary Public for ~~South Carolina~~ DP

My Commission Expires: July 18, 2018



Affidavit

Delores Prescott

Exhibit A

2nd Request

Letter of Hardship

Kim Dehning, Counseling Services
Wells Farm Home Mortgage
VIA FACSIMILE
(866) 359-5154

March 18, 2009

RE: Delores Prescott
Loan Number: [REDACTED]
Property Address: 6365 Saxton Road, Rembert, SC 29128
Mailing Address: P O Box 419, Rembert, SC 29128

To Whom It May Concern:

I have been advised by a NACA representative to reapply for assistance.

I am currently unemployed. I lost my job October 7, 2008. I am currently receiving unemployment benefits. My mortgage payments are current, however, I have been paying past the due date.

I am seeking a reduction in my current interest rate of 6.5% or six months forbearance until I find adequate employment. I am able to pay \$326 per month, which is one week of unemployment compensation.

I had previously tried to work the above arrangement out with Wells Fargo Home Mortgage in December of 2008. January 11, 2009 I received correspondence from *Borrower Counseling Services at Wells Fargo stating they received my information and was in the process of reviewing my request, and I would be advised of a status within thirty (30) days.

February 2009, I was told (by telephone) that there was nothing they could do because my mortgage was current. I was told that if my mortgage fell behind they would be able to help me and to reapply after March 4, 2009. I do not want my mortgage to fall behind.

In addition, I made my final payment to Chapter 13 Trustee on March 13, 2009. I am waiting for the letter of discharge. I am told that it will take approximately 60-90 to receive (**see attached correspondence).

Attached please find the documents required to determine the best alternative for my current financial situation:

- Letter of Authorization from Moss and Associates
- *Letter from Wells Fargo
- Monthly Mortgage Statement
- Current Expenditures
- Weekly Unemployment Compensation
- Food Stamp Approval letter
- **Letter from Chapter 13 Trustee

I may be reached at (803) 420-6253 to discuss the above mentioned.

I look forward to hearing from you soon.

Sincerely,

Delores Prescott
Delores Prescott

Affidavit
Delores Prescott
Exhibit E



CUSTOMER'S RECEIPT

SEE BACK OF THIS RECEIPT
FOR IMPORTANT CLAIM
INFORMATION

NOT
NEGOTIABLE

Pay to

Wells Fargo Home Mortgage

Address

3476 Stateview Blvd

MAC

X7801-03K Ext Mill SC 29715

KEEP THIS
RECEIPT FOR
YOUR RECORDS

Serial Number
17848096863

Year, Month, Day
2010-06-05

Post Office
089041

Amount
\$563.05

Class
0817



Serial Number
17848096863

Year, Month, Day
2010-06-05

Post Office
089041

U.S. Dollars and Cents
\$563.05

Pay to Wells Fargo Home Mortgage

Address 3476 Stateview Blvd

MAC X7801-03K

Memo Fort Mill SC 29715

NO 0613248830

Delores Prescott

P.O. Box 419

Rembert SC 29128

© 2009 United States Postal Service. All Rights Reserved.

PLEASE REVERSE WARNING - NEGOTIABLE ONLY IN THE U.S. AND POSSESSIONS

17848096863

17848096863

Acct #

Delores Prescott

6365 Saxton Rd

Rembert, SC 29128

(Property
Address)

P.O. Box 419

Rembert SC 29128

(Mailing
Address)

\$ 563.05 As per
agreement

Track & Confirm

Search Results

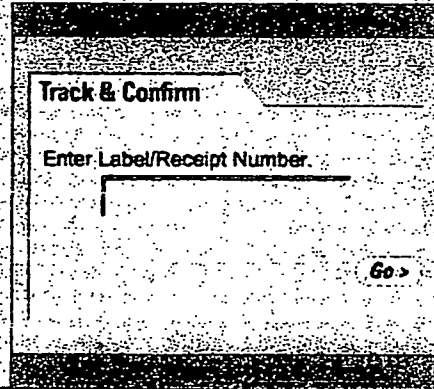
Label/Receipt Number: 0309 2880 0000 3878 8457

Class: Priority Mail®

Service(s): Delivery Confirmation™

Status: Delivered

Your item was delivered at 10:07 AM on June 7, 2010 in FORT MILL, SC 29716.



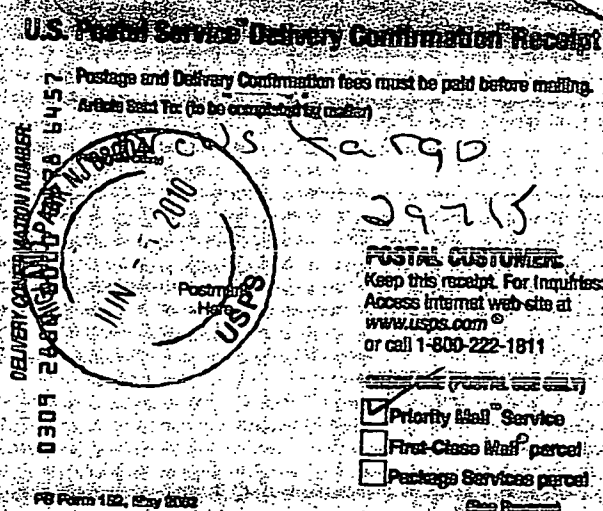
Detailed Results:

- Delivered, June 07, 2010, 10:07 am, FORT MILL, SC 29716
- Arrival at Post Office, June 07, 2010, 7:44 am, FORT MILL, SC 29715
- Processed through Sort Facility, June 05, 2010, 11:22 pm, KEARNY, NJ 07032
- Acceptance, June 05, 2010, 11:19 am, HIGHLAND PARK, NJ 08034

Notification Options

Track & Confirm by email

Get current event information or updates for your item sent to you or others by email. [Go >](#)



INFORMATION SERVICE CENTER
SAINT LOUIS MO, 63180-9400



June 18, 2014

DELORES PRESCOTT
10 SKYTOP GDNS APT 23
PARLIN NJ 08859-2114

Subject: Serial Number: 1784809686
Inquiry ID: 2442439
Amount: \$563.05
Entry Date: June 17, 2014

Dear Mr./Ms. prescott,

As indicated on the customer's receipt, a copy of a money order can be provided up to two years from the cashed date. Unfortunately, our records indicate the money order in question was cashed on June 14, 2010, thus we are unable to provide a copy of the money order.

Sincerely,

A handwritten signature in black ink, appearing to be "A. H." or similar, written over the word "Sincerely,".

Manager, General Accounting Branch

SCANNING AND IMAGING CENTER
UNITED STATES POSTAL SERVICE
P.O. Box 5212
JANESVILLE WI 53547-5212
TEL (866) 974-2733

Affidavit

Delores Prescott

Exhibit F

P339 LN [REDACTED]

MORTGAGE LOAN HISTORY

05-19-13

NAME D PRESCOTT

INV-LN 503-023-0111030201 DUE 05-01-12 TYPE 11

BR PR MAN F P-TYPE 1 INT .0650000 FIRST PB 70,906.04 2ND PB .00

HUD .00 NET 647.64 SF .00440000 SUSP 1396.45 STOP D B P F N A D L

REP .00 RES .00 YMK LOAN 4 0 0 2 R 1 0 1

	05-03	05-03	04-29	04-29	04-29
APP	05-03	05-03	04-29	04-29	04-29
DJE	05-12	07-13	00-00	00-00	00-00
TYPE/TRAN	1 61	3 10	7 45	7 45	7 45
AMOUNT	28.66	28.66	15.00	15.00	15.00
PRIN-PD	.00	.00	.00	.00	.00
PRIN-BAL	70,906.04	70,906.04	70,906.04	70,906.04	70,906.04
INT-PD	.00	.00	.00	.00	.00
ESC-PD	28.66	28.66	.00	.00	.00
ESC-BAL	.00	28.66	.00	.00	.00
A&H-INS	.00	.00	.00	.00	.00
LIFE-INS	.00	.00	.00	.00	.00
LC/FEES	.00	.00	.00	.00	.00
MISC-PD	.00	.00	.00	.00	.00
ADV-BAL	941.63	912.97	912.97	912.97	912.97
SUSP	.00	.00	.00	.00	.00
SC/PAYEE		RBP			

PAGE 001 OF 043 TOTAL TRANS AVAILABLE 0215 OLDEST TRAN 05-04-10 /P

WF_Prescott Production Set 000014

P309 LN [REDACTED]

MORTGAGE LOAN HISTORY

05-19-13

NAME D PRESCOTT

INV-LN J03-023-0111030201 DUE 05-01-12 TYPE 11

BR PR MAN F P-TYPE 1 INT .0650000 FIRST PB 70,906.04 2ND PB .00

HUD .00 NET 647.64 SF .00440000 SUSP 1396.45 STOP D B P F N A D L

REP .00 RES .00 LNK LOAN 4 0 0 2 R 1 0 1

APP	08-04	07-05	07-02	06-18	06-17
DUE	07-11	12-09	07-10	12-09	06-10
TYPE/TRAN	3 10	1 61	3 10	1 61	3 51
AMOUNT	29.91-	30.48	30.48-	679.78	743.00-
PRIN-PD	.00	.00	.00	.00	.00
PRIN-BAL	74,380.97	74,380.97	74,380.97	74,380.97	74,380.97
INT-PD	.00	.00	.00	.00	.00
ESC-PD	29.91-	30.48	30.48-	679.78	743.00-
ESC-BAL	29.91-	.00	30.48-	.00	679.78-
A&H-INS	.00	.00	.00	.00	.00
LIFE-INS	.00	.00	.00	.00	.00
LC/FEES	.00	.00	.00	.00	.00
MISC-PD	.00	.00	.00	.00	.00
ADV-BAL	710.26	710.26	679.78	679.78	.00
SUSP	.00	.00	.00	.00	.00

SC/PAYEE RBP

REP

59001

PAGE 041 OF 043

TOTAL TRANS AVAILABLE 0215

OLDEST TRAN 05-04-10 /P

WF_Prescott Production Set 000054

P309 LN [REDACTED]

MORTGAGE LOAN HISTORY

05-19-13

NAME D PRESCOTT

INV-LN J03-023-0111030201 DUE 05-01-12 TYPE 11

BR PR MAN F P-TYPE 1 INT 0650000 FIRST PB 70,906.04 2ND PB .00

HUD .00 NET 647.64 SF 00440000 SUSP 1396.45 STOP D B P F N A D L

REP .00 RES .00 LNK LOAN 4 0 0 2 R 1 0.1

	06-10	06-04	05-11	05-05	05-05
APP					
DUE	12-09	07-10	12-09	00-00	00-00
TYPE/TRAN	1 73	3 10	1 73	6 32	6 32
AMOUNT	563.05	30.48	563.05	.00	.00
PRIN-PD	.00	.00	.00	.00	.00
PRIN-BAL	74,380.97	74,380.97	74,380.97	74,380.97	74,380.97
INT-PD	.00	.00	.00	.00	.00
ESC-PD	.00	30.48	.00	.00	.00
ESC-BAL	63.22	63.22	93.70	93.70	93.70
A&H-INS	.00	.00	.00	.00	.00
LIFE-INS	.00	.00	.00	.00	.00
LC/FEES	.00	.00	.00	.00	.00
MISC-PD	.00	.00	.00	.00	.00
ADV-BAL	.00	.00	.00	.00	.00
SUSP	563.05	.00	563.05	.00	.00

SC/PAYEE *

RBP

*

ATY-NC-BRO

ATY-NC-BRO

PAGE 042 OF 043

TOTAL TRANS AVAILABLE 0215

OLDEST TRAN 05-04-10 /P

WF - Prescott Production Set 000055

P309 LN

MORTGAGE LOAN HISTORY

05-19-13

NAME D PRESCOTT

INV-LN J03-023-0111030201 DUE 05-01-12 TYPE 11

BR PR MAN F P-TYPE 1 INT .0650000 FIRST PB 70,906.04 2ND PB .09

RUD .00 NET 647.64 SF .00440000 SUSP 1396.45 STOP D B P F N A D L

REP .00 RES .00 LNR LOAN 4 0 0 2 R 1 0 1

	05-05	05-05	05-05	05-05	05-04
APP	05-05	05-05	05-05	05-05	05-04
DUE	00-00	00-00	00-00	00-00	07-10
TYPE/TRAN	6 32	6 32	6 32	6 30	3 10
AMOUNT	.00	.00	.00	.00	30.48
PRIN-PD	.00	.00	.00	.00	.00
PRIN-BAL	74,380.97	74,380.97	74,380.97	74,380.97	74,380.97
INT-PD	.00	.00	.00	.00	.00
ESC-PD	.00	.00	.00	.00	30.48
ESC-BAL	93.70	93.70	93.70	93.70	93.70
A&H-INS	.00	.00	.00	.00	.00
LIFE-INS	.00	.00	.00	.00	.00
LC/FEES	.00	.00	.00	.00	.00
MTSC-PD	.00	.00	.00	.00	.00
ADV-BAL	.00	.00	.00	.00	.00
SUSP	.00	.00	.00	.00	.00
SC/PAYEE	ATY-NC-BRO	ATY-NC-BRO	ATY-NC-BRO	ATY-NC-BRO	REP

PAGE 043 OF 043

TOTAL TRANS AVAILABLE 0215

OLDEST TRAN 05-04-10 /P

WF_Prescott Production Set 000055

Affidavit

Delores Prescott

Exhibit G



Return Mail Operations
PO Box 14411
Des Moines, IA 50308-3411

Monthly Mortgage Statement

Statement Date 08/05/10
Loan Number

For Informational Purposes



1MB 2499/002499/002499 009 01 ACNK14 936
DELORES PRESCOTT
PO BOX 419
REMBERT SC 29128-0419

Customer Service

Online
wellsfargo.com/mym

Fax
(704) 329-3393

Telephone
(800) 274-7025

Correspondence
PO Box 10335
Des Moines IA 50308

Hours of Operation
Mon - Fri 8 AM - 6 PM

Payments
PO Box 560278
Dallas, TX 75266

TTY Deaf/Hard of He
(800) 934-9998

Summary

Payment (Principal and/or Interest, Escrow) \$644.69
Optional Product(s) \$0.00
Current Monthly Payment 09/01/10 \$644.69
Overdue Payments 02/01/10 - 08/01/10 \$4,496.73
Unpaid Late Charge(s) \$0.00
Other Charges \$0.00
TOTAL PAYMENT 09/01/10 \$5,141.42

Property Address

6385 SAXTON RD
REMBERT SC 29128
Unpaid Principal Balance \$74,158.41
(Contact Customer Service for your payoff balance)
Interest Rate 6.500%
Interest Paid Year-to-Date \$2,828.58
Texas Paid Year-to-Date \$0.00
Escrow Balance \$483.15

Activity Since Your Last Statement

Date	Description	Total	Principal	Interest	Escrow	Late Charge	Other
08/05	PAYMENT	\$110.99	\$110.99	\$402.90	\$128.51		\$1,284.78
08/10	PAYMENT	\$563.05				Unapplied	\$563.05

This statement is for informational purposes only and is being provided as a courtesy should you voluntarily decide to make your loan payments. This statement should not be construed as an attempt to collect a debt or a demand for payment contrary to any protections you may have received pursuant to your bankruptcy case.

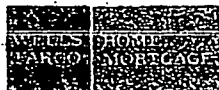
If you have received a discharge, and the loan was not reaffirmed in the bankruptcy case, we will only exercise our rights as against the property and we are not attempting any act to collect the discharged debt from you personally.

If your Plan requires you to make regular post-petition mortgage payments directly to the Bankruptcy Trustee, and you choose to maintain your mortgage payment, any payment should be remitted to the Trustee or otherwise in accordance with the Plan you filed with the Bankruptcy court.

Important Messages

DISASTER PREPARATION

Our disaster assistance line is here to help if you are ever affected by a disaster such as a fire, flood, or storm. If needed, a dedicated disaster representative is available at (888) 818-9147.



Loan Number
Total Payment

\$5,141.42

Monthly Payment A \$

Check here and see
reverse for address
correction.

DELORES PRESCOTT

2499/002499/002499 009 01 ACNK14 936



WELLS FARGO HOME MORTGAGE
PO BOX 660278
DALLAS, TX 75266-0278

Please specify
additional funds.
Any additional
funds not
specified will be
applied first to
any outstanding
charges.

Additional Principal B \$

Late Charges C \$

Other Charges D \$

Additional Escrow E \$

Total Amount Enclosed F \$
(Please do not send cash)

936 0613248830 1 10000064469006652505141420514142 000000005102906239

Record On Appeal
Page 160

Plaintiff's Memorandum in Support of Summary Judgment

November 18, 2014

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Wells Fargo Bank, N.A.,

RECORDED

2014 NOV 19 AM 11:10

BEFORE THE MASTER IN EQUITY
AND JUDICIAL CIRCUIT

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Civil Action No. 2010-CP-43-00823

Plaintiff,)

vs.)

Delores Prescott and Wells Fargo
Financial Bank (SD),)

Defendants.)

PLAINTIFF'S MEMORANDUM IN
SUPPORT OF SUMMARY
JUDGMENT

The issues at stake in this litigation are not subject to legitimate dispute. Ms. Prescott has a loan with Wells Fargo that was secured by a mortgage on property in Sumter County, and she has defaulted on that loan. She cannot deny any of this, nor can she pursue any of her eleventh-hour counterclaims, because she has admitted the accuracy of Wells Fargo's position under oath to the United States Bankruptcy Court. In fact, in proceedings before that court, Ms. Prescott affirmatively abandoned any interest she had in the property that secured this loan. Accordingly, the Court should enter judgment in Wells Fargo's favor.

PROCEDURAL BACKGROUND

The procedural timeline of this dispute illustrates why Wells Fargo is entitled to summary judgment. This litigation began when Wells Fargo filed its foreclosure complaint on April 16, 2010. Ms. Prescott answered the complaint on May 17, 2010, but did not assert any counterclaims at that time. Following the close of pleadings, though, Ms. Prescott commenced bankruptcy proceedings and made a series of admissions to the Bankruptcy Court that void any possible defense she could have presented in this case.

Admissions Made During Ms. Prescott's First Bankruptcy Case

Shortly after answering the complaint in this case, Ms. Prescott commenced voluntary Chapter 13 bankruptcy proceedings in the District of South Carolina. In those proceedings, she responded "NONE" when asked to disclose all "contingent or unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims." Ex. A, Summary of Schedules at 7 (Dkt. No. 8 in *In re Prescott*, Case No. 10-5552-dd (Bankr. D.S.C. Aug. 15, 2010)) ("*In re Prescott I*"). Ms. Prescott further conceded, without any qualification, that Wells Fargo was a creditor with a loan secured by a mortgage on the property at issue in this case. *Id.* at 11. She declared both of these facts to be "true and correct" under penalty of perjury. *Id.* at 31.

Admissions Made During Ms. Prescott's Second Bankruptcy Case

Judge Duncan ultimately dismissed that bankruptcy matter because Ms. Prescott had not proposed plan that complied with Chapter 13's requirements. Ex. B, Order (Dkt. No. 29 in *In re Prescott I* (Jan. 19, 2011).) Not deterred, she filed a second voluntary Chapter 13 bankruptcy case on March 28, 2011.

In her second bankruptcy case, Ms. Prescott again conceded that:

- (1) She did not have any counterclaims to pursue; and
- (2) Wells Fargo was a secured creditor with a mortgage on her property in Sumter County.

Ex. C, Summary of Schedules at 13 (no counterclaims) and 17 (Wells Fargo is a secured creditor) (Dkt. No. 1 in *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. Mar. 28, 2011)) ("*In re Prescott II*"). Just as before, Ms. Prescott swore to both of these facts under penalty of perjury. *Id.* at 36.

On April 11, 2011, Wells Fargo filed a claim in Ms. Prescott's second bankruptcy proceeding in which it claimed a secured debt of over \$80,000. Ex. D, Wells Fargo's Proof of Claim (Claim No. 3-1 in *In re Prescott II* (Apr. 11, 2011).) Ms. Prescott did not file any objection to this claim.

During the second bankruptcy matter, Wells Fargo moved for relief from the automatic stay that attaches to bankruptcy proceedings so that it could prosecute its foreclosure claim. Ex. E, Motion for Relief from Automatic Stay (Dkt. No. 26 in *In re Prescott II* (Dec. 9, 2011).) As proof of its security interest, Wells Fargo provided the Bankruptcy Court with the same note and mortgage upon which its foreclosure claim is based. *Id.* at 8-17.

In response, Ms. Prescott "certified" the validity of Wells Fargo's factual assertions, conceded that Wells Fargo was a secured creditor, and stated that she is "behind on payments due on this loan," while requesting time to "catch up on payments." Ex. F, Answer to Motion for Relief from Stay (Dkt. No. 27 in *In re Prescott II* (Dec. 22, 2011).) The Court ultimately granted Wells Fargo's request and held that Ms. Prescott was "in default" of her payments to the bank. Ex. G, Order Granting Relief from Stay (Dkt. No. 35 in *In re Prescott II* (Sept. 26, 2012).)

On June 17, 2013, Ms. Prescott proposed to amend her Chapter 13 plan to abandon her interest in the property that secured Wells Fargo's debt. She even highlighted her abandonment in blue so that there would not be any confusion as to the proposed amendment:

The Debtor moves to Amend the confirmed Chapter 13 plan due to abandon interest in property located at 635 S. Van R. Rd. Rannett, SC 29128 to Wells Fargo Home Mortgage. Wells Fargo Home Mortgage received relief from stay in September 2012.

Ex. H, Motion to Modify Chapter 13 Plan at 1 (Dkt. No. 39 in *In re Prescott II* (June 17, 2013)) (highlighting and grammatical errors in original). She further verified the effect of this abandonment:

6. Surrender of property: The debtor will surrender the following property upon confirmation of the plan. The order confirming plan shall terminate the automatic stay as to that property: Wells Fargo Home Mortgage; 6365 Saxton Rd., Rembert, SC 29128. Any creditor affected by this provision may file an itemized proof of claim for any unsecured deficiency within a reasonable time after the surrender of the property.

Id. at 6.

On July 17, 2013, Judge Duncan issued an order confirming the Chapter 13 plan with the modifications proposed by Ms. Prescott. Ex. I, Order Confirming Plan and Resolving Motions (Dkt. No. 43 in *In re Prescott II* (July 17, 2013).)

Inconsistent Statements Made to this Court

Once the bankruptcy proceedings closed, this case's result should have been simple. Ms. Prescott affirmatively told the Bankruptcy Court that if it approved her proposed Chapter 13 plan, then she would surrender the property at issue in this case to Wells Fargo. Though the Bankruptcy Court took her at her word, Ms. Prescott has done precisely the opposite, and has instead suggested to this Court that Wells Fargo does not have any interest in this property, that Wells Fargo is not entitled to foreclose on the property, and that Wells Fargo should actually be liable to her for various counterclaims.

Two months after Judge Duncan confirmed a Chapter 13 plan with Ms. Prescott's proposed amendments, Ms. Prescott moved for leave to file an amended answer and counterclaims for breach of the South Carolina Consumer Protection Code, the South

Carolina Unfair Trade Practices Act, and for breach of a fiduciary duty. The Court granted that motion on December 2, 2013.

However, instead of filing such an amended pleading, Ms. Prescott filed a motion on January 3, 2014, to dismiss the complaint in its entirety. The basis for Ms. Prescott's motion was a newfound argument that Wells Fargo was not actually a secured creditor entitled to foreclose on this property. In opposing that motion, Wells Fargo identified the same representations from Ms. Prescott to the Bankruptcy Court that are recited above and argued that Ms. Prescott cannot legally avoid foreclosure—particularly when she has already abandoned her interest in this property.

After a hearing, the Court denied Ms. Prescott's motion to dismiss by order dated April 17, 2014. Less than three weeks later, Wells Fargo moved for summary judgment based on the same arguments it used to defeat Ms. Prescott's motion to dismiss.

On August 25, 2014, after Wells Fargo's motion for summary judgment had been pending for nearly four months, Ms. Prescott filed an amended answer and—for the first time—asserted counterclaims against Wells Fargo. She did not seek consent from Wells Fargo to file this amended pleading; Wells Fargo is not aware of the Court authorizing this eleventh-hour filing; and the very act of asserting counterclaims against Wells Fargo is plainly inconsistent with her repeated statements under oath to the Bankruptcy Court. Accordingly, Wells Fargo moved to strike this filing, as the counterclaims she is attempting to allege—which differ from those that were identified in her motion to amend that was filed nearly a year earlier—are fatally flawed.

Against this procedural backdrop, Wells Fargo is entitled to summary judgment on all claims, with the issue of monies owed to Wells Fargo reserved for a later hearing.

STANDARD OF REVIEW

To prevail on a motion for summary judgment, the moving party must show that there are no genuine issues of material fact and that it is, therefore, entitled to summary judgment as a matter of law. Rule 56(c), SCRCP. Thereafter, the non-moving party may not rely simply on allegations or its own pleadings, but must instead identify specific facts that demonstrate that a genuine issue remains for trial. *Id.* Rule 56(e).

ARGUMENT

Wells Fargo is entitled to summary judgment because a party cannot make a representation to a court to induce it to rule one way, and then make the opposite representation to a different court to achieve a different outcome. This prohibition is a cornerstone of res judicata, judicial estoppel, counsel's duty of candor to the Court, and overall fairness.

Here, after this case was commenced, and after she had answered Wells Fargo's complaint, Ms. Prescott represented to the Bankruptcy Court that:

- (1) She owed a debt to Wells Fargo that was secured by the same property at stake in this foreclosure action;
- (2) She did not have any viable counterclaims to assert against Wells Fargo;
- (3) She was behind on her payments to Wells Fargo; and
- (4) Most importantly, she abandoned her interest in the subject property when the Bankruptcy Court confirmed the Chapter 13 plan.

As explained at length in Wells Fargo's memorandum in opposition to Ms. Prescott's motion to dismiss, courts agree that she is now barred from denying any of these points or asserting claims that run contrary to these concessions. As a result, judgment is proper in Wells Fargo's favor on all claims.

First, Ms. Prescott affirmatively abandoned all interests she has in the subject property at the close of her bankruptcy proceedings. She even highlighted her abandonment in blue when notifying the Bankruptcy Court of this decision. As a practical matter, then, she does not have standing to dispute anything associated with the property.

Second, a party who admits a debt owed in bankruptcy proceedings is barred from later disputing that debt. *See, e.g., Celli v. First Nat'l Bank*, 460 F.3d 289, 295–96 (2d Cir. 2006) (“In summary, we hold that the Chapter 13 bankruptcy confirmation order is *res judicata* with respect to the debtor’s and the Trustee’s post-confirmation attempt to avoid a confirmed, recorded lien on the debtor’s property where the lien was claimed by FNB at the outset of the bankruptcy proceedings and included by the debtor in his plan.”); *Mbazira v. Litton Loan Servicing, LLP*, Case No. 10-11831-FDS, 2011 U.S. Dist. LEXIS 85271, at *10–11 (D. Mass. July 27, 2011) (“Other courts that have considered post-confirmation attacks on the validity of secured claims have likewise rejected these efforts. . . . Although the matter is typically viewed as a question of *res judicata* rather than judicial estoppel, several courts of appeals have held debtors estopped from challenging the status of secured claims after confirmation.”).

Because Ms. Prescott affirmed her secured debt to Wells Fargo, conceded that she had missed payments, and never disputed any of Wells Fargo’s statements about that debt to the Bankruptcy Court, she is estopped from disputing Wells Fargo’s entitlement to foreclose its lien. Accordingly, Wells Fargo is entitled to judgment as a matter of law on its foreclosure claim.¹

¹ Ms. Prescott cannot create a dispute of material fact to avoid summary judgment through her recently-filed affidavit, which contradicts her sworn statements and representations to the Bankruptcy Court. *See, e.g., Dunes W. Golf Club, LLC v. Town of*

Third and finally, a party that does not disclose the existence of a claim on its bankruptcy schedules is precluded from later bringing that claim. See, e.g., *Whitten v. Fred's, Inc.*, 601 F.3d 231, 241 (4th Cir. 2010) (“Judicial estoppel has often been applied to bar a civil lawsuit brought by a plaintiff who concealed the existence of the legal claim from creditors by omitting the lawsuit from his bankruptcy petition.”), *overruled in unrelated part by Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013); *Sprowl v. Pfizer, Inc.*, Case No. 8:08-cv-3316-RBH, 2010 U.S. Dist. LEXIS 30939, at *15 (D.S.C. Mar. 30, 2010) (“[U]pon review, it appears to the court that Plaintiff may actually be judicially estopped from bringing this suit based on Plaintiff’s failure to amend his bankruptcy petition to disclose his potential legal claims.”).

Ms. Prescott affirmatively stated “NONE”—on two different occasions—when asked by the Bankruptcy Court to disclose all counterclaims she could pursue. As a result, even if the Court is inclined to allow Ms. Prescott to amend her responsive pleading to allege counterclaims, all of her counterclaims are barred as a matter of law. Wells Fargo is entitled to summary judgment on those claims as well.

CONCLUSION

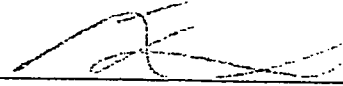
The doctrines of judicial estoppel and res judicata are designed to preserve the integrity of the judicial process, to conserve public and private resources by avoiding relitigation of previously-decided issues, and to give parties finality and certainty in judgments. Ms. Prescott’s post-bankruptcy posturing in this case defies each of these principles and is barred by these doctrines. Accordingly, Wells Fargo respectfully

Mt. Pleasant, 401 S.C. 280, 311, 737 S.E.2d 601, 617 (2012) (noting parenthetically that “a party cannot take inconsistent positions in an attempt to create a sham issue of material fact”).

requests that the Court enter summary judgment in its favor on all claims, with leave to present its damages owed at a subsequent hearing before the Court.

Respectfully submitted,

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November 18, 2014
Columbia, South Carolina

**Defendant's Memorandum In Opposition To Plaintiff's Motions to Dismiss the
Amended Answer and Counterclaim and For Summary Judgment**

November 17, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER)

RECORDED

2014 NOV 19 PM 1:36

IN THE COURT OF MASTER IN EQUITY
Case No. 2010-CP-43-00823

Wells Fargo Bank, N.A.,
Plaintiff,

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

v.

Delores Prescott and Wells Fargo
Financial Bank (SD),

Defendants,

DEFENDANT'S
MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTIONS TO DISMISS
THE AMENDED ANSWER AND
COUNTERCLAIM AND FOR SUMMARY
JUDGMENT.

The Defendant, Delores Prescott, responds to the Plaintiff's Motion to Dismiss and Motion for Summary Judgment as follows:

I. The Motion to Dismiss Amended Answer and Counterclaim should be denied.

The Amended Answer and Counterclaim was authorized by Order of the Honorable Richard L. Booth dated December 2, 2013, which specifically permitted the Defendant to plead all affirmative defenses and compulsory counterclaims related to Plaintiff's complaint. The factual allegations in the amended complaint are the same or similar to those that the Defendant has asserted in her original pro se Answer and Affirmative Defenses, except that cross-claims against the co-Defendant, Wells Fargo Financial Bank (SD), have been omitted, and the claims have been reformatted to clarify the pleading. The relief sought and the basis for Plaintiff's liability/culpability have not been substantially altered, and the Plaintiff has not been subjected to surprise or prejudice by any defense or counterclaim asserted in the amended pleading.

- A. The Plaintiff has not been prejudiced by the Filing of the Amended Answer and Counterclaim.

The Rules governing the amendment of pleadings strongly favor amendment. An amendment should be granted freely when justice so requires and there is no prejudice to the other party.

Kelly v. South Carolina Farm Bureau Mutual Insurance Co., 316 S.C. 319; 450 S.E.2d 59, (Ct. App. 1994). The party opposing an amendment has the burden of demonstrating it will be prejudiced by the amendment of the pleading. Stanley v. Kirkpatrick, 592 S.C. 169, 174, 592 S.E.2d 296, 299 (2004). The prejudice contemplated by Rule 15, is the lack of notice that a new issue will be tried and a lack of opportunity to refute it. *Id.*

At all relevant times the Plaintiff has been aware of the facts and allegations of the Amended Complaint through Defendants' Hardship Affidavit dated May 10, 2010, and her Answer to Complaint and Affirmative Defenses dated May 17, 2010. Additionally, the amendment was authorized in advance of Plaintiff's filing for Summary Judgment. Accordingly, the Plaintiff cannot show any prejudice to preclude Defendant's proposed Amendment.

- B. The Allegations of the Amended Answer and Counterclaim state Timely Causes of Action and Defenses authorized by Law.

1. Defendants claims are not time-barred.

The Counterclaims and Defenses are timely, because they relate back to the filing of the original answer on May 18, 2010. Rule 15(c), SCRCP, states that an Amendment relates back to the original pleading "[w]henver the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading." Defendants claims and defenses clearly arise out of the same transaction or occurrence as the Plaintiff's claims and Defendants' initial defenses, namely the mismanagement of Defendant's mortgage and

misrepresentations made by the Plaintiff, in connection with the alleged default, acceleration and foreclosure process. See Answer to Complaint and Affirmative Defenses, ¶¶ 7-12, May 17, 2010, and Hardship Affidavit Explanations, May 17, 2010. Because they relate back to the time of the initial Answer, they are not barred by the statute of limitations. Additionally, Defendants' claims fall under the extended six-year statute of limitations provided in S.C. Code Ann. § 37-23-70, including the claims relating to Plaintiff's efforts to encourage Defendant's default and misrepresentations in connection with contemplated refinancing.

Finally, while Plaintiff complains of the passage of time, it is indisputable that Defendant could not amend her pleadings during the pendency of bankruptcy proceedings, and that any right to amend or assert a claim during that time would have belonged exclusively to the Trustee. See, Weber v. Bank of America, C/A No. 0:13-cv-01999-JFA (D.S.C., Rock Hill Division, September 10, 2013).

Thus, the Defendants' claims are not barred by the statute of limitations.

2. The Amended Answer and Counterclaim States Adequate Claims for Relief.

Defendant has restyled her original "Answer and Affirmative Defenses" into claims for Fraud, Negligent Misrepresentation, Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, as well as equitable defenses, including Unclean Hands. Plaintiff claims the Defendant has not stated facts sufficient to state a cause of action under Rule 12(b)(6). In ruling on a 12(b)(6) motion, the court must construe the counterclaims in the light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the nonmovant to relief on any theory of the case. Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40 (2012). If the facts alleged would entitle the non-moving party to any relief, dismissal under Rule 12(b)(6) is improper. *Id.*

Fraud and Negligent Misrepresentation

The allegations of the counterclaims state claims for relief distinguishable from the inadequate claims identified in the Plaintiff's motion. A claim of fraud consists of the following elements:

(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Regions Bank v. Schmauch, 354 S.C. 648, 672, 582 S.E.2d 432, 444-45 (Ct.App.2003).

A claim for negligent misrepresentation consists of the following elements:

(1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

The key difference between fraud and negligent misrepresentation is that "fraud requires the conveyance of a known falsity, while negligent misrepresentation is predicated upon transmission of a negligently made false statement." Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676, 680-81 (Ct.App.2001). Negligent Misrepresentation also requires showing (1) the defendant owed a duty of care to see that the information communicated was truthful and that (2) the defendant breached that duty by failing to exercise due care. *Id.*

Wells Fargo does not identify any particular element that is lacking in the counterclaims, but instead relies on a case from the South Carolina District court, Weber v. Bank of America, C/A No. 0:13-cv-01999-JFA (D.S.C., Rock Hill Division, September 10, 2013), asserting that that decision bars any possible fraud or negligent misrepresentation claim for arising out of the

loan modification process. The distinctions between the Defendant's counterclaims and that case are clear.

The plaintiff in Weber alleged that he requested mortgage assistance after becoming unemployed. He further alleged that the bank told him from the outset of their discussions that he was not eligible for assistance due to his unemployment. Weber, p. 1. The bank persistently denied his renewed requests for modification. Id. Furthermore, the plaintiff merely called the bank's promise to refinance a "sham practice" without reference to any duty or misstatement of material fact.

By comparison, in this case, Defendant has alleged that the Bank never informed her that modification was unavailable because of her unemployment. Furthermore, the bank never made a determination on her eligibility for a loan modification despite knowledge that Defendant was never eligible for such assistance. Here, the misrepresentation was that a determination would be made, but never was, not that an unfavorable determination had been made. Additionally, the bank told the Defendant that she had to go into default before she would be eligible for assistance.

Defendant has alleged all the necessary facts to make out her claim. Specifically, Defendant has alleged that (1) she informed Wells Fargo of her financial vulnerability and reliance on public assistance; (2) requested information and advice from Wells Fargo; (3) that Wells Fargo was aware that she was relying on that advice; (4) that Wells Fargo made misrepresentations regarding (a) default being a pre-condition for modification and (b) that a modification determination would be made; (5) that the misrepresentations were material to the transaction, and (6) that Wells Fargo knew or should have known that the representations were false when made or made them with reckless disregard as to their truth or falsity. Defendant has

further alleged that she (7) relied on the banks misrepresentations and that she (8) suffered injury as a result of this (9) reasonable reliance.

Unlike the plaintiff in Weber, Defendant has alleged a duty on behalf of Wells Fargo to support her negligent misrepresentation action. The court in Weber read the complaint to allege a duty on behalf of banks to provide some form of loan modification program, which duty simply does not exist. Weber, p. 7. In this case, the breached duty derives from both the common law duties of care and disclosure and from applicable statutory law.

The Court of Appeals has recognized the existence of a duty to exercise due care in giving information when the party making a representation has a pecuniary interest in the transaction. Winburn v. Insurance Company of North America, 287 S.C. 435, 339 S.E.2d 142 (Ct. App. 1985). Even where no fiduciary duty exists between two parties (as between a bank and its customer), a court will find a duty of care and a duty to disclose where the party making a representation has a financial interest in the representation, knows the other person is relying on the representation, and the representing party intentionally undertakes to provide advice or counsel. See, Restatement (Second) of Torts, §552 (1977); See First Federal Savings Bank v. Knauss, 296 S.C. 136, 370 S.E.2d 906 (1988) (stating §552 applied in negligent misrepresentation case against bank by borrower). Additionally, S.C. Code Ann. § 37-23-70 clearly imposes a duty on banks by prohibiting them from making certain statements and representations in consumer loan transactions. Any encouragement to enter default is strictly prohibited. Accordingly, Ms. Prescott has alleged sufficient facts for both fraud and negligent misrepresentation and her case is clearly distinguishable from Weber.

Contract Claims

Finally, from the face of the Amended Answer and Counterclaim it is obvious that Defendant has not plead a "stand-alone" claim for a breach of the covenant of good faith and fair dealing, but plead that breach in conjunction with a breach of contract claim. No independent or unique remedy has been sought from the claim, and it is clearly an additional breach of the same contract that is the basis for Plaintiff's own action. Plaintiff's reliance on Rotec Servs. V. Encompass, Servs., 359 S.C. 467, 472-73, 597 S.E.2d 881, 883-84, is misplaced. In Rotec, the court held that there was no contractual obligation breached, and as a result a claim for a breach of the implied covenants of that contract could not stand alone. Here, Defendant has alleged breaches of specific provisions of the contract between the parties and that the Wells Fargo acted in bad faith in allowing those breaches to occur. Specifically, Defendant has alleged that Wells Fargo mismanaged and misapplied payments from Defendant, as it was required to do under the Mortgage Agreement. The application of funds was clearly a discretionary act controlled by Wells Fargo, which discretion was abused in repeatedly failing to properly apply funds.

Additionally, the Plaintiff points to good no reason for disallowing the Defendant's breach of contract claim. There is no dispute that there was a contract between the parties. The Defendant has alleged a breach of a material term that relates directly to the performance and obligations of the parties. Plaintiff's failure to apply payments in accordance with the contract had a bearing on Defendant's alleged failure to comply with the payment terms of the note and mortgage. Accordingly, the Defendant's breach of contract claim should be considered at the liability stage and not, as Plaintiff contends, as an afterthought at the damages stage.

II. Motion for Summary Judgment

1. There are disputes about the material facts of Plaintiff's Foreclosure Action, and Summary Judgment should be Denied.

While the "admissions" listed in Plaintiff's motion for Summary Judgment do make out the prima facie elements of a foreclosure action, they do not resolve the factual disputes raised by Defendant's equitable defenses. A foreclosure can be defeated by pleading and proving an equitable defense. See Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 74-76, 698 S.E.2d 244, 247-48 (Ct. App. 2010). Defendant has alleged that Wells Fargo should be barred from foreclosing on the note and mortgage because of its inequitable conduct, including its efforts to induce Defendant's default, its misrepresentations regarding refinancing which resulted in the aggregation of additional fees and costs, and its failure to properly apply payments. Defendants have not denied the factual allegations of Defendant's claims, and there are issues of fact yet to be resolved. Because there is an ongoing dispute about whether the Plaintiff has come to court with unclean hands, the Plaintiff's motion for Summary Judgment on its foreclosure action should be denied.

2. The Defendant's Claims are not Judicially Estopped.

The Defendant has steadfastly asserted its defenses, and has notified the Plaintiff of its defenses and counterclaims throughout this action. The Defendant's alleged omissions in bankruptcy filings do not preclude her claims and defenses under a theory of judicial estoppel.

To establish judicial estoppel, a party claiming estoppel must show the following elements:

First, the party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance taken in prior litigation. The position at issue must be one of fact as opposed to one of law or legal theory. Second, the prior inconsistent position must have been accepted by the court. Lastly, the party against whom judicial estoppel is to be applied must have intentionally misled the court to gain unfair advantage. This bad faith requirement is the determinative factor.

Zinkand v. Brown, 478 F.3d 634, 638 (4th Cir.2007) (citations and internal quotation marks omitted). The failure of the Bankruptcy Trustee to include the equitable and legal claims does not demonstrate the necessary bad faith on the part of the Defendant to prevent the assertion of these arguments in this action.

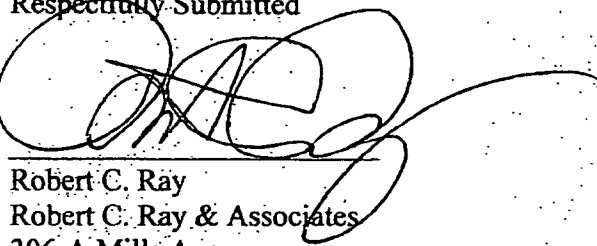
The Plaintiff's own authorities reached the same conclusion. In Whitten v. Fred's, Inc., 601 F.3d 231 (4th Cir., 2010), the court held a Plaintiff's failure to list certain claims in its bankruptcy documents did not prevent the party from raising them later, noting that all interested parties were aware of the claims despite the omission. The court noted that "[e]ven if Whitten should have supplemented her bankruptcy pleadings after she actually filed this action, her initial disclosure of the claims precludes us from finding that she acted in bad faith." Whitten, 601 F.3d at 242.

In her initial responsive pleadings and supporting documents filed in 2010, the Defendant asserted numerous counter-claims and plead all relevant facts contesting the Plaintiff's entitlement to a foreclosure. Those claims have been clarified in the Defendant's subsequent amendments, however, the positions espoused are not contradictory to those taken at earlier stages in this litigation.

Accordingly, the Plaintiff's motion for summary judgment should be denied, and the Defendant is entitled to a determination of her claims and defenses.

Respectfully Submitted

By:


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Attorney for the Defendant

November 17, 2014
Greenville, South Carolina.

Post-Hearing Memorandum In Support of Plaintiff's

Motion for Summary Judgment

December 3, 2014

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

RECORDED

2014 DEC -4 PM 2:14

BEFORE THE MASTER IN EQUITY
THIRD JUDICIAL CIRCUIT

Wells Fargo Bank, N.A.,
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Civil Action No. 2010-CP-43-00823

Plaintiff,)

vs.)

Delores Prescott and Wells Fargo
Financial Bank (SD),)

Defendants.)

POST-HEARING MEMORANDUM IN
SUPPORT OF PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

INTRODUCTION

On November 19, 2014, the parties appeared before the Court for a hearing on Plaintiff's Motion for Summary Judgment and Plaintiff's Motion to Strike. After hearing arguments, the Court ruled from the bench that (1) the parties' loan agreement is enforceable, (2) Ms. Prescott is in default on the note, and (3) Ms. Prescott's counterclaims fail as a matter of law.

In so ruling, the Court stated that the twin doctrines of res judicata and judicial estoppel bar Ms. Prescott from coming to this Court and taking positions contrary to those that she previously represented to the Bankruptcy Court. However, during the hearing, the Court requested that the parties submit additional briefing on two issues:

- What is the legal effect of a debtor abandoning or surrendering property in the bankruptcy context?
- Can Ms. Prescott's allegation that the parties' loan was closed in 2003 without a South Carolina attorney's participation jeopardize the enforceability of Wells Fargo's mortgage by way of an "unclean hands" affirmative defense?

As explained below, case law is clear that by abandoning the property that is at issue in this case, Ms. Prescott affirmatively relinquished any right she had in the

property, including the right to contest these foreclosure proceedings. Likewise, Ms. Prescott's potential unclean hands defense is inapplicable to this mortgage for two reasons: one, the loan was closed before the South Carolina Supreme Court's 2011 ruling in *Matrix*, which only applies to loans closed after the opinion was issued; and two, because Ms. Prescott affirmed the enforceability of the mortgage to the Bankruptcy Court, res judicata and judicial estoppel prohibit her from disputing the lien in this case.

ARGUMENTS AND AUTHORITIES

I. Ms. Prescott's decision to "abandon" the property in her modified Chapter 13 plan precludes her from contesting Wells Fargo's right to foreclose, including raising affirmative defenses to foreclosure.

As explained in Wells Fargo's Motion, Ms. Prescott amended her Chapter 13 plan with the Bankruptcy Court to abandon her interest in the subject property. (Ex. H at 1 & 6 to Memorandum in Support of Motion for Summary Judgment.) That intentional act has significant consequences under the Bankruptcy Code.

As a matter of law, a Chapter 13 debtor cannot modify the rights of a secured creditor whose security interest encumbers the debtor's primary residence. 11 U.S.C. § 1322(b)(2) ("[T]he plan may . . . modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence . . ."). As such, in her bankruptcy matters, Ms. Prescott had two choices with respect to this loan: either she could affirm Wells Fargo's note and mortgage and continue making the agreed-upon payments, or she could abandon the property.

Ms. Prescott originally chose the former option, but ultimately could not make her payments. On June 17, 2013, Ms. Prescott moved to amend her Chapter 13 plan to abandon her interest in the subject property. (Ex. H to Memorandum in Support of

Motion for Summary Judgment.) One month later, Judge Duncan accepted Ms. Prescott's representations and modified her Chapter 13 plan to incorporate this abandonment. (Ex. I to Memorandum in Support of Motion for Summary Judgment.)

While the Bankruptcy Code does not define the term "surrender," bankruptcy courts have consistently construed it to mean "the relinquishment of any rights a debtor has in the collateral." *E.g.*, *In re Cornejo*, 342 B.R. 834, 836 (Bankr. M.D. Fla. 2005); *see In re White*, 487 F.3d 199, 205 (4th Cir. 2007) (holding that the term entails "the secured creditor ultimately holding all rights, including the right of possession, in the property securing the claim").

More specifically, surrendering property pursuant to a Chapter 13 plan "bars the debtor from maintaining possession of the collateral and from contesting the right of the creditor to foreclose on the property." *In re Gelibert*, No. 08-84618, 2010 WL 2026520, at *1 (Bankr. N.D. Ga. Mar. 1, 2010) (emphasis added); *see also In re Pyburn*, No. 11-1137, 2014 WL 2118047, at *2 (Bankr. N.D. W. Va. May 21, 2014) ("A confirmed Chapter 13 plan has a res judicata effect, and the terms of the plan govern the disposition of the property. . . . The Debtors' confirmed Chapter 13 Plan indicates that both Debtors will surrender their interest in the Property and are bound to honor the Plan, which includes affirmative steps to relinquish title and control of the property under non-bankruptcy law.").

In short, under the Bankruptcy Code, Ms. Prescott would have been required to pay the full amount of Wells Fargo's secured claim, but instead she chose to surrender the property. By surrendering the property, Ms. Prescott represented to the Bankruptcy Court, to Wells Fargo, and to the Chapter 13 trustee that she would not contest Wells

Fargo's right to foreclose and enforce its mortgage. On that basis, the Bankruptcy Court approved her modified Chapter 13 plan, thus alleviating her obligation to make payments on account of Wells Fargo's secured claim. Now, having received the benefits of her representations, she has staked out a contrary position.

As this Court is aware, and as it has previously ruled orally in this matter, res judicata attaches to confirmed bankruptcy plans in order to prevent such inconsistent positions. This is true with respect to the issue of abandonment. See *In re Carter*, 390 B.R. 648, 653–54 (Bankr. W.D. Mo. 2008) (“This Court has expressly approved the application of res judicata effect to plan provisions providing for surrender in lieu of the debt. . . . [P]lan confirmation is res judicata as to all issues decided or which could have been decided at the hearing on confirmation.”) (emphasis supplied by the *Carter* court).

Accordingly, because she unambiguously abandoned her interest in the subject property, Ms. Prescott forfeited her ability to contest any aspect of this proceeding, including all affirmative defenses to Wells Fargo's right to foreclose its mortgage lien.

II. A lender is not barred from foreclosing a mortgage when the borrower alleges that the loan was closed without an attorney before August 8, 2011.

The Court also inquired as to whether Ms. Prescott's affirmative defense of unclean hands might remain viable despite her contrary representations to the Bankruptcy Court. Respectfully, it does not.

In *Matrix Financial Services, Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011), the Supreme Court held that failure to have an attorney supervise a loan closing precludes a lender from later obtaining the equitable relief of foreclosure. The Supreme Court's holding, however, was specifically limited “to all filing dates after issuance of [the *Matrix* opinion].” *Id.* at 140, 714 S.E.2d 535 (emphasis added).

In *BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 731 S.E.2d 547, 549–50 (2012), the Supreme Court confirmed that the relevant “filing date” referred to in the above-quoted passage from *Matrix* is the date the mortgage was recorded. Accordingly, if the loan closed before the date of the *Matrix* decision—August 8, 2011—then the lender is not barred from enforcing the mortgage even if no attorney participated in closing the loan. *Id.*

Subsequent cases at both the state and federal levels have confirmed this plain-language understanding of the *Matrix* ruling. See, e.g., *Crop Prod. Servs., Inc. v. SCBT, N.A.*, No. CIV.A. 5:13-02841, 2014 WL 1796345, at *8 (D.S.C. May 6, 2014) (affirming bankruptcy court decision that refused to apply doctrine of unclean hands to loan secured by mortgages recorded before August 8, 2011); *Deutsche Bank Nat’l Trust Co. v. Wilks*, No. 2012-CP-46-03040, 2013 WL 9745584 (S.C. Com. Pl. June 12, 2013) (York Co.) (granting lender’s motion to dismiss counterclaim centered on allegations that the closing of that mortgage was not supervised by an attorney because the loan was closed before *Matrix* decision).

Here, there is no dispute that the parties’ loan and mortgage were closed in June 2003, over eight years prior to issuance of the *Matrix* decision. As such, the *Matrix* decision is facially inapplicable to this case, and Ms. Prescott’s unclean hands defense fails as a matter of law.

Likewise, courts are clear that when a secured claim is part of a confirmed bankruptcy plan, as is the case here, the Bankruptcy Court’s confirmation of the plan prohibits any subsequent challenge to a lien’s enforceability, regardless of whether the challenge is based on an affirmative defense or even a change in the law. *E.g., Celli v.*

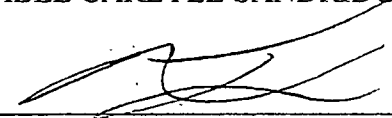
First Nat'l Bank, 460 F.3d 289, 295–96 (2d Cir. 2006); *Mbazira v. Litton Loan Servicing, LLP*, No. 10-11831-FDS, 2011 U.S. Dist. LEXIS 85271, at *10–11 (D. Mass. July 27, 2011). Ms. Prescott's affirmative defenses, including unclean hands, fail as a matter of law for this additional reason.

CONCLUSION

Following the November 19th hearing in this matter, the only unresolved issue involved Ms. Prescott's potential defenses to the enforceability of Wells Fargo's mortgage. However, because Ms. Prescott affirmatively abandoned her interest in the property, because her defense of unclean hands fails as a matter of South Carolina law, and because traditional estoppel principles attach to representations she made to the Judiciary, this final issue should be resolved in Wells Fargo's favor as well. Accordingly, Wells Fargo respectfully moves for entry of summary judgment in its favor on all claims, with the issue of monies owed to Wells Fargo reserved for a subsequent damages hearing.

Respectfully submitted,

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December 3, 2014
Columbia, South Carolina

Defendant's Supplemental Memorandum

In Opposition To Summary Judgment

December 8, 2014

STATE OF SOUTH CAROLINA)

COUNTY OF SUMTER)

Wells Fargo Bank, N.A.,)

Plaintiff,)

v.)

Delores Prescott and Wells Fargo)
Financial Bank (SD),)

Defendants,)
_____)

RECORDED

IN THE COURT OF COMMON PLEAS

Case No. 2010-CP-43-00823

2014 DEC 11 PM 1:16
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

DEFENDANT'S SUPPLEMENTAL
MEMORANDUM IN OPPOSITION TO
SUMMARY JUDGMENT

On November 19, 2014, the Plaintiff's Motion for Summary Judgment was heard before the court at the Greenville County Courthouse. At the hearing, the court requested the parties brief the following issue:

What preclusive effect, if any, does the dismissal of a bankruptcy proceeding in which a plan has been confirmed have on a debtor's right to assert the affirmative defense of unclean hands against the creditor in a subsequent foreclosure?

FACTS:

Wells-Fargo initiated this foreclosure action against Delores Prescott on a note and mortgage signed at her home in 2003, without a supervising attorney present. Wells-Fargo commenced this action in 2010, alleging Ms. Prescott was in default on the note and mortgage. Delores Prescott filed for Chapter 13 relief with the U.S. Bankruptcy Court, and that court issued a stay of the state court foreclosure proceedings. Well-Fargo moved for relief from the stay in 2012, which relief was granted by the order of the Bankruptcy Court. On June 17, 2003, Ms. Prescott moved to modify the Chapter 13 plan to surrender property from the bankruptcy estate. The relevant portion of the Notice to Creditors (Section III, B, 6), stated:

"The debtor will surrender the following property upon confirmation of the plan.
The order confirming plan shall terminate the automatic stay as to that property:

Wells Fargo Home Mortgage; 6365 Saxton Rd., Rembert, SC 29128. Any creditor affected by this provision may file an itemized proof of claim for any unsecured deficiency within a reasonable time after the surrender of the property.”

In Section V of the Notice to Creditors, entitled “Property of the Estate, Status and Obligations of the Debtor After Confirmation,” the Defendant specifically stipulated that “Nothing herein is intended to waive or affect adversely any rights of the debtor, the trustee, or party with respect to any causes of action owned by the debtor.” Motion for Modification of Chapter 13 Plan, p. 7. The Bankruptcy court confirmed the modified plan on July 13, 2013. Defendant moved to amend her Answer to assert the defense of Unclean Hands and affirmative defenses in the state court foreclosure action on September 20, 2013. Plaintiff did not raise any preclusion arguments based on the bankruptcy action at the initial hearing on the motion amend, and the court granted leave to amend by order dated December 2, 2013. Following other proceedings, Defendant filed an amended complaint which asserted Unclean Hands as a defense. The Plaintiff filed a motion for summary judgment, challenging the Defendant’s right to assert the defense as a matter of law.

ARGUMENT

The dismissal of a bankruptcy case puts the debtor and creditor in the same positions held prior to the commencement of the bankruptcy action. When the debtor-as-trustee abandons property from the bankruptcy estate, the title and rights in the property vest in the person who held title prior to the commencement of the bankruptcy action. Abandonment by the debtor-as-trustee is a necessary prerequisite to Defendant asserting her rights in state court, not a promise to convey property to the Plaintiff. After dismissal, the rights of the debtor and creditor are governed by the applicable non-bankruptcy law, which the court has already determined to be

Wachovia v. Coffey, 389 S.C. 68, 698 S.E.2d. 244 (2010). Therefore, Plaintiff's Motion should be denied.

- I. The Defendant did not Abandon the Property to Wells Fargo, but rather, the Defendant, as Debtor-Trustee, abandoned the Property from the Possession of the Bankruptcy Estate, and returned the title and rights in the property to the Defendant, individually.

The motion to modify the Chapter 13 plan to abandon the property does not preclude the Defendant's claims related to the property, nor did it act as a promise to convey the property to the Plaintiff. In fact, the abandonment was a necessary prerequisite for the Defendant to assert her claims and defenses in state court.

When a trustee abandons property of a bankruptcy estate, ownership of that property vests once again in the debtor. In re Carter Paper Co., Inc., 220 B.R. 276 (Bankr. M.D. La., 1998) (Also, explaining historical development of abandonment in bankruptcy). Because the bankruptcy trustee (or the debtor-as-trustee in a Chapter 13 case) has the exclusive right of action over the bankruptcy estate, there must be an affirmative abandonment of the property from the bankruptcy estate before the debtor can challenge a foreclosure in state court. A Texas court explained this as follows:

[T]he trustee, as the representative of the bankruptcy estate, is the real party in interest, and the party with exclusive standing to assert causes of action belonging to the estate. 11 U.S.C. §§ 323, 541(a)(1). If a claim belongs to the estate, then the bankruptcy trustee has exclusive standing to assert it. . . . [W]here "the claims are property of the bankruptcy estate, the Trustee is the real party in interest with exclusive standing to assert them". . . . "[A]ll rights held by the debtor in the asset are extinguished *unless the asset is abandoned*" by the trustee to the debtor under 11 U.S.C. § 554.

Neely v. Trippon (In re Neely) (Bankr. S.D. Tex., 2013), Op. No. 04-44898-H5-7, (internal citations omitted). Thus, when a trustee abandons property of the bankruptcy estate, it is simply

a necessary first step for the debtor to file counterclaims and defenses in a foreclosure action outside the bankruptcy process.

While the property remained an asset of the bankruptcy estate, all rights of action were removed from both the creditor and the debtor individually. The abandonment was not a transfer of the property to the Plaintiff, but merely an administrative act to allow the Defendant to assert her claims in state court. Furthermore, the notice that accompanied the motion specifically reserved all the debtor's rights in the property, including defenses and causes of action. As a result, it would be unjust to prevent the Defendant from asserting her claims merely because she took the necessary steps to enable herself to assert those claims.

II. A Dismissal of a Bankruptcy Action places the Debtor and Creditor in the same positions held prior to the filing of Bankruptcy.

An order of dismissal in a bankruptcy proceeding has the effect of returning the parties to the status quo at the time the bankruptcy was commenced. *See* 11 U.S.C. § 349(b)(3) (2008). Unless the court indicates otherwise, the general effect of an order of dismissal is to restore the status quo ante; it is as though the bankruptcy case had never been brought. *In re Keener*, 268 B.R. 912, 920 (Bankr.N.D.Tex.2001).

Section 349(b)(3) provides in relevant part: "Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title ... (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title." 11 U.S.C.A. § 349(b)(3) (West 2004). The basic purpose of this provision is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case. *In re Lewis*, 346 B.R. 89, 104 (Bankr.E.D.Pa.2006); see *Matter of Petty*, 848 F.2d 654, 655 (5th Cir.1988) ("Congress designed Sec. 349(b) to "undo the bankruptcy case," restoring property

rights to their pre-cause status. S.Rep. No. 95-989, 95th Cong. 2d Sess. 48-49 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5787, 5835”).

Under the plain wording of this statute, the affirmative defenses and counterclaims were revested in Ms. Prescott as the entity who owned them immediately before the filing of the bankruptcy petition. The bankruptcy court made no order limiting Ms. Prescott’s rights, and there is nothing in the plain language of section 349(b)(3) that precludes her assertion of affirmative defenses and counterclaims when the case is dismissed. See B.N. Realty Assocs. v. Lichtenstein, 21 A.D.3d 793, 798, 801 N.Y.S.2d 271, 276 (2005)(concluding that when bankruptcy court dismisses debtor’s petition, section 349(b)(3) operates to “restor[e] his standing to assert his alleged counterclaims, defenses and offsets in this action, notwithstanding his failure (which we do not condone) to disclose such matters in the bankruptcy case....”); Ass’n Res., Inc. v. Wall, 298 Conn. 145, 166–68, 2 A.3d 873, 888–89 (2010) (concluding plaintiff had standing to assert counterclaim because bankruptcy court dismissed petition prior to administration).

III. Application of Judicial Estoppel is only appropriate where the Defendant has received the Functional Equivalent of a Discharge, not where the Bankruptcy case is dismissed with no disposition of the assets.

State Courts have limited their application of judicial estoppel preventing a debtor from asserting affirmative defenses and counterclaims in a state court action following bankruptcy to those cases where the debtor has already received the functional equivalent of a discharge. See, Khan v. GBAK Props., Inc., 371 S.W.3d 347 (Tex. App., 2012); See also, B.N. Realty Assocs. v. Lichtenstein, 21 A.D.3d 793, 798, 801 N.Y.S.2d 271, 276 (2005) (Where debtor failed to disclose counterclaims during bankruptcy, he was not precluded from asserting counterclaims in subsequent state court action, because the creditor’s rights had not been impaired by administration or disposition of debtor’s assets.)

In Khan v. GBAK Props., Inc., 371 S.W.3d 347 (Tex. App., 2012), a Texas Appellate court described the distinction between cases in which judicial estoppel should be applied and those where it should not. In holding a debtor was not barred from challenging a subsequent foreclosure the court wrote:

In reaching this conclusion, we decline to follow our sister court's decision in Kilpatrick v. Kilpatrick, 205 S.W.3d 690, 701–02 (Tex.App.-Fort Worth 2006, pet. denied). In Kilpatrick, the court held that upon dismissal, the estate's assets revert in the debtor "only if the assets were disclosed to the bankruptcy court when the debtor scheduled his assets." The court relied upon the reasoning in Kunica v. St. Jean Fin., Inc., 233 B.R. 46, 53–55 (S.D.N.Y.1999) to reach its holding. Kilpatrick, 205 S.W.3d at 702. In Kunica, however, the debtor had "arguably obtained the functional equivalent of a discharge" because it had "obtained its dismissal after its [bankruptcy] case was fully administered and all of its assets scheduled...." Kunica, 233 B.R. at 55. Norris v. Brookshire Grocery Co., 362 S.W.3d 226 (Tex. App., 2012).

In this case, there is no dispute that the assets of the Defendant have not been fully administered and the rights of the creditor's remain intact, to the same extent that they did prior to the bankruptcy action. Accordingly, the application of judicial estoppel to prevent the assertion of affirmative defenses (and counterclaims) is inappropriate.

IV. The Effectiveness of A Secured Lien after Dismissal of a Confirmed Bankruptcy Plan is Governed by Non-Bankruptcy Law.

a. 11 U.S.C. § 1325-Confirmation of Plan

Section 1325 sets forth the requirements for confirmation of a proposed plan under a Chapter 13 Bankruptcy. One provision, Subsection (a)(5), requires the secured lien holder to accept the plan, and further requires that the plan must provide that if the case "is dismissed . . . without completion of the plan, such lien shall also be retained by such holder *to the extent recognized by applicable nonbankruptcy law.*" 11 U.S.C. § 1325(B).

The purpose of this provision is to ensure that secured lien holders do not rely exclusively on a confirmed plan to protect their interests and allow their secured position to lapse or fail under applicable nonbankruptcy law. This protection is necessary because “applicable nonbankruptcy law” governs the creditor’s rights in the event of a dismissal. Additionally, the plain language of the statute also clearly indicates that the applicable *nonbankruptcy* law governs after the dismissal of a bankruptcy case in which a plan *has already been confirmed*, but not completed.

Thus, Wells-Fargo’s security interest is only enforceable “to the extent recognized” by the applicable nonbankruptcy law. As a result, the Plaintiff’s right to foreclose is subject to the defendant’s affirmative defenses.

V. The Court has already held that Wachovia v. Coffey is the Applicable Non-Bankruptcy Law governing the case.

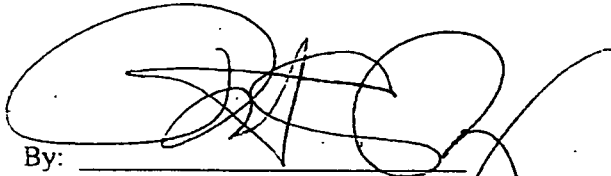
At the hearing on November 19th, the court ruled from the bench that the Defendant’s Unclean Hands defense is governed by the rule stated in Wachovia v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010). In Coffey, the court held the plaintiff-lender was barred from foreclosing on a mortgage that was closed without the supervision of a licensed attorney. In this case, the Defendant has presented evidence that supports a finding that her 2003 mortgage was secured through the unauthorized practice of law as well. The Plaintiff filed this case in 2010, before the court issued its opinion in Matrix Financial Services, Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011) (limiting the application of the rule set forth in Coffey to mortgages filed in 2011). However, the court has not applied this limitation to all cases already pending prior to its statements in Matrix and BAC Home Loan Serviceing, L.P. v. Kinder, 398 S.C. 619, 731 S.E.2d 547, 549-50 (2012). Specifically, the Supreme Court upheld the Court of Appeals

decision in Coffey, in its opinion issued after the opinions rendered in Matrix and BAC. See, Wachovia v. Coffey, 404 S.C. 421, 746 S.E.2d 35 (2013).

Additionally, Defendant has alleged and provided evidence of numerous instances of illegal and inequitable conduct related to the issuance and servicing the mortgage at issue in this case. In addition to the unauthorized practice of law, the facts alleged as part of the Defendant's counterclaims should be considered grounds to support a finding that the Plaintiff has acted with unclean hands related to the transaction in question.

Accordingly, the Plaintiff's Motion for Summary Judgment should be denied, because there are still issues of material fact, and the Defendant is not entitled to judgment as a matter of law.

Respectfully Submitted,



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