

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM OCONEE COUNTY

Court of Common Pleas

Steven C. Kirven, Master-in-Equity

Appellate Case No. 2017-000886

Volume 1 of 3

Federal National Mortgage Association, Respondent,

v.

John D. Dalen, Julie A. Dalen and Wawtockace Hills
Property Owners Association, Defendants,

Of whom John D. Dalen and Julie A. Dalen are Appellants,

And

John D. Dalen and Julie A. Dalen, Appellants,

v.

Bank of America, N.A., Successor by merger to BAC
Home Loans Servicing, L.P. f/k/a Countrywide Home
Loans Servicing, L.P., Respondent.

RECEIVED
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SC Court of Appeals

RECORD ON APPEAL

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Appearing Pro Per / Appellant(s)

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Volume 2 of 3 begins at page 414

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STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Bank of America, N.A. successor by
merger to BAC Home Loans Servicing,
L.P. f/k/a Countrywide Home Loans
Servicing, L.P.,

Plaintiff,

v.

John D. Dalen, Julie A. Dalen and
Wawtockace Hills Property Owners
Association,

DEFENDANT(S).

F11-04694

IN THE COURT OF COMMON PLEAS

C/A No. 2011-CP-37-1056

ORDER DENYING DEFENDANTS'
MOTION TO DISMISS

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 MAR 7 PM 3 54

This is an action for foreclosure as to certain realty located in Oconee County. A Motion to Dismiss was filed by Defendants John D. Dalen & Julie A. Dalen alleging lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). The motion came before the court on February 6, 2012. Appearing on behalf of the Plaintiff was H. Guyton Murrell of the Korn Law Firm. Also appearing were the pro se Defendants John D. Dalen and Julie A. Dalen.

The Defendant John A. Dalen argued that the motion should be granted based upon his allegations that Plaintiff lacked standing and was not the real party in interest to institute or litigate a foreclosure action. Defendant John Dalen submitted a letter dated

February 6, 2011 stating that the owner of the subject note is Federal National Mortgage a, N.A. as the servicing agent. Plaintiff's counsel ing submitted prior to hearing and in the form of an CRCP. Plaintiff's counsel further objected to the ation by a litigant with another party represented by ng pro se litigants, the court has afforded them a wide parties that they would be held to the same standards compliance with the rules of court.

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John D. Dalen + Julie A. Dalen
Street Apt. No.
Or PO Box No. 109 Wood Valley Drive
City, State, ZIP+4
Westminster, SC 29693

Cert
Copies to:
Atty (P) yom (D) dalen
DSS other
Mailed ☒ Boxed ☐ handed ☐

The court has carefully considered the evidence presented and the arguments of the parties. The subject complaint was filed October 31, 2011 and states that Plaintiff is the present lien holder. The subject mortgage was filed December 21, 2007 in Book 2551 at Page 206 in the Oconee County Register of Deeds. The mortgage was assigned to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. by assignment filed May 16, 2011 in Book 2975 at Page 40 in the Oconee County Register of Deeds. The complaint alleges that Bank of America, N.A. is the successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P.

The court finds that the Defendants have failed to present sufficient evidence to grant a motion to dismiss pursuant to Rule 12(b)(1) SCRPC due to a lack of subject matter jurisdiction. "Subject matter jurisdiction is met if the case is brought in the court which has authority and power to determine the type of action at issue." *Washington v. Whitaker*, 317 S.C.108, 115, 451 S.E.2d 894, 898 (1994). In South Carolina, a foreclosure action must be filed and litigated in the county where the real estate is located. §15-7-10(3), S.C. Code of Laws. The subject real estate is located in Oconee County. The court finds that this court has subject matter jurisdiction over this action and venue is proper in this court. Therefore, the Defendants' motion to dismiss pursuant to Rule 12(b)(1) SCRPC due to a lack of subject matter jurisdiction is denied.

The court further finds that the Defendants have failed to present sufficient evidence to grant a motion to dismiss pursuant to Rule 12(b)(6) SCRPC. In this case, the subject complaint states a cause of action for foreclosure of a note and mortgage. The allegations of the complaint and the public record reflect that the subject mortgage was conveyed to Plaintiff by assignment of mortgage filed several months prior to the commencement of this action. "The ruling on a Rule 12(b)(6) motion to dismiss must be based upon the allegations set forth on the face of the complaint. A Rule 12(b)(6) motion may not be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601, 602-03 (1995). The court finds that the allegations set forth in the complaint are sufficient to constitute a cause of action for foreclosure. Therefore, the Defendants' motion to dismiss pursuant to Rule 12(b)(6) SCRPC due to an alleged failure to state a claim upon which relief can be granted is denied.

THEREFORE, IT IS HEREBY ORDERED that the motion by Defendants John Dalen and Julie Dalen to dismiss this action is denied.

IT IS SO ORDERED.


The Honorable J. Cordell Maddox, Jr.
Presiding Judge 10th Judicial Circuit


3/5, 2012
South Carolina

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

2012 MAR 7 PM 3 54

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

C/A NO.: 2011-CP-37-1056

Bank of America, N.A. successor by merger)
to BAC Home Loans Servicing, LP f/k/a)
Countrywide Home Loans Servicing, LP,)

Plaintiff,

John D. Dalen, Julie A. Dalen, and
Wawtackace Hills Property Owners
Association,

Defendants.

ORDER

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JUN 20 PM 3 43

COPY

This order arises out of a hearing before this court on May 21, 2012 on defendant John Dalen's motion for reconsideration of the court's order denying his motion to dismiss, and on plaintiff Bank of America's motion to compel responses to interrogatories and requests for production, as well as Bank of America's motion to deem requests admitted, or in the alternative, to compel responses to its requests to admit. Present at this hearing were Dean Hayes for the plaintiff, and John and Julie Dalen, pro se defendants. After careful review of the arguments and documents submitted during this hearing, this court hereby orders the following:

It is ORDERED that defendant's motion for reconsideration is denied.

It is ORDERED that the parties to this dispute confer on a time not to exceed July 29, 2012 for the defendant to view the original note held by the plaintiff.

It is ORDERED that the defendant respond to the plaintiff's interrogatories and requests to produce. In response to plaintiff's interrogatory number one, this court orders the defendants to provide the names and addresses of any witnesses concerning the facts of this case. Furthermore, the defendants must respond to plaintiff's interrogatory number five concerning defendant's payments made on the note in question. In particular, the defendants must respond if

they allege that they have made payments not reflected in the payment history provided to the defendants by the plaintiff. This court also orders the defendants to produce any responsive documentary evidence to plaintiff's requests for production. Defendants must provide these responses and documents within 30 (thirty) days of this order.

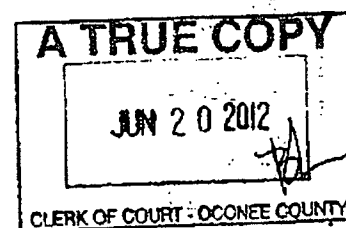
Finally, it is ORDERED that the defendants properly respond to the plaintiff's requests to admit within 30 (thirty) days of this order. If, at the expiration of 30 (thirty) days, the defendants have not submitted responses to these requests, the court will deem them admitted.

IT IS SO ORDERED!


Honorable J. Cordell Maddox, Jr.
Circuit Court Judge

This 18 day of June, 2012
[Signature], South Carolina

FILED O'CONNOR, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JUN 20 PM 3 43



STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Bank of America, N.A., Successor by)
merger to BAC Home Loans Servicing, L.P.)
f/k/a Countrywide Home Loans Servicing)
L.P.,)

Plaintiff,)

v.)

John D. Dalen, Julie A. Dalen, and)
Wawtockace Hills Property Owners)
Association,)

Defendants.)

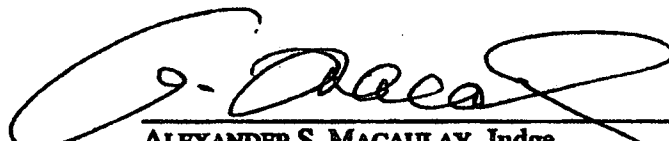
ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

C.A. NO.: 2011-CP-37-1056

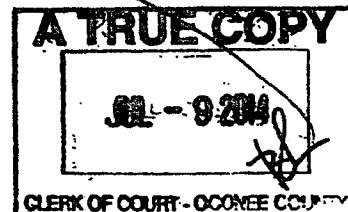
FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2014 JUL 9 PM 2:45

This matter came before the Court on Plaintiff Bank of America, N.A.'s Motion for Summary Judgment as to Defendants John D. Dalen and Julie A. Dalen's Counterclaims. After a careful consideration of the entire record, to include the arguments and filings of the parties, Plaintiff's Motion for Summary Judgment as to Defendant Dalens' Counterclaims is DENIED.

IT IS SO ORDERED.


ALEXANDER S. MACAULAY, Judge

Walhalla, South Carolina
July 9, 2014



STATE OF SOUTH CAROLINA
COUNTY OF Oconee
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-37-01056

Bank of America, NA-Successor, et al

John D. Dalen, et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(f), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order.

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

S/ALEXANDER S. MACAULAY
Circuit Court Judge

2063
Judge Code

07/09/2014
Date

Pg 2

For Clerk of Court Office Use Only

This judgment was entered on the 9th day of July, 2014 and a copy mailed first class or placed in the appropriate attorney's box on this 9th day of July, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Dean A. Hayes (mail)

William H. Sloan (mail)

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)
Beverly H. Whitfield
CLERK OF COURT

Court Reporter: Diane L. Thommes

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF Oconee
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE
CASE NO. 2011-CP-37-1056
FILED OGONEE, S.
BEVERLY H. WHITE
CLERK OF COURT

Bank of America NA, et al

John D. Dalen, et al

2015 JAN 28 PM 2

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: Motion to Strike Jury Demand & Refer to Master In Equity is Granted. Defendant's Motion for Summary Judgment is Denied. Attorney Wyman to prepare formal order.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2155

Judge Code

Copies Date

Atty (P)

DSS

Mailed

Boxed

Page 9 handed

For Clerk of Court Office Use Only

This judgment was entered on the 28th day of January, 2015 and a copy mailed first class or placed in the appropriate attorney's box on this 28th day of January, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Jason D. Wyman

William H. Sloan Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beverly H. Whitfield

CLERK OF COURT

Court Reporter: S. Danette Hanks

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Bank of America, N.A. successor by merger to
BAC Home Loans Servicing, L.P. f/k/a
Countrywide Home Loans Servicing, L.P.

Plaintiff,

v.

John D. Dalen, Julie A. Dalen and
Wawtackace Hills Property Owners
Association.

Defendant.

(515262.01894 JDW)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2011-CP-37-1056

ORDER

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

2015 FEB 25 PM 1 03

This matter came before the Court on January 26, 2015 at 3:00 P.M. on the following motions: John D. Dalen and Julie A. Dalen's ("Defendants") Motion for Summary Judgment and Plaintiff Bank of America, N.A. successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P.'s ("Plaintiff") Motion to Strike the Jury Trial Demand and Refer the above-referenced case to the Master-in-Equity. Counsel for the parties was present: Jason D. Wyman for the Plaintiff and William H. Sloan, Esq., on behalf of the Dalen Defendants.

Based on the record, arguments of counsel, and the applicable case law, the Court makes the following findings and conclusions and hereby denies Defendants' Motion for Summary Judgment, grants Plaintiff's Motion to Strike the Jury Demand and refers the case to the Master-in-Equity.

BACKGROUND AND PROCEDURAL HISTORY

This lawsuit arises out of the foreclosure of a residential real estate mortgage. On October 27, 2011, Plaintiff filed its Complaint seeking foreclosure.

Defendants' Mortgage. On February 21, 2012, Defendants filed an Answer and Counterclaim to Plaintiff's Complaint.

DISCUSSION

A. Defendants' Motion for Summary Judgment

In their motion for summary judgment, Defendants argued that Federal National Mortgage Association ("Fannie Mae") is the real party in interest and that they are entitled to summary judgment as a matter of law because Plaintiff lacks standing to proceed with the foreclosure action. The Court disagrees. The Court finds that *Bank of America, N.A. v. Draper*, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013) is controlling on the issue of whether or not Plaintiff has standing and is, therefore, the proper party plaintiff to this foreclosure action.

In *Draper*, the South Carolina Court of Appeals held that a "servicer of a loan" is a "real party in interest" and is a proper party to "initiate a foreclosure." *Draper*, 405 S.C. at 223, 746 S.E.2d at 482. In the present case, it is undisputed that the assignment of mortgage in to the Plaintiff was recorded prior to the filing of the summons and complaint. Furthermore, it is undisputed that Plaintiff is the current servicer of the loan. Based on the foregoing, the Court finds the Plaintiff has standing and is a real party in interest. Accordingly, Defendants' motion for summary judgment is denied.

B. Plaintiff's Motion to Strike the Jury Demand and Refer Case to the Master in Equity

A mortgage foreclosure is an equitable proceeding. *Continental Mortgage Investors v. Quail Run Assocs.*, 280 S.C. 409, 312 S.E.2d 272 (Ct. App. 1984). A "party is entitled to a jury trial on his counterclaims in an equitable action only if the counterclaims are legal and compulsory." *Carolina First Bank v. BADD, L.L.C.*, Opinion No. 27486 (S.C. Sup. Ct. filed January 28, 2015) (Shearouse Adv. Sh. No. 4 at 21). A counterclaim is compulsory if it arises

out of the same transaction or occurrence as the Plaintiff's claim. See Rule 13, SCRPC. Therefore, in a foreclosure action, a party would be entitled to a jury trial if the counterclaim is considered compulsory and there is a "logical relationship" between the counterclaim and enforceability of the note and mortgage. *Id.* On the other hand, a party waives his right to a jury trial on a counterclaim asserted in a foreclosure action that is considered permissive. See *N.C. Fed. Sav. And Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 381 S.E.2d 903 (1989).

In the present case, the Court finds that Defendants' counterclaims for violation of the South Carolina Unfair Trade Practices Act and the federal Fair Debt Collection Practices Act are permissive. Neither claim arises out of the underlying transaction or occurrence because neither affects the execution or the enforceability of the note or mortgage. Therefore, Defendants' waived their right to a jury trial by asserting these permissive counterclaims in the Plaintiff's foreclosure action. Accordingly, the Court finds that this mortgage foreclosure action should be referred to the Master in Equity for further proceedings under Rule 53 of the South Carolina Rules of Civil Procedure.

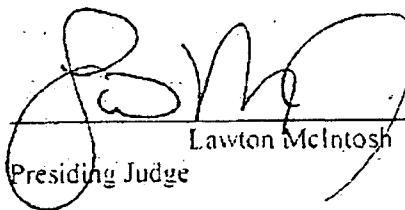
CONCLUSION

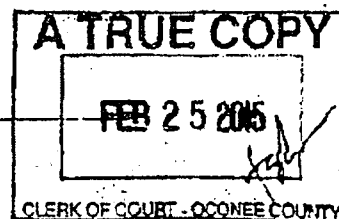
NOW, THEREFORE, IT IS ORDERED THAT:

1. Defendants' Motion for Summary Judgment is Denied.
2. Plaintiff's Motion to Strike the Jury Trial Demand and Refer the Case to the Master in Equity is Granted.
3. This action is referred to the Honorable Ellis B. Drew, Master-in-Equity for Oconee County, to take testimony and to direct entry of final judgment in this action under Rule 53(b), SCRPC, and all matters arising from or reasonably related to such action. The Master-in-Equity shall retain jurisdiction to perform all necessary acts incident to this action, including issuance of a writ of assistance or issuance of any rule to show cause why a party should not be bound by any judgment that may be entered of record. Further, the Master-in-Equity shall retain

jurisdiction to hear any action contesting the validity of the action or any motions pursuant to the South Carolina Rules of Civil Procedure, including but not limited to, Rule 60(b). Pursuant to Rule 53(e), SCRCP, any appeal from the final judgment entered by the Master-in-Equity shall be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.

AND IT IS SO ORDERED!


Lawton McIntosh
Presiding Judge



Anders, South Carolina

Dated: 2-20-15

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2015 FEB 25 PM 1 09

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
DOCKET NO.: 2011-CP-37-1056

Bank of America, N.A. successor by merger to
BAC Home Loans Servicing, L.P. f/k/a
Countrywide Home Loans Servicing, L.P.

Plaintiff,

v.

John D. Dalen, Julie A. Dalen and
Wawtockace Hills Property Owners
Association,

Defendant.

(515262.01894 JDW)

ORDER

CLERK OF COURT
2015 MAY 15 PM 3 23

This matter came before the Court on January 26, 2015 at 3:00 P.M. on the following motions: John D. Dalen and Julie A. Dalen's ("Defendants") Motion for Summary Judgment and Plaintiff Bank of America, N.A. successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P.'s ("Plaintiff") Motion to Strike the Jury Trial Demand and Refer the above-referenced case to the Master-in-Equity. Counsel for the parties was present: Jason D. Wyman for the Plaintiff and William H. Sloan, Esq., on behalf of the Dalen Defendants.

Based on the record, arguments of counsel, and the applicable case law, the Court makes the following findings and conclusions and hereby denies Defendants' Motion for Summary Judgment, grants Plaintiff's Motion to Strike the Jury Demand and refers the case to the Master-in-Equity.

BACKGROUND AND PROCEDURAL HISTORY

This lawsuit arises out of the foreclosure of a residential real estate mortgage. On October 27, 2011, Plaintiff filed a Lis Pendens, Summons, and Complaint seeking foreclosure of

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Defendants' Mortgage. On February 21, 2012, Defendants filed an Answer and Counterclaim to Plaintiff's Complaint.

DISCUSSION

A. Defendants' Motion for Summary Judgment

In their motion for summary judgment, Defendants argued that Federal National Mortgage Association ("Fannie Mae") is the real party in interest and that they are entitled to summary judgment as a matter of law because Plaintiff lacks standing to proceed with the foreclosure action. The Court disagrees. The Court finds that *Bank of America, N.A. v. Draper*, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013) is controlling on the issue of whether or not Plaintiff has standing and is, therefore, the proper party plaintiff to this foreclosure action.

In *Draper*, the South Carolina Court of Appeals held that a "servicer of a loan" is a "real party in interest" and is a proper party to "initiate a foreclosure." *Draper*, 405 S.C. at 223, 746 S.E.2d at 482. In the present case, it is undisputed that the assignment of mortgage in to the Plaintiff was recorded prior to the filing of the summons and complaint. Furthermore, it is undisputed that Plaintiff is the current servicer of the loan. Based on the foregoing, the Court finds the Plaintiff has standing and is a real party in interest. Accordingly, Defendants' motion for summary judgment is denied.

B. Plaintiff's Motion to Strike the Jury Demand and Refer Case to the Master in Equity

A mortgage foreclosure is an equitable proceeding. *Continental Mortgage Investors v. Quail Run Assocs.*, 280 S.C. 409, 312 S.E.2d 272 (Ct. App. 1984). A "party is entitled to a jury trial on his counterclaims in an equitable action only if the counterclaims are legal and compulsory." *Carolina First Bank v. BADD, L.L.C.*, Opinion No. 27486 (S.C. Sup. Ct. filed January 28, 2015) (Shearouse Adv. Sh. No. 4 at 21). A counterclaim is compulsory if it arises

out of the same transaction or occurrence as the Plaintiff's claim. See Rule 13, SCRCP. Therefore, in a foreclosure action, a party would be entitled to a jury trial if the counterclaim is considered compulsory and there is a "logical relationship" between the counterclaim and enforceability of the note and mortgage. *Id.* On the other hand, a party waives his right to a jury trial on a counterclaim asserted in a foreclosure action that is considered permissive. See *N.C. Fed. Sav. And Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 381 S.E.2d 903 (1989).

In the present case, the Court finds that Defendants' counterclaims for violation of the South Carolina Unfair Trade Practices Act and the federal Fair Debt Collection Practices Act are permissive. Neither claim arises out of the underlying transaction or occurrence because neither affects the execution or the enforceability of the note or mortgage. Therefore, Defendants' waived their right to a jury trial by asserting these permissive counterclaims in the Plaintiff's foreclosure action. Accordingly, the Court finds that this mortgage foreclosure action should be referred to the Master in Equity for further proceedings under Rule 53 of the South Carolina Rules of Civil Procedure.

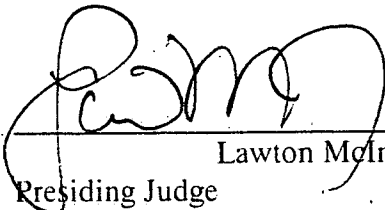
CONCLUSION

NOW, THEREFORE, IT IS ORDERED THAT:

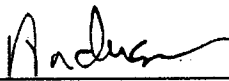
1. Defendants' Motion for Summary Judgment is Denied.
2. Plaintiff's Motion to Strike the Jury Trial Demand and Refer the Case to the Master in Equity is Granted.
3. This action is referred to the Honorable Ellis B. Drew, Master-in-Equity for Oconee County, to take testimony and to direct entry of final judgment in this action under Rule 53(b), SCRCP, and all matters arising from or reasonably related to such action. The Master-in-Equity shall retain jurisdiction to perform all necessary acts incident to this action, including issuance of a writ of assistance or issuance of any rule to show cause why a party should not be bound by any judgment that may be entered of record. Further, the Master-in-Equity shall retain

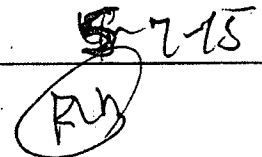
jurisdiction to hear any action contesting the validity of the action or any motions pursuant to the South Carolina Rules of Civil Procedure, including but not limited to, Rule 60(b). Pursuant to Rule 53(e), SCRCPP, any appeal from the final judgment entered by the Master-in-Equity shall be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.

AND IT IS SO ORDERED!



Lawton McIntosh
Presiding Judge

_____, South Carolina

Dated: _____
B-7-15
RW

FILED O'CONNOR, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2015 MAY 15 PM 3 23

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Bank of America, N.A. successor by merger to
BAC Home Loans Servicing, L.P. f/k/a
Countrywide Home Loans Servicing, L.P.,

Plaintiff,

v.

John D. Dalen, Julie A. Dalen and Wawtockace
Hills Property Owners Association,

Defendant(s).

(515262.01894 CSG)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2011-CP-37-1056

ORDER

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2015 SEP 23 A 11:33

This matter came before me at a hearing on August 26, 2015, on Plaintiff's Motion to Substitute Plaintiff; Defendants John D. Dalen and Julie A. Dalen's ("Defendants") Motion to Compel Discovery; and Defendants' Motion to Compel Mediation. Charles S. Gwynne Jr., Esquire, appeared on behalf of the Plaintiff; and William H. Sloan, Esquire appeared on behalf of the Defendants. The court makes the following ruling based on the evidence presented and the arguments of counsel.

Plaintiff's Motion to Substitute Plaintiff

Plaintiff's Motion is granted. On April 22, 2015, an Assignment of Mortgage into Federal National Mortgage Association was recorded in Book 3382 at Page 237 in the Office of the Register of Deeds for Oconee County. Federal National Mortgage Association is the real party in interest to enforce the Note and Mortgage and is the proper party Plaintiff. Substitution of parties is appropriate in accordance with Rule 25(c), SCRCP; and there is just cause for the entry of this order.



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Defendants' counterclaims in this action are asserted against Bank of America, N.A. successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. ("BANA"). BANA shall remain a party in this action to defend the counterclaims.

The caption shall be amended to reflect the said substitution, with Federal National Mortgage Association listed as the plaintiff and BANA listed as the counterclaim defendant.

Defendants Motion to Compel Discovery and Defendants Motion to Compel Mediation

Defendants' Motions are denied.

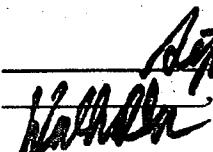
IT IS SO ORDERED.



Ellis B. Drew, Jr.
Master-in-Equity for Oconee County

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

2015 SEP 23 A 11:33

 Sept 15, 2015
South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

DOCKET NO. 2011-CP-37-1056

bank of America, N.A. successor by merger to BAC
Home Loans Servicing, L.P. f/k/a Countrywide
Home Loans Servicing, L.P.

PLAINTIFF(S)

John D. Dalen, Julie A. Dalen and
Wawtackace Hills Property Owners
Association,

DEFENDANT(S)

Submitted by: Charles S. Gwynne Jr. (SC Bar#73844)
Attorneys for the Plaintiff
Rogers Townsend & Thomas, PC
220 Executive Center Drive, Suite 109
Post Office Box 100200
Columbia, SC 29202
(803) 744-4444
(803) 343-7013 - Fax
info@rtt-law.com

Attorney for : ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____

☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: _____

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A

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Copies to:

Atty ☒ (P) ☐ (D)

DSS _____ other _____

Mailed ☒ Boxed _____ handed _____

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2015 SEP 23 A 11:33
ENTERED
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If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Charles S. Gwynne, Jr.
Circuit Court Judge/Master in Equity/Special Referee

3004
Judge Code

Sept 14/2015
Date

For Clerk of Court Office Use Only

This judgment was entered on the 23rd day of September 15 and a copy mailed first class or placed in the appropriate attorney's box on this 23rd day of September, 20 15 to attorneys of record or to parties (when appearing pro se) as follows:

Charles S. Gwynne, Jr., Esq. -mailed
Rogers Townsend & Thomas, PC
P.O. Box 100200
Columbia, SC 29202-3400
ATTORNEY(S) FOR THE PLAINTIFF(S)

William H. Sloan, Esquire -mailed
Sloan Law Firm, PA
PO Box 85
Summerville, SC 29484
ATTORNEY(S) FOR THE DEFENDANT(S)
Beverly H. Whitefield
CLERK OF COURT

Court Reporter: *Karen Deane*

FILED O'CONNOR, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2015 SEP 23 A 11:33

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Federal National Mortgage Association,

Plaintiff,

v.

John D. Dalen, Julie A. Dalen and Wawtockace
Hills Property Owners Association,

Defendant(s).

and

John D. Dalen and Julie A. Dalen,

Counterclaim Plaintiffs,

v.

Bank of America, N.A. successor by merger to BAC
Home Loans Servicing, L.P. f/k/a Countrywide
Home Loans Servicing, L.P.,

Counterclaim Defendant.

(515262.01894 CSG)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2011-CP-37-01056

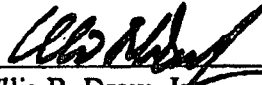
**ORDER REMOVING CASE FROM
THE ACTIVE DOCKET**

FILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2016 MAY 16 P 2:33

It appearing to the Court that Defendant John D. Dalen filed bankruptcy on May 10, 2016 and that the case should be removed from the active roster during the pendency of the bankruptcy action.

IT IS THEREFORE ORDERED that the above case be stricken from the active roster of pending cases with leave to restore under the same docket number without the necessity of an additional filing fee when the bankruptcy stay is lifted.

AND IT IS SO ORDERED.


Ellis B. Drew, Jr.
Master-in-Equity for Oconee County

5-12, 2016

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

DOCKET NO. 2011-CP-37-01056

Federal National Mortgage Association

John D. Dalen, Julie A. Dalen and
Wawtockace Hills Property Owners
Association

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Charles S. Gwynne Jr. (SC Bar#73844)
Attorneys for the Plaintiff
Rogers Townsend & Thomas, PC
220 Executive Center Drive, Suite 109
Post Office Box 100200
Columbia, SC 29202
(803) 744-4444
(803) 343-7013 - Fax
info@rtt-law.com

Attorney for : ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____

☒ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☒ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other *Bankruptcy - my action is dismissed*

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: _____

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A

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Copies to:

Atty ☒ (P) _____ (D) _____

DSS _____ other _____

Mailed ☒ Boxed _____ handed _____

ENTERED
CLERK
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If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

[Signature] 3004 5-12-2016
Circuit Court Judge/Master in Equity/Special Referee Judge Code Date

For Clerk of Court Office Use Only

This judgment was entered on the 11th day of May, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 11th day of May, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Charles S. Gwynne, Jr., Esq.
Rogers Townsend & Thomas, PC
P.O. Box 100200
Columbia, SC 29202-3400
ATTORNEY(S) FOR THE PLAINTIFF(S)

mailed

William H. Sloan, Jr., Esquire
Sloan Law Firm, PA
PO Box 85
Summerville, SC 29484
ATTORNEY(S) FOR THE DEFENDANT(S)

mailed

CLERK OF COURT

Brian A. Calub, Esquire
McGuire Woods LLP
201 North Tryon Street, Suite 3000
Charlotte, NC 28202-2146

mailed

Wawtackace Hills Property Owners Association
100 Lost Forest Drive
Westminster SC 29693

Court Reporter:

FILED OCOEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2016 MAY 16 P. 2:32

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Federal National Mortgage Association,

Plaintiff,

v.

John D. Dalen, Julie A. Dalen and Wawtockace
Hills Property Owners Association,

Defendant and Counterclaim Plaintiffs,

v.

Bank of America, N.A., successor by merger to
BAC Home Loans Servicing, L.P. f/k/a
Countrywide Home Loans Servicing, L.P.,

Counterclaim Defendant.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

DOCKET NO.: 2011-CP-37-1056

**MOTION AND
ORDER TO RESTORE**

FILED OCONEE COUNTY, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2016 JUL 28 P 3:41

Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. (the "Counterclaim Defendant"), by and through the undersigned counsel of record, respectfully moves the court for an Order restoring the above-captioned matter to the active docket. In support of its Motion, the Counterclaim Defendant states as follows:

1. On March 23, 2016, a hearing was held on Counterclaim Defendant's Renewal Motion for Summary Judgment as to the counterclaims alleged by Defendants/Counterclaim Plaintiffs John D. Dalen and Julie A. Dalen. The Court granted Counterclaim Defendant's motion for summary judgment.

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Page 26

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2. On May 10, 2016, before the final Order granting Counterclaim Defendant's motion was entered, Defendant John D. Dalen filed for bankruptcy under U.S. Bankruptcy Court, District of South Carolina, Case No. 16-02332-hb.

3. On May 16, 2016, an *Order Removing Case from the Active Docket* was entered by the Court striking this case from the active roster during the pendency of the bankruptcy action, and ordering that the case be restored under the same docket number without the necessity of an additional filing fee when the bankruptcy stay was lifted.

4. On June 3, 2016, an *Order of Dismissal For Failure to File Timely Lists, Schedules, Statements and Other Documents* was entered by the U.S. Bankruptcy Court in Case No. 16-02332-hb, closing Defendant John D. Dalen's bankruptcy case. A copy of the *Order* is attached hereto as **Exhibit A**.

5. In the interest of judicial economy, justice and equity, and for good cause shown, this case shall be restored to the active docket.

6. This case shall now be restored to the active docket under the same docket number without the necessity of an additional filing fee.

THEREFORE, based upon the motion of the undersigned attorney for the Counterclaim Defendant, and upon my review of the record in this case,

IT IS ORDERED that the above-captioned action shall be restored to the active case roster.


Ellis B. Drew, Jr. Steven C. Kirren
Master-in-Equity for Oconee County

Oconee, South Carolina

July 25, 2016

I SO MOVE:

Brian A. Calub 6/3/2016

Brian A. Calub (S.C. Bar No. 72009)

MCGUIREWOODS LLP

201 N. Tyron Street

Suite 3000

Charlotte, NC 28202

*Counsel for Counterclaim Defendant Bank of America, N.A.,
successor by merger to BAC Home Loans Servicing, L.P.
f/k/a Countrywide Home Loans Servicing, L.P.*

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Federal National Mortgage Association,

Plaintiff,

v.

John D. Dalen, Julie A. Dalen and Wawtockace
Hills Property Owners Association,

Defendant and Counterclaim Plaintiffs,

v.

Bank of America, N.A., successor by merger to
BAC Home Loans Servicing, L.P. f/k/a
Countrywide Home Loans Servicing, L.P.,

Counterclaim Defendant.

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-37-01056

FILED OCONEE COUNTY, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT

2016 JUL 28 P 3 49

**ORDER GRANTING COUNTERCLAIM DEFENDANT'S
RENEWED MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court on March 23, 2016 for hearing on Counterclaim Defendant Bank of America, N.A.'s (hereinafter "Counterclaim Defendant" or "BANA"), Renewed Motion for Summary Judgment as to the counterclaims alleged by Defendants/Counterclaim Plaintiffs John D. Dalen and Julie A. Dalen (hereinafter "Defendants"). Present at the hearing were: Charles S. Gwynne, Jr. of Rogers Townsend & Thomas, PC attorneys for Plaintiff, Federal National Mortgage Association (hereinafter "Plaintiff"), William H. Sloan of Sloan Loan Firm, PA, attorney for Defendants, and Brian A. Calub of McGuireWoods LLP, attorneys for Counterclaim Defendant. Having reviewed all materials filed and submitted to the Court and having heard all oral arguments and materials

the court by the parties, the court finds good cause to grant BANA's Renewed Motion for Summary Judgment as to the counterclaims alleged by Defendants for the following reasons:

FINDINGS OF FACT

1. BANA filed a Complaint to foreclose on real property on or about October 31, 2011 following Defendants' default on their loan obligations.

2. On December 20, 2007, Defendant John Dalen executed and delivered to Quicken Loans Inc. ("Quicken Loans") a promissory note (the "Note") in the amount of \$118,750.00. To secure the payment of the Note, both Defendants executed and delivered a mortgage (the "Mortgage") to Mortgage Electronic Registration Systems, Inc. ("MERS"), acting solely as nominee for Quicken Loans, its successors and assigns, covering real property located at 109 Wood Valley Dr., Westminster, South Carolina 29693 (the "Property").

3. Defendants have been in default of the loan obligations since the December 1, 2010 installment.

4. BANA was the holder of the Note, and thereby the Mortgage, at the time it filed the Complaint to foreclose.

5. After the Note was executed, it was indorsed to Countrywide Bank, FSB. The Note was subsequently endorsed in blank. Countrywide Bank, FSB received the Note in its possession on January 15, 2008. Countrywide Bank, FSB became the holder of the Note, and thereby the Mortgage, as of that date. On April 27, 2009, Countrywide Bank, FSB converted to a national association and merged into BANA making BANA the noteholder as of April 27, 2009.

6. BANA was also the assignee of the Mortgage at the time the Complaint to foreclose was filed. By Assignment of Mortgage dated May 9, 2011, and recorded May 16, 2011

in the Oconee County real property records, MERS assigned the Mortgage to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP (the "Assignment").

7. BANA is the successor to BAC Home Loans Servicing, LP ("BACHLS") pursuant to a corporate merger. On July 1, 2011 by virtue of the corporate merger, BACHLS merged with and into BANA. BANA and its predecessors in interest held the Mortgage until it was assigned from BANA to Plaintiff on or about April 13, 2015.

8. The Assignment was proper.

9. Defendants were not parties to the Assignment.

10. During the pendency of this foreclosure action, BANA was in possession of the original Note and made the Note available for inspection by Defendants during discovery.

11. BANA was also the servicer of the loan at the time the Complaint was filed. Here the evidence establishes that BANA through its predecessor, BACHLS, serviced the loan before and at the point in time Defendants went into default on their mortgage loan payments.

12. BANA filed a Motion for Summary Judgment regarding the Counterclaims on December 4, 2013. BANA's Motion for Summary Judgment was denied on July 9, 2014. Thereafter, BANA moved to amend the December 9, 2014 Scheduling Order entered in this matter to permit the filing of further dispositive motions.

13. The parties executed a Consent Order Amending Scheduling Order that extended the motions deadline to March 9, 2016. Accordingly, BANA filed its Renewed Summary Judgment Motion on March 9, 2016.

CONCLUSIONS OF LAW

Summary judgment is warranted when no material facts are in contest and the movant is entitled to judgment as a matter of law. *McNaughten-McKay Elec. v. Andrich*, 324 S.C. 275,

279, 482 S.E.2d 564, 566 (Ct. App. 1997). “Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E.2d 537, 546 (1991). “With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility may be discharged by showing—that is, pointing out to the trial court—that there is an absence of evidence to support the nonmoving party’s case.” *Id.* (internal quotations and brackets omitted). “Once moving party carries its initial burden, opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a *genuine issue for trial*.” *Id.* (emphasis theirs). “Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings.” *Id.*

Moreover, the denial of a motion for summary judgment does not bar a party from making a later motion based on matters not involved in the decision on the first motion. If a first motion for summary judgment is unsuccessful, the court has the power to permit a second motion for summary judgment prior to trial. *Crosswell Enter., Inc. v. Arnold*, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992). Therefore, although BANA previously filed a motion for summary judgment that a prior judge denied, the renewed dispositive motion was permissible because BANA raised new issues and evidence that had not been previously addressed by the Court. *See Dorrell v. S.C. DOT*, 362 S.C. 312, 325, 605 S.E.2d 12, 18 (2003) (holding that the fact that a different trial judge previously denied a party’s motion for summary judgment did not preclude that party from renewing the motion once new evidence came to light).

Here, BANA met its burden of demonstrating the absence of a genuine issue of material fact with regarding to the Counterclaims. For the following reasons, BANA should be granted summary judgment on all of Defendants' Counterclaims.

I. BANA has standing to pursue foreclosure.

It is undisputed that BANA possessed the Note endorsed first to Countywide and then in blank at the time the foreclosure Complaint was filed on October 31, 2011. The Note was property endorsed. Therefore, BANA had standing to foreclose as holder of the Note.

Under South Carolina law, the holder in possession of a mortgage-backed promissory note may enforce the mortgage without an additional showing that it is the recorded assignee of the mortgage. *See Bank of America, N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013) (“[T]he assignment of a note secured by a mortgage carries with it an assignment of the mortgage” (*quoting Hahn v. Smith*, 157 S.C. 157, 167, 154 S.E. 112, 115 (S.C. 1930)); *see also Scheider v. Deutsche Bank Nat. Trust Co.*, No. 13-1821, 2014 WL 2109810, at *4 (4th Cir. May 21, 2014) (holding that South Carolina law did not recognize a “split the note” theory because the assignment of a note secured by a mortgage necessarily carries with it the assignment of the mortgage).

Defendants' argument that *Draper* is inapplicable to the present matter because it was not decided until June 5, 2013 is unpersuasive. The *Draper* case recognized and confirmed existing South Carolina law regarding negotiable instruments. A note plainly constitutes a negotiable instruction and “the holder of the instrument” is the party entitled to enforce the instrument. *See* S.C. Code Ann. § 36-3-301. A holder is defined as “a person who is in possession of . . . an instrument . . . drawn, issued, transferred, or indorsed to him or to his order or to bearer or in blank.” S.C. Code Ann. § 36-1-201(20). A note endorsed in blank, is bearer paper and

enforceable by whoever possesses it. Here, BANA was the holder of the Note at the time the Complaint was filed and was therefore entitled to enforce the Note.

BANA also had standing to foreclose as loan servicer. It is undisputed that BANA was the servicer of the loan at the time it commenced the foreclosure action. South Carolina law recognizes "that a loan servicer is a 'party in interest' and has standing by virtue of its pecuniary interest in collecting payments under the terms of the note and mortgage." *Bank of America, N.A. v. Draper*, 405 S.C. at 222, 746 S.E.2d at 482. Because a loan servicer is a party in interest, it has standing to initiate a mortgage foreclosure. *Id.* at 223, 746 S.E.2d at 482. There is no dispute that BANA was the loan servicer when it initiated foreclosure proceedings on October 31, 2011 and, therefore, had standing to foreclose.

Based upon the foregoing facts and law, Defendants did not show any valid challenges or defenses to BANA's authority to foreclose.

II. BANA is not a debt collector subject to the provisions of the Fair Debt Collection Practices Act ("FDCPA").

Defendants' first Counterclaim alleges BANA violated numerous provisions of the FDCPA. The FDCPA only applies to a "debt collector" and specifically excludes the consumer's creditors, mortgage servicing companies, and assignees of debt, provided that the debt was not in default when assigned. See 15 U.S.C. § 1692a(6)(A), (F); see also *Scott v. Wells Fargo Home Mortg., Inc.* 326 F. Supp. 2d 709, 717 (E.D. Va 2003) aff'd, 67 Fed. App'x 238 (4th Cir. 2003) (holding that "creditors are not liable under the FDCPA").

Here, Defendants fail to present any evidence demonstrating that BANA meets the definition of debt collector provided by 15 U.S.C. § 1692a(6). Moreover, the evidence presented in this case shows that BANA serviced the Defendants' mortgage loan through its predecessor in

interest, BACHLS, before the loan went into default on December 1, 2010. In the absence of any evidence establishing that the definition of debt collector provided by the FDCPA applies to BANA and because the undisputed evidence establishes that BANA acted as a mortgage servicing company, Defendants have failed to show that BANA can be treated as a debt collector subject to liability under the FDCPA. Based upon the foregoing facts and law, Defendants' claim under the FDCPA fails as a matter of law.

III. Defendants have not suffered any actual damages as a result of any alleged violation of the Real Estate Settlement Practice Act ("RESPA") by BANA.

Defendants' second Counterclaim alleges violations of RESPA based on BANA's alleged failure to inform Defendants of certain appointments, assignments and transfers of the mortgage and provide evidence of standing to foreclosure to Defendants. In order to state a claim under RESPA, the claimant must allege actual damages resulting from or related to the RESPA violation. *Bartley v. Wells Fargo Bank, N.A.*, 2015 U.S. Dist LEXIS 117746 (D.S.C. July 17, 2015)

Defendants did not suffer any actual damages as a result of any purported RESPA violation by BANA. Based upon the foregoing facts and law, Defendants' claim under RESPA fails as a matter of law.

IV. BANA did not make any false statement as required to maintain a claim for slander of title/petition to quiet title.

Defendants' third Counterclaim alleges that BANA knowingly and maliciously communicated in writing false statements affecting Defendants' title to the Property. BANA did not make any false statements. "[T]o maintain a claim for slander of title, the plaintiff must establish (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff's title and (5) causes special damages (6) as a result of diminished value of the property

in the eyes of third parties.” *Huff v. Jennings*, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (S.C. Ct. App. 1995). “A publication is derogatory to the plaintiff’s title if the publication disparages or diminishes the quality, condition, or value of the property.” *Id.* at 150, 459 S.E.2d at 891. In an action for slander of title, “the malice requirement may be satisfied by showing the publication was made in reckless or wanton disregard to the rights of another, or without legal justification.” *Id.*

Moreover, “South Carolina has long recognized that relevant pleadings, even if defamatory, are absolutely privileged.” *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 23, 567 S.E.2d 881, 893 (Ct. App. 2002). “The filing of a lis pendens enjoys the absolute privilege accorded to judicial proceedings. Because the recording of a lis pendens is specifically authorized by statute and has no existence separate and apart from the litigation of which it gives notice, the filing of a lis pendens CANNOT form the basis of an action for slander of title.” *Id.* at 32, 567 S.E.2d at 897 (emphasis in original).

There is no evidence that any statement published by BANA reflecting its interest in the Property as Noteholder, Assignee of the Mortgage, or loan servicer was false. There is no evidence that BANA made any false statement regarding the status of the Property in foreclosure. By filing the Complaint to foreclose on the Property in October 2011 with the accompanying lis pendens, BANA did not publish a false statement. Based upon the foregoing facts and law, Defendants’ claim for slander of title fails as a matter of law.

V. BANA did not engage in any unfair acts or practices affecting the public interest in violation of the South Carolina Unfair Trade Practices Act (“SCUTPA”).

Defendants’ fourth Counterclaim alleges that BANA violated the SCUTPA by instituting an “unlawful” foreclosure action based upon allegedly fraudulent documents and making

purportedly fraudulent misrepresentations regarding the true identity of the Lender and Mortgagee. Defendants did not establish that BANA engaged in any unfair acts or practices affecting the public interest or that they suffered monetary or property loss as a result.

A party seeking to recover under SCUTPA must show: ““(1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant’s unfair or deceptive act(s).”” *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013) (quoting *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006)); S.C. CODE ANN. § 39-5-140(a) (2014). Because of the requirement that the act affect the public interest, conduct that affects only the parties cannot form the basis of a SCUTPA claim. *Robertson v. First Union Nat’l Bank*, 350 S.C. 339, 350, 565 S.E.2d 309, 315 (2002) (citing *Jeffries v. Phillips*, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994)); see also *Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 478–79, 351 S.E.2d 347, 349–50 (Ct. App. 1986) (emphasizing that act must affect the public interest). “[A] plaintiff bringing a private cause of action under SCUTPA must allege and prove that the defendant’s actions adversely affected the public interest.” *Robertson v. First Union Nat’l Bank*, 350 S.C. 339, 350, 565 S.E.2d 309, 315 (S.C. 2002).

The unsubstantiated conduct claimed by Defendants, the actions of BANA in instituting allegedly “unlawful” foreclosure action, only affects the parties to this action. In addition, to succeed on a claim under SCUTPA, a party must show that she “suffered monetary or property loss as a result of the defendant’s unfair or deceptive act(s).”” *Health Promotion Specialists*, 403 S.C. at 638, 743 S.E.2d at 816; S.C. CODE ANN. § 39-5-140(a). Defendants have not sustained a

monetary or property loss. Based upon the foregoing facts and law, Defendants' claim under the SCUTPA fails as a matter of law.

VI. Defendants are not entitled to the remedies pursuant to § 15-75-60 as there is no evidence of a criminal violation of § 16-17-735 by BANA.

Defendants' fifth Counterclaim alleges that BANA engaged in wrongful conduct pursuant to S.C. Code. Ann. § 15-75-60 by falsely asserting authority of law to foreclose and filing false and misleading documents in the public record. Defendants are not entitled to any of the remedies available pursuant to § 15-75-60 as there is no evidence of a violation of § 16-17-735 by BANA.

South Carolina Code. Ann. § 15-75-60 does not provide an affirmative claim for relief. Rather, S.C. Code. Ann § 15-75-60 provides the civil remedies available to a person who is injured by a "sham legal process involving a violation of Section 16-17-735." A violation of Section 16-17-735, a criminal statute, is a prerequisite to seeking available civil remedies pursuant to Section 15-75-70. South Carolina Code Ann. § 16-17-735(B) provides that "it is unlawful for a person falsely to assert authority of state law in connection with a sham legal process."

Defendants did not establish that BANA violated § 16-17-735(B). Based upon the foregoing facts and law, Defendants' claim under the SCUTPA fails as a matter of law.

VI. BANA did not owe a duty of care to Defendants to maintain a claim for negligent supervision, and Defendants have failed to prove a critical element of their negligent supervision claim.

Defendants' sixth Counterclaim alleges that BANA had a duty to supervise its employees and/or agents who engaged in unlawful conduct that violated Defendants' property rights and proximately caused them injury. BANA did not owe a special duty of care as lender or servicer of Defendants' loan.

To recover in a negligence action, "a plaintiff must show: (1) the defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligence act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and plaintiff suffered an injury or damages. *Stalvey v. America Bank Holdings, Inc.*, 2013 U.S. Dist. LEXIS 161634 (D.S.C. November 13, 2013). "If the law does not recognize a particular duty, then the defendant is entitled to judgment as a matter of law." *Stalvey*, 2013 U.S. Dist. LEXIS 161634 at * 16.

BANA and Defendants entered into a simple lender-borrower transaction, which does not create a "special duty of care." Defendants have not presented any evidence establishing that BANA owed them an independent duty of care and Defendants' sixth Counterclaim fails as a matter of law on this basis.

Nevertheless, Defendants also fail to present any evidence to establish supervisory liability. Supervisory liability requires the court to focus specifically on what the employer knew or should have known about the specific conduct of the employee in question. The standard is whether the employer knew the offending employee was in the habit of misconducting himself in a matter dangerous to others. *Land v. Green Tree Servicing, LLC*, 2014 U.S. Dist. LEXIS 154879, *14-15 (D.S.C. October 31, 2014) (dismissing negligent supervision claim based on employees sending threatening letters regarding foreclosure and driving by plaintiffs' property as there were no allegations that defendant knew or should have known its employees were committing misconduct or of the need for exercising control over the employees).

Defendants did not present any evidence that BANA knew or should have known that any of its employees were committing misconduct or that BANA knew or should have known of the necessity for exercising control over any specific employees. In fact, there is no evidence

that BANA's employee actually committed misconduct. Based upon the foregoing facts and law, Defendants' claim for negligent supervision fails as a matter of law.

VII. BANA did not make any fraudulent or false representations to Defendants.

Defendants' seventh Counterclaim alleges that BANA prepared a fraudulent Assignment using the MERS system and that BANA filed a false Assignment enabling BANA to perpetrate the supposed fraudulent foreclosure. Defendants also allege that BANA made untrue statements that it owned the Note and Mortgage and therefore had the ability to enforce them. BANA made no false representations concerning the Assignment or its ability to foreclose.

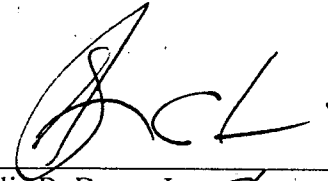
In order to plead fraud, plaintiff must state with sufficient particularity the circumstances constituting fraud. Rule 9(b), SCRPC. Under South Carolina law, to maintain an action for fraud, a plaintiff must demonstrate by clear and convincing evidence the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) knowledge of its falsity or a reckless disregard for its truth or falsity; (5) intent that the plaintiff act upon the representation; (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. *Hendricks v. Hicks*, 374 S.C. 616, 620, 649 S.E.2d 151, 152-153 (S.C. Ct. App. 2007). "Failure to prove any one of these elements is fatal." *Id.* Furthermore, in order to plead fraud, a party must state with sufficient particularity the circumstances constituting fraud. S.C. R. Civ. P. 9(b) (2011).

The alleged representations regarding the Assignment or BANA's ability to enforce the Note and Mortgage were not false. The Assignment was neither improper nor defective. In loan transactions involving MERS, South Carolina courts have recognized MERS's authority to act as a nominee. *See, e.g., Kotsopoulos v. Mortgage Electronic Registration Systems, Inc.*, 2007 WL 905094 (D.S.C. March 22, 2007) (dismissing borrower's allegations that MERS had no legal or

equitable interest in the note and mortgage). BANA had ability to enforce the Note as both the noteholder and loan servicer as discussed more fully above. Defendants have fallen short of the necessary standard to state any claim for fraud against BANA. Based upon the foregoing facts and law, Defendants' claim for fraud and injurious falsehood fails as a matter of law.

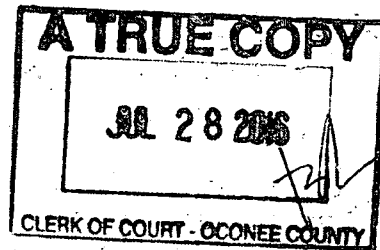
CONCLUSION

Because the foregoing findings of fact and conclusions of law, **IT IS THEREFORE ORDERED** that Counterclaim Defendant's Renewed Motion for Summary Judgment as to Defendants' Counterclaims is **GRANTED**, and the Counterclaims are hereby dismissed with prejudice.


Ellis B. Drew, Jr. *Steven C. Kirtner*
Master-in-Equity for Oconee County

Oconee, South Carolina

July 25, 2016



FILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2016 JUL 28 P 3:48

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Federal National Mortgage Association,

Plaintiff,

v.

John D. Dalen, Julie A. Dalen and Wawtockace
Hills Property Owners Association,

Defendant(s).

and

John D. Dalen and Julie A. Dalen,

Counterclaim Plaintiffs,

v.

Bank of America, N.A. successor by merger to BAC
Home Loans Servicing, L.P. f/k/a Countrywide
Home Loans Servicing, L.P.,

Counterclaim Defendant.

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2011-CP-37-01056

**ORDER RELIEVING WILLIAM H.
SLOAN AS COUNSEL FOR
DALENS**

FILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2016 AUG 11 P 2:07

This case comes before me by a Motion filed by William H. Sloan, Esq. to be relieved as attorney for the Dalens in this case. The Dalens have requested Mr. Sloan to file this Motion as they wish to proceed pro-se in this matter.

Mr. Sloan has consulted with Brian A. Calub, counsel for Bank of America, N.A., and Charlie Gwynne, counsel for Federal National Mortgage Association. Neither Mr. Calub nor Mr. Gwynne object to Mr. Sloan's withdrawal from serving as counsel for the Dalens.

Mr. and Mrs. Dalen, by their signatures, are acceptable to this as they wish to proceed pro-se as soon as possible. Also, this Order shall state the Dalens may be served with court notices or notices from other counsel at the property address of 109 Wood Valley Drive, Westminster, SC 29693 and that they furnish both opposing counsel with the best phone number to reach them which is 864- 647 4705.

IT IS THEREFORE ORDERED that William H. Sloan is relieved as attorney for the Dalens.

IT IS FURTHER ORDERED that all notices from counsel or from the Court to the Dalens shall be served at the property address of 109 Wood Valley Drive, Westminster, SC

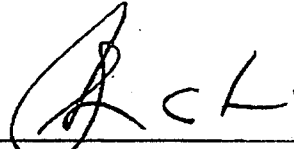


29693.

IT IS FURTHER ORDERED that the Dalens may proceed pro-se from here on out in this case.

IT IS FURTHER ORDERED THAT this case shall not be stayed for any time for the Dalens to seek new counsel.

AND IT IS SO ORDERED!



The Honorable Steven C. Kirven
Master-in-Equity for Oconee County

August 11, 2016
Walhalla, South Carolina

FILED OCONEE COUNTY, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2016 AUG 11 P 2:07

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Federal National Mortgage Association,

Plaintiff,

v.

John D. Dalen, Julie A. Dalen and Wawtockace
Hills Property Owners Association,

Defendants,

John D. Dalen and Julie A. Dalen

Counterclaim Plaintiffs,

v.

Bank of America, N.A., successor by merger to
BAC Home Loans Servicing, L.P. f/k/a
Countrywide Home Loans Servicing, L.P.,

Counterclaim Defendant.

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

Case No.: 2011-CP-37-01056

FILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2016 OCT 13 P 12:28

ORDER DENYING MOTION TO RECONSIDER

This matter comes before the court upon a Motion for Reconsideration¹ filed by John D. Dalen and Julie A. Dalen ("Defendants"). Defendants' Motion for Reconsideration asks the court to reevaluate the court's order granting Counterclaim Defendant Bank of America, N.A.'s renewed motion for summary judgment ("Summary Judgment Order"). The court conducted a hearing for the Motion for Reconsideration on September 8, 2016. The Defendants, who are proceeding pro se; Plaintiff Federal National Mortgage Association ("Fannie Mae"); and

¹ The Court considers Defendants' motion to be motion to alter or amend judgment pursuant to Rule 59(e), S.C.R.C.P. For the ease of reference for the purposes of this order, the Court will continue to refer to the motion as a "Motion for Reconsideration" throughout this order.

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Counterclaim-Defendant Bank of America, N.A. ("BANA") appeared at the hearing to present their respective positions on the motion. After considering entire the record for this action, including the transcript and evidence presented at the March 23, 2016 hearing for BANA's renewed motion for summary judgment; Defendants' submissions to the court; and all of the parties' oral arguments, the court denies Defendants' Motion for Reconsideration pursuant to the following findings of fact and conclusions of law:

STANDARD FOR DECISION

"The purpose of Rule 59(e), S.C.R.C.P., to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). In South Carolina, "[t]he losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 722 (2000). Under this rule, "[i]f the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *Id.* Further, "[u]nder South Carolina law, a party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment." *See McClurg v. Deaton*, 380 S.C. 563, 579-80, 671 S.E.2d 87, 96 (Ct. App. 2008) (citing *Kiawah Proper. Owners Group v. Pub. Serv. Comm'n*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004)).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing Defendants' motion to reconsider and considering all of their oral arguments, the Court concludes that Defendants have failed identify any issues that were raised at the hearing for Defendant Bank of America, N.A.'s renewed motion for summary judgment

and inadvertently omitted from consideration in the Summary Judgment Order. Indeed, a comparison of the issues identified in Defendants' Motion to Reconsider and the Summary Judgment Order establishes that all of the issues raised in the Motion to Reconsider—namely, Bank of America, N.A.'s standing to initiate this foreclosure action and the viability of Defendants' FDCPA claim—are addressed by the Summary Judgment Order.

Moreover, the Court concludes that Defendants attempt to supplement the record for the summary judgment hearing by attaching exhibits that were never presented during the course of the summary judgment hearing is improper, as is their attempt to raise issues concerning any purported securitization of the note and mortgage as a grounds to establish that Bank of America, N.A. lacked standing to file this foreclosure action. Securitization of the note and mortgage was never mentioned at the hearing for the renewed motion for summary judgment, and therefore, the Court need not consider any such issues that should have been raised and presented during the course of the summary judgment hearing. *See McClurg*, 380 S.C. at 579-80, 671 S.E.2d at 96. Accordingly, after considering the entire record presented by the parties, the Court concludes that Defendants have failed to present any grounds for the Court to reconsider the Summary Judgment Order at all.

CONCLUSION

Based on the foregoing findings of fact and conclusions of law, **IT IS THEREFORE ORDERED** that Defendants' Motion for Reconsideration is **DENIED**.

/s/ Steven C. Kirven

The Hon. Steven C. Kirven
Master-in-Equity for Oconee County

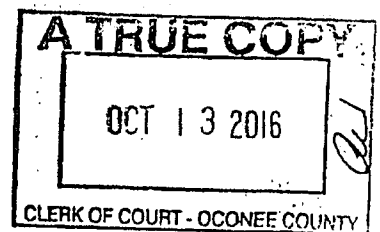
Oconee, South Carolina

10/10, 2016

FILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
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2016 OCT 13 P 12:28

4 of 4

Pg 23



STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Federal National Mortgage Association,

Plaintiff,

v.

John D. Dalen, Julie A. Dalen and Wawtackace
Hills Property Owners Association,

Defendants,

John D. Dalen and Julie A. Dalen

Counterclaim Plaintiffs,

v.

Bank of America, N.A., successor by merger to
BAC Home Loans Servicing, L.P. f/k/a
Countrywide Home Loans Servicing, L.P.,

Counterclaim Defendant.

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-37-01056

FILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2016 OCT 13 P 12:27

ORDER DENYING MOTION TO DISMISS

This matter comes before the court upon a Motion to Dismiss filed by John D. Dalen and Julie A. Dalen ("Defendants"). Defendants' Motion to Dismiss asks the court to dismiss this action for lack of subject matter jurisdiction. The court conducted a hearing for Defendants' Motion to Dismiss on September 8, 2016. The Defendants, who are proceeding pro se; Plaintiff Federal National Mortgage Association ("Fannie Mae"); and Counterclaim-Defendant Bank of America, N.A. ("BANA") appeared at the hearing to present their respective positions on the motion. After considering the Defendants' submissions to the court and all of the parties' oral

Pg 17

arguments, the court denies Defendants' Motion to Dismiss pursuant to the following findings of fact and conclusions of law:

STANDARD FOR DECISION

"Subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong." *Watson v. Watson*, 319 S.C. 92, 93, 460 S.E.2d 394, 395 (1995). "Actions for foreclosure or the cancellation of instruments are actions in equity." *Wilder Corp. v. Wilke*, 324 S.C. 570, 479 S.E.2d. 510 (Ct. App. 1996). Under section 14-11-15 of the South Carolina Code, "[t]he equity court is considered a division of the circuit court, and the master-in-equity, as judge of the equity court, is entitled to all the benefits and subject to all the requirements of the South Carolina Bar and the rules of the Supreme Court in the same respect as circuit court and family court judges." S.C. Code Ann. § 14-11-15. "The Master-in-Equity is considered a division of the circuit court and obtains jurisdiction through an order of reference from the circuit court." *See id.*; S.C. R. Civ. P. 53. Accordingly, a master has subject matter jurisdiction over any properly referred foreclosure action. *See Wachovia Bank of South Carolina, N.A. v. Player*, 341 S.C. 424, 427, 535 S.E.2d 128, 129 (2000). Moreover, in South Carolina, a foreclosure action must be filed and litigated in the county where the real property subject to foreclosure is located. S.C. Code Ann. § 15-7-10(3).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants argue that the court lacks subject matter jurisdiction in this case by arguing that contact between the parties is unlawful. Defendants' position is untenable and unsupported by South Carolina law, where foreclosure actions are actions subject to the equitable jurisdiction of this court. S.C. Code Ann. § 14-11-15. Defendants' real property, which is the subject of

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Pa 18

this foreclosure action, is located in Oconee County, South Carolina. Moreover, the complaint initiating this action alleges the elements of a foreclosure claim by alleging the existence of a mortgage loan encumbering Defendants' real property in Oconee County, and Defendants' default on the repayment terms of the mortgage loan. To this end, this foreclosure action was properly filed with this court on October 31, 2011 pursuant to S.C. Code Ann. §§ 14-11-15 & 15-7-10(3). Because this foreclosure action is subject to this court's equity jurisdiction, the court entered an order of reference on February 25, 2015, that referred this foreclosure action to the jurisdiction of the Master-in-Equity for Oconee County for final non-jury adjudication. Nothing provided in Defendants' Motion to Dismiss or their oral arguments compels a different result, and their motion to dismiss must be denied.

CONCLUSION

Based on the foregoing findings of fact and conclusions of law, **IT IS THEREFORE ORDERED** that Defendants' Motion to Dismiss for lack of subject matter jurisdiction is **DENIED**.

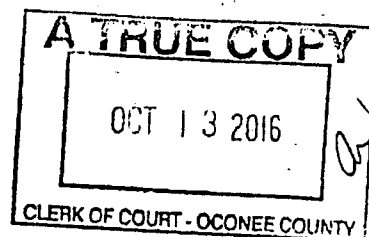
/s/ Steven C. Kirven

The Hon. Steven C. Kirven
Master-in-Equity for Oconee County

Oconee, South Carolina

10-10, 2016

FILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2016 OCT 13 P 12:27



3

Pa 19

The South Carolina Court of Appeals

Federal National Mortgage Association, Respondent,

v.

John D. Dalen, Julie A. Dalen and Wawtockace Hills
Property Owners Association, Defendants,

Of whom John D. Dalen is the Appellant.

And

John D. Dalen and Julie A. Dalen, Counterclaim
Plaintiffs,

Of whom John D. Dalen is the Appellant,

v.

Bank of America, N.A., successor by merger to BAC
Home Loans Servicing, L.P. f/k/a Countrywide Home
Loans Servicing, L.P., Respondent.

Appellate Case No. 2016-002291

ORDER

This appeal arises out of an order of the circuit court denying the appellant's motion to dismiss for lack of subject matter jurisdiction. The denial of a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable. *Deskins v. Boltin*, 319 S.C. 356, 357, 461 S.E.2d 395, 396 (1995). Accordingly, this appeal is dismissed. Remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.


FOR THE COURT

Columbia, South Carolina

FILED

November 18, 2016

cc:

John D. Dalen

Brian A. Calub, Esquire

Charles Stuart Gwynne, Jr., Esquire

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-37-01056

Federal National Mortgage Association

John D. Dalen and Julie A. Dalen

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Court

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ STAYED DUE TO BANKRUPTCY
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: MOTION FOR NEW TRIAL AND/OR AMENDMENT OF JUDGMENT FILED BY DEFENDANTS, JOHN D. DALEN AND JULIE A. DALEN, ON MARCH 15, 2017, IS DENIED.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

SCRCP Form 4C (02/2017)

A TRUE COPY

MAR 17 2017

3081

Judge Code

MARCH 17, 2017

Date

Page 1 of 4

Page 53

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRPC.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON
PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Pg 25

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE

DOCKET NO.: 2011-CP-37-01056

Federal National Mortgage Association,

Plaintiff,

V.

John D. Dalen, Julie A. Dalen and Wawtockace
Hills Property Owners Association,

Defendant(s).

and

John D. Dalen and Julie A. Dalen,

Counterclaim Plaintiffs,

V.

Bank of America, N.A. successor by merger to BAC
Home Loans Servicing, L.P. f/k/a Countrywide
Home Loans Servicing, L.P.,

Counterclaim Defendant.

(515262.01894 CSG)

Charles S. Gwynne Jr., Esquire
Attorney for the Plaintiff

Brian A. Calub, Esquire
Attorney for Counterclaim Defendant
Bank of America, N.A. successor by
Merger to BAC Home Loans Servicing, L.P.
F/k/a Countrywide Home Loans Servicing, L.P.

John D. Dalen
Pro Se Defendant

Julie A. Dalen
Pro Se Defendant

Pursuant to Rule 53 of the South Carolina Rules of Civil Procedure, the above-entitled matter was referred to the undersigned. A hearing was held on March 2, 2017 at 1:00 P.M. Evidence was presented, which is reported herewith, and from the evidence, I find and conclude as follows:

FINDINGS OF FACT:

1. The Lis Pendens was filed on October 31, 2011.
2. The Summons and Complaint were filed on October 31, 2011.
3. The First Amended Lis Pendens was filed on August 4, 2016.
4. Service was made upon all Defendant(s) as shown by proof(s) of service filed herein.
5. The Defendant Wawtackace Hills Property Owners Association is in default.
6. The Defendants John D. Dalen and Julie A. Dalen are not in the Military Service of the United States of America, as contemplated under The Servicemembers Civil Relief Act, 50 U.S.C. § 3901 et. seq. as shown by affidavit, certificate or order filed or will be filed herein.
7. The Plaintiff has standing to prosecute this action.
8. Pursuant to the South Carolina Supreme Court Administrative Order 2009-05-22-01 dated May 22, 2009, the Plaintiff set forth its belief in its Complaint or by Affidavit, which is already of record in this case, that the mortgage loan which is the subject of this foreclosure action is not eligible for modification pursuant to the terms of the Home Affordable Modification Program (HMP). Pursuant to the South Carolina Supreme Court Administrative Order dated May 22, 2009, Plaintiff's attorney has not received a counter affidavit from any Defendant(s).
9. Attorney for the Plaintiff has fully complied with the South Carolina Supreme Court Administrative Order 2011-05-02-01 dated May 2, 2011.
10. On or about February 21, 2012, Defendants John D. Dalen and Julie A. Dalen filed an Answer and Counterclaim. Defendants were then represented by William H. Sloan, Jr., Esquire. On or about August 11, 2016, an Order Relieving William H. Sloan as Counsel for Dalens was filed, thereby relieving William H. Sloan, Jr. as counsel for the Defendants John D. Dalen and Julie A. Dalen.
11. On September 23, 2015 an Order was filed substituting Federal National Mortgage Association for Bank of America, N.A. successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. ("BANA") as the Plaintiff in this action. BANA remained as a party in the case and made a Counterclaim Defendant to defend the counterclaims.
12. On July 28, 2016 an Order was filed dismissing the counterclaims asserted by Plaintiff against BANA.
13. All Pro Se Defendant(s) and all attorneys of record were notified of the time, date, and place of the hearing by letter and certificate of mailing of record herein.
14. John Dalen for value received, made, executed and delivered a Fixed Rate Note ("Note") dated December 20, 2007 promising thereby to pay to Plaintiff or its predecessor the sum

of \$118,750.00 with interest at 6.750% per annum. Other terms and conditions are stated in the Note, of record herein.

15. To better secure the payment of the Note described above, John Dalen and Julie A. Dalen made, executed, and delivered to Mortgage Electronic Registration Systems, Inc. as nominee for Quicken Loans, Inc., its successors and assigns, a certain real estate Mortgage in writing, dated December 20, 2007 covering real property in Oconee County, which is the same as that described in the Complaint. This Mortgage was filed on December 21, 2007, and is of record in the Office of RMC/ROD in Book 2551 at Page 206. This Mortgage was assigned to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. by assignment dated May 9, 2011 and recorded on May 16, 2011 in Book 2975 at Page 40. Subsequently, this Mortgage was assigned to Federal National Mortgage Association, by assignment dated April 13, 2015 and recorded on April 22, 2015 in Book 3382 at Page 237.

16. This mortgage constitutes a first Priority lien on the subject property, subject to ad valorem taxes or other liens/taxes given priority by statute.

17. Plaintiff has the legal right to enforce the negotiable instrument secured by the Mortgage and is the real party in interest as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure.

18. Plaintiff established that the Note is in default for failure to make the December 1, 2010 and all subsequent payments.

19. Payment due on the Note was not made as provided for therein, and Plaintiff, as the holder or nominee for the holder thereof, elected to require immediate payment of the entire amount due thereon and placed the Note and Mortgage in the hands of the attorney herein for remedy for collection by foreclosure.

20. The sum of \$25,455.15 is a reasonable fee and cost to allow Plaintiff's counsel for services performed and anticipated to be performed until final adjudication of this action, under the terms of the Note and Mortgage. This fee is likewise reasonable based on the time necessarily devoted to representation of Plaintiff during the several month course of these proceedings. The services of counsel performed for Plaintiff, which include the number and types of pleadings and documents prepared, the incumbent liabilities, and the difficulties involved in this particular case also support the fee awarded. The fee is also reasonable given the professional standing of Plaintiff's counsel and their experience in handling foreclosure matters. The fee awarded herein is also reasonable in light of the fees customarily awarded by this court for similar services in this locality. Moreover, the efforts of Plaintiff's counsel have had the beneficial result of a prompt foreclosure of the Mortgage. Services anticipated to be performed until final adjudication contemplate completion of this matter within a reasonable time and does not include exceptional circumstances delaying conclusion beyond the normal time.

21. According to Plaintiff's accounting, after all payments received by Plaintiff have been credited to the subject loan, the amount due and owing on the Note, with interest at the rate provided in the Note, advances made by Plaintiff, and other costs and expenses of the action, including a reasonable attorney fee, all secured by the Note and Mortgage, is as follows:

Principal	\$114,875.72

Interest from 11/01/2010 to 03/02/2017 @ 6.750%	\$49,130.92

Escrow

Credit

08/12/2011	(\$188.72)

Total:	(\$188.72)

Taxes

12/20/2010	\$366.68

12/14/2011	\$443.50

12/03/2012	\$443.50

11/26/2013	\$452.12

12/05/2014	\$452.12

11/19/2015	\$452.12

12/06/2016	\$452.12

Total:	\$3,062.16

\$14,359.49

Hazard Insurance

11/14/2011	\$891.50

11/13/2012	\$1,070.59

12/12/2012	\$43.19

11/12/2013	\$1,161.42

11/12/2014	\$957.28

11/30/2015	\$1,049.32

11/29/2016	\$600.69

Total:	\$5,773.99

Mortgage Insurance

01/14/2011	\$77.19
02/14/2011	\$77.19
03/15/2011	\$77.19
04/14/2011	\$77.19
05/12/2011	\$77.19
06/14/2011	\$77.19
07/14/2011	\$77.19
08/11/2011	\$77.19
09/14/2011	\$77.19
10/14/2011	\$77.19
11/08/2011	\$77.19
12/09/2011	\$77.19
01/18/2012	\$77.19
02/17/2012	\$77.19
03/16/2012	\$77.19
04/16/2012	\$77.19
05/18/2012	\$77.19
06/19/2012	\$77.19
07/18/2012	\$77.19
08/17/2012	\$77.19
09/18/2012	\$77.19
10/18/2012	\$77.19
11/16/2012	\$77.19
12/14/2012	\$77.19
01/15/2013	\$77.19
02/15/2013	\$77.19
03/14/2013	\$77.19
04/11/2013	\$77.19
05/14/2013	\$77.19
06/13/2013	\$77.19
07/15/2013	\$77.19
08/15/2013	\$77.19
09/13/2013	\$77.19
10/11/2013	\$77.19
11/15/2013	\$77.19
12/12/2013	\$77.19
01/13/2014	\$77.19
02/14/2014	\$77.19
03/14/2014	\$77.19
04/14/2014	\$77.19

05/13/2014	\$77.19
06/09/2014	\$77.19
07/15/2014	\$77.19
08/15/2014	\$77.19
09/15/2014	\$77.19
10/15/2014	\$77.19
11/12/2014	\$77.19
12/15/2014	\$77.19
01/15/2015	\$77.19
02/11/2015	\$77.19
03/13/2015	\$77.19
04/28/2015	\$154.38
05/29/2015	\$77.19
06/24/2015	\$77.19
07/28/2015	\$77.19
08/26/2015	\$77.19
09/16/2015	\$77.19
10/15/2015	\$77.19
11/13/2015	\$77.19
12/14/2015	\$77.19
01/14/2016	\$77.19
02/12/2016	\$77.19
03/17/2016	\$77.19
04/19/2016	\$77.19
05/16/2016	\$77.19
06/15/2016	\$77.19
07/14/2016	\$77.19
08/11/2016	\$77.19
09/14/2016	\$77.19
10/13/2016	\$77.19
11/11/2016	\$77.19
12/15/2016	\$77.19
01/12/2017	\$77.19
Total:	\$5,712.06

Pro Rata MIP/PMI

\$154.38

Corporate Advances

\$805.25

Property Inspections

12/29/2010	\$8.00
02/03/2011	\$15.00
03/14/2011	\$15.00
05/08/2011	\$15.00
06/28/2011	\$15.00
08/15/2011	\$15.00
09/09/2011	\$15.00
10/10/2011	\$15.00
11/10/2011	\$15.00
12/14/2011	\$15.00
01/26/2012	\$14.00
03/06/2012	\$14.00
05/10/2012	\$14.00
12/07/2012	\$15.00
02/16/2013	\$15.00
05/19/2013	\$15.00
06/24/2013	\$15.00
07/24/2013	\$15.00
08/26/2013	\$15.00
10/25/2013	\$15.00
11/25/2013	\$15.00
12/17/2013	\$15.00
01/20/2014	\$15.00
02/17/2014	\$15.00
03/19/2014	\$15.00
04/17/2014	\$15.00
05/19/2014	\$15.00
06/16/2014	\$15.00
07/17/2014	\$15.00
08/15/2014	\$15.00
09/16/2014	\$15.00
11/13/2014	\$15.00
12/12/2014	\$15.00
01/12/2015	\$15.00
02/11/2015	\$15.00
03/04/2015	\$5.25
03/16/2015	\$15.00
04/23/2015	\$15.00
05/27/2015	\$15.00
06/24/2015	\$15.00

07/30/2015	\$15.00	
08/27/2015	\$15.00	
11/24/2015	\$15.00	
12/23/2015	\$15.00	
01/27/2016	\$15.00	
04/27/2016	\$15.00	
05/25/2016	\$15.00	
06/21/2016	\$15.00	
07/27/2016	\$15.00	
08/24/2016	\$15.00	
09/26/2016	\$15.00	
10/26/2016	\$15.00	
11/22/2016	\$15.00	
12/22/2016	\$15.00	
01/19/2017	\$15.00	
Total:	\$805.25	
Prior Servicer Attorney's Fees and Costs:		
10/05/2011	\$550.00	
10/05/2011	\$225.00	
01/26/2012	\$185.00	\$1,515.00
01/26/2012	\$150.00	
01/26/2012	\$405.00	
Total:	\$1,515.00	
Attorney's Fees incurred (paid, billed but unpaid or unbilled)		\$22,375.00
Anticipated attorney fees awarded herein		\$1,950.00
Expenses		
(Deposition Transcript; Transcript Fee; Motion / Order filing fees;		\$1,130.15
Reference fee; Auto Mileage Reimbursement; and Title Search)		
TOTAL PRINCIPAL, INTEREST AND EXPENSES:		\$206,295.91

Interest shall accrue to the above stated "Total Debt" after the date of judgment at the rate of 6.750% per annum (pursuant to the terms of the Note and First Mortgage). Accrued interest shall be added to the "Total Debt" and shall comprise the amount of the Plaintiff's debt secured by the first Mortgage through the date to which such interest is computed.

22. Plaintiff is seeking the usual foreclosure of the first mortgage and has in the Complaint (or subsequently thereto in writing) expressly demanded the right to a personal or deficiency judgment against Defendant John D. Dalen only.

23. The following Defendant(s) may claim a subordinate lien upon or subordinate legal interest in the subject property and in the event there is a surplus from the sale of the subject

property, these Defendant(s) may present through any such lien or legal interest a claim to the surplus at a hearing subsequent to the sale, in accordance with Rule 71(c) South Carolina Rules of Civil Procedure. The said Defendant(s) and such liens or legal interests are as follows:

a. Wawtackace Hills Property Owners Association, by virtue of any homeowners liens or assessments recorded or unrecorded that are due or that may become due in the future.

IT IS THEREFORE ORDERED:

24. Plaintiff has fully complied with The South Carolina Supreme Court Administrative Orders 2009-05-22-01 dated May 22, 2009 and 2011-05-02-01 dated May 2, 2011, and the foreclosure action may proceed.

25. There is due on the Note and purchase money first Mortgage set forth in the Complaint the sum of \$206,295.91, as set out in the Findings of Fact *supra*, together with interest at the rate provided therein on the balance of principal from the date aforesaid to the date hereof.

26. Plaintiff shall have judgment demanded against John Dalen. The Plaintiff may waive any of its rights, including its right to a personal or deficiency judgment, at any time prior to the foreclosure sale.

27. The amount due in the preceding paragraph (the "Final Total Debt" as set out in the Findings of Fact *supra*) shall accrue interest at the rate of the respective note rate(s) per annum and together with such interest shall constitute the total judgment debt due Plaintiff.

28. The Defendant(s) liable for the aforesaid judgment debt of the Note and Mortgage including interest at the rate of 6.750% per annum shall pay on or before the date of sale of the property hereinafter described, to Plaintiff or Plaintiff's attorney the amount of Plaintiff's debt as aforesaid, including with the costs and disbursements of this action.

29. On default of payment at or before the time of the sale of the property, the mortgaged property described hereinafter shall be sold by the Clerk of Court for Oconee County or other court-appointed or designated agent or auctioneer at public auction at the Oconee County Courthouse, in the City of Walhalla, and State of South Carolina on a sales day determined by the Clerk of Court, on the following terms:

a. For cash or its equivalent: An immediate deposit of 5% is required on the amount of the bid. The deposit will be applied to the purchase price when total compliance is made. In the event compliance is not made, the deposit shall be forfeited without further hearing and applied first to costs and expense of the action and then to plaintiff's debt. Should the successful bidder at the regularly conducted sale fail or refuse either to make the required

deposit at time of bid or to comply with the other terms of the bid within 20 days, then the property may be re-sold on the same terms and conditions on the same or some subsequent sales day and at the risk of the defaulting bidder.

b. Interest on the balance of the bid after the deposit is applied shall be paid through the day of compliance at the note rate of 6.750%.

c. The sale shall be subject to taxes and assessments, existing easements and restrictions, and any other senior encumbrances.

d. Purchaser shall pay for any statutory commission on sale from the proceeds of the final bid amount.

e. Purchaser to pay for deed preparation, costs of recording the deed and the satisfaction of mortgage, and transfer taxes on the deed.

f. Purchaser shall be entitled to possession of the premises only after Purchaser fully complies with the bid amount and a deed is issued by the Clerk of Court.

30. A personal or deficiency judgment having been demanded against John Dalen, the sale will remain open for thirty (30) days pursuant to S.C. Code Ann. Sec. 15-39-720 (1976).

31. Plaintiff may waive any of its rights, including its right to a deficiency judgment in accordance with Rule 71, of the South Carolina Rules of Civil Procedure, prior to sale.

32. The Clerk of Court will give notice of the time and place of the sale by advertisement according to law and the terms thereof by advertisement according to law and will execute to the Purchaser a deed to the property sold. Plaintiff or any other party to this action may become a purchaser at such sale. If, upon such sale being made, the Purchaser should fail to comply with the terms thereof within 20 days after date of sale, then the Clerk of Court may advertise the said premises for sale on the next or some other subsequent sales day at the risk of the highest bidder and so from time to time thereafter until a full compliance shall be secured.

33. In the event an agent of Plaintiff does not appear at the time of sale, the within property shall be withdrawn from sale and sold at the next available sales date upon the same terms and conditions as set forth in this Judgment of Foreclosure and Sale or such terms as may be set forth in a supplemental order.

34. If Plaintiff is the successful bidder at the said sale for a sum not exceeding the amount of costs and expenses of the sale, plus the indebtedness of Plaintiff in full, Plaintiff may pay to the Clerk of Court only the amount of the costs and expenses crediting the balance of the bid on Plaintiff's indebtedness.

35. The Clerk of Court will apply the proceeds of the sale as follows:

FIRST: To the payment of the permitted costs, charges, and expenses of this action, including any Guardian ad Litem fee, Servicemember Civil Relief Act attorney fee, or any other attorney's awarded under this or any other Order of this Court;

NEXT: To the payment to Plaintiff or Plaintiff's attorney of the amount of Plaintiff's debt and interest or so much thereof as the purchase money will pay on the same; and the Plaintiff's attorney shall receive and disburse such funds only in absolute compliance with Plaintiff's principal, interest allowable advances, and related calculations of this Court, including the Court's award for attorney fees, court permitted charges and taxable costs pursuant to Rules 54 and 71 of the South Carolina Rules of Civil Procedure and the terms of the Note and Mortgage; After crediting the proceeds of sale, net of any commission on sale, an Order for Deficiency Judgment shall be entered without further notice or hearing.

NEXT: Any surplus should be held pending further Order of this court as provided for in the South Carolina Rules of Civil Procedure, particularly Rule 71(c) of the South Carolina Rules of Civil Procedure.

36. In the event the successful bidder is someone other than the Defendant(s) in possession of the subject property, the Sheriff of Oconee County is ordered and directed to eject and remove from the property the occupant(s) of the property sold, together with all personal property located thereon, and put the successful bidder or his assigns in full, quiet, and peaceable possession of said property without delay, and to keep said successful bidder or his assigns in such peaceable possession.

37. In the event the successful bidder is other than the Defendant(s) in possession of the subject property and the occupants have voluntarily vacated the property or have been ejected from the property leaving furnishings, fixtures and items not subject to Plaintiff's Mortgage in said property, the Purchaser is authorized to remove from the property all furnishings, fixtures and items not subject to the lien of Plaintiff's Mortgage. The personal property, being deemed abandoned, shall be removed by the Purchaser or its agents from the subject property by placing said personal property on the public street or highway or by any other means.

38. The Defendant(s) named herein, and all persons whosoever claiming under Defendant(s), is forever barred and foreclosed of all right, title, interest, equity of redemption or lien in the said mortgaged property so sold, or any part thereof.

39. In accordance with Rule 77(d), of the South Carolina Rules of Civil Procedure, the Clerk of Court shall serve a notice of entry of this Judgment of Foreclosure upon all parties not in default for failure to appear in this action.

40. The deed of conveyance made pursuant to the foreclosure sale shall contain the names of only the first-named Plaintiff and the first-named Defendant(s), and the Defendant(s) who was/were the titleholder(s) of the mortgaged property at the time of the filing of the notice of pendency of

the within action, and the name of the grantee. The Register of Deeds/Clerk of Court is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deed.

41. The undersigned will retain jurisdiction to do all necessary acts incident to this foreclosure including, but not limited to, the issuance of a Writ of Assistance.

42. The following is a description of the property herein ordered to be sold:

ALL THAT CERTAIN piece, parcel or lot of land situate, lying and being in Oconee County, State of South Carolina, being shown and designated as LOT NUMBER TWENTY EIGHT (28), BLOCK A, WAWTOCKACE HILLS n/k/a WESTLAKE ESTATES, as shown and more fully described on a plat thereof prepared by Stephen R. Edwards, PLS #19881, dated July 31, 2006 and recorded November 2, 2006, in Plat Book B 172, at Page 10, records of Oconee County, South Carolina.

THIS BEING the same property conveyed unto John D. Dalen and Julie A. Dalen by virtue of a Deed from Karl G. Lowrey and Kathleen F. Lowrey, dated December 20, 2007 and recorded December 21, 2007, in Deed Book 1635 at Page 185, in the Office of the Register of Deeds for Oconee County, South Carolina.

Property Address: 109 Wood Valley Drive
Westminster, SC 29693

TMS#: 295-01-02-007

"JUDGE'S SIGNATURE PAGE TO FOLLOW"

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS**

JUDGMENT IN A CIVIL CASE

DOCKET NO. 2011-CP-37-01056

Federal National Mortgage Association,

John D. Dalen, Julie A. Dalen and Wawtockace
Hills Property Owners Association,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Charles S. Gwynne Jr. (SC Bar#73844)
Attorneys for the Plaintiff
Rogers Townsend & Thomas, PC
Post Office Box 100200 (29202)
1221 Main Street 14th Floor
Columbia, SC 29201
(803) 744-4444
charlie.gwynne@rtt-law.com

Attorney for : ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: _____

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

As required by statute, a foreclosure sale has been or will be scheduled, which will officially end the case. Also, if a deficiency judgment remains demanded, a separate Order for Deficiency Judgment will be entered at the completion of the foreclosure sale.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

ALL THAT CERTAIN piece, parcel or lot of land situate, lying and being in Oconee County, State of South Carolina, being shown and designated as LOT NUMBER TWENTY EIGHT (28); BLOCK A, WAWTOCKACE HILLS n/k/a WESTLAKE ESTATES, as shown and more fully described on a plat thereof prepared by Stephen R. Edwards, PLS #19881, dated July 31, 2006 and recorded November 2, 2006, in Plat Book B 172, at Page 10, records of Oconee County, South Carolina.

THIS BEING the same property conveyed unto John D. Dalen and Julie A. Dalen by virtue of a Deed from Karl G. Lowrey and Kathleen F. Lowrey, dated December 20, 2007 and recorded December 21, 2007, in Deed Book 1635 at Page 185, in the Office of the Register of Deeds for Oconee County, South Carolina.

Property Address: 109 Wood Valley Drive
Westminster, SC 29693

TMS#: 295-01-02-007

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge/Master in Equity/Special Referee

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Charles S. Gwynne, Jr., Esq.

Rogers Townsend & Thomas, PC

P.O. Box 100200

Columbia, SC 29202-3400

ATTORNEY(S) FOR THE PLAINTIFF(S)

Brian A. Caluh, Esquire

McGuire Woods LLP

201 North Tryon Street, Suite 3000

Charlotte, NC 28202-2146

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Wawtockace Hills Property Owners Association
100 Lost Forest Drive
Westminster SC 29693

John D. Dalen
109 Wood Valley Drive
Westminster, SC 29693

NOTICE OF SALE

BY VIRTUE of a decree heretofore granted in the case of: Federal National Mortgage Association v. John D. Dalen, Julie A. Dalen and Wawtockace Hills Property Owners Association v. Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P., C/A No. 2011-CP-37-01056, The following property will be sold on April 3, 2016, at 11:00 AM at the Oconee County Courthouse to the highest bidder:

ALL THAT CERTAIN piece, parcel or lot of land situate, lying and being in Oconee County, State of South Carolina, being shown and designated as LOT NUMBER TWENTY EIGHT (28), BLOCK A, WAWTOCKACE HILLS n/k/a WESTLAKE ESTATES, as shown and more fully described on a plat thereof prepared by Stephen R. Edwards, PLS #19881, dated July 31, 2006 and recorded November 2, 2006, in Plat Book B 172, at Page 10, records of Oconee County, South Carolina.

Derivation: Book 1635 at Page 185

Property Address: 109 Wood Valley Drive, Westminster, SC 29693

TMS #: 295-01-02-007

SUBJECT TO ASSESSMENTS, OCONEE AD VALOREM TAXES, EASEMENTS AND/OR, RESTRICTIONS OF RECORD, AND OTHER SENIOR ENCUMBRANCES.

TERMS OF SALE: A 5% deposit in certified funds is required. The deposit will be applied towards the purchase price unless the bidder defaults, in which case the deposit will be forfeited. If the successful bidder fails, or refuses, to make the required deposit on the day of sale or fails or refuses to comply with the bid within 20 days, then the property will be resold at the bidder's risk. Personal or deficiency judgment having been demanded or reserved, the sale will remain open for thirty (30) days pursuant to S.C. Code Ann. §15-39-720 (1976). The Plaintiff may waive any of its rights, including its right to a personal or deficiency judgment, at any time prior to the foreclosure sale. The successful bidder will be required to pay interest on the balance of the bid after the deposit is applied from date of sale to date of compliance with the bid at the rate of 6.750% per annum. For complete terms of sale, see Judgment of Foreclosure and Sale filed with the Oconee County Clerk of Court at C/A #2011-CP-37-01056.

NOTICE: The foreclosure deed is not a warranty deed. Interested bidders should satisfy themselves as to the quality of title to be conveyed by obtaining an independent title search prior to the foreclosure sale date.

John J. Hearn, Esq.
Attorney for Plaintiff
P.O. Box 100200
Columbia, SC 29202-3200
(803) 744-4444
016477.01301

Beverly H. Whitfield
Clerk of Court for
Oconee County

Website: www.rtt-law.com (see link to Resources/Foreclosure Sales)

NOTICE TO PRINTER: Please insert:

____ Once during week commencing _____
____ Once during week commencing _____
____ Once during week commencing _____

Pg 40



Oconee Common Pleas

Case Caption: Bank of America NA-sbm , plaintiff, et al VS John D Dalen ,
defendant, et al

Case Number: 2011CP3701056

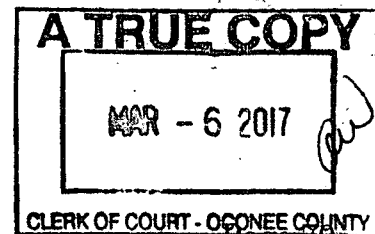
Type: Master/Order/Foreclosure & Sale and Form 4

And it is so ordered

s/ Steven C. Kirven, Master in Equity, #3081

Electronically signed on 2017-03-06 15:49:45 page 16 of 16

Pa 41



STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Bank of America, N.A. successor by merger to BAC Home Loans
Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P.,

PLAINTIFF,

vs.

John D. Dalen, Julie A. Dalen, and Wawtackace Hills Property
Owners Association,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS

SUMMONS

(NON-JURY MORTGAGE FORECLOSURE)

C/A NO:

2011-CP-37-1056

DEFICIENCY REQUESTED

F11-04694

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, or otherwise appear and defend, and to serve a copy of your Answer to said Complaint upon the subscriber at his office, 1300 Pickens Street, P.O. Box 11264, Columbia, South Carolina, 29211-1264, within thirty (30) days after service hereof, except as to the United States of America, which shall have Sixty (60) days, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, or otherwise appear and defend, the Plaintiff in this action will apply to the Court for the relief demanded therein, and judgment by default will be rendered against you for the relief demanded in the Complaint.

TO MINOR(S) OVER FOURTEEN YEARS OF AGE, AND/OR TO MINOR(S) UNDER FOURTEEN YEARS OF AGE AND THE PERSON WITH WHOM THE MINOR(S) RESIDES, AND/OR TO PERSONS UNDER SOME LEGAL DISABILITY:

YOU ARE FURTHER SUMMONED AND NOTIFIED to apply for the appointment of a guardian ad litem within thirty (30) days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by the Mortgagee immediately and separately and such application will be deemed absolute and total in the absence of your application for such an appointment within thirty (30) days after the service of the Summons and Complaint upon you.

YOU WILL ALSO TAKE NOTICE that should you fail to Answer the foregoing Summons, the Plaintiff will move for an Order of Reference of this cause to the Master-in-Equity or Special Referee in/for this County, which Order shall, pursuant to Rule 53 of the South Carolina Rules of Civil Procedure, specifically provide that the said Master in Equity or Special Referee is authorized and empowered to enter a final judgment in this cause with appeal only to the South Carolina Court of Appeals pursuant to Rule 203(d)(1) of the SCAR, effective June 1, 1999.

KORN LAW FIRM, P.A.
1300 Pickens Street
P.O. Box 11264
Columbia, S.C. 29211-1264
(803) 252-5817

Ashley Zarrett
PETER D. KORN / JOHN S. KAY / DEAN HAYES
ALAN M. STEWART / JOHN B. KELCHNER
H. GUYTON MURRELL / SUZANNAH HAYES
MEREDITH L. PRICKETT / KELLER C. FOSTER
TERESA D. VAN FLAKE / ASHLEY ZARRETT
Attorneys for Plaintiff

Columbia, South Carolina
October 27, 2011

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

Bank of America, N.A. successor by merger to BAC
Home Loans Servicing, L.P. f/k/a Countrywide
Home Loans Servicing, L.P.,

PLAINTIFF,

vs.

John D. Dalen, Julie A. Dalen, and Wawtockace
Hills Property Owners Association,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS

COMPLAINT

(NON-JURY MORTGAGE FORECLOSURE)

C/A NO:

2011-CP-37-1056
DEFICIENCY REQUESTED

2011 OCT 31 P 3:39
CLERK OF COURT
JULIE A. WILKINS
CLERK OF COURT

F11-04694

The Plaintiff, complaining of the Defendants above-named would respectfully show unto this Honorable Court:

1. That the Plaintiff is a national association organized and existing under and by virtue of the laws of the United States of America; and that the Defendants, John D. Dalen and Julie A. Dalen, are upon information and belief, citizens and residents of the County of Oconee, State of South Carolina. That the Defendant, Wawtockace Hills Property Owners Association, is upon information and belief a business organized and existing under the laws of South Carolina.
2. Any Defendant described herein as a judgment creditor(s) has, by filing the judgment(s), designated the attorney(s) entering the judgment(s) as their agent for service of process pursuant to the provisions of Section 15-35-840 of the S.C. Code of Laws (1976) as amended.
3. That the real property hereinafter described, which is the subject of this action, is situated and located in the County of Oconee, State of South Carolina.
4. That on or about December 20, 2007, for value received, John Dalen did execute and deliver to Quicken Loans, Inc., a certain promissory note in writing according to the terms and conditions set out therein, wherein and whereby said John Dalen promised to pay to Quicken Loans, Inc., the sum of One Hundred Eighteen Thousand Seven Hundred Fifty And 00/100 Dollars (\$118,750.00), together with interest thereon at the rate of Six And 75/100 per cent (6.75%) per annum.
5. That in order to better secure the payments of the said note and debt, in accordance with the terms and conditions thereof, John Dalen and Julie A. Dalen, did execute and deliver on December 20, 2007 unto Mortgage Electronic Registration Systems, Inc., as nominee for Quicken Loans, Inc., its successors and assigns, a mortgage covering the following described property:
Legal description and property address:
ALL THAT CERTAIN piece, parcel or lot of land situate, lying and being in Oconee County, State of South Carolina, being shown and designated as LOT NUMBER TWENTY EIGHT (28), BLOCK A, WAWTOCKACE HILLS n/k/a WESTLAKE ESTATES, as shown and more fully described on a plat thereof prepared by Stephen R.



Edwards, PLS #19881, dated July 31, 2006 and recorded November 2, 2006, in Plat Book B 172, at Page 10, records of Oconee County, South Carolina.

THIS BEING the same property conveyed unto John D. Dalen and Julie A. Dalen by virtue of a Deed from Karl G. Lowrey and Kathleen F. Lowrey, dated December 20, 2007 and recorded December 21, 2007, in Deed Book 1635 at Page 185, in the Office of the Register of Deeds for Oconee County, South Carolina.

109 Wood Valley Drive, Westminster, SC 29693
TMS# 295-01-02-007

6. Thereafter said mortgage was recorded in Book 2551 at page 206 on December 21, 2007 in the office of the Register of Deeds of Oconee County.

7. The above referenced instrument constitutes a first mortgage lien and is a purchase money mortgage with the proceeds of the loan being used to purchase the property above described.

8. Thereafter, by virtue of an assignment dated May 9, 2011, recorded May 16, 2011, in Mortgage Book 2975 at page 40, Mortgage Electronic Registration Systems, Inc. assigned said mortgage unto BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P.

9. Thereafter, by virtue of a corporate merger, Bank of America, N.A. successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. merged with Bank of America, N.A. making Bank of America, N.A. successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. the present lien holder and Plaintiff herein.

10. That the Defendant, Wawtackace Hills Property Owners Association, is made a party by virtue of any homeowners liens or assessments recorded or unrecorded that are due or that may become due in the future.

11. According to the terms and conditions of the said note and mortgage, it is provided that in the event of default in the payment of any installment when due, and if such default is not made good prior to the due date of the next such installment, the entire principal and accrued interest shall at once become due and payable without notice at the option of the holder, and if the same should be placed in the hands of an attorney for collection, all costs of collection, including a reasonable attorney's fee, would be secured by the said mortgage as a part of the debt secured thereby.

12. That under the terms and conditions of said mortgage, it is provided that, together with, and in addition to, the monthly payments of principal and interest payable under the terms of the note secured thereby, the mortgagor will pay to the mortgagee, on the payment due date each month until the said note is fully paid, certain additional sums, including but not limited to, certain amounts for fire and other hazard insurance and taxes and assessments due on the mortgaged premises.

13. Further, under the terms and conditions of said mortgage, it was agreed that the mortgagor would pay all taxes, assessments, water rates and other governmental or municipal charges, fines or impositions for which provisions were not otherwise made, and if they failed to do so, the mortgagee might pay same, which amount, together with interest thereon, would be secured by said mortgage.

14. According to the terms of said mortgage, and as additional security, the mortgagor assigned all rents, issues and profits of the mortgaged premises from and after any default there under, and should legal proceedings be

instituted pursuant to said mortgage, the mortgagee, its successors or assigns, was given the right to have a Receiver appointed of the rents, issues and profits, who, after deducting all charges and expenses attending such proceedings, and the execution of his trust as a Receiver, shall apply the residue of the rents, issues and profits, toward the debt secured by said mortgage.

15. The monthly payments due on said note and mortgage are in default since December 1, 2010, and the conditions of said note and mortgage have been broken and the Plaintiff elects to, and does declare the entire balance of said indebtedness due and payable, and that there is due on said note and mortgage as of December 1, 2010 the sum of One Hundred Fourteen Thousand Eight Hundred Seventy-Five And 72/100 Dollars (\$114,875.72), together with interest at the rate of six and 75/100 per cent (6.75 %) per annum from November 1, 2010 and also for the costs and disbursements of this action, including attorney's fees.

16. That the Plaintiff does not waive but specifically demands judgment against the Defendant, John Dalen for the full amount found to be due to Plaintiff on the note and mortgage held by plaintiff, with the right to enter personal judgment against the Defendant, John Dalen for any deficiency in this action remaining after sale of the mortgaged premises.

17. That the servicer is participating in the Home Affordable Modification Program (HMP). The HMP modification process specified by the Guidelines or Supplemental Directive has been completed without resulting in a modification because the borrower defaulted under the terms of the HMP Trial Plan.

18. That upon information and belief, certain costs for inspecting and securing the subject property have been incurred by the Plaintiff as a result of this delinquency and Plaintiff is informed and believes it is entitled to reimbursement for such charges, if any.

19. The notice of consumer's right to cure, as contemplated under S.C. Code Sections 37-5-110 and 37-5-111, has been given or is not required, and all conditions precedent to the acceleration of the debt and foreclosure of the mortgage have been performed or have occurred.

WHEREFORE, having fully set forth its complaint, the Plaintiff prays that this Honorable Court inquire into the matters set forth herein and:

- (1) That 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.
- (2) That the said Plaintiff's mortgage be declared a purchase money mortgage and that the said 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, with a reasonable sum as attorney's fees and for the costs of this action.
- (3) That the mortgaged premises be sold under the direction 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 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.

Fourth, Plaintiff have judgment against the Defendant, John Dalen for the full amount found to be due Plaintiff on the note and mortgage, with right to enter personal judgment against the Defendant, John Dalen for any deficiency in this action remaining after sale of the mortgaged premises.

(4) For an Order directing and empowering the Sheriff of Oconee County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the property hereinabove described should the same become necessary.

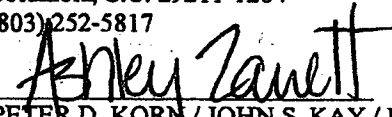
(5) For an Order granting the appointment of a receiver to secure and supervise the rental of the property sought to be foreclosed.

(6) For reimbursement of all costs for inspecting and securing the property incurred by the Plaintiff as a result of the delinquency.

(7) For such other and further relief as may be just and proper.

(8) For an order satisfying any prior liens that may be of record, but have been paid in full.

KORN LAW FIRM, P.A.
1300 Pickens Street
P.O. Box 11264
Columbia, S.C. 29211-1264
(803) 252-5817


PETER D. KORN / JOHN S. KAY / DEAN HAYES
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MEREDITH L. PRICKETT / KELLER C. FOSTER
TERESA D. VAN VLAKE / ASHLEY ZARRETT
Attorneys for Plaintiff

Columbia, South Carolina
October 27, 2011

NOTICE REQUIRED BY THE
FAIR DEBT COLLECTION PRACTICES ACT
15 U.S.C. Section 1601 As Amended

EXHIBIT D
Pg 5 of 5

2011 CP-37-1056

1. The amount of the debt is stated in paragraph 15 of the Complaint attached hereto.
2. The Plaintiff as named in the attached Summons and Complaint is the creditor to whom the debt is owed.
3. The debt as described in the Complaint attached hereto will be assumed to be valid by the creditor's law firm, unless the debtor(s), within thirty (30) days after the receipt of this notice, disputes the validity of the debt or some portion thereof.
4. If the debtor(s) notify the creditor's law firm in writing within thirty days of the receipt of this notice that the debt or any portion thereof is disputed, the creditor's law firm will obtain a verification of the debt and a copy of the verification will be mailed to the debtor(s) by the creditor's law firm.
5. If the creditor named as Plaintiff in the attached Summons and Complaint is not the original creditor, and if the debtor(s) makes a written request to the creditor's law firm within thirty (30) days from the receipt of this notice, the name and address of the original creditor will be mailed to the debtor(s) by the creditor's law firm.
6. Written requests should be addressed to Korn Law Firm, P.A., Post Office Box 11264, Columbia, South Carolina 29211-1264.
7. This notice should NOT be construed as a thirty (30) day grace period. Creditor may pursue collection efforts immediately and not wait thirty (30) days.

THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE. THIS COMMUNICATION IS FROM A DEBT COLLECTOR.

2011 OCT 31 P 3:40
CLERK OF COURT



IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-37-1056

PLAINTIFF

vs.

DEFENDANT(S).

FILED JUDGE: SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2011 NOV 22 A 9:02

The Defendants Motion this Court to dismiss this action due to:

- 1) The Plaintiff lacks standing to pursue its claims against the Defendants and/or lacks standing at the time this action was filed as the Plaintiff has not, and cannot establish it is the real party in interest to enforce the mortgage and/or note that is the subject of the above-styled action.
- 2) Pursuant to Civil Rule 12(b)(6), South Carolina Rules of Civil Procedure, the Plaintiff has failed to state a claim upon which relief may be granted inasmuch as Plaintiff has not, and cannot establish it is the real party in interest to enforce the mortgage and/or note that is the subject of the above-styled action.
- 3) Pursuant to Civil Rule 12(b)(1), South Carolina Rules of Civil Procedure, the court lacks subject matter jurisdiction over this action inasmuch as Plaintiff has not, and cannot establish it is the real party in interest to enforce the mortgage and/or note that is the subject of the above-styled action.
- 4) The Plaintiff has failed to meet a condition precedent to institution of this action because the "Lender" failed to mail a notice of default and failed to mail a notice of acceleration before filing this action as required by Covenant 20 of the mortgage.

Plaintiff further Motions this Court to take mandatory judicial notice of the following court case from the Massachusetts Supreme Court regarding evidence of perfected chain of title before Plaintiff can foreclose on Defendants' property. The Massachusetts Supreme Court has ruled that before the "lender" may foreclose on a subject property, they must provide evidence of perfected chain of title in both the Deed of Trust as well as the promissory note. Blank assignments of the promissory note cannot be construed as evidence of perfected

interest. Neither is possession without proper assignment. A copy of the Massachusetts Court's ruling is Exhibit A and the ruling is a part of this Motion. The Plaintiff is not the true and beneficial party of interest. There is no evidence that Bank of America, N.A. is entitled to be named the beneficiary under this debt. The original lender under the Deed of Trust/Mortgage is Quicken Loans, Inc. There is no chain of title naming Bank of America, N.A. as the real party of interest or holder of the negotiable instrument.

STATE OF SOUTH CAROLINA

OCONEE COUNTY

Bank of America, N.A. Successor by merger to BAC
Home Loans Servicing, L.P. f/k/a Countrywide Home
Loans servicing, L.P.,

PLAINTIFF

vs.

John D. Dalen, Julie A. Dalen, and Wawtockace
Hills Property Owners Association,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-37-1056

FILED OOCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2011 NOV 22 A 9:02

MEMORANDUM OF LAW

Under Federal Rules of Civil Procedure Rule 17, an action must be taken by a real party of interest. The Defendants have reason to believe that the Plaintiff is not the real party of interest. Unless the Plaintiff can present perfection in the chain of title for the promissory note, ending in the Plaintiff being NAMED as the holder in due course, the Defendants believe that the Plaintiff is in fact bringing fraud before the court. The Plaintiff is in fact a Servicer.

In McLaughlin v. Williams, 665 S.E. 2d 667, 379 S.C. 451 (S.C. App. 06/30/2008), the Court notes the "(the Plaintiff) must offer some evidence that a genuine issue of material fact exists as to each element of the complaint." See Steele v. Rogers, 306 S.C. 546, 552, 413 S.E.2d 329, 333 (Ct. App. 1992) (explaining the plaintiff has the burden to prove each element of the cause of action).

The plaintiff offers no affidavit, no testimony and no evidence of any kind. In Housing Authority of the City of Columbia vs. Cornerstone Housing, LLC, 356 S.C. 328, 588 S.E. 2d 617 (S.C. App. 09/15/2003) the court held: "A trial judge may dismiss a claim when the defendant demonstrates the plaintiff's failure to state facts sufficient to constitute a cause of action in the pleadings filed with the court." FOC Lawshe Ltd. P'ship v. Int'l Paper Co., 352 S.C. 408, 412, 574 S.E. 2d 228, 230 (Ct. App. 2002) quoting Rule 12(b)(6), South Carolina Rules of Civil Procedure, "The trial court must dispose of a motion for failure to state a cause of action based solely upon the allegations set forth on the face of the complaint." In Brown v. Leverett, 291 S.C. 364, 366, 353 S.E. 2d 697, 698 (1987), under rule 12(b)(6), SCRPC, a defendant may make a motion to dismiss based on a failure to

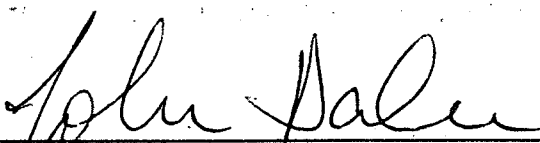
state facts sufficient to constitute a cause of action. Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. Stiles v. Onorato, 318 S.C. 297, 457 S.E. 2d 601 (1995).

Under Federal Rules of Civil Procedure 17, an action must be taken in the name of a real party of interest. Since the Plaintiff is not a real and beneficial party of interest, the Plaintiff cannot be a party to this controversy.

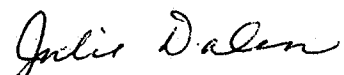
WHEREFORE defendants respectfully request an order dismissing plaintiff's complaint because:

- (1) the Plaintiff lacks standing to pursue its claims
- (2) the Plaintiff has failed to state a claim upon which relief may be granted
- (3) the Court lacks subject matter jurisdiction over this action
- (4) the Plaintiff has failed to meet a condition precedent to institution of this action.

DATED this 23rd day of November, 2011



John D. Dalen, Defendant



Julie A. Dalen, Defendant

109 Wood Valley Drive
Westminster, SC 29693

864 647 4705

STATE OF SOUTH CAROLINA
OCONEE COUNTY

Bank of America, N.A. Successor by merger to
BAC Home Loans Servicing, L.P. f/k/a Countrywide
Home Loans Servicing, L.P.,

PLAINTIFF

Vs.

John D. Dalen, Julie A. Dalen, and Wawtockace
Hills Property Owners Association,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-37-1056

MOTION FOR RECONSIDERATION
OF DEFENDANT'S MOTION TO DISMISS

MOTION FOR RECONSIDERATION

Motion is hereby respectfully made by Defendants for this court to reconsider its denial of defendant's Motion to Dismiss based on Rule 59(e) and/or Rule 60(b) SCRPC. While it is understood by Defendants that Motions of Reconsideration are generally disfavored, Defendants feel the court should most carefully weigh its judgment. With all due respect, Defendants assert that the court has not given sufficient attention to Defendant's Motion to Dismiss. We, John D. Dalen and Julie A. Dalen, Defendants in the above-captioned action, hereby request reconsideration to the Motion to Dismiss and ask the court to take mandatory judicial notice of the following:

- a) The United States Supreme Court, in *Haines v. Kerner* 404 U.S. 519 (1972), said that all litigants defending themselves must be afforded the opportunity to present their evidence and that the Court should look to the substance of the complaint rather than the form.
- b) In *Platsky v. CIA*, 953 F.2d 26 (2nd Cir. 1991), the Circuit Court of Appeals allowed that the District Court should have explained to the litigant proceeding without a lawyer the

correct form to the litigant so that he could have amended his pleadings accordingly.

Defendants respectfully reserve the right to amend their pleadings.

- c) Constitutional provisions, both state(s) and federal give full faith and credit to judicial proceedings in other states – effective proceedings as evidence or as a bar to further litigation. *M’Elmoyle v. Cohen* 13 Pet. (38 U.S.) 312; 34 C.J. p.1137 and *Chicago & Alton R. Co. v. Wigginsferry Co.*, 108 U.S. 18 (1 Sup. Ct. 614). In ascertaining a particular state’s **substantive law** [common law] when the highest court of that state has not spoken, a federal court should “consider relevant cases from jurisdictions other than [the subject state] in an effort to predict ‘what would be the decision of reasonable intelligent lawyers,’ sitting as judges of the highest . . . Court [of that state], and fully jurisprudence.” Further, “[i]t is well established that the court will honor the parties’ choice of law where there is a reasonable basis for the choice or the chosen state has some relation to the agreement.” *Depositors Trust Co. v. Hudson Gen. Corp.*, 485 F. Supp. 1355, 1359 (E.D.N.Y. 1980).
- d) Defendants Motion to Dismiss included a Massachusetts Supreme Court ruling cited as *US Bank National Association vs. Ibanez* (SJC – 10694), wherein it was ruled unanimously that for a bank to foreclose, it must demonstrate that it is the real party of interest through perfection of chain of title for both the Deed of Trust and the Promissory Note.
- e) Defendants Motion to Dismiss also included a Memorandum of Law citing *McLaughlin v. Williams*, 665 S.E. 2d 667, 379 S.C. 451 (S.C. App. 06/30/2008) wherein the Court notes that “(the Plaintiff) must offer some evidence that a genuine issue of material fact exists as to each element of the complaint.” See *Steele v. Rogers*, 306 S.C. 546, 552, 413 S.E. 2d 329, 333 (Ct. App. 1992) (explaining the plaintiff has the burden to prove each element of the cause of action). The plaintiff offers no affidavit, no testimony and no evidence of any kind.
- f) Standing to sue is a fundamental requirement in instituting an action. *Joytime Distributors & Amusement Co., Inc. v. State*, 338 S.C. 634, 639, 528 S.E. 2d 647, 649 (10/14/1999).

- g) As part of the original Motion to Dismiss, item number four was not addressed at the hearing on February 6, 2012. To reiterate, the Plaintiff has failed to meet a condition precedent to institution of this action because the "Lender" failed to mail a notice of default and failed to mail a notice of acceleration before filing this action as required by Covenant 20 of the mortgage.

MEMORANDUM OF LAW

The point at issue in this Civil Action is whether or not the Plaintiff has standing to proceed with foreclosure. The Plaintiff has the presumption of law that they do have standing yet have not offered any proof of the right of enforcement. This presumption is hereby formally rebutted. The Defendants move the Court to compel the Plaintiff to prove, verify and validate whether or not they have standing to enforce the debt. Material to the arguments of this case is the evidence contained on the original wet-ink signature Promissory Note. The original note is a critical piece of evidence that establishes the following: (1) who is the current Holder in Due Course, and (2) whether the Plaintiff is the current Holder in Due Course.

While it is true that the Defendants signed a note in 2007, that Note is likely to have been sold and assigned. Material to Defendant's argument is "Who was it sold/assigned to and is the Plaintiff the Holder in Due Course, and if not, who is?" Specifically, does the Plaintiff have the authority to enforce the negotiable instrument?

While it is not normally required of the Plaintiff to provide proof of claim in the normal conduct of a foreclosure proceeding, the Fair Debt Collections Act is enacted when the debt is in dispute and the right of enforcement is being challenged.

The authority to disclose is derived directly from the negotiable instrument's right of enforcement. As the issue at hand is the Promissory Note, which is a negotiable instrument, the matter must be governed under the UCC (Uniform Commercial Code) Article III, Sections 3101 to 3605. The Commercial Codes cited are on point and relevant to the issue at hand. The Defendants have presented crucial evidence that indicates the Plaintiff is not the rightful owner in due course. Crucial evidence consists of letters that the Court allowed to be introduced at the hearing on February 6, 2012. Copies are attached to this Motion and listed as Exhibits A, B,

C, and D. The Plaintiff is attempting to collect a debt that is in dispute. We assert the following regarding **Bank of America, N.A., Successor by Merger to Countrywide Home Loan Servicing, L.P.:**

- 1) Bank of America, N.A. has no right, title or beneficial interest in the note or mortgage
- 2) Bank of America, N.A. is not the Secured Creditor, and therefore has no standing to foreclose
- 3) Bank of America, N.A. is only the Servicer
- 4) Bank of America, N.A. has falsely conveyed the Deed Assignment misrepresenting itself as the Lender/Creditor
- 5) Bank of America, N.A. has violated FDCPA 15 U.S.C. having no right, title or beneficial interest in the note or mortgage Section 1692 f(6)(A):
 - a) The FDCPA prohibits the "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if . . . there is no present right to possession of the property claimed as collateral through an enforceable security interest."
 - b) The FDCPA also allows a plaintiff to recover "any actual damage sustained" as a result of a violation of the statute. 15 U.S.C. Section 1692 k(a)(1). Actual damages under the FDCPA include damages for emotional distress. Johnson v. Eaton, 880 F.3d 148, 152 (5th Cir. 1996) (noting that the FDCPA not only requires that the debt collector compensate the debtor for any monetary damages, but also for "emotional distress or other injury that the debtors can prove the debt collector caused."

Furthermore under the United States Supreme Court decision of Carpenter v. Longan, 83 U.S. 16 Wall, 271 271 (1872); the Deed of Trust follows the Promissory Note. Where the promissory note goes, the Deed of Trust must follow. Page 83 U.S. 274: 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 ownership of the Deed of Trust and subsequent assignments follow the promissory note, and not an arbitrary assignment of MERS. The Massachusetts Supreme Court has ruled

that before the "lender" may foreclose on a subject property, the "lender" must provide evidence of perfected chain of title in both the Deed of Trust as well as the promissory note. Blank assignments of the promissory note cannot be construed as evidence of perfected interest. Neither is possession without proper assignment. US Bank National Association vs. Ibanez, (SJC – 10694).

The Defendants, upon information and belief, have reason to believe the following:

- a) The mortgage note has been paid in whole or in part by one or more undisclosed party/parties who prior to or contemporaneously, with the closing of the "loan", paid the originating lender in exchange for certain unrecorded rights to the revenues arising out of the loan documents.
- b) In connection with the matters which are the subject of paragraph "a" as above, the plaintiff (foreclosing party) has no financial interest in the Note or Mortgage.
- c) The original note was destroyed or was transferred to a structured investment vehicle which may be located offshore, which also has no interest in the Note or Mortgage or revenue therefrom.
- d) The revenue stream deriving from the Note/Mortgage was eviscerated upon one or more assignments of the Note/Mortgage to third parties and parsing of obligations as part of the securitization process, some of whom are joined as co-obligators/co-obligatees, in connection with the closing.
- e) **To the extent which Plaintiff has been paid on the underlying obligation or has no legal interest therein, or in the Note or Mortgage, or does not have lawful possession of the Note or Mortgage, Plaintiff's allegations of possession and capacity to institute foreclosure constitute a fraud upon the Court. Based upon one or more of the affirmative defenses set forth above, Defendants John and Julie Dalen are entitled to a dismissal of the foreclosure claim with prejudice.**

If the lender is allowed to proceed without proof, there is a possibility another institution which may have bought our note may attempt to collect the same debt from us again. Courts across the country are becoming more sympathetic to homeowners because

of the prevalence of predatory lending and servicing. They are holding the lender to the law, requiring them to produce evidence that they are the true owners of the Note.

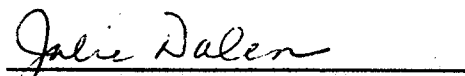
Not only does the foreclosing party need to physically hold the note, but the note must be properly endorsed and transferred every time a mortgage is sold. A clear chain of title must be demonstrated to make the note valid. This is to protect borrowers from fraud – no one can manufacture a note, claim to be a creditor, and then take a homeowner's property. This is especially important when mortgages are securitized and bought and sold a dozen times – if there is no clear chain of title, the borrower can never be sure who is really the creditor.

WHEREFORE Defendants respectfully request an order dismissing plaintiff's complaint with prejudice as a matter of law.

Submitted by John D. Dalen and Julie A. Dalen

DATED this 14th day of February, 2012


John D. Dalen, Defendant


Julie A. Dalen, Defendant

109 Wood Valley Drive,
Westminster, SC 29693

864 647 4705

STATE OF SOUTH CAROLINA
OCONEE COUNTY

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-37-1056

Bank of America, N.A. Successor by merger to
BAC Home Loans Servicing, L.P. f/k/a Countrywide
Home Loans Servicing, L.P.,

**DEFENDANTS' ANSWER, AFFIRMATIVE DEFENSES,
COUNTERCLAIM, AND DEMAND FOR JURY TRIAL**

PLAINTIFF

Vs.

John D. Dalen, Julie A. Dalen, and Wawtockace
Hills Property Owners Association,

DEFENDANT(S).

2012 FEB 21 A 9 25

Comes now Defendants John and Julie Dalen, acting Pro Se and hereby filing this:
Defendants' Answer, Affirmative Defenses, Counterclaim, and Demand for Jury Trial against
Plaintiff Bank of America, N.A. Successor by merger to BAC Home Loans Servicing, L.P. f/k/a
Countrywide Home Loans Servicing, L.P.

Defendants hereby ask the court to take mandatory judicial notice of the following:

- a) The United States Supreme Court, in Haines v. Kerner 404 U.S. 519 (1972), said that all litigants defending themselves must be afforded the opportunity to present their evidence and that the Court should look to the substance of the complaint rather than the form.
- b) In Platsky v. CIA, 953 F.2d 26 (2nd Cir. 1991), the Circuit Court of Appeals allowed that the District Court should have explained to the litigant proceeding without a lawyer the correct form to the litigant so that he could have amended his pleadings accordingly. Defendants respectfully reserve the right to amend their pleadings.
- c) Constitutional provisions, both state(s) and federal give full faith and credit to judicial proceedings in other states – effective proceedings as evidence or as a bar to further litigation. M'Elmoyle v. Cohen 13 Pet. (38 U.S.) 312; 34 C.J. p.1137 and Chicago & Alton R.

Co. v. Wigginsferry Co., 108 U.S. 18 (1 Sup. Ct. 614). In ascertaining a particular state's **substantive law** [common law] when the highest court of that state has not spoken, a federal court should "consider relevant cases from jurisdictions other than [the subject state] in an effort to predict 'what would be the decision of reasonable intelligent lawyers,' sitting as judges of the highest . . . Court [of that state], and fully jurisprudence." Further, *"[i]t is well established that the court will honor the parties' choice of law where there is a reasonable basis for the choice or the chosen state has some relation to the agreement."*

Depositors Trust Co. v. Hudson Gen. Corp., 485 F. Supp. 1355, 1359 (E.D.N.Y. 1980).

- d) A Massachusetts Supreme Court ruling cited as US Bank National Association vs. Ibanez (SJC – 10694), ruled unanimously that for a bank to foreclose, it must demonstrate that it is the real party of interest through perfection of chain of title for both the Deed of Trust and the Promissory Note.

ANSWER

- 1) Defendants are without knowledge of the first part and so the allegations are expressly, directly, and explicitly denied, and strict proof is demanded thereon. Admit that the Defendants are citizens and residents of Oconee County, State of South Carolina, and are without knowledge of the third part.
- 2) Defendants are without knowledge and so the allegations are expressly, directly, and explicitly denied, and strict proof is demanded thereon.
- 3) Admit.
- 4) The Defendants admit signing a mortgage and note on or about December 20, 2007. Denied "for value received". The Defendants expressly, directly, and explicitly deny the material allegations of this statement, and strict proof is demanded thereon.
- 5) Admit.
- 6) Admit.
- 7) Defendants are without knowledge and so the allegations are expressly, directly, and explicitly denied, and strict proof is demanded thereon.
- 8) Defendants are without knowledge and so the allegations are expressly, directly, and explicitly denied, and strict proof is demanded thereon.

- 9) Defendants are without knowledge and so the allegations are expressly, directly, and explicitly denied, and strict proof is demanded thereon.
- 10) Defendants are without knowledge.
- 11) Defendants are without knowledge and so the allegations are expressly, directly, and explicitly denied, and strict proof is demanded thereon.
- 12) Defendants are without knowledge and so the allegations are expressly, directly, and explicitly denied, and strict proof is demanded thereon.
- 13) Defendants are without knowledge and so the allegations are expressly, directly, and explicitly denied, and strict proof is demanded thereon.
- 14) Defendants are without knowledge and so the allegations are expressly, directly, and explicitly denied, and strict proof is demanded thereon.
- 15) Defendants are without knowledge and so the allegations are expressly, directly, and explicitly denied, and strict proof is demanded thereon.
- 16) Denied.
- 17) Denied.
- 18) Defendants are without knowledge and so the allegations are expressly, directly, and explicitly denied, and strict proof is demanded thereon.
- 19) Denied.

Any allegations of the complaint not expressly admitted herein are expressly, directly, and explicitly denied and strict proof is demanded thereon.

DEMAND FOR JURY TRIAL (S.C. Rule 38)

The Defendants hereby demand trial by jury as to all issues so triable thereon. (Pursuant to S. C. Rules of Civil Procedure Rule 38.)

Wherefore, the Defendants pray that this honorable court dismiss this action in toto, ordering that Plaintiff take nothing by this action.

AFFIRMATIVE DEFENSES TO THE COMPLAINT

- 1) The Plaintiff lacks standing to pursue its claims against the Defendants, and/or lacked standing at the time of the filing of this action as the Plaintiff has not, and cannot establish it is the real party in interest to enforce the mortgage and/or note that is the subject of the above-styled action. Plaintiff's complaint fails to adequately show the chain of title of the note and mortgage, demonstrating that Plaintiff is in fact the real party in interest (i.e. owner of the note) with standing to bring this action. Plaintiff has provided no proof of claim.
- 2) This court lacks subject matter jurisdiction over this action inasmuch as Plaintiff has not, and cannot establish it is the real party in interest to enforce the mortgage and/or note that is the subject of the above-styled action. It appears on the face of the Complaint that a person/party other than the Plaintiff is/was the true owner of the claim sued upon at the time this action was filed and that the Plaintiff is not the real party of interest and is not shown to be the real party of interest and is not shown to be authorized to bring this foreclosure action. Plaintiff admits to being a Servicer. CFR Title 12, Banks and Banking, Part 226 – Truth in Lending (Regulation Z), (a)(1) A “covered person” means any person, as defined in §226.2(a)(22), that becomes the owner of an existing mortgage loan by acquiring legal title to the debt obligation, whether through a purchase, assignment, or other transfer, and who acquires more than one mortgage loan in any twelve-month period. **For purposes of this section, a servicer of a mortgage loan shall not be treated as the owner of the obligation** if the servicer holds title to the loan or it is assigned to the servicer solely for the administrative convenience of the servicer in servicing the obligation.
- 3) The Plaintiff has failed to state a claim upon which relief may be granted inasmuch as Plaintiff has not, and cannot establish it is the real party in interest to enforce the mortgage and/or note that is the subject of the above-styled action. CFR Title 12, Banks and Banking, Part 226 – Truth in Lending (Regulation Z), (a)(1) . . . **For purposes of this section, a servicer of a mortgage loan shall not be treated as the owner of the obligation** Additionally, under the Financial Accounting Standards (FAS), specifically FAS 140, “Once an asset has been sold, the seller forever loses control of the asset.”
- 4) The Plaintiff has failed to plead the performance or meet a condition precedent to institution of this action because the “Lender” failed to mail a notice of acceleration to the Defendants as required by ¶22 of the mortgage.

- 5) Any and all claims against Defendants are offset by the damages owed by Plaintiff in connection with the counterclaim set forth herein.
- 6) The complaint should be dismissed for failure to state a cause of action upon which relief may be granted since Plaintiff never acquired the note and/or mortgage, and/or never properly acquired the note and/or mortgage under the Uniform Commercial Code, nor the right to reestablish and enforce the note and/or mortgage that it seeks to reestablish and/or enforce and/or foreclose under South Carolina and/or Federal law.
- 7) Plaintiff has failed to join indispensable parties; to wit, the party who currently owns the mortgage and note.

Plaintiff moves this honorable court to take mandatory judicial notice of the following:

- a) The United States Supreme Court, in *Haines v. Kerner* 404 U.S. 519 (1972), said that all litigants defending themselves must be afforded the opportunity to present their evidence and that the court should look to the substance of the complaint rather than the form.
- b) In *Platsky v. CIA*, 953 F.2d 26 (2nd Cir. 1991), the Circuit Court of Appeals allowed that the District Court should have explained to the litigant proceeding without a lawyer the correct form to the litigant so that he could have amended his pleadings accordingly. Defendants respectfully reserve the right to amend their pleadings.
- c) Constitutional provisions, both state(s) and federal give full faith and credit to judicial proceedings in other states – effective proceedings as evidence or as a bar to further litigation. *M'Elmoyle v. Cohen* 13 Pet. (38 U.S.) 312; 34 C.J. p.1137 and *Chicago & Alton R. Co. v Wigginsferry Co.*, 108 U.S. 18 (1 Sup. Ct. 614). In ascertaining a particular state's **substantive law** [common law] when the highest court of that state has not spoken, a federal court should "consider relevant cases from jurisdictions other than [the subject state] in an effort to predict 'what would be the decision of reasonable, intelligent lawyers,' sitting as judges of the highest . . . court [of that state], and fully jurisprudence." Further, '[i]t is well established that the court will honor the parties' choice of law where there is reasonable basis for the choice or the chosen state has some relation to the agreement." *Depositors Trust Co., v. Hudson Gen. Corp.*, 485 F. Supp. 1355, 1359 (E.D.N.Y. 1980).
- d) Under a recent Massachusetts Supreme Court Ruling on a similar matter in *US Bank National Association vs. Ibanez* (SJC – 10694), it was ruled unanimously that for a bank

to foreclose, it must demonstrate that it is the real party of interest through perfection of chain of title for both the Deed of Trust and the Promissory Note.

COUNTER-CLAIM

Defendants/Counter-claimants hereby sue Plaintiff which is Counter-Defendant Bank of America, N.A. Successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. and Korn Law Firm, their attorneys/agents, and state as follows:

- 1) This is an action for damages exceeding \$15,000.00 USD exclusive of interest and cost.
- 2) Counter-claimants, the Defendants, are South Carolina residents with their principal place of residence situated in Oconee County, South Carolina.
- 3) Venue is proper in this jurisdiction because the events and transactions at issue herein took place within Oconee County, South Carolina and the parties to this dispute are all situated within Oconee County, South Carolina.
- 4) Counter-Defendant, Bank of America, N.A. Successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P., is a debt collector as defined by 15 U.S.C. Sec. 1692 et seq.
- 5) Counter-Defendant, Bank of America, N.A. Successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P., is a mortgage loan servicer with a principal office at 100 North Tryon Street, Charlotte, North Carolina.
- 6) Defendant Korn Law Firm is a debt collector as defined by 15 U.S.C. Sec. 1692 et seq. whose principal address is 1300 Pickens Street, P.O. Box 12369, Columbia, SC 29211-2369.
- 7) Any allegations about acts of any corporate or other business Counter-Defendants means that the corporation or other business did the alleged acts through its officers, directors, employees, agents and/or representatives while they were acting within the actual or ostensible scope of their authority.
- 8) At all relevant times, each Counter-Defendant committed acts, caused or directed others to commit the acts, or permitted others to commit the acts alleged in this complaint;

additionally, some of the Defendants acted as the agent for other Defendants, and all of the Defendants acted within the scope of their agency as if acting as the agent of another.

- 9) Knowing or realizing that other Counter-Defendants were engaging in or planning to engage in unlawful conduct, each Defendant nevertheless facilitated the commission of those unlawful acts.
- 10) Each Counter-Defendant intended to and did encourage, facilitate or assist in the commission of the unlawful acts, and thereby aided and abetted the other Counter-Defendants in the unlawful conduct.
- 11) All Counter-Defendants engaged in continuous and multiple unfair and deceptive trade practices, fraud and misrepresentations that affected interstate commerce and proximately caused the herein injuries to the Counter-Plaintiff.
- 12) Counter-Plaintiffs believe the alleged loan became part of a real estate mortgage conduit and became a special purpose vehicle (SPV) for the purposes of tax exemption.
- 13) REMICs are investment vehicles that hold commercial and residential mortgages in trust and REMICs issue securities representing an undivided interest in these mortgages.
- 14) Once the REMIC containing Counter-Plaintiff's loan was formed, the loan was converted into a security owned by thousands of shareholders throughout the world and was traded on Wall Street.
- 15) At that point, the state of Counter-Plaintiff's loan changed and was converted forever more into a stock.
- 16) Once Counter-Plaintiff's loan was securitized and converted, it forever lost its security.
- 17) Since the loan was sold and securitized into stock, the "Lender" can no longer claim that it is a real party in interest, or even that the loan still exists as a loan, since double-dipping is a form of securities fraud.
- 18) A negotiable instrument can only be in one of two states after undergoing securitization, not both at the same time. It can either be a loan or a stock.
- 19) Once the instrument is traded as a stock, it is forever a stock and therefore regulated as this loan was by the SEC as a stock.
- 20) The subject Mortgage states that the Mortgage secures the Promissory Note.
- 21) The Promissory Note, by conversion into stock, was extinguished as a collateralized asset and therefore the trust secures absolutely nothing and Bank of America, N.A., not being a real party in interest, has no standing to foreclose in Counter-Plaintiff.

- 22) Since the "Lender" sold the loan to a REMIC, it forever lost the ability to enforce, control or otherwise foreclose on Counter-Plaintiff's property, including the right to assign the Mortgage or endorse the Note. It was no longer the real party in interest.
- 23) If Bank of America, N.A. owned the Note, it would have to be taxed on the interest owned from the Note. If the REMIC owned the Note, it would have a tax liability.
- 24) To avoid double taxation, under Internal Revenue Code 860, the loan was put into an SPV so that only the shareholders are taxed and therefore are the real parties in interest.
- 25) Because of IRS Code 860, Bank of America, N.A. is not the real and beneficial party in interest because the REMIC does not own the Note, the shareholders do.
- 26) By distributing the tax liabilities to the shareholders, the REMIC has also distributed the parties in interest.
- 27) Since a Promissory Note is only enforceable in its entirety and thousands of shareholders own the subject Note, no one of them can foreclose on Counter-Plaintiff's home.
- 28) The asset of the REMIC is registered and traded as part of a security, and as such cannot be traded out and is permanently attached and converted into stock preventing the Note from being assigned and securitized again and again which would create securities fraud.
- 29) Since Counter-Plaintiff's loan went into default, it was written off by the REMIC and received tax credits from the IRS, was therefore discharged, and settled destroying the Note forever.
- 30) After securitization, the Note cannot be reattached to the Mortgage through adhesion.
- 31) Under the Uniform Commercial Code (UCC Sec. 3), the Promissory Note is a one-of-a-kind instrument and any assignment must be a permanent fixture onto the original Note much like a check.
- 32) There is no endorsement on the original Note.
- 33) The original Promissory Note has the only legally binding chain of title, otherwise the instrument is faulty.
- 34) The original Note had to be destroyed upon securitization because the Note and the stock cannot exist at the same time.
- 35) All Counter-Defendants lack standing to enforce the Note.
- 36) Under the terms of the pooling and servicing agreement, the Servicer can buy back the Note as a non-performing, non-secured debt like collection agencies that buy non-performing credit card debts.

- 37) This purchase is of a discharged asset and cannot be re-adhered to the original Mortgage, since the original Note was a one-of-a-kind instrument, not part of the discharged asset.
- 38) Therefore, the purchaser of the discharged asset can never be the holder in due course of the original Note.
- 39) Under the Uniform Commercial Code (UCC), the original Promissory Note is the only valid and legally binding chain of title for the Note.
- 40) The numerous attempts by Counter-Defendant Bank of America, N.A. to claim ownership of the original Note by the purchaser of the discharged asset is fraudulent and is characterized as "reverse engineering."
- 41) There is no perfection of title.
- 42) Counter-Plaintiffs were never informed or notified of any transfer of the Note to Counter-Defendant Bank of America, N.A.
- 43) The Mortgage states that only the lender can make an assignment.
- 44) No evidence exists to support the claim that Bank of America, N.A. is the holder in due course of the Note at issue in this action.
- 45) Counter-Plaintiff's Mortgage was flawed from the date of the origination of the loan because MERS was named as the beneficiary and nominee of the lender on the Mortgage, which was done for purposes of deception, fraud, and confusing—and therefore harming—the Counter-Plaintiff, and theft of revenue from the local county government through the illegal avoidance of mortgage recording fees.
- 46) MERS is unregistered and unlicensed to conduct mortgage lending or any other type of business in the State of South Carolina, and MERS has been and continues to knowingly, intentionally, illegally, and fraudulently record mortgages and conduct business in South Carolina on a large scale and systematic fashion.
- 47) Neither MERS nor Bank of America, N.A. is the original lender for the Counter-Plaintiff's subject Mortgage or Note herein.
- 48) Neither MERS nor Bank of America, N.A. are legally documented assignees of either the Counter-Plaintiff's Mortgage or Note and do not hold the original Mortgage nor have they ever held the Counter-Plaintiff's Note.
- 49) No Note or other evidence exists which could ever make the Counter-Plaintiff indebted to MERS or Bank of America, N.A. in any way.

- 50) Neither MERS nor Bank of America, N.A. ever had nor will they ever have the authority to assign the Mortgage to any entity.
- 51) Neither MERS nor Bank of America, N.A. ever had any right to collect on the Note or enforce the Mortgage, nor have they ever had a right to hold, enforce, or collect upon Counter-Plaintiff's Note.
- 52) At the time Counter-Plaintiff signed the Note and Mortgage, he/she was unknowingly converting his/her property into an asset of an MBS (Mortgage Backed Security) and was deliberately induced into signing a negotiable instrument, which was never intended as such but was intended as collateral for an MBS.
- 53) The alleged Note in question started its life as a negotiable instrument, similar to a check. The negotiation and enforceability of the Note is governed by Article III of the Uniform Commercial Code.
- 54) The Note that had been executed with the Mortgage became part of a pool of mortgages losing its individual identity as a note between a lender and a borrower; it merged with other unknown notes as a total obligation due to the investor or investors; it is no longer a negotiable instrument, rather, it is collateral for a federally regulated security under the confines of the SEC (Securities and Exchange Commission).
- 55) In actuality, MERS was not the "nominee" for the lender; the true lenders were investors who had provided the funds for the loans through mortgage backed security pools which were held as trusts.
- 56) This fact was known to MERS and the servicers and the subsequent assignees of any and all rights purported to have been assigned by MERS at the time the Note and Mortgage was signed by Counter-Plaintiff and at the time (or each and every later purported assignment by MERS, or others) of any interest in the note and mortgage.
- 57) The proper parties to this action would be the investors of the mortgage backed securities to which Counter-Plaintiff's loan was securitized; but these parties have no recorded interest in the mortgage, which were never delivered to the trustee for the mortgage backed security pool; therefore the note itself is, at best, unsecured rights to payment.
- 58) All of the purported assignments and transfers were done by the Counter-Defendants without the required corporation resolution giving authority for that person to conduct such assignments and transfers.

- 59) A "debt collector" under the Statute is "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another" 15 U.S.C. Section 92(a)(6).
- 60) Attorneys who regularly engage in debt collection or debt collection litigation are covered by the FDCPA and their litigation activities must comply with the requirements of that Act.
- 61) In *Platsky v. CIA*, 953 F.2d 26 (2nd Cir. 1991), the Circuit Court of Appeals allowed that the District Court should have explained to the litigant proceeding without a lawyer the correct form to the litigant so that he could have amended his pleadings accordingly. Defendants respectfully reserve the right to amend their pleadings.

COUNT I
VIOLATIONS OF THE FAIR DEBT COLLECTIONS PRACTICES ACT
("FDCPA") 15 USC § 1692

Counter-Defendants Bank of America, N.A. Successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. and Korn Law Firm, their Attorneys/Agents

1. All preceding paragraphs are incorporated herein as though fully set forth.
2. Counter-Defendants misrepresented the character and legal status of the unlawful debt in violation of 15 USC 1692(e)(2), by sending false correspondence to Counter-Plaintiffs and third persons and assisting in the filing of an unlawful foreclosure action in county court.
3. Counter-Defendants threatened to take and did take actions that they could not legally take without the ruse and falsities committed upon the Counter-Plaintiffs in violation of 15 USC 1692(e)(5).
4. Counter-Defendants engaged in conduct that disgraced the Counter-Plaintiffs in violation of 15 USC 1692(e)(7), by sending false correspondence to Counter-Plaintiffs and third persons and assisting in the filing of an unlawful foreclosure action in county court.

5. Although Counter-Plaintiffs disputed the alleged debt, Counter-Defendants communicated false credit information to others and failed to communicate that the debt was disputed, when it was disputed, in violation of 15 USC 1692(e)(8).
6. Counter-Defendants stated numerous times that they were the lawful owners in interest of the debt or empowered to speak on behalf of the owner in interest (as Attorneys/Agents), yet knew or should have known that they were not, and as such violated 15 USC 1692(e)(5).
7. All Counter-Defendants engaged in unfair and deceptive means and attempts to collect the alleged debt in violation of 15 USC 1692(f).
8. Counter-Defendants attempted to collect the alleged debt in a manner and amount not authorized by the original MORTGAGE and Note in violation of 15 USC 1692(f)(1).
9. Counter-Defendants threatened to unlawfully repossess the Counter-Plaintiffs' property in violation of 15 USC 1692(f)(8).
10. Counter-Plaintiffs suffered actual damages from these violations.
11. Pursuant to 15 USC 1692(k), Counter-Plaintiffs are entitled to actual damages, statutory damages as set forth herein, and reasonable attorney fees and costs.
12. Because the conduct of the Counter-Defendants was frequent and persistent and because the nature of the violations of the FDCPA were so egregious and because the FDCPA violations were a part of a deliberate scheme, Counter-Plaintiffs are entitled to the maximum possible relief permitted under 15 USC 1692(k)(a).

COUNT II

VIOLATIONS OF RESPA 12 USC 2601 ET SEQ.

13. All preceding paragraphs are incorporated as though fully set forth herein.
14. Counter-Defendants failed to timely inform Counter-Plaintiffs of any alleged Appointments, Assignments and transfers of the mortgage in violation of RESPA.
15. Counter-Plaintiffs have previously made written demands to Counter-Defendants to show evidence of standing to claim a debt and Counter-Defendants have refused to evidence such standing.

COUNT III
SLANDER OF TITLE / PETITION TO QUIET TITLE

16. Counter-Plaintiffs incorporate by this reference each preceding paragraph of this Complaint as if set forth fully herein.
17. The Counter-Defendants have knowingly and maliciously communicated, in writing, false statements that have the effect of disparaging the Counter-Plaintiffs' title to property. The Counter-Plaintiffs have incurred special damage as a result.
18. Counter-Defendants Bank of America, N.A. Successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. and Korn Law Firm, their Attorneys/Agents have no legally enforceable claim, interest or standing to sue as to the Note or Mortgage in question and the claim is a cloud on the Counter-Defendants' title and should be quieted under South Carolina law.
19. Counter-Plaintiffs are the rightful owners of the subject property.
20. Counter-Plaintiffs are the legal titleholders of their property.
21. Counter-Defendants Bank of America, N.A. Successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. and Korn Law Firm, their Attorneys/Agents have knowingly and unlawfully caused a cloud to be recorded against the title of Counter-Plaintiffs' property and have caused to be sent notices of default and foreclosures, and have served and filed mortgage documents that claim an interest in the property of the Counter-Plaintiffs.
22. Any purported transfer of any interest in the Counter-Plaintiffs' real estate was wrongful and invalid because of the endorsements, assignments, foreclosures or purported foreclosures were invalid and were not conducted in accordance with the laws of South Carolina.
23. Counter-Defendants Bank of America, N.A. Successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. and Korn Law Firm, their Attorneys/Agents knew or should have known that such transfers were wrongful and invalid and the publication of an ownership interest in the Counter-Plaintiffs' property is, therefore false.
24. The recording of the mortgages published the information to third parties.

25. Because of said wrongful publication of an ownership interest in the Counter-Plaintiffs' property, Counter-Plaintiffs have incurred damages and will continue to incur attorney's fees and costs related to this litigation, in an amount to be proven at trial.
26. Counter-Plaintiffs seek a declaratory judgment against Counter-Defendants stating that the Counter-Defendants have violated Counter-Plaintiffs' rights and that the Counter-Defendants had and have no right to hold mortgages in the name of Bank of America, N.A. and/or foreclose on Counter-Plaintiffs' property and that the Counter-Defendants are entitled to no further payments from the Counter-Plaintiffs or recognition in Counter-Plaintiffs' Title to their property.
27. The Counter-Plaintiffs are entitled to a reformation of this note as an unsecured note or as a partially or wholly discharged note and a right to reformation of the contract with the persons or entities who are owed obligations because of funding of the loan of the Counter-Plaintiffs.

COUNT IV

FRAUD AND MISREPRESENTATION

SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT

SCUTPA S.C. Code Ann. § 39-5-20(a)(1985), S.C. Code Ann. § 39-5-140(a)(1985)

28. Counter-Plaintiffs re-allege and affirm each preceding paragraph of this Complaint and incorporate such as if alleged anew.
29. In 2011, Counter-Defendants intentionally instituted unlawful foreclosure against Counter-Plaintiffs based upon fraudulent documents in the Oconee County Court.
30. The deceptive acts of the Counter-Defendants and their employees and agents resulted in a multitude of misrepresentations, including but not limited to the true identity of the Lender, and the fraudulent misrepresentation as to the Mortgagee.
31. The Counter-Defendants induced the Counter-Plaintiffs to enter into the transaction when there existed in the inducement and execution material representations that were false and were known to be false or were made recklessly, which inducement was reasonably acted upon by Counter-Plaintiffs and acted upon in reliance thereon and Counter-Plaintiffs have suffered injury proximately due to such.

32. The scheme employed by Counter-Defendants intentionally had the capacity and tendency to deceive Counter-Plaintiffs, and did deceive Counter-Plaintiffs and the Clerk of Court.
33. The acts of the Counter-Defendants violated standards of fair trade practices and affected commerce.
34. As a result of the Counter-Defendants unfair and deceptive trade practices, Counter-Plaintiffs were proximately injured in their business and in their persons.
35. This foreclosure has been continued with no date set for a hearing.
36. The deceptive acts of the Counter-Defendants constitute fraudulent misrepresentation and the Counter-Defendants are jointly and severally liable for their acts of fraud by their misrepresentation and all damages stemming from such, including punitive damages and attorney's fees.

COUNT V
WRONGFUL CONDUCT
SOUTH CAROLINA CODE OF LAWS
S.C. Code of Laws Title 15 -75-60

37. Counter-Plaintiffs re-allege and affirm each preceding paragraph of this Complaint and incorporate such as if alleged anew.
38. Counter-Defendants in instigating foreclosure action against Counter-Plaintiffs in their Complaint falsely asserting authority of law, claiming to be the Holder of the Note and Mortgage, and as such claim the authority at law to collect on the Note and the Mortgage and foreclose on Counter-Plaintiffs' property.
39. Counter-Defendants have filed false or misleading documents with Oconee County Recorder's Office to assert their claim.
40. By falsely asserting authority of law, Counter-Defendants are jointly and severally liable for their acts and all damages stemming from such including actual damages, punitive damages, costs and reasonable attorney's fees.

COUNT VI
NEGLIGENT SUPERVISION
SOUTH CAROLINA CODE OF LAWS
S.C. Code of Laws Title 15 -75-60

41. Counter-Plaintiffs re-allege and affirm each preceding paragraph of this Complaint and incorporate such as if alleged new.
42. Counter-Defendants had a duty of care to supervise the actions of their employees and agents.
43. Counter-Defendants' employees and/or agents' actions, as alleged previously, were unlawful and violated Counter-Plaintiffs' property rights.
44. Counter-Defendants knew or should have known that their employees and/or agents were acting unlawfully.
45. As a result of the Counter-Defendants' negligent supervision, Counter-Plaintiffs were proximately injured by the unlawful acts of their employees and/or agents.
46. An agency relationship exists between the individual defendants and the corporate defendants.
47. The actions of the individual defendants were done on behalf of and at the direction of the corporate defendants and within the scope of their agency relationship.
48. As a result of the actions of the individual defendants, the Counter-Plaintiffs were injured.

COUNT VII
COMMON LAW FRAUD AND INJURIOUS FALSEHOOD

49. Counter-Plaintiffs incorporate by this reference each paragraph of this Complaint as if set forth fully herein.
50. The publicly filed false mortgage assignments enabled all of the Counter-Defendants to perpetrate the fraudulent foreclosure.
51. All of the Counter-Defendants knew or should have known the material representations were false.

52. The material representations to the Counter-Plaintiffs were made so that the Court and the Counter-Plaintiffs would believe that the Counter-Defendants had a legitimate claim in the property. The Counter-Plaintiffs relied on such and the Counter-Plaintiffs were injured as a result with the facing of foreclosure litigation.
53. Counter-Defendants fraudulently concealed their wrongdoings and prevented Counter-Plaintiffs from discovering their cause of action.
54. Counter-Plaintiffs have been injured by the fraud by Counter-Defendants and have remained in ignorance of it without any fault or want of diligence or care on their part.
55. Counter-Defendants made many misleading statements that the loan contained certain terms desirable to the consumer when it did not.
56. Counter-Defendants' use of deceit or trickery caused Counter-Plaintiffs to act to their disadvantage.

WHEREFORE, Counter-Plaintiffs demand judgment against Counter-Plaintiffs as follows:

- 1) Judgment against Counter-Defendants as Jointly and Severally Liable for all issues in excess of \$1,000,000.00;
- 2) Costs and Attorneys Fees pursuant to 18 USC § 1964(c) and relevant South Carolina law;
- 3) Actual and statutory damages for violations of FDCPA pursuant to 15 USC § 1692(k) and relevant South Carolina law;
- 4) Costs and Attorneys Fees pursuant to 15 USC § 1692(k) and relevant South Carolina law;
- 5) Rescission of the entire Mortgage and Note amounting to clear title to property with fixtures as a result of the aforementioned, and
- 6) Damages for the Unfair and Deceptive Acts and Practices and
- 7) Judgment against Counter-Defendants for return of the down payment, and other payments, as well as interest on the above amount, and
- 8) Cost of litigation as provided in Title 15 United States Code, Section 1601 et Seq.
- 9) Pre-judgment and post judgment interest at the maximum rate allowable by law;
- 10) Compensatory damages;
- 11) Punitive damages as allowed by law;

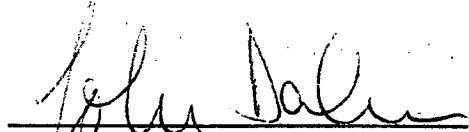
12) Such other and further relief available under all applicable state and federal laws and any relief the court deems just and appropriate;

DEMAND FOR JURY TRIAL pursuant to Rule 38 of the South Carolina Rules of Civil Procedure (SCRCP) Counter-Plaintiffs demand a jury trial as to all issues triable by a jury.

Respectfully submitted this February 21, 2012.

Submitted by John D. Dalen and Julie A. Dalen.

DATED this 21st day of February, 2012


John D. Dalen, Defendant


Julie A. Dalen, Defendant

109 Wood Valley Drive,
Westminster, SC 29693

864 647 4705

STATE OF SOUTH CAROLINA
OCONEE COUNTY

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-37-1056

Bank of America, N.A. Successor by merger to
BAC Home Loans Servicing, L.P. f/k/a Countrywide
Home Loans Servicing, L.P.,

PLAINTIFF

Vs.

John D. Dalen, Julie A. Dalen, and Wawtrockace
Hills Property Owners Association,

DEFENDANT(S).

2017 FEB 21 A 9 25

MEMORANDUM OF LAW

The point at issue in this Civil Action is whether or not the Plaintiff has standing to proceed with foreclosure. The Plaintiff has the presumption of law that they do have standing yet have not offered any proof of the right of enforcement. This presumption is hereby formally rebutted. The Defendants move the Court to compel the Plaintiff to prove, verify and validate whether or not they have standing to enforce the debt. Material to the arguments of this case is the evidence contained on the original wet-ink signature Promissory Note. The original note is a critical piece of evidence that establishes the following: (1) who is the current Holder in Due Course, and (2) whether the Plaintiff is the current Holder in Due Course.

While it is true that the Defendants signed a note in 2007, that Note is likely to have been sold and assigned. Material to Defendant's argument is "Who was it sold/assigned to and is the Plaintiff the Holder in Due Course, and if not, who is?" Specifically, does the Plaintiff have the authority to enforce the negotiable instrument?

While it is not normally required of the Plaintiff to provide proof of claim in the normal conduct of a foreclosure proceeding, the Fair Debt Collections Act is enacted when the debt is in dispute and the right of enforcement is being challenged.

The authority to disclose is derived directly from the negotiable instrument's right of enforcement. As the issue at hand is the Promissory Note, which is a negotiable instrument, the matter must be governed under the UCC (Uniform Commercial Code) Article III, Sections 3101 to 3605. The Commercial Codes cited are on point and relevant to the issue at hand. The Defendants have presented crucial evidence that indicates the Plaintiff is not the rightful owner in due course. Crucial evidence consists of letters that the Court allowed to be introduced at the hearing on February 6, 2012. Copies are attached to this Motion and listed as Exhibits A, B, C, and D. The Plaintiff is attempting to collect a debt that is in dispute. We assert the following regarding **Bank of America, N.A., Successor by Merger to Countrywide Home Loan Servicing, L.P.:**

- 1) Bank of America, N.A. has no right, title or beneficial interest in the note or mortgage
- 2) Bank of America, N.A. is not the Secured Creditor, and therefore has no standing to foreclose
- 3) Bank of America, N.A. is only the Servicer
- 4) Bank of America, N.A. has falsely conveyed the Deed Assignment misrepresenting itself as the Lender/Creditor
- 5) Bank of America, N.A. has violated FDCPA 15 U.S.C. having no right, title or beneficial interest in the note or mortgage Section 1692 f(6)(A):
 - a) The FDCPA prohibits the "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if . . . there is no present right to possession of the property claimed as collateral through an enforceable security interest."
 - b) The FDCPA also allows a plaintiff to recover "any actual damage sustained" as a result of a violation of the statute. 15 U.S.C. Section 1692 k(a)(1). Actual damages under the FDCPA include damages for emotional distress. *Johnson v. Eaton*, 880 F.3d 148, 152 (5th Cir. 1996) (noting that the FDCPA not only requires that the debt collector compensate the debtor for any monetary damages, but also for "emotional distress or other injury that the debtors can prove the debt collector caused."

Furthermore under the United States Supreme Court decision of *Carpenter v. Longan*, 83 U.S. 16 Wall, 271 271 (1872), the Deed of Trust follows the Promissory Note. Where the promissory note goes, the Deed of Trust must follow. Page 83 U.S. 274: 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 ownership of the Deed of Trust and subsequent assignments follow the promissory note, and not an arbitrary assignment of MERS. The Massachusetts Supreme Court has ruled that before the "lender" may foreclose on a subject property, the "lender" must provide evidence of perfected chain of title in both the Deed of Trust as well as the promissory note. Blank assignments of the promissory note cannot be construed as evidence of perfected interest. Neither is possession without proper assignment. *US Bank National Association vs. Ibanez*, (SJC – 10694).

The Defendants, upon information and belief, have reason to believe the following:

- a) The mortgage note has been paid in whole or in part by one or more undisclosed party/parties who prior to or contemporaneously, with the closing of the "loan", paid the originating lender in exchange for certain unrecorded rights to the revenues arising out of the loan documents.
- b) In connection with the matters which are the subject of paragraph "a" as above, the plaintiff (foreclosing party) has no financial interest in the Note or Mortgage.
- c) The original note was destroyed or was transferred to a structured investment vehicle which may be located offshore, which also has no interest in the Note or Mortgage or revenue therefrom.
- d) The revenue stream deriving from the Note/Mortgage was eviscerated upon one or more assignments of the Note/Mortgage to third parties and parsing of obligations as part of the securitization process, some of whom are joined as co-obligators/co-obligatees, in connection with the closing.
- e) **To the extent which Plaintiff has been paid on the underlying obligation or has no legal interest therein, or in the Note or Mortgage, or does not have lawful possession of the Note or Mortgage, Plaintiff's allegations of possession and capacity to institute foreclosure constitute a fraud upon the Court. Based upon one or more of the affirmative defenses set forth above, Defendants John and Julie Dalen are entitled to a dismissal of the foreclosure claim with prejudice.**

If the lender is allowed to proceed without proof, there is a possibility another institution which may have bought our note may attempt to collect the same debt from us again. Courts across the country are becoming more sympathetic to homeowners because of the prevalence of predatory lending and servicing. They are holding the lender to the law, requiring them to produce evidence that they are the true owners of the Note.

Not only does the foreclosing party need to physically hold the note, but the note must be properly endorsed and transferred every time a mortgage is sold. A clear chain of title must be demonstrated to make the note valid. This is to protect borrowers from fraud – no one can manufacture a note, claim to be a creditor, and then take a homeowner's property. This is especially important when mortgages are securitized and bought and sold a dozen times – if there is no clear chain of title, the borrower can never be sure who is really the creditor.

Defendants move the Court to consider the following cases:

Patton v. Diemer, 35 Ohio St. 3d 68; 518 N.E.2d 941 (1988)

Lebanon Correctional Institution v. Court of Common Pleas, 35 Ohio St. 2d 176 (1973), and

Wells Fargo Bank v. Byrd, 178 Ohio App. 3d 285, 2008 - Ohio - 4603, 897 N.E. 2d 722 (2008)

"A party lacks standing to invoke the jurisdiction of a court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action." Furthermore the Wells Fargo case went on to hold, "If plaintiff has offered no evidence that it owned the note and mortgage when the complaint was filed, it would not be entitled to judgment as a matter of law."

Stachnik v. Winkel, 394 Mich. 375, 387; 230 N.W. 2d 529, 534 (1975) In determining whether the plaintiffs come before this Court with clean hands, the primary factor to be considered is whether the plaintiffs sought to mislead or deceive the other party, not whether that party relied upon plaintiff's misrepresentations.

LaSalle Bank v. Ahearn, 875 N.Y. S. 2d 595 (2009) Dismissed with prejudice; lack of standing.

Novastar Mortgage, Inc. v. Snyder 3:07CV480 (2008) Plaintiff has the burden of establishing its standing. It has failed to do so.

DU Capital, Inc. v. Parsons, Case No. 07 – MA – 17 (2008) A genuine issue of material fact existed as to whether or not appellee was the real party in interest as there was no evidence on the record of an assignment. Reversed for lack of standing.

Everhome Mortgage Company v. Rowland, No. 07AP – 615 (Ohio 2008) Mortgagee was not the real party in interest pursuant to Rule 17(a). Lack of standing.

Lambert v. Firststar Bank, 83 Ark. 259, 127 S.W. 3d 523 (2003) Complying with the Statutory Foreclosure Act does not insulate a financial institution from liability and does not prevent a party from timely asserting any claims or defenses it may have concerning a mortgage foreclosure A.C.A. § 18-50-116(d)(2) and violates honest services Title 18 Fraud. Notice to credit reporting agencies of overdue payments/foreclosure on a fraudulent debt is defamation of character and a whole separate fraud. A Court of Appeals does not consider assertions of error that are unsupported by convincing legal authority or argument, unless it is apparent without further research that the argument is well taken. FRAUD is a point well taken! Lambert Supra.

Anheuser-Busch Brewing Company v. Emma Mason, 44 Minn. 318, 46 N.W. 558 (1890) No lawful consideration tendered by Original Lender and/or Subsequent Mortgage and/or Servicing Company to support the alleged debt. "A lawful consideration must exist and be tendered to support the Note" and demand under TILA full disclosure of any such consideration.

National Bank Act, Sect. 28 & 56

National Bank of Commerce v. Atkinson, 8 Kan. App. 30, 54 P. 8 (1898) National Banks and/or subsidiary Mortgage companies cannot retain the note, "Among the assets of the state bank were two notes, secured by mortgage, which could not be transferred to the new bank as assets under the National Banking Laws.

WHEREFORE Defendants respectfully request an order dismissing plaintiff's complaint with prejudice as a matter of law.

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Bank of America, N.A., successor by merger to
BAC Home Loans Servicing, L.P. f/k/a
Countrywide Home Loans Servicing, L.P.,

PLAINTIFF,

v.

John D. Dalen, Julie A. Dalen, Wawtockace
Hills Property Owners Association,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

C/A NO.: 2011-CP-37-1056

**PLAINTIFF'S REPLY TO DEFENDANTS
JOHN D. DALEN AND JULIE A. DALEN'S
ANSWER, AFFIRMATIVE DEFENSES,
COUNTERCLAIM AND DEMAND FOR
JURY TRIAL**

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 MAR 26 AM 9 26

TO: JOHN D. DALEN AND JULIE A. DALEN, PRO SE DEFENDANTS:

Plaintiff, responding to Defendants' Answer, Affirmative Defenses, Counterclaims, and Demand for Jury Trial, alleges that:

1. Each allegation of Defendants' Answer, Affirmative Defenses, Counterclaims, and Demand for Jury Trial not specifically admitted is denied.
2. No response is required to the allegations contained in Paragraphs 1 through 19 of Defendants' Answer in Defendants Answer, Affirmative Defenses, Counterclaims, and Demand for Jury Trial. To the extent a response is required, Plaintiff denies the allegations.
3. Plaintiff denies the allegations contained in Paragraphs numbered 1 through 7 of the Affirmative Defenses to the Complaint in Defendants Answer, Affirmative Defenses, Counterclaims, and Demand for Jury Trial.
4. Plaintiff denies the allegations set forth in Paragraphs 1 through 61 of Defendant's Counterclaim.

AS A FIRST DEFENSE TO DEFENDANT'S FIRST COUNTERCLAIM

Violations of the Fair Debt Collections Practices Act

(General Denial)

5. To the extent that they are consistent with the pleadings herein, the above paragraphs are incorporated as if repeated verbatim.

Copies to:

Atty ☒ (P) ☐ (D)

DSS ☐ other ☐

Mailed ☒ Boxed ☐ Handled ☐

ENTERED
COMPUTER

6. No response is required to the allegations contained in Paragraph 1 of the Defendants' Counterclaim, Count I. To the extent a response is required, Plaintiff denies the allegations.

7. Plaintiff denies the allegations contained in Paragraphs 2 through 12 Defendants' Counterclaim, Count I.

AS A FIRST DEFENSE TO DEFENDANT'S SECOND COUNTERCLAIM

Violations of the Real Estate Settlement Procedures Act

(General Denial)

8. To the extent that they are consistent with the pleadings herein, the above paragraphs are incorporated as if repeated verbatim.

9. No response is required to the allegations contained in Paragraph 13 of the Defendants' Counterclaim, Count II. To the extent a response is required, Plaintiff denies the allegations.

10. Plaintiff denies the allegations contained in Paragraphs 14 through 15 of Defendant's Counterclaim, Count II.

AS A FIRST DEFENSE TO DEFENDANT'S THIRD COUNTERCLAIM

Slander of Title/Petition to Quiet Title

(General Denial)

11. To the extent that they are consistent with the pleadings herein, the above paragraphs are incorporated as if repeated verbatim.

12. No response is required to the allegations contained in Paragraph 16 of the Defendants' Counterclaim, Count III. To the extent a response is required, Plaintiff denies the allegations.

13. Plaintiff denies the allegations contained in Paragraphs 17 through 23 in the Defendant's Counterclaim, Count III.

14. No response is required to the allegations contained in Paragraph 24 of the Defendants' Counterclaim, Count III. To the extent a response is required, Plaintiff denies the allegations.

15. Plaintiff denies the allegations contained in Paragraphs 25 through 27 in the

Defendant's Counterclaim, Count III.

AS A FIRST DEFENSE TO DEFENDANT'S FOURTH COUNTERCLAIM

Fraud and Misrepresentation: SC Unfair Trade Practices Act

(General Denial)

16. To the extent that they are consistent with the pleadings herein, the above paragraphs are incorporated as if repeated verbatim.

17. No response is required to the allegations contained in Paragraph 28 of the of Defendants' Counterclaim, Count IV. To the extent a response is required, Plaintiff denies the allegations.

18. Plaintiff denies the allegations contained in Paragraphs 29 through 34 in the Defendant's Counterclaim, Count IV.

19. No response is required to the allegations contained in Paragraph 35 of the of Defendants' Counterclaim, Count IV. To the extent a response is required, Plaintiff denies the allegations.

20. Plaintiff denies the allegations contained in Paragraph 36 in the Defendant's Counterclaim, Count IV.

AS A FIRST DEFENSE TO DEFENDANT'S FIFTH COUNTERCLAIM

Wrongful Conduct: SC Code of Laws

(General Denial)

21. To the extent that they are consistent with the pleadings herein, the above paragraphs are incorporated as if repeated verbatim.

22. No response is required to the allegations contained in Paragraph 37 of the of Defendants' Counterclaim, Count V. To the extent a response is required, Plaintiff denies the allegations.

23. Plaintiff denies the allegations contained in Paragraphs 38 through 40 in the Defendant's Counterclaim, Count V.

AS A FIRST DEFENSE TO DEFENDANT'S SIXTH COUNTERCLAIM

Negligent Supervision: SC Code of Laws

(General Denial)

24. To the extent that they are consistent with the pleadings herein, the above paragraphs are incorporated as if repeated verbatim.

25. No response is required to the allegations contained in Paragraphs 41 through 42 of the of Defendants' Counterclaim, Count VI. To the extent a response is required, Plaintiff denies the allegations.

26. Plaintiff denies the allegation contained in Paragraphs 43 through 48 in the Defendant's Counterclaim, Count VI.

AS A FIRST DEFENSE TO DEFENDANT'S SEVENTH COUNTERCLAIM

Common Law Fraud and Injurious Falsehood

(General Denial)

27. To the extent that they are consistent with the pleadings herein, the above paragraphs are incorporated as if repeated verbatim.

28. No response is required to the allegations contained in Paragraph 49 of the of Defendants' Counterclaim, Count VII. To the extent a response is required, Plaintiff denies the allegations.

29. Plaintiff denies the allegations contained in Paragraphs 50 through 56 in the Defendant's Counterclaim, Count VII.

AS A SECOND DEFENSE TO DEFENDANT'S COUNTERCLAIMS

(Dismissal pursuant to SCRPC 12(b)(6))

30. To the extent that they are consistent with the pleadings herein, the above paragraphs are incorporated as if repeated verbatim.

31. That the Defendant has failed to state facts sufficient to constitute causes of action, therefore, the Defendant's counterclaim should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

32. That further, by pleading this 12(b)(6) dismissal in its reply herein, the Plaintiff does not intend to waive any right to have the Court hear a motion for dismissal. The dismissal herein is included for notice purposes and to preserve the Plaintiff's right to move for a dismissal

at anytime hereafter and up until trial.

AS A THIRD DEFENSE TO DEFENDANT'S COUNTERCLAIMS

(Failure to Mitigate Damages)

33. To the extent that they are consistent with the pleadings herein, the above paragraphs are incorporated as if repeated verbatim.

34. Defendant has failed to mitigate his alleged damages. Therefore, Defendant's claims against Plaintiff should be reduced accordingly.

AS A FOURTH DEFENSE TO DEFENDANT'S COUNTERCLAIMS

(Waiver)

35. To the extent that they are consistent with the pleadings herein, the above paragraphs are incorporated as if repeated verbatim.

36. Defendant's claims are barred in whole or part by the doctrine of waiver based on Defendant's failure to comply with the agreement, including Defendant's failure to make timely payments under the terms of the note and mortgage.

AS A FIFTH DEFENSE TO DEFENDANT'S COUNTERCLAIMS

(Estoppel)

37. To the extent that they are consistent with the pleadings herein, the above paragraphs are incorporated as if repeated verbatim.

38. Defendant's claims are barred in whole or part by the doctrine of estoppel based on Defendant's failure to comply with the agreement, including Defendant's failure to make timely payments under the terms of the note and mortgage.

AS A SIXTH DEFENSE TO DEFENDANT'S COUNTERCLAIMS

(Set-Off / Offset / Recoupment)

39. To the extent that they are consistent with the pleadings herein, the above paragraphs are incorporated as if repeated verbatim.

40. If the Plaintiff is found liable to Defendant, then any damages should be reduced by the doctrines of set-off, offset, or recoupment.

AS A SEVENTH DEFENSE TO DEFENDANT'S COUNTERCLAIMS

(Laches)

41. To the extent that they are consistent with the pleadings herein, the above paragraphs are incorporated as if repeated verbatim.

42. Defendant's claims are barred in whole or part by the doctrine of laches.

AS AN EIGHTH DEFENSE TO DEFENDANT'S COUNTERCLAIMS

(Unclean Hands)

43. To the extent that they are consistent with the pleadings herein, the above paragraphs are incorporated as if repeated verbatim.

44. Defendant's claims are barred in whole or part by the doctrine of unclean hands.

AS AN NINTH DEFENSE TO DEFENDANT'S COUNTERCLAIMS

(Statute of Limitations)

45. To the extent that they are consistent with the pleadings herein, the above paragraphs are incorporated as if repeated verbatim.

46. Defendant's claims are barred in whole or part by the statute of limitations of 1 year for The Fair Debt Collection Practices Act (FDCPA) and for The Real Estate Settlement Procedures Act (RESPA).

47. Defendant's claims are barred in whole or part by the statute of limitations of 3 years for Slander of Title, Fraud, The South Carolina Unfair Trade Practices Act, Wrongful Conduct, Negligent Supervision, and Injurious Falsehood.

AS A TENTH DEFENSE TO DEFENDANT'S COUNTERCLAIMS

(Statute of Frauds)

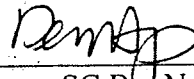
48. To the extent that they are consistent with the pleadings herein, the above paragraphs are incorporated as if repeated verbatim.

49. Defendant's claims are barred in whole or part by the statute of frauds.

WHEREFORE, having fully responded to the allegations contained in Defendants' Answer and Counterclaims, the Plaintiff prays for the following:

- (a) That the Defendants' counterclaims be dismissed with costs;
- (b) That the Plaintiff be granted the relief requested in the complaint; and
- (c) For such other and further relief as the court may determine to be just and proper.

KORN LAW FIRM, P.A.



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ATTORNEYS FOR PLAINTIFF

March 23, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Bank of America, N.A., Successor by
merger to BAC Home Loans Servicing, L.P.
f/k/a Countrywide Home Loans Servicing,
L.P.,

PLAINTIFF,

vs.

John D. Dalen, Julie A. Dalen, and
Wawtackace Hills Property Owners
Association,

DEFENDANTS.

F11-04694

IN THE COURT OF COMMON PLEAS

C/A No.: 2011-CP-37-1056

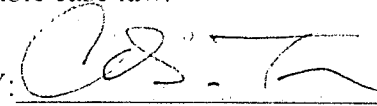
**NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT**

BEVERLY H. WHITFIELD
CLERK OF COURT
2013 DEC 4 PM 2 47

TO: JOHN AND JULIE DALEN, PRO SE DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that the attorney for the Plaintiff will, on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, move before the above-referenced court for an order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure granting the Plaintiff Summary Judgment in this matter.

This Motion is made on the grounds that there is no genuine issue as to any material fact and that the Plaintiff is entitled to judgment as a matter of law. This Motion is based on the pleadings in this case, affidavits, and the applicable case law.

BY: 
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Chris S. Truluck, SC Bar No: 77829
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November 27th, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE

C/A No.: 2011-CP-37-1056

Bank of America, N.A., Successor by
merger to BAC Home Loans Servicing, L.P.
f/k/a Countrywide Home Loans Servicing,
L.P.,

PLAINTIFF,

MEMORANDUM OF LAW

vs.

John D. Dalen, Julie A. Dalen, and
Wawtockace Hills Property Owners
Association,

DEFENDANTS.

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2013 DEC 4 PM 2 47

F11-04694

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT PURSUANT TO RULE 56 OF THE SOUTH CAROLINA
RULES OF CIVIL PROCEDURE**

AND NOW comes the Plaintiff, Bank of America, N.A., by and through its counsel,
Chris S. Truluck, and files the within Motion for Summary Judgment, averring as follows:

I. INTRODUCTION AND FACTS

This is an action to foreclose upon real property located in Oconee County, South Carolina. On or about December 20, 2007, for value received, John Dalen executed and delivered to Quicken Loans, Inc., a promissory note whereby John Dalen promised to pay Quicken Loans, Inc., the sum of One Hundred Eighteen Thousand Seven Hundred Fifty and 00/100 Dollars (\$118,750.00), together with interest at the rate of Six and 75/100 percent (6.75%) per annum. A copy of the note is attached and incorporated herein as **Exhibit "A."**

In order to better secure the payments of the note, John and Julie Dalen executed and delivered on December 20, 2007, a mortgage unto Mortgage Electronic Registration Systems, Inc. A copy of the mortgage is attached and incorporated herein as **Exhibit "B."** The mortgage



was recorded in Mortgage Book 2551 at Page 206 on December 21, 2007 in the Office of the Register of Deeds of Oconee County.

Thereafter, by virtue of an assignment dated May 9, 2011, recorded May 16, 2011, in Mortgage Book 2975 at page 40, Mortgage Electronic Registration Systems, Inc. assigned said mortgage unto BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. The Assignment of Mortgage is attached and incorporated herein as **Exhibit "C."**

Thereafter, by virtue of a corporate merger, Bank of America, N.A. successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. merged with Bank of America, N.A. making Bank of America, N.A. successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. the present lien holder and Plaintiff herein.

The monthly payments due on said note and mortgage are in default since December 1, 2010. Plaintiff initiated this foreclosure action in accordance with the terms of the note and mortgage by filing a Summons and Complaint on October 27, 2011. Plaintiff's Summons and Complaint, are attached and incorporated herein as **Exhibit "D."** Plaintiff's Affidavit of Debt as to the amount owed as of September 24, 2013 is attached and incorporated herein as **"Exhibit "E."**

Defendant John and Julie Dalen (hereinafter, "Defendants") subsequently responded to Plaintiff's Complaint by filing an Answer and Counterclaim on February 21, 2012. In their Answer and Counterclaim, Defendants allege counterclaims of violations of FDCPA, violations of RESPA, slander of title/petition to quiet title, fraud and misrepresentation under SCUTPA, wrongful conduct, negligent supervision, and common law fraud/injurious falsehood. A copy of Defendants' Answer and Counterclaim is attached and incorporated herein as **Exhibit "F."**

Upon service of Plaintiff's discovery requests and by order of the Court, Defendants John and Julie Dalen provided responses to requests for admission admitting the accuracy of the Note, Mortgage and Payment History as retained by the Plaintiff in regards to the above listed foreclosure action. A copy of Defendant's discovery responses is attached and incorporated herein as **Exhibit "G."** As further provided in Exhibit H, Defendants only provided a copy of their PowerPoint presentation in response to Plaintiff's request for production and Judge Maddox's Order to produce any responsive documentary evidence to plaintiff's requests for production executed June 18th, 2012.

II. STANDARD OF REVIEW: SC R. CIV. P. 56

"The purpose of summary judgment is to expedite dispositions 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). "A motion for summary judgment shall be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Mettis v. Mims*, 384 S.C. 491, 499, 682 S.E.2d 813, 818 (2009) (quoting Rule 56(c), SCRCF). Summary judgment is proper "where further inquiry into the facts of the case is [not] desirable to clarify the application of the law." *South Carolina Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001).

III. DISCUSSION OF COUNTERCLAIMS

A. Violations of the Fair Debt Collections Practice Act ("FDCPA") 15 USC § 1692

In their first counterclaim/cause of action, Defendants allege multiple violations of the Fair Debt Collections Practices Act by Plaintiff. Defendants allege (a) Plaintiff misrepresented the character and legal status of the unlawful debt in violation of 15 U.S.C. § 1692(e)(2); (b) Plaintiff threatened to take and did take actions in violation of 15 U.S.C. § 1692(e)(5); (c) Plaintiff engaged in conduct that disgraced Defendants in violation of 15 U.S.C. § 1692(e)(7), (e)(8), by sending false correspondence; and (d) Plaintiff used unfair and deceptive means to collect a debt in a manner not authorized by the original Mortgage and Note. Defs.' Answer and Countercl. ¶¶ 1-12. As Plaintiff became the proper party in interest to the debt before its default, Defendants' counterclaim should be dismissed as a matter of law.

According to 15 U.S.C. § 1692a (6)(F)(iii), the term debt collector does not include any person collecting or attempting to collect any debt owed to another to the extent such activity concerns a debt which was not in default at the time it was obtained by such person. 15 U.S.C. § 1692a (6)(F)(iii). Defendants did not default on the note and mortgage until December 1, 2010, nearly two years after Plaintiff became holder of the note on January 14, 2008. A letter from Defendants dated April 28, 2008, acknowledges they were aware that Plaintiff was responsible for their mortgage. This letter is attached and incorporated herein as "Exhibit H." As Plaintiff

became holder of the note before the date of default. Defendants' claim for violations of the FDCPA must fail as a matter of law.

Defendants' claim should similarly be dismissed as a matter of law where they failed to plead any specific facts sufficiently to evidence a claim pursuant to a violation of the FDCPA. Defendants' claim should also be dismissed as a matter of law where they failed to provide any evidence in response to Plaintiff's discovery requests and, alternatively, have admitted the accuracy of Plaintiff's Note, Mortgage and Payment History. "A party opposing a properly supported motion for summary judgment . . . may not rest on the mere allegations or denials of his pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact." *Bravis v. Dunbar*, 316 S.C. 263, 265, 449 W.E.2d 495, 496 (Ct. App. 1994).

B. Violations of RESPA 12 USC 2601 et seq.

In their second counterclaim/cause of action, Defendants allege that Plaintiff failed to timely inform Defendants "of any alleged Appointments, Assignments and transfers of the mortgage in violation of RESPA." Defs.' Answer and Countercl. ¶ 14. Additionally, Defendants claim that Plaintiff refused to provide evidence of standing to a claim. Defs.' Answer and Countercl. ¶ 15. Defendants' first alleged violation of RESPA fails as a matter of law as it is barred by the applicable statute of limitations under RESPA. Defendants second alleged violation of RESPA fails as a matter of law as Plaintiff did provide evidence of standing to a claim.

Pursuant to 12 U.S.C. § 2605, each transfer of loan servicing at the time of transfer must notify the borrower in writing of any assignment, sale, or transfer of servicing of the loan to any other person. 12 U.S.C. § 2605(b)(1). Any action brought pursuant to 12 U.S.C. § 2605 must be brought within three years of a violation. 12 U.S.C. § 2614. Evidence in this case demonstrates that Defendants were aware that Plaintiff was the servicer of the loan as of April 28, 2008. Ex. I. As Defendants did not assert a cause of action for failure of a notification of the service transfer until February 21, 2012, more than three years after the cause of action accrued, it is barred by the statute of limitations located in 12 U.S.C. § 2614.

Pursuant to 12 U.S.C. § 2605(e)(2), a loan servicer has a duty to provide a written response acknowledging receipt of correspondence from a borrower relating to the servicing of a loan within 5 business days. 12 U.S.C. § 2605(e)(2). Defendants submitted correspondence relating to the servicing of its loan on November 21, 2011 which was received by Plaintiff on

November 29, 2011. A reply acknowledging receipt of the correspondence was mailed to Defendants within five business days. On December 21, 2011, Plaintiff sent an additional follow up letter to Defendants. These letters are attached and incorporated herein as "Exhibit I." As Plaintiff fully complied with the statutory requirements of 12 U.S.C. § 2605, Defendants' counterclaim should be dismissed as a matter of law.

Defendants' claim should similarly be dismissed as a matter of law where they failed to plead any specific facts sufficiently to evidence a claim pursuant to a violation of the RESPA. Defendants' claim should also be dismissed as a matter of law where they failed to provide any evidence in response to Plaintiff's discovery requests. "A party opposing a properly supported motion for summary judgment . . . may not rest on the mere allegations or denials of his pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact." *Bravis v. Dunbar*, 316 S.C. 263, 265, 449 W.E.2d 495, 496 (Ct. App. 1994).

C. Slander of Title/Petition to Quiet Title

In their third counterclaim/cause of action, Defendants allege that Plaintiff has "knowingly and maliciously communicated, in writing, false statements that have the effect of disparaging the [Defendants'] title to property." Defs.' Answer and Countercl. ¶ 17. Defendants further allege that Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing have no legal right to enforce the collection of the debt owed. Defs.' Answer and Countercl. ¶ 18.

"The term 'slander of title' is defined as a false and malicious statement, oral or written, made in disparagement of a person's title to real or personal property, causing him injury." 50 Am. Jur. 2d Libel & Slander § 548 (1995). "The court in *Hopkins [v. Drowne]* emphasized that in using the term malice it was not using the term in its 'worst sense,' but described malice as an intent to deceive or injure and emphasized that in order to establish malice, the record must present evidence of the making of a false statement that is made with full knowledge of its falsity, and for the specific purpose of injuring the plaintiff." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 19-24, 567 S.E.2d 881, 890 (Ct. App. 2002) (citing *Hopkins*, 21 R.I. 20, 23, 41 A. 567 (1898)). "Slander of title is grounded in the tort of injurious falsehood." *Pond Place Partners, Inc.*, 351 S.C. at 19-24, 567 S.E.2d at 890 (citing *Wendy's of South Jersey, Inc. v. Blanchard Mgmt. Corp. of N.J.*, 170 N.J. Super. 491, 406 A.2d 1337, 1338 (N.J. Super. Ct. Ch. Div. 1979)). "The particular form of injurious falsehood that involves disparagement of the

property in land, chattels, or intangible things, is commonly called 'slander of title.'" *Pond Place Partners, Inc.*, 351 S.C. at 25, 567 S.E.2d at 890. To have a claim for slander of title there must be proof of special harm and proof of a greater amount of fault than negligence. *Id.* at 26, 567 S.E.2d at 890-91.

South Carolina has adopted the elements of slander of title identified in *TXO Prod. Corp. v. Alliance Res. Corp.*, which requires the plaintiff establish: "(1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff's title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties." *Pond Place Partners, Inc.*, at 30, 567 S.E.2d at 892 (citing *TXO Prod. Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992)). Additionally, in *Pond Place Partners, Inc.*, the Court of Appeals held that the filing of a lis pendens cannot form the basis of an action for slander of title. 351 S.C. at 52, 567 S.E.2d at 897.

Based on the holding in *Pond Place Partners, Inc.*, Defendants cannot bring an action for slander of title solely because of the filing of a lis pendens. Defendants are Guarantors of the Mortgage and Note and as such are liable. As provided in the Mortgage, Defendants default on the loan gives the Plaintiff the ability to use legal action to collect the remaining debt.

Defendants' claim should similarly be dismissed as a matter of law where they failed to plead any specific facts sufficiently to evidence a claim of Slander of Title. Defendants' claim should also be dismissed as a matter of law where they failed to provide any evidence in response to Plaintiff's discovery requests and, alternatively, have admitted the accuracy of Plaintiff's Note, Mortgage and Payment History. "A party opposing a properly supported motion for summary judgment . . . may not rest on the mere allegations or denials of his pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact." *Bravis v. Dunbar*, 316 S.C. 263, 265, 449 W.E.2d 495, 496 (Ct. App. 1994).

D. Fraud and Misrepresentation under South Carolina Unfair Trade Practice Act

In their fourth counterclaim/cause of action, Defendants allege that Plaintiff intentionally instituted unlawful foreclosure against Defendants based on fraudulent documents in Oconee County Court. Defs.' Answer and Countercl. ¶ 29. Defendants further allege that the actions of the Plaintiff resulted in a variety of misrepresentations. Defs.' Answer and Countercl. ¶ 30.

Based on S.C. Code Ann. § 39-5-20, "[u]nfair methods of competition and unfair deceptive acts or practices in the conduct of any trade or commerce are hereby declared

unlawful." "Trade" and "commerce" are defined in S.C. Code Ann. §39-5-10(b) as "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." "Person" is defined in S.C. Code Ann. §39-5-10(a) as "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity."

The South Carolina Court of Appeals, in *Wogan v. Kunze*, 366 S.C. 583, 606, 623 S.E.2d 107, 120 (Ct. App. 2005), defines an unfair trade practice "as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." Additionally, "[t]o be actionable under the [Uniform Trade Practices Act], the unfair or deceptive act or practice must have an impact upon the public interest." *Id.* at 607, 623 S.E.2d at 120. "An impact on the public interest may be shown if the acts or practices have the potential for repetition." *Id.* "The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts." *Id.*

"In order to recover in an action [] based upon misrepresentation, the following elements must be shown by clear, cogent and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a 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; (9) the hearer's consequent and proximate injury. Failure to prove any one of the foregoing elements is fatal to recovery." *M. B. Kahn Const. Co., Inc. v. S. C. Nat'l Bank of Charleston*, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980).

According to the court in *Regions Bank v. Schmauch*, "there is no right to rely, as required to establish fraud, where there is no confidential or fiduciary relationship and there is an arm's length transaction between mature, educated people. This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests." 354 S.C. 648, 672, 582 S.E.2d 432, 445 (Ct. App. 2003). "South Carolina holds the normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature." *Id.* at 671. The relationship between Plaintiff and Defendants in this case is one of creditor-debtor, and not fiduciary in nature. As there was no fiduciary relationship between the

parties, Defendants did not have a right to rely on any representation made by Plaintiff. As stated by the court in *M.B. Kahn*, failure to prove any one of the required elements is fatal to recovery.

Defendants' claim should similarly be dismissed as a matter of law where they failed to plead any specific facts sufficiently to evidence a claim pursuant to a violation of the SCUTPA or supporting a claim of Misrepresentation and Fraud. Defendants' claim should also be dismissed as a matter of law where they failed to provide any evidence in response to Plaintiff's discovery requests and, alternatively, have admitted the accuracy of Plaintiff's Note, Mortgage and Payment History. "A party opposing a properly supported motion for summary judgment . . . may not rest on the mere allegations or denials of his pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact." *Bravis v. Dunbar*, 316 S.C. 263, 265, 449 W.E.2d 495, 496 (Ct. App. 1994).

E. Wrongful Conduct

In their fifth counterclaim/cause of action, Defendants allege that Plaintiff, in instigating this foreclosure action against Defendants, used false authority of law in order to claim to be holder of the Note and Mortgage, and therefore Defendants seek redress under S.C. Code Ann. § 15-75-60. Defs.' Answer and Countercl. ¶ 38.

According to S.C. Ann. § 15-75-60, "A person who is injured by a sham legal process involving a violation of Section 16-75-735 has [] civil remedies against the person who committed the violation. S.C. Ann. § 15-75-60. Pursuant to Section 16-75-735 it is unlawful to: (a) impersonate a state or local official in connection with a sham legal process; (b) assert false authority of state law in connection with a sham legal process; (c) act as a Supreme Court Justice or other authorized official in determining a controversy; or (d) falsely assert authority of law in an attempt to intimidate or hinder a state or local official. S.C. Code Ann. § 16-75-735.

Defendants' claim should similarly be dismissed as a matter of law where they failed to plead any specific facts sufficiently to evidence a claim pursuant to a violation of Section 15-75-60. Defendants' claim should also be dismissed as a matter of law where they failed to provide any evidence in response to Plaintiff's discovery requests and, alternatively, have admitted the accuracy of Plaintiff's Note, Mortgage and Payment History. "A party opposing a properly supported motion for summary judgment . . . may not rest on the mere allegations or denials of his pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact." *Bravis v. Dunbar*, 316 S.C. 263, 265, 449 W.E.2d 495, 496 (Ct. App. 1994).

Finally, Defendants' claim should be dismissed where Judge Maddox's Order Denying Defendant's Motion to Dismiss, executed on March 3, 2012, provided, "[t]he court finds that the allegations set forth in the complaint are sufficient to constitute a cause of action for foreclosure."

F. Negligent Supervision

In their sixth counterclaim/cause of Action, Defendants allege that the Plaintiff failed to properly supervise their employees and the Plaintiff knew or should have known of the unlawful conduct. Defs.' Answer and Countercl. ¶¶ 42-44.

"An employer owes a duty of care to a third party when the possible harm resulting to the third party by the employee could have been reasonably anticipated by the employer." *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 302, 468 S.E.2d 292, 299 (1996). "In addition, any duty the principal owes a third party arising from a contract between them is limited to an obligation on the part of the principal to use due care in supervising the actions of the agent which are undertaken in his capacity as an agent for the principal and not in his individual capacity." *Id.*; see also *Degenhart v. Knights of Columbus*, 309 S.C. 114, 420 S.E.2d 495 (1992). In order for Defendants to maintain a claim for negligence against Plaintiff, Defendants must "allege facts which demonstrate the concurrence of three elements: (1) a duty of care owed by the [plaintiff]; (2) a breach of that duty by negligent act or omission; and (3) damage proximately caused by the breach." *Kleckley v. Northwest Nat'l Cas. Co.*, 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000).

Plaintiff asserts that it did not have a "special relationship" with Defendants and therefore Plaintiff, nor its employees, owed a duty of due care to Defendants as required to prove negligence supervision. See *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 445 (Ct. App. 2003). As there was no fiduciary relationship between Defendants and Plaintiff, Defendants did not have a right to rely on statements made by Plaintiff or their representatives. Therefore, Plaintiff's Motion for Summary Judgment to Defendants' counterclaim of negligence supervision should be granted as a matter of law.

Defendants' claim should similarly be dismissed as a matter of law where they failed to plead any specific facts sufficiently to evidence a claim of Negligent Supervision. Defendants' claim should also be dismissed as a matter of law where they failed to provide any evidence in response to Plaintiff's discovery requests and, alternatively, have admitted the accuracy of

Plaintiff's Note, Mortgage and Payment History. "A party opposing a properly supported motion for summary judgment . . . may not rest on the mere allegations or denials of his pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact." *Bravis v. Dunbar*, 316 S.C. 263, 265, 449 W.E.2d 495, 496 (Ct. App. 1994). Finally, Defendants' claim should be dismissed where Judge Maddox's Order Denying Defendant's Motion to Dismiss, executed on March 3, 2012, provided, "[t]he court finds that the allegations set forth in the complaint are sufficient to constitute a cause of action for foreclosure."

G. Common Law Fraud and Injurious Falsehood

In their eighth and final Counterclaim/Cause of Action, the Defendants allege that the Plaintiff filed false mortgage assignments enabling Plaintiff to perpetrate the fraudulent foreclosure. Defs.' Answer and Countercl. ¶¶ 51-52.

In order to prove fraud, the following elements must be shown: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a 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. *King v. Oxford*, 282 S.C. 307, 311, 318 S.E.2d 125, 127 (Ct. App. 1984). Failure to prove any one of these elements is fatal. *Id.*

Defendants fail to allege several of the necessary elements of fraud. Foremost, As previously stated, the creditor-debtor relationship is not fiduciary in nature and therefore Defendants do not have the right to rely on representations made by the Plaintiff. According to the court in *Regions Bank v. Schmauch*, "there is no right to rely, as required to establish fraud, where there is no confidential or fiduciary relationship and there is an arm's length transaction between mature, educated people. This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests." 354 S.C. 648, 672, 582 S.E.2d 432, 445 (Ct. App. 2003). "South Carolina holds the normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature." *Id.* at 671.

Defendants' claim should similarly be dismissed as a matter of law where they failed to plead any specific facts sufficiently to evidence a claim of Fraud or Injurious Falsehood. Defendants' claim should also be dismissed as a matter of law where they failed to provide any evidence in response to Plaintiff's discovery requests and, alternatively, have admitted the

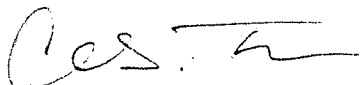
accuracy of Plaintiff's Note, Mortgage and Payment History. "A party opposing a properly supported motion for summary judgment . . . may not rest on the mere allegations or denials of his pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact." *Bravis v. Dunbar*, 316 S.C. 263, 265, 449 W.E.2d 495, 496 (Ct. App. 1994). Finally, Defendants' claim should be dismissed where Judge Maddox's Order Denying Defendant's Motion to Dismiss, executed on March 3, 2012, provided, "[t]he court finds that the allegations set forth in the complaint are sufficient to constitute a cause of action for foreclosure."

IV. CONCLUSION

For the reasons set forth more fully above, the Plaintiff respectfully requests that this Court grant the Plaintiff's Motion pursuant to S.C. R. Civ. P. 56 and dismiss Defendants' counterclaims with prejudice.

Respectfully Submitted,

By:


Dean A. Hayes, SC Bar No: 66066
Chris S. Truluck, SC Bar No. 77829
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ATTORNEYS FOR PLAINTIFF

November ²27, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA
OCONEE COUNTY

Bank of America, N.A. Successor by merger to
BAC Home Loans Servicing, L.P. f/k/a Countrywide
Home Loans Servicing, L.P.,

Vs.

John D. Dalen, Julie A. Dalen

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-37-1056

Notice of Motion and
Motion to Deny Plaintiff's Motion
For Summary Judgment

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2014 JAN 15 PM 1 43

Defendant's Notice of Motion and
Motion to Deny Plaintiff's Motion for Summary Judgment

To: Bank of America, N.A.

YOU WILL PLEASE TAKE NOTICE that the Defendants Pro Se, John Dalen and Julie Dalen will, on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, move before the above-referenced court for an order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure denying the Plaintiff's motion for summary judgment in this matter.

This Motion is made on the grounds that there are genuine issues of material fact, Discovery is not yet complete, and the Defendants are entitled to judgment denying Plaintiff's Motion for Summary Judgment as a matter of law. This Motion is based on the pleadings in this case, affidavits, and exhibits filed in conjunction with the attached Defendants' Cross-Motion for Summary judgment and the applicable case law.

By: John D. Dalen
John D. Dalen, Defendant Pro Se

109 Wood Valley Drive
Westminster, SC 29693

864 647 4705

Julie A. Dalen
Julie A. Dalen, Defendant Pro Se

DATED this 11 day of January 2014

STATE OF SOUTH CAROLINA
OCONEE COUNTY

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-37-1056

Bank of America, N.A. Successor by merger to
BAC Home Loans Servicing, L.P. f/k/a Countrywide
Home Loans Servicing, L.P.,

PLAINTIFF

Vs.

John D. Dalen, Julie A. Dalen, and Wawtockace
Hills Property Owners Association,

DEFENDANT(S).

Defendants' Verified Memorandum
in Opposition to Plaintiff's Motion
for Summary Judgment Pursuant to
Rule 56 of SCRPC

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2011 JAN 15 PM 1 44

**Defendants' Verified Memorandum in Opposition to
Plaintiff's Motion for Summary Judgment
Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure**

Plaintiff's Motion for Summary Judgment should be denied and summary judgment should be entered in favor of the Defendants on their counterclaims. Plaintiff has filed a motion for summary judgment which ignores the threshold issue of legal standing; fails to justify the dismissal of Defendants' contesting Answer and counterclaims; and purports to be supported by an Affidavit of Debt, which is not made on personal knowledge and which is in fact based on incompetent hearsay. Plaintiff has failed to demonstrate the absence of genuine issues of material fact, and has failed to sustain its burden of proof to be entitled to the entry of summary judgment.

Plaintiff's own submissions and admissions therein demonstrate that the Defendants are entitled to the entry of summary judgment on their seven separate defenses and their seven counterclaims as a matter of law, and pursuant to their Cross-Motion for Summary Judgment, filed separately but simultaneously herewith.

Defendants file this verified memorandum in opposition to Plaintiff Bank of America, N.A.'s Motion for Summary Judgment, stating:

- 1) This verified memorandum is supported by the attached Affidavit of John and Julie Dalen
- 2) Three genuine issues of material fact precluding summary judgment are:

- A) Whether plaintiff is in fact the holder in due course of the note and mortgage with rights to enforce (whether plaintiff has standing to sue).
 - B) Whether the assignment of the mortgage to plaintiff is valid.
 - C) Whether plaintiff suffered damage.
- 3) These issues have not been adjudicated. No evidence has been presented on the record to prove plaintiff's claim, nor contradict defendants' allegations in regard thereto, and summary judgment is therefore improper at this time. In *U.S. Bank Trust National Association v. Bell*, 684 S.E.2d 199, 385 S.C. 364 (S.C. App. 08/31/2009) *fn9 See, e.g., *Franklin Credit Mgmt. Corp. v. Nicholas*, 812 A.2d 51, 57-58 (Conn. App. Ct. 2002)

("In a mortgage foreclosure action, to make out its prima facie case, the foreclosing party had to prove by a preponderance of the evidence that it was the owner of the note and mortgage and that the [defendant] had defaulted on the note.") (internal quotations omitted) (internal citations omitted); *Campaign v. Barba*, 805 N.Y.S.2d 86, 86 (N.Y. App. Div. 2005) ("To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment."); ... 55 *Am. Jur. 2d Mortgages* §604 ("[T]he burden of proof of any particular issue rests upon the party asserting the affirmative of that issue under the pleadings.");

In *Paramount Fund, Inc. v. CUSAAC*, 282 S.C. 497, 319 S.E.2d 354 (S.C. App. 08/13/1984):

In an action to foreclose a mortgage on real property, the mortgagee has the burden of proving a disputed mortgage by the preponderance of the evidence. *Wagener v. Kirven*, 47 S.C. 347, 25 S.E. 130 (1920).

In *Town of Arcadia Lakes v. South Carolina Department of Health and Environmental Control*, 5095 (S.C. App. 03/06/2013):

"The Party seeking to establish standing carries the burden of demonstrating each of the three elements." *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291.

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" to withstand a motion to dismiss. *Lujan*, 504 U.S. at 561. Elements of standing, however, "are not mere pleading requirements but rather an indispensable part of the plaintiff's case"; therefore, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stage of the litigation." *Id.* (quoted in *Beaufort Cnty. v. Trask*, 349 S.C. 522, 528 n.14, 563 S.E.2d 660, 663 n.14 (Ct. App. 2002)).

"Standing to sue is a fundamental requirement in instituting an action."

Bodman v. State of S.C., Op. No. 27248 (S.C. Sup. Ct. filed May 8, 2013)

(Shearouse Adv. Sh. No. 21 at 27, 31) (quoting *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999)).

- 4) Each of the foregoing issues is genuine, material, justiciable, and remains in dispute.
 - 5) Bank of America, N.A.'s denial of these issues is insufficient as a matter of law.
- In *Lennon v. South Carolina Coastal Council*, 330 S.C. 414, 498 S.E.2d (S.C.App. 03/23/1998):

A threshold inquiry for any court is a determination of justiciability, *i.e.*, whether the litigation presents an active case or controversy. "No justiciable controversy is presented unless the plaintiff has standing to maintain the action." *Brock v. Bennett*, 313 S.C. 513, 519, 443 S.E.2d 409, 409, 413 (Ct. App. 1994). "A plaintiff must allege an actual controversy in which he has a Personal stake." *Energy Research Found. v. Waddell*, 295 S.C. 100, 102, 367 S.E.2d 419, 420 (1988).

Again quoting from the Lennon case:

The supreme court noted, however, that “there is a difference between the concepts of ‘standing,’ ‘capacity to sue,’ and ‘real party in interest.’” *Id.* at 169 n.3, 485 S.E.2d at 373 n. 3 (citing 6A *Charles A. Wright et al, Federal Practice and Procedure* §1542, at 328-29 (1990); *Firestone v. Galbraith*, 976 F.2d 279, 283 (6th Cir. 1992)).

And also quoting Lennon:

However, several other elements of the standing Doctrine are clearly unrelated to the rather simple proposition set out in Rule 17(a), and plaintiff must both be the real party in interest and have standing....

- 6) Defendants have not yet completed discovery.

In *Mulherin-Howell v. Cobb*, No. 3919 (S.C. App. 01/10/2004):

In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). If triable issues exist, those issues must go to the jury. *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

- 7) Summary judgment is not proper where discovery has not yet been completed.

Under Rules of Evidence, Rule 1003, Admissibility of Duplicates, Plaintiff has failed to produce the original mortgage document. In our Request for Admissions, Interrogatories, and Production requests, Plaintiff has claimed both to be in possession of the note and mortgage, and claimed to *not* be in possession of the mortgage (the original). Defendants currently have unresolved discovery issues with the Plaintiff, including Interrogatories and

Request[s] for Production of documents as well as depositions that are contemplated upon resolving the just-mentioned discovery issues.

- 8) Summary judgment should not be granted until facts have been sufficiently developed to enable the court to be reasonably certain that there is no genuine issue of material fact.

In *Mulherin-Howell v. Cobb*, No. 3919 (S.C. App. 01/10/2004):

In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). If triable issues exist, those issues must go to the jury. *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

... see also *Higgins v. Medical Univ. of South Carolina*, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997) (noting that when ruling on motion for summary judgment, trial judge must consider all of documents and evidence within record, including pleadings, depositions, answers to interrogatories, admissions on file, and affidavits). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002); see also *Schmidt v. Courtney*, 357 S.C. 310, 592 S.E. 2d 326 (Ct. App. 2003) (noting that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000), *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E. 2d 557 (Ct. App. 2004). Summary

judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000); *Ellis V. Davidson*, 358 S.C. 509, 595 S.E. 2d 817 (Ct. App. 2004).

Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004); *Hawkins*, 358 S.C. at 289, 594 S.E.2d at 561-62; *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001).

- 9) It is reversible error to grant summary judgment where depositions are still pending.
- 10) Plaintiffs have not yet carried their burden of proof nor even been heard on the pending issue, i.e., there remain genuine issues of material fact such that summary judgment is not proper at this time.
- 11) Summary judgment should be denied. In *Hancock v. Mid-South Management Co., Inc.*, 673 S.E. 2d 801, 381 S.C. 326 (S.C. 01/26/2009):

Accordingly, we hold that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.

*fn1 In *Anders v. South Carolina Farm Bureau Mut. Ins. Co.*, the court of appeals stated that “[a]t the summary judgment stage of the proceedings, it [is] only necessary for the [nonmoving party] to submit a scintilla of evidence warranting determination by a jury.” 307 S.C. 371, 375, 415 S.E.2d 406, 408 (Ct. App. 1992).

In *Murphy v. Tyndall*, 681 S.E.2d 28, 384 S.C. 50 (S.C.App. 06/04/2009), quoting *Hill v. York County Sheriff's Dep't.*, 313 S.C. 303, 305, 437 S.E.2d 179, 180 (Ct. App. 1993), "At the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied."

In their Cross-Motion for Summary Judgment, Defendants have presented "more than a scintilla" of evidence, and in fact, Defendants believe that the evidence proves Defendants' case and summary judgment should be granted on their seven defenses and seven counterclaims, and their Motion for Summary Judgment should be granted.

GENERAL ARGUMENT

- 12) The plaintiff claims to be the lien holder and holder in due course with rights to enforce by virtue of an assignment of mortgage dated May 9, 2011. Defendants challenge this assignment and present evidence to show that the assignment is invalid, was manufactured for this foreclosure and is in fact fraud upon the court.
- 13) Under UCC Sec. 3-309(2) bank must prove its right to enforce its note. They must show the chain of title from the original lender to the current note holder. Any attempt to transfer the mortgage without ownership of the note is void under South Carolina law and the Uniform Commercial Code. Unless the plaintiff can present perfection in the chain of title for the promissory note, ending in the plaintiff being named as the holder in due course, the defendants believe that the plaintiff is in fact bringing fraud before the court.
- 14) Plaintiff's claims that defendants admitted to the accuracy of the note and mortgage are false. Defendants admitted only that the note and mortgage appeared to be copies of the original note and mortgage based on our comparison to our copies. We do not have the originals for comparison. Defendants have always insisted that Bank of America, N.A. is not the proper party in interest and possession of the note is insufficient to prove rights to enforce. These rights must exist prior to filing foreclosure.

- 15) Also, Plaintiff's Exhibit E, pgs. 3-4, Account Information Statement is not proof Defendants owe anything to Bank of America, N.A. Further, Plaintiff's Affidavit of Debt is hearsay, legally inadmissible, and should be excluded. Affidavits filed without personal knowledge are fraud upon the court. The affidavit fails to state how and when Plaintiff came into possession of the original note. Defendants cannot verify the identity of the note holder nor the amount of debt in question. Rules of Evidence, Rule 602 requires that affidavits in support of motions need to be made on personal knowledge, and Rule 802 is the hearsay rule. Personal knowledge excludes matters based on information and belief. The Affidavit of Debt which is based on a review of computerized records (which are per se incompetent hearsay) by someone without personal knowledge is thus incompetent to support the Plaintiff's Motion for Summary Judgment as a matter of law and SC Rules of Civil Procedure.
- 16) The Affidavit of Debt also makes reference to Bank of America, N.A. being the assignee of the security instrument to the referenced loan. This is a reference to Plaintiff's Exhibit C, page 1, the Assignment of Mortgage, which constitutes an admission by the Plaintiff. The Assignment of Mortgage is the very document which demonstrates that Plaintiff had no legal interest or ownership in either the note or mortgage at the time that the complaint was filed, and that raises genuine issues of material fact as to when, if ever, Plaintiff came into any ownership rights of either the note or the mortgage. Plaintiff's Motion for Summary Judgment must be denied and summary judgment must be entered in favor of the defendants, John Dalen and Julie Dalen on their seven separate defenses and their seven counterclaims.

STANDING ARGUMENT

- 17) Plaintiffs must have legal standing and a direct interest in the outcome of the litigation. Plaintiff is required to prove their claim. This includes perfection in the chain of title for the promissory note and the mortgage from the original lender to the plaintiff ending in the plaintiff being named as the holder in due course. Any break in the chain renders the note unenforceable.

- 18) In order to prove a claim under the note or to verify the debt, the holder must explain how it acquired any rights under the note and whether it is acting in its own right or as agent for another.
- 19) The mortgage failed to name anyone as beneficiary but instead names Mortgage Electronic Registration Systems (MERS) solely as lender's nominee. The promissory note does not make any reference to MERS. The note and the mortgage both require payments to be made to the lender.
- 20) Standing to sue is critical to the proper functioning of the judicial system. It is a threshold issue. If standing is blocked, the pathway to the courthouse is blocked. If a plaintiff lacks standing to sue, the plaintiff may not proceed in the action. In *Powell v. Bank of America*, 665 S.E.2d 237, 379 S.C. 437 (S.C. App. 06/20/2008),

Standing refers to a "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary 1413 (7th ed. 1999).

"Standing is ...that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims." 1A C.J.S. Actions § 101 (2005). It concerns an individual's "sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court." *Id.*

Standing is comprised of three elements.

First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly...trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court."

Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Smiley v. South Carolina Dep't of Health & Env't'l Control, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (alteration in original)). "The party seeking to establish

standing carries the burden of demonstrating each of the three elements.” *Sea Pines Ass’n for the Protection of Wildlife, Inc. v. South Carolina Dep’t of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001).

“As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation.” *Ex parte Morris*, 367 S.C. 56, 62, 624 S.E.2d 649, 652 (2006). “One must be a real party in interest, i.e., a party who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.” *Id.*

Plaintiff lacked legal standing to institute this mortgage foreclosure action. This issue of material fact warrants not only the denial of Plaintiff’s Motion for Summary Judgment, but also supports the entry of summary judgment in favor of the Defendants, John Dalen and Julie Dalen on their seven separate defenses and their counterclaims.

CONVEYANCE OF MORTGAGE

- 21) Loans originated through Mortgage Electronic Registration Systems (MERS) fail to create enforceable liens, leaving the promissory note an unsecured debt. MERS creates a systemic break in chains of title and homeowners are unable to identify the owner(s) of the mortgage(s). MERS hides the chain of ownership linking original lender to current owner, making it difficult to spot forgery or errors. MERS claims to be both nominee and mortgagee, but it cannot be both. The note is not negotiated to MERS. This is known as bifurcation. The U.S. Supreme Court in *Carpenter vs. Longan*, 83 U.S. 16 Wall, 271, 274 (1872), stated that the Promissory Note is the object, and the Deed of Trust/Mortgage is the attachment. Where the Promissory Note goes, the Deed of Trust/Mortgage must follow. If there is a break in the chain of title, then bifurcation occurs, where the Deed of Trust/Mortgage points to one party and the Promissory Note points to another party. Once bifurcation occurs, State law has been violated and the security has been broken. MERS advances no loan principal. It has no right to receive payments. It is not the actual party in interest, and MERS eliminates reference to the actual mortgagee.

We refer the Court to the following Law Review articles: **Exhibits J, K, L, M, and N**, in which learned scholars and respected law professors discuss the issues Defendants have raised from the beginning of this litigation, and continue to bring to the Court's attention.

DISCOVERY

22) In addition to the disputed issues of material fact, Defendants have propounded a series of Requests for Production, Admissions, and Interrogatories upon Plaintiff, much of which has been objected to or insufficiently and incompletely answered as of the date of this response. These discovery requests seek information as to the Plaintiff's legal standing, including the chain of title to the mortgage and note which are factual issues material to not only the Plaintiff's claim but also the counterclaims of the Defendants. As there is a dispute as to the absence of factual issues at this early stage of the proceedings where the case is not fully developed, summary judgment is inappropriate.

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000), *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E. 2d 557 (Ct. App. 2004). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000); *Ellis V. Davidson*, 358 S.C. 509, 595 S.E. 2d 817 (Ct. App. 2004).

See also South Carolina Appellate Court Rules, Sec. 407, Rules of Professional Conduct, Rule 3.4

SCACR, "Fairness to Opposing Party and Council" regarding Attorney Ethics:

A lawyer shall not:

- (a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having

potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel, or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

and (d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

Also, from the "Comment" section of the rule:

(1) The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics and discovery procedure, and the like.

(2) Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party ... to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed...Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

23) Furthermore, Plaintiff's Motion for Summary Judgment is not a verified motion, being unsupported by any witness with personal knowledge of the facts of this case.

CONCLUSION

- 24) Plaintiff has by its very submissions demonstrated that there *are* genuine issues of material fact in question as to when, if ever, Plaintiff came into any ownership interest in the note or mortgage; and in contrast, Plaintiff's submissions demonstrate that there is *no genuine issue of material fact*; at the time Plaintiff filed this foreclosure action, Plaintiff did not have any legal interest in either the note or the mortgage, and has thus demonstrated that it was without legal standing to institute this action. Summary judgment for Plaintiff is therefore inappropriate.
- 25) Discovery in these proceedings is not yet closed.
- 26) Justiciable issues of fact have been asserted by both sides under oath.
- 27) These justiciable issues of fact should be put to a jury for determination after both sides have been afforded a reasonable opportunity to complete their discovery.
- 28) Justiciable issues of law should be left to this honorable court to decide in due course after both sides have been permitted to fully present their cases.

WHEREFORE the defendants move this Honorable Court to deny Bank of America, N.A.'s Motion for Summary Judgment and enter Summary Judgment in favor of the Defendants on their seven separate defenses and counterclaims, pursuant to the Cross-Motion for Summary Judgment filed by the Defendants, and to grant such further relief as the court may deem reasonable and just under the circumstances.

Respectfully submitted:


John D. Dalen, Defendant Pro Se


Julie A. Dalen, Defendant Pro Se

109 Wood Valley Drive
Westminster, SC 29693
864 647 4705

DATED this 11th day of January, 2014

STATE OF SOUTH CAROLINA
OCONEE COUNTY

Bank of America, N.A. Successor by merger to
BAC Home Loans Servicing, L.P. f/k/a Countrywide
Home Loans Servicing, L.P.,

Vs.

John D. Dalen, Julie A. Dalen

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-37-1056

Notice of Motion and Cross-Motion

For Summary Judgement

Defendants/Counter-Plaintiff's Notice of Motion and Cross-Motion

For Summary Judgment

To: Bank of America, N.A. and Korn Law Firm, P.A.

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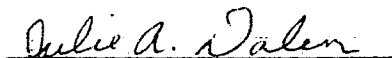
YOU WILL PLEASE TAKE NOTICE that the Defendants/Counter Plaintiff's Pro Se, John Dalen and Julie Dalen will, on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, move before the above-referenced court for an order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure granting the Defendants'/ Counter Plaintiffs' motion for summary judgment in this matter.

This Motion is made on the grounds that there are no genuine issues of material fact, and Defendants are entitled to judgment as a matter of law. This Motion is based on the pleadings in this case, affidavits, exhibits, and the applicable case law.

By:


John D. Dalen, Defendant Pro Se

DATED this 11 day of January, 2014


Julie A. Dalen, Defendant Pro Se

109 Wood Valley Drive
Westminster, SC 29693
864 647 4705

STATE OF SOUTH CAROLINA
OCONEE COUNTY

Bank of America, N.A. Successor by merger to
BAC Home Loans Servicing, L.P. f/k/a Countrywide
Home Loans Servicing, L.P.,

Vs.

John D. Dalen, Julie A. Dalen, and Wawtockace
Hills Property Owners Association,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-37-1056

Defendants' Verified Memorandum of Law
in Support of Defendants' Cross-Motion
For Summary Judgment Pursuant to
Rule 56 of SCRPC

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CLERK OF COURT
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Defendants' Verified Memorandum of Law in Support of
Defendants' Cross-Motion For Summary Judgment
Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure

AND NOW come John Dalen and Julie Dalen, Defendants Pro Se and file this verified memorandum of law in support of Defendants' Cross-Motion for Summary Judgment. Defendants' Answer, Affirmative Defenses, Counterclaims, and Demand for Jury Trial are attached and incorporated herein as though fully set forth.

A. INTRODUCTION AND FACTS

- 1) On October 27, 2011 Plaintiff filed a summons and complaint against Defendants claiming to be the present lien holder of the note and mortgage which is the subject of this action.
- 2) The Defendants have repeatedly challenged Plaintiffs' standing and Plaintiffs' presumption of law that they have standing. No evidence accompanies the complaint that shows that Plaintiff is the current holder in due course and has rights to enforce the note. No evidence has been submitted to date to prove their claim in spite of Defendants' repeated demands for proof of claim. When standing is challenged:

In *U.S. Bank Trust National Association v. Bell*, 684 S.E.2d 199, 385 S.C. 364 (S.C. App. 08/31/2009) *fn9 See, e.g., *Franklin Credit Mgmt. Corp. v. Nicholas*, 812 A.2d 51, 57-58 (Conn. App. Ct. 2002)

“In a mortgage foreclosure action, to make out its prima facie case, the foreclosing party had to prove by a preponderance of the evidence that it was the owner of the note and mortgage and that the [defendant] had defaulted on the note.”) (internal quotations omitted) (internal citations omitted); *Campaign v. Barba*, 805 N.Y.S.2d 86, 86 (N.Y. App. Div. 2005) (“To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant’s default in payment.”); ... 55 *Am. Jur. 2d Mortgages* §604 (“[T]he burden of proof of any particular issue rests upon the party asserting the affirmative of that issue under the pleadings.”);

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requirements but rather an indispensable part of the plaintiff's case"; therefore, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stage of the litigation." *Id.* (quoted in *Beaufort Cnty. v. Trask*, 349 S.C. 522, 528 n.14, 563 S.E.2d 660, 663 n.14 (Ct. App. 2002)).

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(*Shearouse Adv. Sh. No. 21* at 27, 31) (quoting *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999)).

- 3) Further, Plaintiff claims that Mortgage Electronic Registration Systems, Inc. (MERS) assigned the mortgage to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P., and that by virtue of corporate merger, Bank of America, N.A. became the present lien holder and Plaintiff. Defendants have repeatedly challenged the assignment of the mortgage.
- 4) Plaintiff further claims that Defendants admitted the accuracy of the note, mortgage and payment history as retained by the Plaintiff in regards to the foreclosure action, and that Defendants did not provide documentary evidence to Plaintiff's Request for Production, executed June 18, 2012.

Defendants have been in discovery, collecting evidence from the Plaintiff, and Defendants are continuing to do so. Defendants have provided evidence to the court and Plaintiffs' attorneys through the filing of various motions. Defendants did not admit the accuracy of the note and mortgage as was claimed by Plaintiffs/Counter-defendants in their discussion of each of Defendants/Counter-plaintiffs' seven counts, only that the copies submitted by Plaintiff appeared to be accurate copies of the copies that we have. Defendants do not have originals to compare and had not seen the "original note" that Plaintiff made available at a later date for our inspection.

Therefore, Defendants have in no way attested to the accuracy of the copy of the note and mortgage. The "original note" which Plaintiff provided has no dates of transfer, nor does it list all parties who have held the note. Under the UCC, Uniform Commercial Code, the promissory note is a "one of a kind instrument." All assignments have to be done as a permanent fixture onto the original promissory note. The original promissory note has the only legally binding chain of title. Without a proper chain of title, the instrument is defective and unenforceable.

To prevent accounting fraud, various governing bodies created Financial Accounting Standards (FAS 140). Specifically, FAS 140 was created to govern the sale and securitization of a negotiable instrument. A transaction can only be recognized as a sale if it is sold to a party at arm's length, i.e. you cannot sell an asset to yourself. Also, in relation to this case and in regards to FAS 140, specifically Financial Accounting Standards Rule 140, the original lender sold the note to a REMIC, Real Estate Mortgage Investment Conduit, and forever lost their rights to enforce the note. The seller is no longer the "real party in interest." They are just a servicer. The servicer can only collect the money and pass it to the REMIC. If a bank owns a note, they have to pay tax on the interest earned from that note. If a REMIC owns a note, then the REMIC has a tax liability. To avoid the problem of double taxation, banks put these loans into SPV's (special purpose vehicles). See Internal Revenue Code 860. This way only the shareholders are taxed and this means only the shareholders are the real parties of interest.

Evidence in the Pooling and Servicing Agreement which was provided to the Defendants by the Plaintiffs during discovery confirms the above and serves as evidence that parties other than that shown on the "note" claim ownership of the note. Defendants believe this is further proof that Plaintiff is bringing fraud before this court.

The Pooling and Servicing Agreement Exhibits A, B, and C requires the delivery of the promissory note to be properly done within 90 days of sale into the REMIC. If this was not done, this means that the chain of title was broken leading to a defective instrument, and therefore the bank cannot foreclose on a defective instrument. The bank has to prove that the loan was not written off by the REMIC. The bank has to prove there is a perfected chain of title from origination to the REMIC, and from the REMIC back to the bank. If the servicer buys back a loan for administrative purpose, i.e. to foreclose, then they do not have the rights of the owner of the obligation, i.e. the right to foreclose. Again, Defendants believe this is further proof that Plaintiffs are bringing fraud before this Court. For a more detailed discussion on information related to all of the above topics, please see the Law Review articles we have submitted, Exhibits I, J, K, L, M, and N as well as Exhibit D, Plaintiff's Attorney's letter to Judge Alexander Macauley stating that "... this loan has been reclassified out of the trust as of March 21, 2011."

The payment history which Plaintiff submits as evidence does not prove the existence of a debt, nor that Defendants owe Plaintiff any money. Rules of Evidence, Rule 1002, also known as the "Best Evidence Rule" requires the original of any writing, recording or photograph. Plaintiff claims to be in possession of the original mortgage document. Defendants have repeatedly requested Plaintiffs to make the original mortgage document available for viewing and copying. (Copies are inadmissible under this rule.) Rule 1003 of the Rules of Evidence pertains to the admissibility of duplicates, specifically part 2 states that "A duplicate is admissible to the same extent as an original *unless ... (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.*" (Italics for emphasis only.) Defendants have challenged Plaintiff's Assignment of Mortgage; and because Plaintiff claims to have the original, Defendants are entitled to see the *original* document.

- 5) Defendants dispute Plaintiffs' Affidavit of Debt as to the amount owed, and submit that the Affidavit is hearsay and should be excluded. Affidavits filed without personal knowledge are fraud upon the court. The Affidavit fails to state how and when the plaintiff came into possession of the original note. Defendants cannot verify the identity of the note holder nor the amount of debt in question. SCRCP, Rule 56 (e), "Summary Judgment," requires that Affidavits in support of a motion for Summary Judgment be made on personal knowledge. Personal knowledge excludes matters based on "information and belief." The Affidavit of Debt which is based on a review of computerized records (which are per se incompetent hearsay) by someone without personal knowledge is thus incompetent to support the Plaintiff's Motion for Summary Judgment as a matter of law and according to SC Rules of Civil Procedure.
- 6) Defendants/Counter-plaintiffs challenge Plaintiffs/Counter-defendants' assertion that their motion for summary judgment is properly supported. Again they provide no evidence or proof of their claim. Their motion is not a verified motion, being unsupported by any witness with personal knowledge of the facts of this case.

B. STANDARD OF REVIEW: SCRCP

In *Mulherin-Howell v. Cobb*, No. 3919 (S.C. App. 01/10/2004):

(27) When reviewing the grant of summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c). SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 601 S.E.2d 342 (2004); *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 603 S.E.2d 629 (Ct.App. 2004); *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct.App. 2003).

(28) Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 602 S.E.2d 389 (2004); *McCall v. State Farm Mut. Ins. Co.*, 359 S.C. 372, 597 S.E. 2d 181 (Ct. App. 2004); Rule 56(c), SCRCP; see also *Higgins v. Medical Univ. of South Carolina*, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997)(noting that when ruling on motion for summary judgment, trial judge must consider all of documents and evidence within record, including pleadings, depositions, answers to interrogatories, admissions on file, and affidavits).

(30) The party seeking summary judgment has the burden of clearly establishing absence of a genuine issue of material fact. *McCall*, 359 S.C. 372, 597 S.E. 2d at 183. Once the party moving for summary judgment meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct.App. 2003). Rather the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. *Ellis*, 358 S.C. at 518-19, 595 S.E.2d at 822; *Peterson v. West American Ins. Co.*, 336 S.C. 89, 518 S.E.2d 608 (Ct.App. 1999); Rule 56(c), SCRCP.

(31) The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003); *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C., 386, 593 S.E.2d 183 (Ct.App. 2004).

From *Hancock v. Mid-South Management Co., Inc.*, 673 S.E.2d 801, 381 S.C. 326 (S.C. 01/26/2009):

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP.

Quoted from *U.S. Bank Trust National Association v. Bell*, 684 S.E.2d 199, 385 S.C. 364 (S.C. App. 08/31/2009) *fn9 See, e.g., *Franklin Credit Mgmt. Corp. v. Nicholas*, 812 A.2d 51, 57-58 (Conn. App. Ct. 2002):

“In a mortgage foreclosure action, to make out its prima facie case, the foreclosing party had to prove by a preponderance of the evidence that it was the owner of the note and mortgage and that the [defendant] had defaulted on the note.”) (internal quotations omitted) (internal citations omitted); *Campaign v. Barba*, 805 N.Y.S.2d 86, 86 (N.Y. App. Div. 2005) (“To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant’s default in payment.”); ... *55 Am. Jur. 2d Mortgages §604* (“[T]he burden of proof of any particular issue rests upon the party asserting the affirmative of that issue under the pleadings.”);

In *Paramount Fund, Inc. v. CUSAAC*, 282 S.C. 497, 319 S.E.2d 354 (S.C. App. 08/13/1984):

In an action to foreclose a mortgage on real property, the mortgagee has the burden of proving a disputed mortgage by the preponderance of the evidence. *Wagener v. Kirven*, 47 S.C. 347, 25 S.E. 130 (1920).

C. DISCUSSION OF COUNTERCLAIMS

COUNT 1

VIOLATIONS OF THE FAIR DEBT COLLECTIONS PRACTICE ACT

(“FDCPA”) 15 USC § 1692

Defendants’ counterclaims (copy attached) is incorporated herein as though fully set forth. In Plaintiff/Counter-defendants’ discussion of counterclaims, A. Violations of the Fair Debt Collections Practice Act (“FDCPA”) 15 USC § 1692, Plaintiff/Counter-defendants claims that Bank of America, N.A. became the proper party in interest to the debt before its default. No proof is submitted to back up this claim. Plaintiff/Counter-defendants further claims that Bank of America, N.A. became the

holder of the note on January 14, 2008. Again no proof is submitted to back up this claim. A letter from Defendant/Counter-plaintiffs dated April 28, 2008, is submitted as evidence that Defendants were aware that Bank of America, N.A. was responsible for their mortgage. The court will note that Exhibit H provided by the Plaintiff/Counter-defendants is a letter to Countrywide Home Loans, the servicer of our mortgage at that time. Bank of America, N.A. was not the servicer of the note at that time. See **Exhibit E**, pgs. 1, 6, 7, 14, and 15, Fannie Mae letter dated 10/18/2011, stating loan is owned by Fannie Mae and is currently delinquent, and other pertinent letters.

Under Count 1, Violations of the Fair Debt Collections Practices Act ("FDCPA") 15 USC § 1692, for item numbers 2, 3, and 4, Counter-Defendants misrepresented the character and legal status of the unlawful debt in violation of 15 USC § 1692 (e)(2), by sending false correspondence to Counter-Plaintiffs and third persons and assisting in the filing of an unlawful foreclosure action in county court. Counter-Defendants threatened to take and did take actions that they could not legally take without the ruse and falsities committed upon the Counter-Plaintiffs in violation of 15 USC § 1692 (e)(2). Counter-Defendants engaged in conduct that disgraced the Counter-Plaintiffs in violation of 15 USC § 1692 (e)(7), by sending false correspondence to Counter-Plaintiffs and third persons and assisting in the filing of an unlawful foreclosure action in county court. The following exhibits are presented as evidence to prove these points:

Exhibit H, page 15, Plaintiffs' complaint

Exhibit H, pages 4 and 5, Bank of America, N.A. letter dated August 18, 2011

Exhibit H, page 12, Bank of America, N.A. letter dated December 6, 2011

Exhibit H, page 17, Korn Law Firm letter dated December 21, 2011

Exhibit H, page 18, Assignment of Mortgage

Exhibit D, page 1, Korn Law Firm letter to Judge Macauley

Under Count 1, Violations of the Fair Debt Collections Practices Act ("FDCPA") 15 USC § 1692, for item number 5, Counter-Plaintiffs disputed the alleged debt. Counter-Plaintiffs communicated false credit information to others and failed to communicate that the debt was disputed, in violation of 15 USC § 1692 (e)(8). The following exhibits are presented as evidence to prove this point:

Exhibit H, page 3, Defendants/Counter-Plaintiffs' letter dated July 18, 2011

Exhibit H, pages 6 and 7, Defendants/Counter-Plaintiffs' letter dated November 21, 2011

Exhibit H, pages 8, 9, and 10, Defendants/Counter-Plaintiffs' letter November 21, 2011

Under Count 1, Violations of the Fair Debt Collections Practices Act ("FDCPA") 15 USC § 1692, for item number 6, Counter-Defendants stated numerous times that they were the lawful owners in interest of the debt or empowered to speak on behalf of the owner in interest (as Attorneys/Agents) yet knew or should have known that they were not, and as such violated 15 USC § 1692 (e)(5). The following exhibits are presented as evidence to prove this point:

Exhibit C, pages 24 and 25, Pooling and Servicing Agreement, Attorneys Informed of Identity of note holder and securitization of loan.

Exhibit H, page 17, Korn Law Firm letter dated December 21, 2011

Exhibit E, pages 1, 7, 9, and 12

See also South Carolina Appellate Court Rules, Sec. 407, Rules of Professional Conduct, Rule 3.4

SCACR, "Fairness to Opposing Party and Council" regarding Attorney Ethics:

A lawyer shall not:

- (a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having

potential evidentiary value. A lawyer shall not counsel or assist

another person to do any such act;

(b) falsify evidence, counsel, or assist a witness to testify falsely, or offer

an inducement to a witness that is prohibited by law;

and (d) in pretrial procedure, make a frivolous discovery request or fail to

make a reasonably diligent effort to comply with a legally proper

discovery request by an opposing party.

Also, from the "Comment" section of the rule:

(1) The procedure of the adversary system contemplates that the evidence

in a case is to be marshaled competitively by the contending parties.

Fair competition in the adversary system is secured by prohibitions

against destruction or concealment of evidence, improperly

influencing witnesses, obstructive tactics and discovery procedure,

and the like.

(2) Documents and other items of evidence are often essential to establish

a claim or defense. Subject to evidentiary privileges, the right of an

opposing party ... to obtain evidence through discovery or subpoena

is an important procedural right. The exercise of that right can be

frustrated if relevant material is altered, concealed or

destroyed...Falsifying evidence is also generally a criminal offense.

Paragraph (a) applies to evidentiary material generally, including

computerized information.

Under Count 1, Violations of the Fair Debt Collections Practices Act ("FDCPA") 15 USC § 1692, item number 7, all Counter-Defendants engaged in unfair and deceptive means and attempts to collect the alleged debt in violation of 15 USC § 1692 (f), the following exhibits are presented as evidence to prove this point:

Exhibit H, pages 3 through 10, pages 12, 15, 17 and 18, Correspondence between Counter-Plaintiffs and Counter-Defendants

Exhibit C, pages 24 and 25, Pooling and Servicing Agreement, Fannie Mae Servicing Guide
See again South Carolina Appellate Court Rules, Sec. 407, Rules of Professional Conduct,
Rule 3.4 SCACR

Under Count 1, Violations of the Fair Debt Collections Practices Act ("FDCPA") 15 USC § 1692, items numbers 8 and 9, Counter-Defendants attempted to collect the alleged debt in a manner and amount not authorized by the original mortgage and note in violation of 15 USC § 1692 (f)(1)(8). The following exhibit is presented as evidence to prove these points:

Exhibit H, page 15, Plaintiff's Complaint

Under Count 1, Violations of the Fair Debt Collections Practices Act ("FDCPA") 15 USC § 1692, item numbers 10, 11, and 12, Counter-Plaintiffs suffered actual damage from these violations. Pursuant to 15 USC § 1692 (k) Counter-Plaintiffs are entitled to actual damages and statutory damages as set forth herein, and reasonable attorney fees and costs. Because the conduct of the Counter-Defendants was frequent and persistent and because the nature of the violations of the FDCPA were so egregious and because the FDCPA violations were part of a deliberate scheme, Counter-Plaintiffs are entitled to the maximum possible relief permitted under 15 USC § 1692 (k)(a).

Plaintiff/Counter-Defendants' only defense to this claim is that the term "debt collector" does not include any person collecting or attempting to collect any debt owed to another to the extent such activity concerns a debt which was not in default at the time it was obtained by such person, citing 15 USC § 1692 (a)(6)(f)(iii). Plaintiff/Counter-Defendants again claims that Bank of America, N.A. became holder of the note before the date of the alleged default, providing no proof to support this claim. Under FDCPA 15 USC, where a creditor or servicer pretends to be a debt collector, the law treats him as such. See Exhibit E, pages 1, 6, 7, 14, and 15.

See Exhibit H, pages 1, 2 and 15 and Exhibit K, pages 29-36. See also Exhibit O, Brief of the Consumer Financial Protection Bureau as Amicus Curiae, pages 3, 6, 7, 8, 9, 10, and 13. This Brief presents interpretation of the Fair Debt Practices Act, a statute for which Congress has granted the Bureau rulemaking and enforcement authority. In particular, the Bureau presents arguments on the extent to which the FDCPA prohibits harmful debt-collection practices that occur in the context of foreclosure proceedings.

In *Foster v. Ford Motor Credit Co.*, 302 S.C. 450, 395 S.E.2d 440 (S.C. 1990), discussing the FDCPA:

(16)... "The trial judge dismissed this cause of action on the ground the Act does not apply to Lender's. We disagree. Section 1692a(6) defines debt collector to include a business whose principal purpose is the enforcement of security interests."

(17)... "Section 1692f(6)(A) defines an unfair practice to include any nonjudicial action to effect dispossession of property if there is no present right to possession through an enforceable security interest."

In the Sixth Circuit Court's Opinion for *Glazer v. Home Financial Fin., et al.*, U.S. Court of Appeals, January 14, 2013, paragraph one:

...we hold that mortgage foreclosure is debt collection under the Act.

In the Court's discussion of this particular case, Defendants find striking parallels to our case. The Court discusses the transfer of servicing rights. "This transaction did not transfer any ownership rights in the note and mortgage But in order to sell its servicing rights, Coldwell Banker had to assign whatever rights it had in the note and mortgage (which were none) to JP Morgan, who then reassigned the rights to Fannie Mae...."

Also quoting from that same U.S. Court of Appeals Opinion:

Chase (JP Morgan) hired defendant Reimer, Arnovitz, Cherek & Jeffrey Co., LPA, and two of its attorneys ("RACJ") to foreclose on the Klie property. On June 2, 2008, RACJ prepared an assignment of the note and mortgage on behalf of JP Morgan that purported to "sell, convey and transfer all rights and interests in the Klie promissory note and the mortgage ... to Chase" in order to establish Chase's right to foreclose. According to Glazer, the assignment transferred absolutely no rights because *Fannie Mae* still owned the note and mortgage by virtue of Coldwell Banker's assignment shortly after origination.¹

¹As the magistrate judge noted in his recommendation, "Chase has offered no explanation as to how Coldwell Banker could assign its rights in the mortgage and note to another entity [when those rights] had previously been assigned, nor has Chase disputed that an assignment to *Fannie Mae* occurred."

Continuing to quote from the Opinion of the U.S. Sixth Circuit Court of Appeals:

According to Glazer, Chase and RACJ fraudulently concealed the fact that *Fannie Mae* owned the loan

... RACJ filed an amended foreclosure complaint and again represented that Chase owned the note. Litigation continued, and RACJ eventually moved for summary judgment, representing once again that Chase owned the Klie note. ...

In the midst of the foreclosure proceedings, Glazer filed the instant lawsuit, alleging that Chase (and an employee) and RACJ violated the FDCPA and Ohio law when they, among other things, falsely stated in the foreclosure complaint that Chase owned the note and mortgage, improperly scheduled a foreclosure sale, and refused to verify the debt upon request.

In section II:

We review de novo a district court's order to dismiss a claim under Federal Rule of Civil Procedure 12(b)(6). In doing so, we accept all well-pled allegations as true and determine whether they plausibly state a claim for relief. *Roberts v. Hamer*, 655 F.3d 578, 581(6th Cir. 2011).

In section IV:

... The question is whether mortgage foreclosure is debt collection under the Act. We hold that it is and therefore reverse.

Defendants are providing the Court with a copy of this foregoing case as Exhibit P and rather than quoting extended sections of this case, we ask the Court to review Sections A, B, C and D of this ruling.

COUNT II
VIOLATIONS OF RESPA
12 USC § 2601 ET SEQ.

Defendants' counter-claim (copy attached) is incorporated herein as though fully set forth. Plaintiff/Counter-Defendants informed Defendants only of servicing transfers, not assignments of or sale of the loan. For number 14, the following exhibits are presented as evidence to prove these points:

Exhibit E, pages 10 and 11 – Quicken Loans letter

Exhibit H, pages 1 and 2 – Bank of America, N.A. letter, servicing transfer July 1, 2011

Exhibit H, page 3 – Defendants/Counter-plaintiffs' letter dated July 18, 2011, dispute of debt

Under Count II, for number 15, Plaintiff/Counter-Defendants further has provided no proof of their claim regarding Defendants' challenge to their right to enforce the note. The Plaintiff/Counter-Defendants claim that Bank of America, N.A. is the holder of the note and mortgage and provided a copy of the assignment of the mortgage purporting to assign the note and mortgage to BAC Home Loans Servicing, L.P., f/k/a Countrywide Home Loans Servicing, L.P. In letters dated July 1 and December, 2011, wherein Plaintiff/Counter-Defendants inform us that the current owner of the note is Federal National Mortgage Association (FNMA) and also informing us that Bank of America, N.A. is the servicer of our loan since January 14, 2008. The following exhibits are presented as evidence to prove these points:

Exhibit E, pages 1, 6, 7, 14, and 15

Exhibit H, page 2 and page 12, Plaintiff/Counter-Defendants' letters from Bank of America, N.A. dated July 1, 2011 and December 6, 2011

Exhibit H, pages 3, Defendants/Counter-plaintiffs' letter dated July 18, 2011, dispute of debt

Exhibit H, pages 6, 7, 8-10, Defendants/Counter-plaintiffs' letters to Bank of America, N.A.

dated November 21, 2011

Exhibit H, page 15, Plaintiff/Counter-Defendants' complaint

Exhibit H, page 17, Plaintiff/Counter-Defendants' letter from Korn Law Firm dated

December 21, 2011

Exhibit K, Christopher Peterson, Univ. of Cincinnati Law Review article pages 4-6, 11-14,

18-23, 35, and 39

The Plaintiff/Counter-Defendants' assertion that the Statute of Limitations bars our claim is false. Defendants believe that the Applicability of Equitable Tolling applies here. Citing *Riddle v. Bank of America Corporation et al*, from the United States District Court for the Eastern District of Pennsylvania, in a Memorandum from the Civil Action case #12-1740 of April 11, 2013, under Section B, Applicability of Equitable Tolling, *1. Principles of equitable tolling*

Equitable tolling is appropriate if: (1) the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) the plaintiff has timely asserted his or her rights mistakenly in the wrong forum. *Oshiver v. Levin, Sedran & Berman*, 38 F.3d 1380, 1387 (3d Cir. 1994). Furthermore, a plaintiff must demonstrate that he or she exercised reasonable diligence in investigating and bringing the claims. *Miller v. N.J. Dep't of Corr.*, 145 F.3d 616, 618-19 (3d Cir. 1998).

In the analysis of the Court, quoting *Oshiver*, 38 F.3d at 1891-92 “(noting that plaintiffs need only plead the applicability of equitable tolling doctrine to defeat motion to dismiss); see also *Robinson v. Dalton*, 107 F.3d 1018, 1022 (3d Cir. 1997)”

In *Barlee v. First Horizon National Corp.*, Civ. A. No. 12-3045, 2013 WL 706091 (E.D. Pa. Feb. 27, 2013) The court concluded that allegations that the plaintiffs were unable, despite due diligence, to discover the underlying basis for their claims and that the defendants knowingly and actively concealed the basis for the plaintiffs’ claims were sufficient to overcome a motion to dismiss because the allegations “sufficiently plead equitable tolling at this stage of the litigation.” *Id.* at *5.

Citing *Riddle v. Bank of America Corporation et al* once again, ... RESPA is a remedial statute and must be construed liberally in favor of the consumer. See *Cortez v. Keystone Bank, Inc.*, Civ. A. No. 98-2457, 2000 WL 36666, at *111 (E.D. Pa. May 2, 2000); *Smith*, 2002 WL 32349873, at *6. Defendants are providing this case as Exhibit Q.

COUNT III

SLANDER OF TITLE / PETITION TO QUIET TITLE

Defendants’ counter-claim (copy attached) is incorporated herein as though fully set forth. South Carolina has identified the elements of slander of title which requires a Plaintiff to establish: “(1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff’s title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties.” *Pond Place Partners, Inc.*, at 30, 567 S.E. 2d at 892 (citing *TXO Prod. Corp.*, 187 W. Va. 457, 419 S.E. 2d 870 (1992) Plaintiff/Counter-Defendants’ claim that Defendants’ alleged default on the loan gives the Plaintiff the ability to use legal action to collect the remaining debt. Plaintiffs have

provided no proof that they have the right to enforce under the note or mortgage, no proof that they are the proper party in interest. On the contrary, Defendant/Counter-Plaintiffs as evidenced by their Exhibits, have provided abundant evidence to show that Plaintiff/Counter-Defendants' claims are false.

For point number 17, Plaintiffs/Counter-Defendants have knowingly and maliciously communicated false statements in writing that have effect of disparaging the Counter-plaintiffs' title to property and Counter-plaintiffs have incurred special damage as a result. The following exhibits are presented to prove this point and to prove the existence of the elements necessary for slander of title:

Exhibit H, page 18, Assignment of Mortgage

Exhibit R, pages 1, 5-11, Plaintiff's Complaint

Exhibit R, page 6, Lis Pendens

Exhibit H, pages 1 and 2, letters from Bank of America, N.A., dated July 1, 2011, identifying note holder

Exhibit H, pages 4 and 5, letter from Bank of America, N.A., dated August 18, 2011, identifying the owner of the loan

Exhibit H, page 12, letter from Bank of America, N.A., dated December 6, 2011, identifying the owner of the note

Exhibit H, page 15, FDCPA notice attached to complaint, claiming Plaintiff is the creditor

Exhibit H, page 17, letter from Korn Law Firm, P.A., representing Plaintiffs, dated December 21, 2011, stating Bank of America, N.A. is the holder of the note

Exhibit H, page 18, Assignment of the Mortgage recorded May 16, 2011

For point number 18, Plaintiff/Counter-Defendants has no legally enforceable claim, interest or standing to sue as to the note or mortgage in question and the claim is a cloud on the Counter-Defendants' title, and should be quieted under South Carolina law. Citing *Mulherin-Howell v. Cobb*, No. 3919 (S.C.App. 01/10/2004) number (72):

*fn3 ... (2) S.C. Code Ann. § 15-67-10 (1976), which allows a person in possession of property to bring an action to settle all claims against any parties who may have adverse claims.

The above Annotated Code refers to what is known as "Quiet Title." The following exhibits are presented to prove this point:

Exhibit R, pages 1, 5-11, Plaintiff's Complaint

Exhibit E, page 1, letter from Fannie Mae, dated October 18, 2011, stating the loan is owned by Fannie Mae.

Exhibit E, pages 2 and 3, copy of "Bailee Letter" from Deutsche Bank to Countrywide Home Loans, Inc., dated January 10, 2008. This letter names Countrywide Home Loans, Inc. as the "Investor." Bank of America, N.A. is informing us that Fannie Mae is the current investor. If Bank of America, N.A. acquired the note by reason of merger with Countrywide Home Loans, Inc., then how did Fannie Mae come to own the note?

Exhibit E, pages 4 and 5, Fannie Mae loan lookup identifying Fannie Mae as the owner of the note

Exhibit E, pages 6 and 7, Law Firm Blank Rome, LLP, representing Bank of America, N.A. dated February 22, 2012 referring to Fannie Mae as the owner of the note and Bank of America, N.A. as the servicer

Exhibit E, page 9, Bank of America, N.A. loan statement dated July 28, 2011 stating “Bank America, N.A. services your home loan on behalf of the holder of your note (Noteholder).”

Exhibit E, page 12, statement dated May 27, 2011, letter from BAC Home Loans Servicing, LP, stating that “BAC Home Loans Servicing, LP services your loan on behalf of the holder of your note (Noteholder).”

Exhibit E, pages 14 and 15, MERS Servicer ID obtained from MERS website December, 2013, identifying the servicer as Bank of America, N.A. and the investor, Fannie Mae

Exhibit A, pages 1, 18, 19, 21, 26, 30, 34, and 35, Pooling and Servicing Agreement, Prospectus, identifying beneficial owners and recipients of the stream of revenue from the mortgages in the pool

Exhibit B, pages 1, 9, 18, and 54, Pooling and Servicing Trust Agreement, identifying beneficial owners and recipients of the stream of revenue from mortgages in the pool

Exhibit B, page 12, Pooling and Servicing Trust Agreement Definition of Holder: “With respect to any Certificate, the Person in whose name that Certificate is registered in the records of the Fiscal Agent.”

Exhibit B, page 19, Pooling and Servicing Trust Agreement, Transfer and Conveyance of Loans, unconditional sale and transfer of beneficial interest

Exhibit B, pages 20 and 21, Pooling and Servicing Trust Agreement, Equitable Interest and Transfer of Legal Ownership

For point numbers 19 and 20, Counter-Plaintiffs are the rightful owners and legal title holders of the subject property.

For point number 21, Counter-Defendants knowingly and unlawfully caused a cloud to be

recorded against the title of Counter-Plaintiffs' property and sent notices of default and foreclosure, and served and filed mortgage documents that claim an interest in the property.

Exhibit H, pages 4 and 5, Bank of America, N.A. letter dated August 28, 2011, reporting negative credit information

Exhibit H, page 15, Plaintiff's complaint

Exhibit H, page 18, Assignment of Mortgage, letter from Bank of America, N.A. dated December 6, 2011, identifying Fannie Mae as the current owner of the note

Exhibit E, pages 6 and 7, Blank Rome LLP letter dated February 22, 2012, identifying the current owner of the note

Exhibit E, page 9, Bank of America, N.A. Account statement, July 28, 2011, "Bank of America, N.A. services your home loan on behalf of the holder of your note (Noteholder)."

Exhibit E, pages 12 and 13, Bank statement dated May 27, 2011, BAC Home Loans Servicing, LP services your home loan on behalf of the holder of your note (Noteholder).

Exhibit H, page 17, letter from Korn Law Firm, P.A., representing Plaintiffs, dated December 21, 2011, stating Bank of America, N.A. is the holder of the note

For point number 22, Counter-Plaintiffs cite *Independence National Bank v. Buncombe Professional Park, LLC, and David DeCarlis s/a David D. DeCarlis*, Appellate Case No. 2011-1096049, filed February 20, 2013. The court refers to Section 30-7-10 of the South Carolina code (2007) which provides:

All ... mortgages or instruments in writing in the nature of a mortgage of any real property, ... all assignments, satisfactions, releases, and contracts

in the nature of subordinations, ... or other liens on real property created by law or by agreement of the parties and generally all instruments in writing conveying an interest in real estate required by law to be recorded in the office of the register of deeds ... are valid so as to affect the rights of subsequent creditors ... only from the day and hour when they are recorded in the office of the register of deeds or clerk of the county in which the real property affected is situated. In the case of a subsequent purchaser of real estate, or in the case of a subsequent lien creditor on real estate for valuable consideration without notice, the instrument evidencing the subsequent conveyance or subsequent lien must be filed for record in order for its holder to claim under this section as a subsequent creditor or purchase for value without notice, and **the priority is determined by the time of filing for record.**

Still addressing point 22, once again from *U.S. Bank Trust National Association v. Bell*, 684 S.E.2d 199, 385 S.C. 364 (S.C. App. 08/31/2009) *fn9 See, e.g., *Franklin Credit Mgmt. Corp. v. Nicholas*, 812 A.2d 51, 57-58 (Conn. App. Ct. 2002):

“In a mortgage foreclosure action, to make out its prima facie case, the foreclosing party had to prove by a preponderance of the evidence that it was the owner of the note and mortgage and that the [defendant] had defaulted on the note.”) (internal quotations omitted) (internal citations omitted); *Campaign v. Barba*, 805 N.Y.S.2d 86, 86 (N.Y. App. Div. 2005) (“To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant’s default in payment.”); ... *55 Am. Jur. 2d Mortgages §604* (“[T]he burden of proof of any particular issue rests upon the party asserting the affirmative of that issue under the pleadings.”);

SCRCP Rule 17 (a) states: “Every action shall be prosecuted in the name of the real party in interest.” In *Carpenter v. Longan*, 83 U.S. 16 Wall, 271, 274 (1872), the U.S. Supreme Court ruling states: “the Promissory Note is the object, and the Deed of Trust is the attachment. Where the Promissory note

goes, the Deed of Trust must follow....” If there is a break in the chain of title, then bifurcation occurs, where the Deed of Trust/Mortgage points to one party and the Promissory Note points to another party. Once bifurcation occurs, State law has been violated and the security has been broken. MERS advances no loan principal. It has no right to receive payments. It is not the actual party in interest, and MERS eliminates reference to the actual mortgagee. See also CFR Title 12, FAS 140, and the Pooling and Servicing Agreement, Exhibits A and B as well as the Law Review articles, Exhibit J, pages 4, 9-12, 15, 24-27, 30-35, 48, 50 and 51, Exhibit K, pages 14, 18-23, 27, 36, 38-40, Exhibit M, pages 4, 5, 7, 8-11, and 17, Exhibit N, pages 3, 4, 9, 11-13, 17, 18, 22, and 24, and UCC § 3, 308 and 309

For point number 23, see the Pooling and Servicing Agreement, Exhibit C, pages 24-26, which is the Fannie Mae Servicing Guide which on page 24 states: “...In all cases, servicers must advise the attorney or trustee to whom the referral is made that Fannie Mae owns or securitizes the mortgage loan being referred....”

See also South Carolina Appellate Court Rules, Sec. 407, Rules of Professional Conduct, Rule 3.4

SCACR, “Fairness to Opposing Party and Council” regarding Attorney Ethics:

A lawyer shall not:

- (A) (c) Unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (B) (d) falsify evidence, counsel, or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

and (d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

Also, from the "Comment" section of the rule:

(3) The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties.

Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics and discovery procedure, and the like.

(4) Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party ... to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed...Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

For point number 24, recording of mortgages published the information to third parties, the following exhibits are presented to prove this point:

Exhibit H, page 18, Assignment of Mortgage

For point number 25, Wrongful publication of ownership interest in Counter-Plaintiffs' property

Exhibit H, page 18, Assignment of Mortgage

Exhibit R, page 6, Lis Pendens

For point numbers 26 and 27, Defendants/Counter-Plaintiffs seek a declaratory judgment against Counter-Defendants stating that the Counter-Defendants have violated Counter-Plaintiffs' rights and that the Counter-Defendants had and have no right to hold mortgages in the name of Bank of America, N.A. and/or foreclose on Counter-Plaintiffs' property and that the Counter-Defendants are entitled to no further payments from the Counter-Plaintiffs or recognition in Counter-Plaintiffs' Title to their property. The Counter-Plaintiffs are entitled to a reformation of this note as an unsecured note or as a partially or wholly discharged note and a right of reformation to the contract with the persons or entities who are owed obligations because of funding of the loan of the Counter-Plaintiffs.

COUNT IV

FRAUD AND MISREPRESENTATION

SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT

SCUTPA S.C. CODE ANN. § 39-5-20(a)(1985),

S.C. CODE ANN. § 39-5-20(a)(1985) CODE ANN. § 39-5-140(a)(1985)

Counter-Plaintiffs re-allege and affirm each preceding paragraph of this Complaint and incorporate such as if alleged anew. S.C. Code Ann. § 39-5-20, "[u]nfair methods of competition and unfair deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." "Trade" and "commerce" are defined in S.C. Code Ann. § 39-5-10 (b) as "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." "Person" is

defined in S.C. Code Ann. § 39-5-10 (a) as “natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity.”

In *Wogan v. Kunze*, 366 S.C. 583, 606, 623 S.E. 2d 107, 120 (Ct. App. 2005), an unfair trade practice is defined “as a practice which is offensive to public policy or which is immoral, unethical, or oppressive,” and “[t]o be actionable..., the unfair or deceptive act or practice must have an impact upon the public interest.” *Id.* at 607, 623 S.E. 2d at 120. “An impact on the public interest may be shown if the acts or practices have the potential for repetition.” *Id.* “The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company’s procedures created a potential for repetition of the unfair and deceptive acts.” *Id.*

“In order to recover in an action [] based upon misrepresentation, the following elements must be shown by clear, cogent and convincing evidence; (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a 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; (9) the hearer’s consequent and proximate injury....”

The following exhibits are presented to prove these points:

For point number 29, **Exhibit R**, Plaintiff’s Complaint and **Exhibit H**, page 18, Assignment of Mortgage.

For point number 30, the Identity of the Lender/Mortgagee, see:

Exhibit A, Prospectus, **Pooling and Servicing Agreement**, pages 1, 18, 19, 21, 26, 30, 34, and 35

Exhibit B, Trust Agreement, **Pooling and Servicing Agreement**, pages 12, 19 and 21

For point number 31, Defendants/Counter-Plaintiffs were not told of the securitization of the loan or transfers of loan ownership.

For point number 32, Counter-Plaintiffs and the court were deceived; see:

Exhibit R, Plaintiff's Complaint, **Exhibit H**, page 18, Assignment of Mortgage, and **Exhibit G**;

See pages 1-24 of news articles, evidence of habit and repetition, submitted under Rule 406

Rules of Evidence

For point number 33, Counter-Defendants violated standards of Fair Trade Practices and affected commerce. Counter-Plaintiffs' activities in part caused the financial collapse/crisis of 2007-2008. See **Exhibit T** as well as Law Review articles, **Exhibits I, J, K, L, M, and N**.

For point number 34, Counter-Plaintiffs were injured; loss of income, loss of business/means to obtain income.

For point number 35, no date has been set for trial.

For point number 36, the deceptive acts of the Counter-Defendants constitute fraudulent misrepresentation and the Counter-Defendants are jointly and severally liable for their acts of fraud by their misrepresentation and all damages stemming from such, including punitive damages and attorney's fees.

The following exhibits are presented to prove these points:

Exhibit R, Plaintiff's Complaint

Exhibit H, page 18, Assignment of Mortgage

Exhibit H, page 17, letter from Korn Law Firm, P.A., representing Plaintiffs, dated

December 21, 2011, stating Bank of America, N.A. is the holder of the note

Exhibit A, pages 1, 18, 19, 21, 26, 30, 34, and 35, Prospectus, Pooling and Servicing Agreement, Beneficial owners and stream of revenue

Exhibit B, pages 1, 9, 18, and 54, Trust Agreement, Pooling and Servicing Agreement, Beneficial owners

Exhibit B, pages 19-21, True sales and transfers

Defendants' evidence is substantial and we believe proves all nine elements necessary to recover under this Statute, S.C. Code Ann. § 39-5-20(a)(1985) and S.C. Code Ann. § 39-5-140(a)(1985).

Plaintiffs' (only) defense to these allegations is to claim that counter-plaintiffs do not have a right to rely on any representation made by the plaintiff, and since there's no confidential or fiduciary relationship and there's an arm's length transaction, and where one should have utilized caution and protection to safeguard his interests, quoting *Regions Bank v. Schmauch*, "South Carolina holds the normal relationship between a bank and its customer...creditor-debtor and not fiduciary in nature."

Counter-Plaintiffs point out that we are not Bank of America's customer. We executed a mortgage and note with Quicken Loans in December of 2007. We were unaware that the loan would be securitized and sold to investors on Wall Street.

In *Nelson v. Piggly Wiggly Central, Inc.*, No. 4754 (S.C.App. 10/20/2010):

[36] ... "Generally, duty is defined as the obligation to conform to a particular standard of conduct toward another." ... A "standard" is "a model accepted as correct by custom, consent, or authority." Black's Law Dictionary 1412 (7th ed. 1999)

[37] ... South Carolina courts have long recognized that merchants owe their customers a general duty of care:

[38] ...“Where a duty of due care exists, a person is required to consider only the foreseeable risks of his conduct or failure to act.... *Hubbard, F.P. and Felix, R.L.*, *The Law of Torts in South Carolina* 43 (3d ed. 2004). This means that the risk must be “reasonably foreseeable” before one is required to take action to prevent the injury. See, e.g., *Hayes v. Peoples Fed. Sav. & Loan Ass’n*, 289 S.C. 63, 66, 344 S.E.2d 624, 625 (Ct. App. 1986). Foreseeability “is determined by looking to the natural and probable consequences of the defendant’s act or omission.” *Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97; 101 (2006)

See also South Carolina Appellate Court Rules, Sec. 407, Rules of Professional Conduct, Rule 3.4 SCACR, “Fairness to Opposing Party and Council” regarding Attorney Ethics as previously quoted herein.

Counter-Plaintiffs contend that this duty implies that we should have been able to rely on the truthfulness of statements and representations made by the Plaintiff. Plaintiff/Counter-Defendants repeats their claim that Defendant/Counter-Plaintiffs has admitted to the accuracy of plaintiff’s note and mortgage and as stated previously, this is not true. Plaintiff also claims that their motion for summary judgment is properly supported yet has provided no evidence to prove their claim.

COUNT V
WRONGFUL CONDUCT
SOUTH CAROLINA CODE OF LAWS
S.C. CODE OF LAWS TITLE 15-75-60

Counter-Plaintiffs re-allege and affirm each preceding paragraph of this Complaint and incorporate such as if alleged anew.

For point number 38, Counter-Defendants in instigating foreclosure action against Counter-Plaintiffs in their complaint falsely asserting authority of law, claiming to be the Holder of the Note and Mortgage, and as such claim the authority at law to collect on the Note and the Mortgage and foreclose on Counter-Plaintiffs' property. The following exhibits are presented to prove this point:

Exhibit H, page 18, Assignment of Mortgage

Exhibit A, pages 1, 18, 19, 21, 26, 30, 34, and 35 Prospectus, Pooling and Servicing Agreement

Exhibit B, pages 12, 19, and 21, Trust Agreement, Pooling and Servicing Agreement

Exhibit H, page 17, Plaintiff/Counter-Defendants' letter from Korn Law Firm, dated December 21, 2011

Exhibit E, pages 1, 6, 7, 14, and 15

For point number 39, Counter-Defendants filed false or misleading documents with Oconee County Recorder's Office to assert their claim. The following exhibit is presented to prove this point:

Exhibit H, page 18, Assignment of Mortgage

See also South Carolina Appellate Court Rules, Sec. 407, Rules of Professional Conduct,

Rule 3.4 SCACR, "Fairness to Opposing Party and Council" regarding Attorney Ethics as previously quoted herein.

In *Nelson v. Piggly Wiggly Central, Inc.*, No. 4754 (S.C.App. 10/20/2010):

[36] ... “Generally, duty is defined as the obligation to conform to a particular standard of conduct toward another.” ... A “standard” is “a model accepted as correct by custom, consent, or authority.” Black’s Law Dictionary 1412 (7th ed. 1999)

[37] ... South Carolina courts have long recognized that merchants owe their customers a general duty of care:

[38] ... “Where a duty of due care exists, a person is required to consider only the foreseeable risks of his conduct or failure to act.... *Hubbard, F.P. and Felix, R.L.*, *The Law of Torts in South Carolina* 43 (3d ed. 2004). This means that the risk must be “reasonably foreseeable” before one is required to take action to prevent the injury. See, e.g., *Hayes v. Peoples Fed. Sav. & Loan Ass’n*, 289 S.C. 63, 66, 344 S.E.2d 624, 625 (Ct. App. 1986). Foreseeability “is determined by looking to the natural and probable consequences of the defendant’s act or omission.” *Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006)

See also South Carolina Appellate Court Rules, Sec. 407, Rules of Professional Conduct, Rule 3.4 SCACR, “Fairness to Opposing Party and Council” regarding Attorney Ethics as previously quoted herein.

By falsely asserting authority of law, Counter-Defendants are jointly and severally liable for their acts and all damages stemming from such including actual damages, punitive damages, costs and reasonable attorney’s fees.

COUNT VI
NEGLIGENT SUPERVISION
SOUTH CAROLINA CODE OF LAWS
S.C. CODE OF LAWS TITLE 15-75-60

“An employer owes a duty of care to a third party when the possible harm resulting to the third party by the employee could have been reasonably anticipated by the employer.” *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 302, 468 S.E. 2d 292, 299 (1996). “In addition, any duty the principal owes a third party arising from a contract between them is limited to an obligation on the part of the principal to use due care in supervising the actions of the agent which are undertaken in his capacity as an agent for the principal and not in his individual capacity.” *Id.*; see also *Degenhart v. Knights of Columbus*, 309 S.C. 114, 420 S.E. 2d 495 (1992).

The three elements are: “(1) duty of care owed by the [plaintiff]; (2) a breach of that duty by negligent act or omission; and (3) damage proximately caused by the breach.” *Kleckley v. Northwest Nat’l Cas. Co.*, 338 S.C. 131, 138, 526 S.E. 2d 218, 221 (2000). Plaintiffs’ (only) defense to these allegations is to claim that counter-plaintiffs do not have a right to rely on any representation made by the plaintiff, and since there’s no confidential or fiduciary relationship and there’s an arm’s length transaction, and where one should have utilized caution and protection to safeguard his interests, quoting *Regions Bank v. Schmauch*, “South Carolina holds the normal relationship between a bank and its customer...creditor-debtor and not fiduciary in nature.”

For point number 42, In *Nelson v. Piggly Wiggly Central, Inc.*, No. 4754 (S.C.App. 10/20/2010):

[36] ... “Generally, duty is defined as the obligation to conform to a particular standard of conduct toward another.” ... A “standard” is “a model accepted as correct by custom, consent, or authority.” Black’s Law Dictionary 1412 (7th ed. 1999)

[37] ... South Carolina courts have long recognized that merchants owe their customers a general duty of care:

[38] ... "Where a duty of due care exists, a person is required to consider only the foreseeable risks of his conduct or failure to act.... *Hubbard, F.P. and Felix, R.L.*, The Law of Torts in South Carolina 43 (3d ed. 2004). This means that the risk must be "reasonably foreseeable" before one is required to take action to prevent the injury. See, e.g., *Hayes v. Peoples Fed. Sav. & Loan Ass'n*, 289 S.C. 63, 66, 344 S.E.2d 624, 625 (Ct. App. 1986). Foreseeability "is determined by looking to the natural and probable consequences of the defendant's act or omission." *Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006)

See also *Hubbard v. Taylor*, 529 S.E.2d 549 (S.C. Ct. App. 2000) wherein it states that the elements for a cause of action for the tort of negligence are: (1) a duty owed to the plaintiff by the defendant, (2) a breach of that duty by the defendant, and (3) damages proximately resulting from the breach of duty. *Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 502 S.E.2d 78 (1998); *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E.2d 292 (1996).... Duty is generally defined as "the obligation to conform to a particular standard of conduct toward another." *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977).... "Causation is proved by establishing the injury would not have occurred but for the defendant's negligence." *Bramlette v. Charter-Medical-Columbia*, 302 S.C. 68, 72, 393 S.C. 68, 72, 393 S.E.2d 914, 916 (1990).... Legal cause is proved by establishing foreseeability, i.e., that the injury occurred as a natural and probable consequence of the defendant's negligence. *Id.* at 72, 393 S.E.2d at 916. See also *Young v. Tide Craft*,

Inc., 270 S.C. 453, 242 S.E.2d 671 (1978); *Stone v. Bethea*, 251 S.C. 157, 161 S.E.2d 171 (1968). ... it is sufficient if the defendant should have foreseen that his negligence would probably cause injury to someone. *Id.*

See also South Carolina Appellate Court Rules, Sec. 407, Rules of Professional Conduct, Rule 3.4 SCACR, "Fairness to Opposing Party and Council" regarding Attorney Ethics as previously quoted herein.

See Exhibit T, The Financial Crisis Inquiry Report, Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States, Official Government Edition, provided on CD because the document is over 600 pages.

Counter-Plaintiffs contend that the Plaintiff does have a duty to the plaintiffs and to society at large with regard to the conduct of their business. All allegations of Counter-Plaintiff are proven by the evidence.

For point numbers 43 and 44, Counter-Defendants' employees and/or agents' actions, as alleged previously, were unlawful and violated Counter-Plaintiffs' property rights. Counter-Defendants knew or should have known that their employees and/or agents were acting unlawfully.

The following exhibit is presented to prove this point: Exhibit C, Servicing Guide, Pooling and Servicing Agreement, pages 24 and 25.

For point number 45, as a result of result of the Counter-Defendants' negligent supervision, Counter-Plaintiffs were proximately injured by the unlawful acts of their employees and/or agents, in that we suffered financial loss.

For point numbers 46 and 47, an agency relationship exists between the individual defendants and the corporate defendants, and the actions of the individual defendants were done on behalf of or at the direction of the corporate defendants and within the scope of their agency relationship.

The following exhibit is presented to prove this point: Exhibit C, pages 24 and 25.

As a result of the actions of the individual defendants, the Counter-Plaintiffs were injured.

Plaintiff/Counter-Defendants repeats their claim that Defendant/Counter-Plaintiffs has admitted to the accuracy of plaintiff's note and mortgage and as stated previously, this is not true. Plaintiff also claims that their motion for summary judgment is properly supported yet has provided no evidence to prove their claim.

Plaintiff/Counter-Defendants further claim that Counter-Plaintiffs' claim should be dismissed because of an order from Judge Maddox, executed on March 3, 2012, that found the allegations set forth in the Complaint are sufficient to constitute a cause of action. This Order is based on the presumption that the claims in the Complaint are true. They have not been proved, and in fact, the Counter-Defendants through their evidence have disproved these claims.

In Town of Arcadia Lakes v. South Carolina Department of Health and Environmental Control, 5095 (S.C. App. 03/06/2013):

"The Party seeking to establish standing carries the burden of demonstrating each of the three elements." *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291.

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" to withstand a motion to dismiss. *Lujan*, 504 U.S. at 561. Elements of standing, however, "are not mere pleading requirements but rather an indispensable part of the plaintiff's case"; therefore, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stage of the litigation." *Id.*

(quoted in *Beaufort Cnty. v. Trask*, 349 S.C. 522, 528 n.14, 563 S.E.2d 660, 663 n.14 (Ct. App. 2002)).

COUNT VII
COMMON LAW FRAUD AND
INJURIOUS FALSEHOOD

Counter-Plaintiffs incorporate by this reference each paragraph of this Complaint as if set forth fully herein. The following elements must be shown in order to prove fraud:

(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a 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. *King v. Oxford*, 282 S.C. 307, 311, 318 S.E. 2d 125, 127 (Ct. App. 1984). The publicly-filed false mortgage assignment enabled all of the Counter-Defendants to perpetrate the fraudulent foreclosure. All of the Counter-Defendants knew or should have known the material representations were false. The material representations to the Counter-Plaintiffs were made so that the Court and the Counter-Plaintiffs would believe that the Counter-Defendants had a legitimate claim in the property. The Counter-Plaintiffs relied on such and the Counter-Plaintiffs were injured as a result with the facing of foreclosure litigation. Counter-Defendants fraudulently concealed their wrongdoings and prevented Counter-Plaintiffs from discovering their cause of action. Counter-Plaintiffs have been injured by the fraud by Counter-Defendants and have remained in ignorance of it without any fault or want of diligence or care on their part. Counter-Defendants made many misleading statements that the loan contained certain terms desirable to the consumer when it did not. Counter-Defendants' use of deceit or trickery caused Counter-Plaintiffs to act to their disadvantage. The following exhibits are presented to prove these points:

For point numbers 50 – 56:

Exhibit R, Plaintiff's Complaint

Exhibit H, page 18, Assignment of Mortgage

Exhibit H, page 17, letter from Korn Law Firm, P.A., representing Plaintiffs, dated

December 21, 2011, stating Bank of America, N.A. is the holder of the note

Exhibit A, pages 1, 18, 19, 21, 26, 30, 34, and 35, Prospectus, Pooling and Servicing Agreement,

Exhibit B, pages 12, 19 and 21, Trust Agreement, Pooling and Servicing Agreement, True sales
and transfers

Exhibit B, pages 1, 9, 18, and 54, Trust Agreement, Pooling and Servicing Agreement, Beneficial
owners

Exhibit G, various news articles relating to habit and repetition of Plaintiff and aswell as
Law Review articles, **Exhibits I through N**

Defendants' evidence is substantial and we believe proves all nine elements necessary to recover under this Statute, S.C. Code Ann. § 39-5-20(a)(1985) and S.C. Code Ann. § 39-5-140(a)(1985). Plaintiffs' (only) defense to these allegations is to claim that counter-plaintiffs do not have a right to rely on any representation made by the plaintiff, and since there's no confidential or fiduciary relationship and there's an arm's length transaction, and where one should have utilized caution and protection to safeguard his interests, quoting *Regions Bank v. Schmauch*, "South Carolina holds the normal relationship between a bank and its customer...creditor-debtor and not fiduciary in nature." Counter-Plaintiffs point out that we are not Bank of America's customer. We executed a mortgage and note with Quicken Loans in December of 2007. We were unaware that the loan would be securitized and sold to investors on Wall Street.

In *Nelson v. Piggly Wiggly Central, Inc.*, No. 4754 (S.C.App. 10/20/2010):

[36] ... “Generally, duty is defined as the obligation to conform to a particular standard of conduct toward another.” ... A “standard” is “a model accepted as correct by custom, consent, or authority.” Black’s Law Dictionary 1412 (7th ed. 1999).

See also South Carolina Appellate Court Rules, Sec. 407, Rules of Professional Conduct, Rule 3.4 SCACR, “Fairness to Opposing Party and Council” regarding Attorney Ethics as previously quoted herein.

Counter-Plaintiffs contend that this duty implies that we should have been able to rely on the truthfulness of statements and representations made by the Plaintiff. Plaintiff/Counter-Defendants repeats their claim that Defendant/Counter-Plaintiffs has admitted to the accuracy of plaintiff’s note and mortgage and as stated previously, this is not true. Plaintiff also claims that their motion for summary judgment is properly supported yet has provided no evidence to prove their claim. Plaintiff’s motion is not verified by any witness with personal knowledge.

Counter-Plaintiffs contend that the Plaintiff does have a duty to the plaintiffs and to society at large with regard to the conduct of their business. All allegations of Counter-Plaintiff are proven by the evidence. The Defendants/Counter-plaintiffs would like the Court to take particular note of **Exhibit M** from the Loyola Consumer Law Review, “Why Mortgage ‘Formalities’ Matter” with regard to the Defendants’ above seven counterclaims.

WHEREFORE, there are no facts in evidence that prove that Bank of America, N.A. is the Noteholder.

WHEREAS, Plaintiff's attorneys could not have lawfully commenced a foreclosure against Defendants' property unless Plaintiff is and was at the time of the commencement the Holder in Due Course of the Promissory Note that was integral to the Mortgage.

WHEREAS, in order for Plaintiff to legally foreclose they are required, as per UCC Section 3, covering promissory notes: Assignments of interest have to be in sequence from mortgagee to the foreclosing entity, and be recorded at county clerk's office.

WHEREFORE, Counter-Plaintiffs move the Court for an Order for Summary Judgment in favor of the Defendants' Counter-Plaintiffs on the pleadings against Counter-Defendants as follows:

- 1) Judgment against Counter-Defendants as Jointly and Severally Liable for all issues in excess of \$1,000,000.00;
- 2) Costs and attorney's fees pursuant to 18 USC § 1964 (c) and relevant South Carolina law;
- 3) Actual and statutory damages for violations of FDCPA pursuant to 15 USC § 1692 (k) and relevant South Carolina law;
- 4) Costs and attorney's fees pursuant to 15 USC § 1692 (k) and relevant South Carolina law;
- 5) Rescission of the entire Mortgage and Note amounting to clear title to property with fixtures as a result of the aforementioned, and
- 6) Damages for the Unfair and Deceptive Acts and Practices and
- 7) Judgment against Counter-Defendants for return of the down payment, and other payments, as well as interest on the above amount, and
- 8) Cost of litigation as provided in Title 15 United States Code, Section 1601 et Seq.;
- 9) Pre-judgment and post judgment interest at the maximum rate allowable by law;
- 10) Compensatory damages;

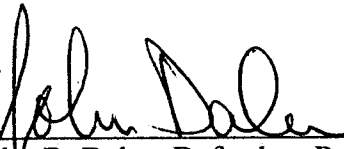
11) Punitive damages as allowed by law;

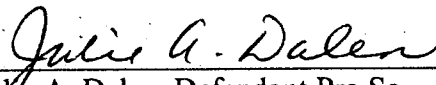
12) Such other and further relief available under all applicable state and federal laws and any relief the court deems just and appropriate.

DEMAND FOR JURY TRIAL pursuant to Rule 38 of the South Carolina Rules of Civil Procedure (SCRCP), Counter-Plaintiffs demand a jury trial as to all issues triable by a jury.

Respectfully submitted by John D. Dalen and Julie A. Dalen

Dated this 11th day of January, 2014


John D. Dalen, Defendant Pro Se


Julie A. Dalen, Defendant Pro Se

109 Wood Valley Drive
Westminster, SC 29693
864 647 4705

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)
BANK OF AMERICA, NA,)
Plaintiff)
Vs.)
JOHN D. DALEN, JULIE A. DALEN)
AND WAWTOCKACE HILLS)
PROPERTY OWNERS ASSOC.)

COURT OF COMMON PLEAS
CASE NO. 11-CP-37-1056
MOTION BY DEFENDANTS DALEN
FOR SUMMARY JUDGMENT
ON PLAINTIFF'S COMPLAINT FOR
FORECLOSURE

FILED FOR
DEPT. CLERK OF COURT
2011 NOV 17 3:11 27

TO THE COURT AND TO PLAINTIFF'S COUNSEL

Comes now, Defendants Dalen, to move before the Court for Summary Judgment for them on the Plaintiff's Complaint for foreclosure as follows:

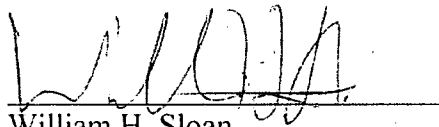
1. This is an action for foreclosure on the primary residence of the Defendants Dalen.
2. In the Plaintiff's Complaint, No. 8, specifically, they rely on the Assignment of Mortgage from Mortgage Electronic Registration Systems, Inc., as nominee for Quicken Loans, Inc. to BAC Home Loans Servicing, LP that was signed on May 9, 2011 and recorded in the ROD Office for Oconee County on May 16, 2011 in Book 2975, Page 40.
3. On September 12, 2014, the undersigned took the deposition of Mr. Zachary Chromiak, the appointed representative of Plaintiff pursuant to Rule 30-b-6, SCRCP.
4. On Page 16 of the deposition, Mr. Chromiak testified that Federal National Mortgage Association, "Fannie Mae", has owned the Note and Mortgage since January 2008, more than three years before the Assignment of Mortgage mentioned in No. 3 above. Mr. Chromiak confirmed that there was no reason to think that the date of the Assignment is inaccurate in anyway.
5. Therefore, it is not a genuine issue of material fact that Quicken Loans, Inc. was not the owner of the Note and the Mortgage of this case on May 9, 2011 and therefore, MERS, Inc. had no authority to assign the Mortgage for Quicken Loans, Inc. on that date.
6. On Page 14 of the Deposition, Mr. Chromiak testified that Bank of America and its predecessor in interest, Countrywide, have serviced the loan of this case since January 14, 2008, just after the loan was originated and before the date the first loan payment was due on February 1, 2008.
7. Mr. Chromiak confirmed this answer in his deposition at the bottom of Page 34 and the top of Page 35 when he stated that Quicken Loans was not servicing this loan in 2011 at the time the Assignment of Mortgage was executed on behalf of Quicken Loans, Inc., via MERS, Inc. to Plaintiff.
8. Mr. Chromiak further testified at the bottom of Page 35 that he did not whether or not Quicken was even aware of the Assignment of Mortgage done on their behalf.

ENT
11/17/11

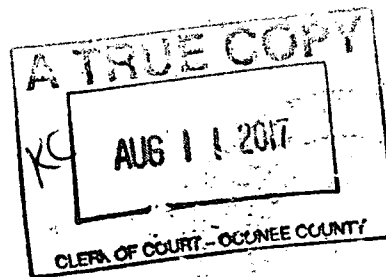
9. Therefore, it is not a genuine issue of material fact that Quicken Loans, Inc. was not the servicer of the Note and Mortgage of this case as of the date of the Assignment of Mortgage on May 9, 2011.
10. Therefore, it is not a genuine issue of material fact that the Assignment of Mortgage that Plaintiffs are relying on to foreclose is void since Quicken Loans, Inc. was not the owner or the servicer of the Note of this action.
11. As there is no genuine issue of material fact that the Assignment of Mortgage is void, there is no genuine issue of material fact that the Plaintiff lacks standing to bring the foreclosure of this action.
12. A copy of the Assignment of Mortgage is attached with this Motion as Exhibit A and a copy the relevant pages of the Deposition are attached as Exhibit B with this Motion.
13. Therefore, the Defendants Dalen should have judgment as a matter of law on the Plaintiff's Complaint, per Rule 56, SCRPC

WHEREFORE, having completed the basis for its Motion, Defendants Dalen move before this Court for the following relief:

- A. Summary Judgment for the Defendants on the Plaintiff's Complaint for Foreclosure;
- B. Any other such relief that this Court deems prudent, just and proper.



William H. Sloan
Sloan Law Firm
Post Office Box 85
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843-873-7531
Fax 843-873-7527
whs@sloanlawfirm.net
October 29, 2014



STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

Bank of America, N.A. successor by merger to
BAC Home Loans Servicing, L.P. f/k/a
Countrywide Home Loans Servicing, L.P.

Plaintiff,

v.

John D. Dalen, Julie A. Dalen and
Wawtockace Hills Property Owners
Association,

Defendant.

(515262.01894 JDW)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2011-CP-37-1056

**MOTION TO STRIKE JURY TRIAL DEMAND
AND REFER TO THE MASTER IN EQUITY**

FILED 00099E, SC
BEVERLY H. WILFIELD
CLERK OF COURT
NOV 17 AM 10 57

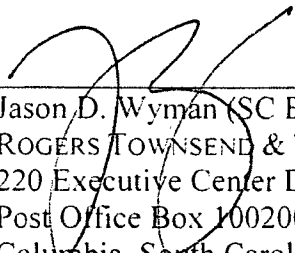
TO: WILLIAM H. SLOAN, ESQ., ATTORNEY FOR DEFENDANTS JOHN D. DALEN AND JULIE A. DALEN:

YOU WILL PLEASE TAKE NOTICE that at such time and place as is set by the Court the Plaintiff will move the Court for an order striking Defendants John D. Dalen and Julie A. Dalen's ("Defendants") jury trial demand and referring the case to the Master in Equity for Oconee County.

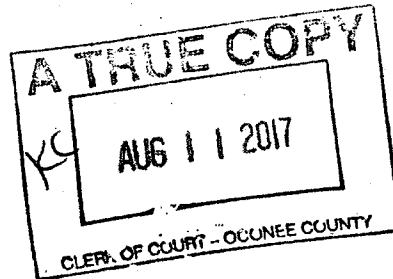
This motion is based on the grounds that a right of trial by jury does not exist in this matter as the claims proffered by the Defendants are not legal and compulsory, and as such, by pleading them in response to this foreclosure, Defendants have waived her right to a jury trial on the matters plead. This motion is further based on the holding of *Wells Fargo Bank, NA v. Smith*, 398 S.C. 487, 730 S.E.2d 328 (Ct. App. 2012) (de-published); Rules 39, 53, and 71, SCRPC; the pleadings; the laws of the State of South Carolina; and upon such other and further grounds as may be properly presented to the Court.

[Signature on following page]

ENTER
COMPT


Jason D. Wyman (SC Bar # 100271)
ROGERS TOWNSEND & THOMAS, PC
220 Executive Center Drive (29210)
Post Office Box 100200
Columbia, South Carolina 29202-3200
(803) 771-7900 Tel
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jason.wyman@rtt-law.com
Attorneys for Plaintiff
Rogers Townsend & Thomas, PC, and its staff are debt collectors.

November 13, 2014



STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

COURT OF COMMON PLEAS
CASE NO. 11-CP-37-1056

BANK OF AMERICA, NA,)
Plaintiff)
Vs.)
JOHN D. DALEN, JULIE A. DALEN)
AND WAWTOCKACE HILLS)
PROPERTY OWNERS ASSOC.)

MOTION BY DEFENDANTS DALEN
TO COMPEL DISCOVERY

2015 MAR 17 PM 4 31

FILED
BEVERLY H. WHITFIELD
CLERK OF COURT

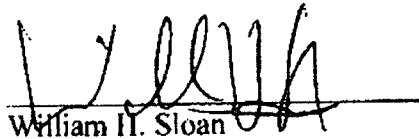
TO THE COURT AND TO PLAINTIFF'S COUNSEL

Comes now, Defendants Dalen, to move before the Court for an Order to Compel Discovery against the Plaintiff based on the Following:

1. This is an action for foreclosure on the primary residence of the Defendants Dalen.
2. Defendants previously sent discovery to the Plaintiff, both through the undersigned and by the Dalens when they were pro-se.
3. While the Defendants did respond to the discovery requests, the responses were incomplete in that they were improper objections.
4. This discovery is necessary for the Dalens in order to know how properly to proceed with their case.
5. The specific discovery sent that the Dalens want responses to will be included under separate cover prior to this Motion being held.
6. Consultation is not required for this Motion, per rule 11, SCRCP, nor do the Defendants believe it will be productive.

WHEREFORE, having completed the basis for its Motion, Defendants Dalen move before this Court for the following relief:

- A. An Order compelling discovery against Plaintiff in favor of Defendants Dalen;
- B. Any other such relief that this Court deems prudent, just and proper.



William H. Sloan
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March 16, 2015

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

COURT OF COMMON PLEAS
CASE NO. 11-CP-37-1056

BANK OF AMERICA, NA,)
Plaintiff)
Vs.)
JOHN D. DALEN, JULIE A. DALEN)
AND WAWTOCKACE HILLS)
PROPERTY OWNERS ASSOC.)

MOTION BY DEFENDANTS DALEN
TO COMPEL MEDIATION

2015 MAR 17 PM 4 31

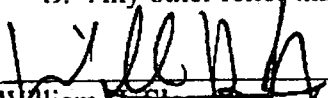
FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

Comes now, Defendants Dalen, through the undersigned, to ask the Court to mandate mediation in this case based on the following:

1. This case is a foreclosure on the primary residence of the Dalens.
2. As this is the case, the *Administrative Order Re: Mortgage Foreclosure Actions*, May 2, 2011 applies to this case.
3. The said *Admin. Order* states:
"The Court having jurisdiction over the action shall have the authority, and may in its discretion, order the parties to submit to mediation. In such event, the mediation shall proceed in accordance with the ADR Rules."
4. The Defendants Dalen believe that the case could be settled and/or progress made toward settlement if the Court ordered the Plaintiff to submit to mediation.
5. Consultation is not required under Rule 11, SCRPC, since this is a mortgage foreclosure action. The undersigned will attempt consultation with Plaintiff's counsel prior to this motion being scheduled.

WHEREFORE, Defendants Dalen move before this Court for the following relief:

- A. An Order from this Court requiring the Plaintiffs to engage in mediation with the Defendants Dalen;
- B. Any other relief that this Court deems prudent, just and proper.


William H. Sloan

Sloan Law Firm, PA
Post Office Box 85
Summerville, SC 29484
(843) 873-7531
Attorney for Defendants Dalen
March 16, 2015



STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Bank of America, N.A. successor by merger to
BAC Home Loans Servicing, L.P. f/k/a
Countrywide Home Loans Servicing, L.P.,

Plaintiff,

v.

John D. Dalen, Julie A. Dalen and Wawtockace
Hills Property Owners Association.

Defendant.

(516477.01301 CSG)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2011-CP-37-1056

PLAINTIFF'S MOTION TO
SUBSTITUTE PLAINTIFF

2015 JUN 1 PM 2 20

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

Plaintiff respectfully moves the court for an Order substituting Federal National Mortgage Association as the Plaintiff in this action.

On April 22, 2015, an Assignment of Mortgage into Federal National Mortgage Association was recorded in Book 3382 at Page 237 in the Office of the Register of Deeds for Oconee County. A copy of the Assignment of Mortgage is attached as Exhibit A.


Charles S. Gwynne Jr. (SC Bar #73844)
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Tel: (803) 771-7900
Fax: (803) 343-7017

ATTORNEYS FOR THE PLAINTIFF

Rogers Townsend & Thomas, PC and its staff are debt collectors.

May 28, 2015

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EN
COMPU

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Federal National Mortgage Association,

Plaintiff,

v.

John D. Dalen, Julie A. Dalen and Wawtackace
Hills Property Owners Association,

Defendant and Counterclaim Plaintiffs,

v.

Bank of America, N.A., successor by merger to
BAC Home Loans Servicing, L.P. f/k/a
Countrywide Home Loans Servicing, L.P.,

Counterclaim Defendant.

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2011-CP-37-1056

**COUNTERCLAIM DEFENDANT'S
MOTION TO AMEND
SCHEDULING ORDER**

FILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2016 FEB 16 A 11:23

Pursuant to Rule 16 of the South Carolina Rules of Civil Procedure, Counterclaim Defendant Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. ("BANA") respectfully moves the Court to amend the Scheduling Order for this case and to adopt Counterclaim Defendant's proposed schedule. As grounds for this motion, BANA states:

1. On December 9, 2014, the Court entered a Consent Scheduling Order in this Case, attached hereto as Exhibit A. The Scheduling Order imposed a discovery deadline of February 24, 2015, and a motions deadline, except those relating to the admissibility of evidence at trial, of March 16, 2015.
2. Subsequent to the entry of the Scheduling Order, the subject Mortgage was assigned from BANA to Federal National Mortgage Association on or about April 13, 2015. Accordingly, on or about September 15, 2015, the Court entered an Order substituting Federal National Mortgage Association as Plaintiff. BANA was ordered to remain in this action as Counterclaim Defendant.

ENTERED
COMPUTER

3. Subsequent to the entry of the Order substituting Federal National Mortgage Association as Plaintiff, additional/new counsel was retained to represent BANA in defense of the Counterclaims.
4. Therefore, BANA respectfully moves the Court to amend the Scheduling Order to permit the filing of further dispositive motions on or before March 9, 2016, with a merits hearing scheduled for such motions set for March 23, 2016 at 11:00 a.m.
5. This new date for filing dispositive motions is consistent with the current schedule of hearings for this action, while permitting BANA's new counsel to review the voluminous discovery conducted in this matter and file any new or renewed dispositive motions as appropriate in a timely fashion that does not prejudice the presentation of any party's claims or defenses.
6. Although BANA has previously filed a motion for summary judgment that a prior judge denied, a renewed dispositive motion is permissible because BANA will raise new issues and evidence that have not been previously addressed by the Court. *See Dorrell v. S.C. DOT*, 362 S.C. 312, 325, 605 S.E.2d 12, 18 (2003) (holding that the fact that a different trial judge previously denied a party's motion for summary judgment did not preclude that party from renewing the motion once new evidence came to light); *Crosswell Enter., Inc. v. Arnold*, 309 S.C. 176, 279, 422 S.E.2d 157, 159 (Ct. App. 1992) ("The denial of a motion for summary judgment does not bar a party from making a later motion for summary judgment based on matters not involved in the first motion.").
7. Granting the parties with additional time to submit further dispositive motions gives the court an opportunity to narrow the issues presented at trial.
8. A proposed Order amending the Scheduling Order for this action is attached hereto as **Exhibit B**.
9. Plaintiff Federal National Mortgage Association, by counsel, consents to the amendment of the Scheduling Order. Defendants John D. Dalen and Julie A. Dalen have not consented to the requested relief.

WHEREFORE, BANA respectfully moves this Court to amend the Scheduling Order as proposed.

This the 12th day of February, 2016.

Respectfully submitted,

Bank of America, N.A.

By Counsel



Brian A. Calub (S.C. Bar # 72009)

Trent M. Grissom (S.C. Bar No. 77718)

Robert A. Muckenfuss (S.C. Bar No. 13903)

McGUIREWOODS, LLP

Fifth Third Center

201 N. Tryon Street (Suite 3000)

Charlotte, NC 28202

Telephone: (704) 343-2052

Facsimile: (704) 373-8935

BCalub@mcguirewoods.com

TGrissom@mcguirewoods.com

*Attorneys for Bank of America, N.A., successor by
merger to BAC Home Loans Servicing, L.P. f/k/a
Countrywide Home Loans Servicing, L.P.*

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Federal National Mortgage Association,

Plaintiff,

v.

John D. Dalen, Julie A. Dalen and Wawtockace
Hills Property Owners Association,

Defendant and Counterclaim Plaintiffs,

v.

Bank of America, N.A., successor by merger to
BAC Home Loans Servicing, L.P. f/k/a
Countrywide Home Loans Servicing, L.P.,

Counterclaim Defendant.

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2011-CP-37-1056

**COUNTERCLAIM DEFENDANT'S
RENEWED MOTION FOR SUMMARY
JUDGMENT AS TO COUNTERCLAIMS
OF COUNTERCLAIM PLAINTIFFS
JOHN D. DALEN AND JULIE A.
DALEN**

FILED OCTOBER 2011
BY CLERK OF COURT
2011 MAR -9 P 4:28

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure ("SCRCP"), Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. (hereinafter "Counterclaim Defendant" or "BANA"), by and through its undersigned counsel, hereby renews its motion for summary judgment as to the Counterclaims asserted by Counterclaim Plaintiffs John D. Dalen and Julie A. Dalen ("Counterclaim Plaintiffs"). Summary judgment in favor of BANA on the counterclaims is appropriate for the following reasons:

- At the time this foreclosure action was filed, BANA had standing to foreclose because Counterclaim Plaintiffs lacked standing to challenge transfer of their mortgage loan to BANA and because BANA was the holder of the note. *See Bank of America, N.A. v. Draper*, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013).
- The Fair Debt Collection Practices Act ("FDCPA") does not apply to BANA because BANA cannot be deemed a "debt collector" as defined by the FDCPA. *See* 15 U.S.C. § 1692(e) (defining a "Debt collector" as "any person who uses any instrumentality of

interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”).

- The Counterclaim Plaintiffs’ RESPA claim fails because they have failed to prove actual damages as required. *See Ward v. Sec. Atl. Mortg. Elec. Registration Sys., Inc.*, 858 F. Supp. 2d 561, 575 (E.D.N.C. 2012) (dismissing the plaintiffs’ section 2605(e) RESPA claim, with prejudice, because the plaintiffs “fail to allege any pecuniary loss attributable to the RESPA violation”).
- The Counterclaim Plaintiffs’ slander of title claim fails because the Counterclaim Plaintiffs’ cannot show that BANA published any false statement about the property that is subject to this foreclosure action. *See Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 23, 567 S.E.2d 881, 893 (Ct. App. 2002) (“South Carolina has long recognized that relevant pleadings, even if defamatory, are absolutely privileged.”).
- The Counterclaim Plaintiffs’ Unfair Trade Practices Act claim fails because there is no evidence that BANA’s acts affected the public interest or that Counterclaim Plaintiffs suffered damages. *See Robertson v. First Union Nat’l Bank*, 350 S.C. 339, 350, 565 S.E.2d 309, 315 (2002) (“[A] plaintiff bringing a private cause of action under SCUTPA must allege and prove that the defendant’s actions adversely affected the public interest.”); *see also Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013) (recognizing that to succeed on a claim under the SCUTPA, a party must show that she “suffered monetary or property loss as a result of the defendant’s unfair or deceptive act(s).”).
- The Counterclaim Plaintiffs cannot maintain a claim against BANA pursuant S.C. Code. Ann. § 15-75-60 because the statute does provide an affirmative claim for relief and because Counterclaim Plaintiffs have failed to present evidence establishing a violation of S.C. Code Ann. § 16-17-735.
- The Counterclaim Plaintiffs have failed to prove the elements necessary to maintain a claim for negligent supervision. *See Land v. Green Tree Servicing, LLC*, 2014 U.S. Dist. LEXIS 154879, *14-15 (D.S.C. October 31, 2014) (dismissing negligent supervision claim based on employees sending threatening letters regarding foreclosure and driving by plaintiffs’ property as there were no allegations that defendant knew or should have known its employees were committing misconduct or of the need for exercising control over the employees).
- Counterclaim Plaintiffs’ fraud claim fails because they cannot show that any alleged representations by BANA were false, nor can they demonstrate a right to rely on any of the alleged representations. *Turner v. Milliman*, 392 S.C. 116, 124, 708 S.E.2d 766, 770 (2011) (“Under the elements for both fraud and negligent misrepresentation, the representation at issue must be false.”); *see also Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 445 (Ct. App. 2003).

For the above stated reasons, BANA should be granted summary judgment in its favor, pursuant to SCRPC Rule 56, on the basis that there is no genuine issue as to any material fact and that BANA is entitled to judgment as a matter of law.

BANA reserves its right to support this Motion for Summary Judgment with all pleadings, discovery responses, depositions, the South Carolina Rules of Civil Procedure, applicable statutes, and other applicable law, any evidence as may be accepted by the Court, and a memorandum of law, which will be filed and served before the hearing for this motion on March 23, 2016.

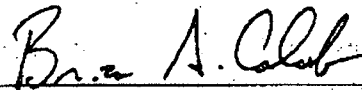
WHEREFORE, BANA prays that the Court enter an Order:

- (a) Entering judgment in favor of BANA with respect to Counterclaim Plaintiffs' Counterclaims; and
- (b) Granting such other further relief that the Court deems just and proper.

Respectfully submitted, this the 9th day of March, 2016.

Bank of America, N.A.

By Counsel



Brian A. Calub (S.C. Bar # 72009)
Trent M. Grissom (S.C. Bar No. 77718)
Robert A. Muckenfuss (S.C. Bar No. 13903)
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Attorneys for Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P.

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

Federal National Mortgage Association,
Plaintiff,

v.

John D. Dalen, Julie A. Dalen and Wawtockace
Hills Property Owners Association,

Defendant and Counterclaim Plaintiffs,

v.

Bank of America, N.A., successor by merger to
BAC Home Loans Servicing, L.P. f/k/a
Countrywide Home Loans Servicing, L.P.,

Counterclaim Defendant.

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2011-CP-37-1056

**COUNTERCLAIM DEFENDANT'S
MEMORANDUM OF LAW IN
SUPPORT OF ITS RENEWED
SUMMARY JUDGMENT MOTION**

FILED OCONEE COUNTY, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2016 MAR 21 P 1:51

Counterclaim Defendant Bank of America, N.A. ("BANA"), by and through counsel and pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, files this memorandum in support of its Renewed Motion for Summary Judgment in its favor as to the counterclaims asserted by Defendants/Counterclaim Plaintiffs John D. Dale and Julie A. Dalen ("Defendants"). To this end, BANA respectfully states as follows:

INTRODUCTION

Defendants have filed counterclaims against BANA in an effort to continue avoiding a lawful foreclosure. Despite extensive discovery exchanged between the parties over the course of the last four years, the undisputed evidence in this case shows that the counterclaims lack the factual and legal support necessary to raise a genuine issue of material fact. Accordingly, this Court should grant BANA's Motion for Summary Judgment.

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Copies to:

Atty ☒ (P) _____ (D) _____

DSS _____ other _____

Mailed ☒ Boxed _____ handed _____



STATEMENT OF UNDISPUTED FACTS

On December 20, 2007, Defendant John Dalen executed and delivered to Quicken Loans Inc. ("Quicken Loans") a promissory note (the "Note") in the amount of \$118,750.00. (Compl. ¶ 6.) To secure the payment of the Note, both Defendants executed and delivered a mortgage (the "Mortgage") to Mortgage Electronic Registration Systems, Inc. ("MERS"), acting solely as nominee for Quicken Loans, its successors and assigns, covering real property located at 109 Wood Valley Dr., Westminster, South Carolina 29693 (the "Property"). (Compl. ¶ 7; Exhibit 1, Mortgage.) The Mortgage was recorded on December 21, 2007 in the Oconee County real property records. (Compl. ¶ 8.)

The evidence for this case establishes that BANA was the holder of the Note, and thereby the Mortgage, at the time it filed this foreclosure action. After the Note was executed, it was indorsed to Countrywide Bank, FSB. It was subsequently endorsed in blank. (Exhibit 2, Chromiak Tr. 35:14-end; 36:1-12.¹) Countrywide Bank, FSB received the Note in its possession on January 15, 2008. (See Exhibit 3, BANA's Answers to Defendants Third Set of Interrogs. ¶¶ 4, 8, 9.) Accordingly, Countrywide Bank, FSB became the holder of the Note, and thereby the Mortgage, as of that date. (Exhibit 4, Note.) On April 27, 2009, Countrywide Bank, FSB converted to a national association and merged into BANA making BANA the noteholder. (See BANA's Ans. to Defs. 3d Set of Interrogs. ¶¶ 1, 3.) BANA's counsel took possession of the original Note and made it available for inspection by Defendants. (BANA's Ans. to Defs. 1st Set of Interrogs. ¶ 5; BANA's Ans. to Defs. 3d Set of Interrogs. ¶ 2.)

Effective January 9, 2008, Defendants were notified that the servicing of their loan was being transferred from Quicken Loans to Countrywide Home Loans, Inc. (Exhibit 5, Notice

¹ The Rule 30(b)(6) deposition of BANA's corporate representative, Zackary Chromiak ("Chromiak Dep."), was conducted on September 12, 2014.

dated 1/8/2008.) Thereafter, BAC Home Loans Servicing, LP ("BACHLS") took over servicing of the loan. (Exhibit 6, John Dalen Tr. 22:1-end.)² Subsequently, Defendants were notified that effective July 1, 2011, the servicing of the loan was being transferred from BACHLS to BANA. (Exhibit 7, Notice dated 7/1/2011.) On July 1, 2011 by virtue of a corporate merger, BACHLS merged with and into BANA. (Compl. ¶ 10; Chromiak Tr. 20:10-17.) BANA serviced the loan until April 1, 2015, at which time the servicing of the loan was transferred from BANA to Seterus, Inc. Defendants were made aware of this transfer pursuant to a March 11, 2015 letter from BANA. (Exhibit 8, Notice dated 3/11/2015.)

BANA and its predecessors in interest were also the assignee of the Mortgage at all relevant times. By Assignment of Mortgage dated May 9, 2011, and recorded May 16, 2011 in the Oconee County real property records, MERS assigned the Mortgage to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP (the "Assignment"). (Compl. ¶ 10.) BANA is the successor to BACHLS pursuant to the corporate merger discussed more fully above. (BANA's Ans. to Def. 1st Set of Interrogs. ¶ 5.) BANA and its predecessors in interest held the Mortgage until it was assigned from BANA to Federal National Mortgage Association ("Fannie Mae") on or about April 13, 2015. (Exhibit 9, Mortg. Assign.). Defendants have admittedly been in default on their loan payments since the December 1, 2010 installment. (John Dalen Tr. 21:12-24; 29:2-6.) Accordingly, BANA, as holder of both the Note and Mortgage, exercised its remedy granted in the Mortgage and filed the present Complaint to foreclose on the Property on or about October 31, 2011. BANA was also the servicer of the loan at the time the Complaint was filed. (Compl. ¶ 17; John Dalen Tr. 29:2-6; Notice Dated 7/1/2011; Notice Dated 3/11/2015.) On February 21, 2012, Defendants filed their Answer, Affirmative Defenses,

² The deposition of Defendant John Dalen ("John Dalen Dep.") was conducted on September 12, 2014. Relevant portions of the depositions transcript are attached hereto as Exhibit 6.

Counterclaim, and Demand for Jury Trial ("Counterclaim" or "Counter."). Despite a lack of factual support, Defendants asserted the following claims for relief: (1) Violations of the Fair Debt Collection Practices Act ("FDCPA"); (2) Violations of the Real Estate Settlement Practices Act ("RESPA"); (3) Slander of Title/Petition to Quiet Title; (4) Violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"); (5) Wrongful Conduct; (6) Negligent Supervision; and (7) Fraud and Injurious Falsehood. (Counter. ¶¶ 1-56.) Defendants' Counterclaim is primarily a challenge to the lawful foreclosure. Because the filing of the Complaint to foreclose by BANA was lawful and because Defendants have offered insufficient evidence in support of their Counterclaim, BANA is entitled to summary judgment as a matter of law.

PROCEDURAL HISTORY

After the filing of the Complaint, Defendants filed a Motion to Dismiss on November 22, 2011 alleging that BANA lacked standing to foreclose and was not the real party in interest to enforce the Note and/or Mortgage. (Exhibit 10, Def. Mot. to Dismiss.) At the hearing on February 6, 2012, Defendants produced documents, which were essentially charts and diagrams regarding the history of mortgage lending with no specific reference or application to the present matter. (Exhibit 11, Def. Hrg. Evid.) The Court entered an Order denying Defendants' Motion to Dismiss on March 7, 2012 finding the allegations in the Complaint were sufficient to constitute a cause of action for foreclosure. (Exhibit 12, Ord. Denying Def. Mot. to Dismiss.) On April 13, 2012, BANA filed an Affidavit certifying that it held both the Note and Mortgage. (Exhibit 13, BANA Aff.) Defendants subsequently moved for reconsideration of the Order denying their Motion to Dismiss. This motion was denied on June 20, 2012. (Exhibit 14, Ord. Denying Def. Mot. to Reconsider.)

On January 12, 2012, BANA served its First Set of Interrogatories ("BANA's Interrogs."), First Set of Requests for Production of Documents ("BANA's Req. f. Doc. Prod."), and Request for Admissions ("BANA's Admissions") to Defendants. (Exhibit 15, BANA Req. for Admissions.) On or about February 6, 2012, Defendants served their answers to BANA's Interrogatories ("Defendants' Interrogatory Answers") and responses to BANA's Requests for Production of Documents ("Defendants' Document Production"). Defendants did not respond to BANA's Admissions at this time. In Defendants' Interrogatory Answers, Defendants did not identify any fact witnesses, any expert witnesses, any expert witness reports, or any information regarding payments they made on the loan. (Exhibit 16, Def. Interrog. Ans.) In Defendants' Document Production, Defendants did not produce any documents regarding transactions with BANA, any documents regarding communications with BANA, any witness statements, any expert reports, any documents related to their claims or defenses, or any documents related to payments they made on the loan. (Exhibit 17, Def. Doc. Prod.) Instead, in response to the discovery requests, Defendants reproduced a copy of documents submitted at the Motion to Dismiss hearing on February 6, 2012. (*Id.*)

Pursuant to a Court Order, Defendants provided supplemental discovery responses via letter on July 18, 2012 ("Supplemental Discovery Responses"). (Exhibit 18, Def. Suppl. Resp.) Per the Supplemental Discovery Responses, Defendants identified themselves as the only fact witnesses in this matter and confirmed that all payments they made on the loan are accurately reflected in BANA's payment history. (Exhibit 19, Payment Hist.) Defendants provided responses to BANA's Admissions at this time and admitted that BANA produced true and accurate copies of the Note, Mortgage, and payment history. (*See* Def. Suppl. Resp.) The Interrogatory Responses, Document Production, and Supplemental Discovery Responses are the

only discovery responses Defendants have provided to date and the only evidence Defendants have produced in support of their claims.

On December 4, 2013, BANA filed its Motion for Summary Judgment regarding the Counterclaim. BANA's Motion for Summary Judgment was denied on July 9, 2014. (Exhibit 20, Ord. Denying BANA Mot. For Summ. Judg.) After the retention of counsel by Defendants, Defendants moved for summary judgment on BANA's Complaint to foreclose on about October 29, 2014 arguing that the Assignment to BANA was void and BANA therefore lacked standing to foreclose. On February 25, 2015, the Court entered an order denying Defendants' Motion. The Court found that because the Assignment was recorded prior to the filing of the Summons and Complaint and because BANA was the undisputed servicer of the loan when the Complaint was filed, BANA was a real party in interest with standing to foreclose. *Id.* (Exhibit 21, Ord. Denying Def. Mot. for Summ. Judg.)

Due to the Assignment of Mortgage from BANA to Fannie Mae, on or about September 15, 2015, the Court entered an Order substituting Fannie Mae as Plaintiff in this matter. BANA was ordered to remain in this action as Counterclaim Defendant only. (Exhibit 22, Ord. Substitute Pl.) Thereafter, the parties executed a Consent Order Amending Scheduling Order that extended the motions deadline, except those related to the admissibility of evidence at trial, to March 9, 2016. (Exhibit 23, Consent Ord. Am. Sched. Ord.)

STANDARD OF REVIEW

Summary judgment is warranted when no material facts are in contest and the movant is entitled to judgment as a matter of law. *McNaughten-McKay Elec. v. Andrich*, 324 S.C. 275, 279, 482 S.E.2d 564, 566 (Ct. App. 1997). "Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of

material fact.” *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E.2d 537, 546 (1991). “With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility may be discharged by showing— that is, pointing out to the trial court—that there is an absence of evidence to support the nonmoving party’s case.” *Id.* (internal quotations and brackets omitted). “Once moving party carries its initial burden, opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a *genuine issue for trial*.” *Id.* (emphasis theirs). “Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings.” *Id.*

Moreover, the denial of a motion for summary judgment does not bar a party from making a later motion based on matters not involved in the decision on the first motion. If a first motion for summary judgment is unsuccessful, the court has the power to permit a second motion for summary judgment prior to trial. *Crosswell Enter., Inc. v. Arnold*, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992). Therefore, although BANA previously filed a motion for summary judgment that a prior judge denied, this renewed dispositive motion is permissible because BANA is raising new issues and evidence that have not been previously addressed by the Court. *See Dorrell v. S.C. DOT*, 362 S.C. 312, 325, 605 S.E.2d 12, 18 (2003) (holding that the fact that a different trial judge previously denied a party’s motion for summary judgment did not preclude that party from renewing the motion once new evidence came to light).

ARGUMENT

For the following reasons, BANA should be granted summary judgment on all of Defendants’ Counterclaims.

I. BANA had standing to foreclosure.

The majority of allegations in the Counterclaim and raised throughout discovery are defenses to the complaint to foreclose and not separate/affirmative causes of action. Defendants have attempted to characterize potential defenses to the complaint as viable causes of action in their Counterclaim. BANA is entitled to summary judgment to the extent these defenses are improperly pled as counterclaims. Moreover, these "claims" have been repeatedly raised by Defendants and rejected by the Court. This Court previously denied Defendants' Motion to Dismiss holding that the Complaint stated a sufficient claim for foreclosure. (*See* Ord. Denying Def. Mot. to Dismiss.) In addition, this Court previously denied Defendants' Motion for Summary Judgment and found that BANA was a real party in interest with standing to foreclose. (*See* Ord. Denying Def. Mot. for Summ. Judg.)

To the extent any alleged wrongful conduct by BANA during the foreclosure process is the basis for Defendants' Counterclaims for Slander of Title (Third Counterclaim) for allegedly communicating false statements effecting Defendants' title to the Property and allegedly filing false documents claiming an interest in the Property, Violation of the SCUTPA (Fourth Counterclaim) for instituting a purportedly "unlawful" foreclosure action, Wrongful Conduct (Fifth Counterclaim) for allegedly falsely asserting authority of law to foreclose and allegedly filing false and misleading documents in the public record, and Fraud (Seventh Counterclaim) for filing the purportedly fraudulent Assignment which perpetuated the alleged fraudulent foreclosure, BANA is entitled to summary judgment as BANA was a real party in interest with standing to foreclose.

A. Defendants Lack Standing to Challenge the Assignment from MERS to BANA.

Defendants allege that BANA lacked standing to foreclose because the Assignment from MERS to BANA was void as MERS lacked authority to assign the Mortgage. Defendants contend the Assignment is false and fraudulent for these reasons. (Counter. ¶¶ 9-10.) However, Defendants have no standing to challenge the Assignment because they make no claim that they were a party to the Assignment. As a threshold matter, Defendants lack standing to challenge the Assignment from MERS to BANA under South Carolina law. Indeed, the United States District Court for the District of South Carolina has unequivocally held that a borrower lacks standing to challenge a mortgage assignment. *See Reese v. U.S. Bank, N.A.*, 2012 WL 1952819, at *3 (D.S.C. April 30, 2012). ("Plaintiff lacks standing to contest the Assignment of the Mortgage. Plaintiff is only a party to the Mortgage and, because the Assignment is a separate contract to which Plaintiff is not a party, she cannot question its validity.") (citing *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 164 (4th Cir. 2004)).

Here, Defendants were not parties to the Assignment. Defendants do not allege that they were parties to the Assignment. Defendants have not produced any evidence in discovery showing they were parties to the Assignment. Accordingly, based on the overwhelming authority holding that a borrower lacks standing to challenge a mortgage assignment and the plain language of the Assignment, Defendants' allegation that the Assignment was somehow improper and fraudulent cannot support a cause of action against BANA, and any such claim should be dismissed.

Even if Defendants had standing to challenge the Assignment, Defendants have failed to allege or show how the Assignment was improper or defective. Indeed, in loan transactions involving MERS, South Carolina courts have recognized MERS's authority to act as a nominee. *See, e.g., Kotsopoulos v. Mortgage Electronic Registration Systems, Inc.*, 2007 WL 905094

(D.S.C. March 22, 2007) (dismissing borrower's allegations that MERS had no legal or equitable interest in the note and mortgage). In addition, South Carolina does allow the transfer of a mortgage. See *Bank of America, N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (S.C. App. 2013) (holding that multiple assignments, including assignments from MERS, were valid and that "an assignee stands in the shoes of its assignor.") (internal citations omitted). Here, the Mortgage specifically names MERS, as nominee for Quicken Loans, its successors and assigns, as the beneficiary of the Mortgage. (See Mortgage; Chromiak Tr. 35:14-end; 36:1-12.) Thus, MERS had the authority to properly transfer the Mortgage as nominee for Quicken Loans to BANA on May 16, 2011.

Moreover, the Mortgage expressly provides that MERS and "the successors and assigns of MERS" have the right to foreclose and sell the Property upon Defendants' default. (See Mortgage, ¶ 22.) Defendants did not dispute the validity of contents of the Mortgage. (See Def. Supp. Resp.) Therefore, the Complaint and the Assignment, as well as South Carolina law, unequivocally support BANA's standing to file the foreclosure action, as assignee of the Mortgage and holder of the Note. As such, any "counterclaim" challenging BANA's standing to foreclose based on the Assignment, fails.

B. BANA had Standing to Foreclose as the Holder of the Note Endorsed in Blank and as Servicer of the Loan.

It is also undisputed that BANA possessed the Note endorsed first to Countywide and then in blank at the time the foreclosure Complaint was filed. BANA filed an Affidavit on April 13, 2012 confirming that it held both the Note and Mortgage. (See BANA Aff.) BANA stated it was in possession of the original Note and made the Note available for inspection by Defendants during discovery. (See BANA's Ans. To Def. 1st Set of Interrogs. ¶ 5; BANA's Ans. to Def. 3d

Set of Interrogs ¶ 2.) Defendants even admit that BANA held the original Note endorsed in blank. (John Dalen Tr. 29:2-6.)

"The holder of the instrument" is the party entitled to enforce the instrument. See S.C. Code Ann. § 36-3-301. A holder is defined as "a person who is in possession of . . . an instrument . . . drawn, issued, transferred, or indorsed to him or to his order or to bearer or in blank." S.C. Code Ann. § 36-1-201(20). In South Carolina, whoever possesses an instrument endorsed in blank has full power to enforce it. *Scheider v. Deutsche Bank Nat. Trust Co.*, 572 Fed. Appx. 185, 190 (4th Cir. 2014) (applying South Carolina law). In *Scheider*, Deutsche Bank came into possession of the underlying note endorsed in blank after a series of transactions. *Id.* at 187. The borrowers alleged that Deutsche Bank could not enforce the mortgage because it was not the proper holder of the note. See *id.* at 189. But the court rejected the borrowers' allegation, noting that "[w]henever possesses an instrument endorsed in blank has full power to enforce it." *Id.* at 190. Because it was undisputed that Deutsche Bank currently possessed the note, the court held that Deutsche Bank could enforce the note under South Carolina law.

Here, BANA has unequivocally established that it was the holder of the Note at the time the Complaint was filed. Defendants failed to produce any evidence showing that BANA lacked possession of the Note. Therefore, BANA was entitled to enforce the Note. See *Bank of America, N.A. v. Draper*, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013) (Because the evidence indicated that a bank was the owner or holder of a mortgage note, as the bank produced a copy of the note, the Court found that the bank was entitled to enforce the note.)

BANA still properly commenced the foreclosure action as the servicer of the loan. South Carolina law recognizes "that a loan servicer is a 'party in interest' and has standing by virtue of its pecuniary interest in collecting payments under the terms of the note and mortgage." *Bank of*

America, N.A. v. Draper, 405 S.C. at 222, 746 S.E.2d at 482. Because a loan servicer is a party in interest, it has standing to initiate a mortgage foreclosure. *Id.* at 223, 746 S.E.2d at 482. Here, BANA was the loan servicer when it initiated foreclosure proceedings on October 31, 2011. (Exhibit 23, Pl. Resp. to Def. Req. for Adm. ¶ 1.) Effective July 1, 2011, BANA succeeded to servicing of the loan due to the merger of BACHLS into BANA. (See Notice dated 7/1/2011.) BANA continued to service the loan until April 1, 2015. (See Notice dated 3/11/2015.) Throughout discovery, Defendants have not denied that BANA serviced the loan at the time the Complaint was filed. Defendants have yet to produce any evidence suggesting that another entity serviced the loan on October 31, 2011. Under *Draper*, as the loan servicer BANA had standing to initiate the foreclosure action, and the Court should grant summary judgment on Defendants' Counterclaims based on lack of standing to foreclose.

Because Defendants do not have any valid challenges or defenses to BANA's authority to foreclose, their Counterclaims for slander of title, violations of the SCUUTPA, wrongful conduct, and fraud based on any such challenge should be dismissed.

II. The FDCPA Does not Apply to BANA.

In their first Counterclaim, Defendants allege BANA violated numerous provisions of the FDCPA. (Counter. ¶¶ 2-12.) BANA is entitled to summary judgment on Defendants' claim for violations of the FDCPA because BANA is not a "debt collector."

The purpose of the FDCPA is "to eliminate abusive debt collection practices by debt collectors." See 15 U.S.C. § 1692(e). The FDCPA narrowly defines a "debt collector" as a person or entity that collects debts on behalf of a third party. See *id.* (defining a "Debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or

attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”). The FDCPA only applies to a “debt collector” and specifically excludes the consumer’s creditors, mortgage servicing companies, and assignees of debt, provided that the debt was not in default when assigned. *See* 15 U.S.C. § 1692a(6)(A), (F); *see also Scott v. Wells Fargo Home Mortg., Inc.* 326 F. Supp. 2d 709, 717 (E.D. Va 2003) *aff’d*, 67 Fed. App’x 238 (4th Cir. 2003) (holding that “creditors are not liable under the FDCPA”).

Here, at all relevant times, BANA was clearly a mortgage servicing company attempting to collect a debt owed to it. BANA and/or its predecessors have serviced the loan January 9, 2008 when servicing was transferred to Countrywide Home Loans, Inc., well before the loan went into default on December 1, 2010. (Chromiak Tr.14:11-17.) Defendants concede that BANA was their loan servicer, and serviced the loan prior to the time they stopped making payments on the loan. (John Dalen Tr. 22:6-25;23:1-8.) Because the undisputed evidence establishes that BANA acted as a mortgage servicing company, Defendants cannot establish that BANA acted as a debt collector subject to liability under the FDCPA. Therefore, this Counterclaim should be dismissed.

III. Defendants’ RESPA Claim Fails as There is No Evidence of a RESPA Violation Causing Actual Damages to Defendants.

In support of their RESPA claim, Defendants merely allege that BANA failed to inform them of certain appointments, assignments and transfers of the mortgage and that Defendants made written demands to BANA to show standing to foreclose but BANA has refused to evidence such standing. (Counter. ¶¶ 13-14.)

RESPA only requires transferors and transferees of *loan servicing rights* to inform the borrower within fifteen (15) days of the transfer of the servicing rights. 12 U.S.C. § 2605(a)-(c) (emphasis added). Accordingly, Defendants were not entitled to any other notices besides those

relating to servicing transfers and cannot maintain a claim based on a failure to provide notices of certain appointments and assignments. Moreover, while Defendants were entitled to notices of servicing transfers, Defendants have failed to identify the transferor(s), the transferee(s), or the date of the servicing transfer(s) of which they were required to receive notice. Throughout discovery, Defendants have failed to make any additional allegations, present any additional arguments, or put forth any additional evidence to support their RESPA claim for failure to provide notice.

Even if the allegations could state a claim under this section, any claims based on the original servicing transfer are barred by the applicable statute of limitations. Pursuant to 12 U.S.C. § 2614, any civil action must be brought "within 3 years in the case of a violation of section 2605 of this title." *Id.* No "discovery" requirement applies to the RESPA statute of limitations. *Id.* Here, the servicing transfer to Countrywide Home Loans, Inc. was effective January 9, 2008. (See Notice dated 1/8/2008.) Defendants' claim brought on February 21, 2012, more than four years after the servicing transfer occurred, is therefore time barred.

Moreover, in order to state a claim under RESPA, the claimant *must allege actual damages resulting from the violation* which Defendants have entirely failed to do. 12 U.S.C. § 2605(f)(1)³ (emphasis added); *Frazile v. EMC Mortg. Corp.*, 382 F. App'x 833, 836 (11th Cir. 2010) (holding that the plaintiff failed to state a claim under RESPA where she had failed to allege actual damages, which is a necessary element); *Hayes v. U.S. Bank*, 2014 WL 2938534 (S.D. Fla. June 30, 2014) (finding that plaintiffs failed to state any claims upon which relief could be granted where there were no allegations of actual damages); *see also Restrepo v. Wells*

³ Section 2605(f)(1) states that servicers will be liable to an individual borrower in "an amount equal to the sum of: (A) any actual damages to the borrower as a result of the failure; and (B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed \$2,000."

Fargo Bank, N.A., 2010 U.S. Dist. LEXIS 8924, at *5-6 (S.D. Fla. Feb. 3, 2010) (dismissing RESPA violation based on bald assertion of actual damages).

In order to state actual damages, the loss alleged must be related to the RESPA violation. *Bartley v. Wells Fargo Bank, N.A.*, 2015 U.S. Dist LEXIS 117746 (D.S.C. July 17, 2015); *Lal v. Am. Home Servicing, Inc.*, 680 F. Supp. 2d 1218, 1223 (E.D. Cal. 2010); *Turner v. Beneficial Corp.*, 242 F.3d 1023, 1027-28 (11th Cir. 2001) (en banc) (requiring a causal link for TILA claims). Absent factual allegations demonstrating that a plaintiff has suffered actual damages, a RESPA claim is insufficiently pled and subject to dismissal. *See Molina v. Washington Mut. Bank*, 2010 WL 431439, at *7 (S.D. Cal. Jan. 29, 2010) (concluding that a RESPA claim was unsound because the plaintiffs "failed to sufficiently plead pecuniary loss"); *Lemieux v. Litton Loan Servicing, LP*, WL 5206641, at *3 (E.D. Cal. Dec. 22, 2009) ("Plaintiffs have not pled facts showing they suffered actual damages. Their failure to do so defeats their RESPA claim."); *Garcia v. Wachovia Mortg. Corp.*, 676 F. Supp. 2d 895, 909 (C.D. Cal. 2009) (dismissing RESPA claim because plaintiff "failed to allege damages under Section 2605"); *Ward v. Sec. Atl. Mortg. Elec. Registration Sys., Inc.*, 858 F. Supp. 2d 561, 575 (E.D.N.C. 2012) (dismissing the plaintiffs' section 2605(e) RESPA claim, with prejudice, because the plaintiffs "fail to allege any pecuniary loss attributable to the RESPA violation").

Here, Defendants have not established or even alleged any "actual damages" resulting from an alleged RESPA violation. In fact, the only "damages" alleged by Defendants throughout this litigation is the threat of foreclosure and damage to their reputations as a result of the filing of the Complaint to foreclose. (John Dalen Tr. 45:14-18;-56:18-22.) As there are no facts indicating that Defendants suffered *actual damages* as a result of any purported RESPA violation by BANA, Defendants' RESPA claim must be dismissed.

IV. Defendants' Slander of Title Claim Fails because Defendants Cannot Show that BANA Published any False Statement about Title to the Property.

In their third Counterclaim, Defendants contend that BANA knowingly and maliciously communicated in writing false statements affecting Defendants' title to the Property. Specifically, Defendants contend BANA filed mortgage documents claiming an interest in the Property (the Assignment) and caused notices of default and foreclosures to be sent to Defendants. (Counter. ¶¶ 17-25.)

"[T]o maintain a claim for slander of title, the plaintiff must establish (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff's title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties." *Huff v. Jennings*, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (S.C. Ct. App. 1995). "A publication is derogatory to the plaintiff's title if the publication disparages or diminishes the quality, condition, or value of the property." *Id.* at 150, 459 S.E.2d at 891. In an action for slander of title, "the malice requirement may be satisfied by showing the publication was made in reckless or wanton disregard to the rights of another, or without legal justification." *Id.*

Here, Defendants' claim for slander of title fails because they cannot demonstrate that any statement published by BANA reflecting its interest in the Property as Noteholder, Assignee of the Mortgage, or loan servicer was false as discussed more fully in Sections I.A and I.B *supra*. Moreover, there is no evidence that BANA made any false statement regarding the status of the Property in foreclosure. In the Counterclaim and throughout discovery, Defendants have failed to identify any specific notices of default and/or foreclosure that support their claim. Despite being asked to identify and/or produce all documents in support of their claims, Defendants have failed to identify any written statements made by BANA and/or produce any written statement made by BANA. (See Def. Interrog. Ans.; Def. Doc. Prod.; Def. Suppl. Resp.) The only such

statement BANA can identify is the filing of the Complaint to foreclose on October 31, 2011. (See Compl.) However, there is no evidence of false statements contained in the Complaint.

Defendants have admitted the validity of the Note and Mortgage. Defendants have admitted that Defendant John Dalen signed the Note and that both Defendants signed the Mortgage. (See Def. Suppl. Resp.) Defendants admit their default on the Note and the accuracy of the loan payment history which indicates that no payments have been made on the loan since the November 2010 installment. (*Id.*; John Dalen Tr. 7:16-end; 8:1-48; See Payment Hist.) Thus, by Defendants' own testimony, they defaulted on their obligations under the Note and Mortgage by failing to make the required monthly payment amounts. By filing the Complaint to foreclose on the Property in October 2011 with the accompanying lis pendens, BANA did not publish a false statement. To the contrary, the evidence unequivocally demonstrates that BANA was rightfully and lawfully seeking to enforce the terms of the Note and Mortgage by foreclosing on the Property after Defendants' admitted default.

Moreover, "South Carolina has long recognized that relevant pleadings, even if defamatory, are absolutely privileged." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 23, 567 S.E.2d 881, 893 (Ct. App. 2002). "The filing of a lis pendens enjoys the absolute privilege accorded to judicial proceedings. Because the recording of a lis pendens is specifically authorized by statute and has no existence separate and apart from the litigation of which it gives notice, the filing of a lis pendens CANNOT form the basis of an action for slander of title." *Id.* at 32, 567 S.E.2d at 897 (emphasis in original). Accordingly, because the only actions of BANA supporting Defendants' slander of title claim concern BANA's filing of the present Complaint to foreclose and accompanying lis pendens identifying the property as subject to foreclosure, Defendants' claim for slander of title fails as a matter of law, and summary judgment should be

granted in favor of BANA on this claim. See *Mulherin-Howell v. Cobb*, 362 S.C. 588, 602, 608 S.E.2d 587, 595 (Ct. App. 2005) (affirming summary judgment in favor of plaintiff on defendants' slander of title counterclaim because "the slander of title claim is based upon the filing of the pleadings in the underlying matter" and was not "a proper basis for the claim").

V. Defendants' Unfair Trade Practices Claim Fails Because There is No Evidence that BANA's Acts Affected the Public Interest or That Defendant Suffered Damages.

Defendants' Fourth Counterclaim purports to state a claim for violation of SCUTPA. (Counter. ¶¶ 29-36.) Defendants' claim is based on BANA's instituting an "unlawful" foreclosure action based upon allegedly fraudulent documents and making purportedly fraudulent misrepresentations regarding the true identity of the Lender and Mortgagee. (Counter. ¶¶ 29-32.)

A party seeking to recover under SCUTPA must show: "(1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013) (quoting *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006)); S.C. CODE ANN. § 39-5-140(a) (2014).

"An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive." *Gentry v. Yonce*, 337 S.C. 1, 12, 522 S.E.2d 137, 143 (1999). "An act is 'deceptive' when it has a tendency to deceive." *Id.* Because of the requirement that the act affect the public interest, conduct that affects only the parties cannot form the basis of a SCUTPA claim. *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 350, 565 S.E.2d 309, 315 (2002) (citing *Jeffries v. Phillips*, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994)); see

also *Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 478–79, 351 S.E.2d 347, 349–50 (Ct. App. 1986) (emphasizing that act must affect the public interest). “[A] plaintiff bringing a private cause of action under SCUTPA must allege and prove that the defendant’s actions adversely affected the public interest.” *Robertson v. First Union Nat’l Bank*, 350 S.C. 339, 350, 565 S.E.2d 309, 315 (S.C. 2002). A claimant may show that actions and practices affect the public interest by demonstrating a potential for repetition, which “may be shown by proving that the same kind of actions occurred in the past or by showing that the procedures employed by the defendant create a potential for repetition of the deceptive practices.” *Schnellmann v. Roettger*, 368 S.C. 17, 23, 627 S.E.2d 742, 746 (Ct. App. 2006).

Here, in an effort to show the acts of BANA affected the public interest, Defendants simply rely on the baseless and conclusory allegation that BANA’s actions “violated standards of fair trade practices and affected commerce.” (Counter. ¶ 33.) However, the only allegedly wrongful conduct identified by Defendants to support their SCUTPA claim are the actions of BANA in instituting an allegedly “unlawful” foreclosure action against Defendants based upon purportedly fraudulent documents regarding Defendants’ Mortgage and making allegedly fraudulent misrepresentations to Defendants regarding their loan. (Counter. ¶¶ 29-32.) There is not only no basis for such allegations as detailed above, but the completely unsubstantiated conduct claimed by Defendants clearly only affects the parties to this action. Throughout discovery, Defendants have failed to make any additional allegations, present any additional arguments, or put forth any additional evidence to support their claim that the actions of BANA affected commerce and/or the public interest in anyway. As conduct that only affects the parties to the transaction provides no basis for a SCUTPA claim, Defendants’ SCUTPA claim must fail. See *Robertson*, 350 S.C. at 350, 56 S.E.2d at 315.

Finally, to succeed on a claim under SCUTPA, a party must show that she "suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." *Health Promotion Specialists*, 403 S.C. at 638, 743 S.E.2d at 816; S.C. CODE ANN. § 39-5-140(a). Here, Defendants have not alleged nor have they presented any evidence showing a monetary or property loss. The only specific harm Defendants complained of in the Counterclaim are that "they were proximately injured in their business and in their persons." (Counter. ¶ 34.) In his deposition, Defendant John Dalen only referred to the threat of foreclosure and damage to his reputation as actual damages sustained. (John Dalen Tr. 45:14-18; 56:18-22.) In BANA's Interrogatories, Defendants were asked to set forth a list of all documents in their possession that support their claims or defenses in this matter. (See BANA's Interrogs.) In Defendants' Interrogatory Responses, they did not identify any documents regarding any alleged damages. (See Def. Interrog. Ans.) In BANA's Requests for Production, Defendants were asked to produce "all documents in your possession that relate to any claim or defense in the case." (See BANA's Req. f. Doc. Prod.) In Defendants' Document Production, Defendants did not produce any documents regarding any alleged damages. (See Def. Doc. Prod.) In Defendants' Supplemental Discovery Responses, Defendants did not produce any documents regarding alleged damages nor did they identify any damages allegedly sustained. (See Def. Suppl. Resp.) Thus, Defendants have not produced any evidence establishing that they suffered a monetary or property loss as a result of any conduct of BANA.

Because Defendants cannot show that BANA engaged in any unfair acts or practices affecting the public interest or that they suffered monetary or property loss as a result, their SCUTPA claim fails and BANA is entitled to summary judgment.

VI. Defendants Cannot Maintain a Claim Against BANA Pursuant S.C. Code. Ann. § 15-75-60.

In their fifth Counterclaim, Defendants contend that BANA engaged in wrongful conduct pursuant to S.C. Code. Ann. § 15-75-60 by falsely asserting authority of law to foreclose and filing false and misleading documents in the public record. (Counter. ¶¶ 38-39.) South Carolina Code. Ann. § 15-75-60 does not provide an affirmative claim for relief nor is there any case law recognizing such a claim for relief. Rather, S.C. Code. Ann. § 15-75-60 provides the civil remedies available to a person who is injured by a "sham legal process involving a violation of Section 16-17-735." Accordingly, a violation of Section 16-17-735 is a prerequisite to seeking available civil remedies pursuant to Section 15-75-70. South Carolina Code. Ann. § 16-17-735(B) provides that "it is unlawful for a person falsely to assert authority of state law in connection with a sham legal process." Notably, this is a criminal statute. Defendants have not specifically alleged nor have they put forth any evidence in discovery establishing that BANA violated this statute. Without any evidence of a violation of § 16-17-735 by BANA, Defendants are not entitled to any of the remedies available pursuant to § 15-75-60 and Defendants cannot maintain a claim against BANA under the statute.

VII. Defendants Have Not Put Forth Evidence of the Elements Necessary to Maintain a Claim for Negligent Supervision.

Defendants contend that BANA had a duty to supervise its employees and/or agents who engaged in unlawful conduct that violated Defendants' property rights and proximately caused them injury. Further, despite not naming any individual defendants in the Counterclaim, Defendants contend that an agency relationship exists between the "individual defendants" and corporate defendants and that the actions of the "individual defendants" were done on behalf of the corporate defendants. (Counter. ¶¶ 42-47.)

To recover in a negligence action, "a plaintiff must show: (1) the defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligence act or omission; (3) the

defendant's breach was the actual and proximate cause of the plaintiff's injury; and plaintiff suffered an injury or damages. *Stalvey v. America Bank Holdings, Inc.*, 2013 U.S. Dist. LEXIS 161634 (D.S.C. November 13, 2013). "The existence of a duty owed is a question of law for the courts." *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 11-12, 620 S.E.2d 326, 329 (Sup. Ct. 2005). "If the law does not recognize a particular duty, then the defendant is entitled to judgment as a matter of law." *Stalvey*, 2013 U.S. Dist. LEXIS 161634 at * 16 (dismissing plaintiff's claims for negligent training and/or supervision as plaintiff failed to establish that defendant bank owed her a duty of care).

In South Carolina, an employer may be liable for negligent supervision if the employee intentionally harms another when the employee: (1) is upon the premises of the employer, or is using a chattel of the employer, (2) the employer knows or has reason to know that he has the ability to control his employee, and (3) the employer knows or should know of the necessity and opportunity for exercising such control. *Degenhart v. Knights of Columbus*, 309 S.C. 114, 420 S.E.2d 495, 496 (S.C. 1992).

Here, the negligent supervision claim fails because BANA owed no duty to Defendants under South Carolina law. Courts in South Carolina and throughout the United States have consistently refused to impose a special duty of care between a borrower and a lender in the context of a normal debtor-creditor relationship. *See, e.g., Kerr v. Branch Banking & Trust Co.*, 408 S.C. 328, 333, 759 S.E.2d 724, 726 (2014) ("It is well established that banks owe a limited duty of care to their customers."); *Regions Bank v. Schmauch*, 354 S.C. 648, 670-71, 582 S.E.2d 432, 443 (Ct. App. 2003) (holding guarantor "was not in a vulnerable position, and the Plaintiff owed her no special duty of care"). In addition, there is no duty to act as a reasonable and prudent loan servicing company under South Carolina law. *Land v. Green Tree Servicing, LLC*,

2014 U.S. Dist. LEXIS 154879 (D.S.C. October 31, 2014) (dismissing plaintiffs' negligence claim as defendants did not owe a duty to act as reasonable and prudent loan servicing companies and agents). Moreover, if the relationship between the parties arises from contract, an action in tort will not lie without showing a duty independent of the contractual commitments. *See Beattie v. Nations Credit Fin. Servs. Corp.*, 69 F. App'x 585, 591 (4th Cir. 2003) (applying South Carolina law); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54-55, 463 S.E.2d 85, 88 (1995).

Here, BANA did not owe a special duty of care as lender or servicer of Defendants' loan. BANA and Defendants entered into a simple lender-borrower transaction, which does not create a "special duty of care." *Citizens & S. Nat. Bank of S. Carolina v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994). Moreover, the relationship between BANA and Defendants arose solely out of the Note and Mortgage contracts. No provision of the Note or Mortgage imposed a duty upon BANA to control its employees. (See Note; Mortgage.) Accordingly, because Defendants cannot show that BANA owed them a contractual or independent duty of care, BANA is entitled to summary judgment on the negligent supervision claim.

Even if Defendants could establish a duty of care, BANA is still entitled to summary judgment as Defendants have not put forth evidence of the elements necessary to maintain a claim for negligent supervision. Supervisory liability requires the court to focus specifically on what the employer knew or should have known about the specific conduct of the employee in question. The standard is whether the employer knew the offending employee was in the habit of misconducting himself in a matter dangerous to others. *Land v. Green Tree Servicing, LLC*, 2014 U.S. Dist. LEXIS 154879, *14-15 (D.S.C. October 31, 2014) (dismissing negligent supervision claim based on employees sending threatening letters regarding foreclosure and

driving by plaintiffs' property as there were no allegations that defendant knew or should have known its employees were committing misconduct or of the need for exercising control over the employees).

Here, there is no evidence that BANA knew or should have known that any of its employees were committing misconduct or that BANA knew or should have known of the necessity for exercising control over any specific employees. Throughout the entire course of the litigation, Defendants have failed to identify any specific employee of BANA who allegedly engaged in misconduct. In their Interrogatory Responses, Supplemental Discovery Responses, and deposition testimony, Defendants did not identify any specific employee who engaged in misconduct nor did Defendants provide any information regarding what BANA knew or should have known in regards to any of its employees. Because Defendants have presented no evidence in support of their claim for negligent supervision, BANA is entitled to summary judgment.

VIII. Defendants' Fraud Claim Fails Because Defendants Cannot Show That Any of the Alleged Representations by Plaintiff Were False, nor Can They Demonstrate a Right to Rely on Any of the Alleged Representations.

The basis of Defendant's final Counterclaim is that BANA prepared an allegedly fraudulent Assignment using the MERS system and that BANA filed a purportedly false Assignment enabling BANA to perpetrate the supposed fraudulent foreclosure. BANA supposedly knew that the purported "material misrepresentations" were false and were made so that the Court and Defendants would believe BANA had authority to foreclose. (Counter. ¶¶ 50-55.) Defendants' fraud claim is also premised on BANA's allegedly untrue statements that it owned the Note and Mortgage and therefore had the ability to enforce them. (John Dalen Tr. 69:7-16.)

In order to plead fraud, plaintiff must state with sufficient particularity the circumstances constituting fraud. Rule 9(b), SCRPC. Under South Carolina law, to maintain an action for fraud, a plaintiff must demonstrate by clear and convincing evidence the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) knowledge of its falsity or a reckless disregard for its truth or falsity; (5) intent that the plaintiff act upon the representation; (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. *Hendricks v. Hicks*, 374 S.C. 616, 620, 649 S.E.2d 151, 152-153 (S.C. Ct. App. 2007). "Failure to prove any one of these elements is fatal." *Id.* Furthermore, in order to plead fraud, a party must state with sufficient particularity the circumstances constituting fraud. S.C. R. Civ. P. 9(b) (2011). Indeed, the failure to allege facts in support each of the elements of a fraud claim will lead to the dismissal of that claim. See *Warr v. Carolina Power & Light Co.*, 237 S.C. 121, 126, 115 S.E. 799, 802 (S.C. 1960) (citations omitted) (stating that "if the complaint fails to allege facts to support any one of the elements of fraud and deceit, then the complaint is fatally defective."); *Bookhart v. Central Elec. Power Co-op.*, 222 S.C. 289, 296, 72 S.E.2d 576, 579 (S.C. 1952) ("It is essential that the facts and circumstances which constitute fraud should be set out clearly.") Moreover, "[m]ere general averments of fraud, or the fraudulent conduct of a party without the facts, do not constitute a statement upon which the Court can pronounce judgment." *State v. Jaques*, 65 S.C. 178, 184, 43 S.E. 515, 517 (S.C. 1903).

Here, Defendants have failed to demonstrate how any of the alleged representations regarding the Assignment or BANA's ability to enforce the Note and Mortgage were false. Notably, "[u]nder the elements for both fraud and negligent misrepresentation, the representation at issue must be false." *Turner v. Milliman*, 392 S.C. 116, 124, 708 S.E.2d 766, 770 (S.C. 2011).

As discussed more fully in Section I(A)(B) *supra*, even if Defendants had standing to challenge the Assignment from MERS to BANA, Defendants have failed to allege or show how the Assignment was improper or defective. In loan transactions involving MERS, South Carolina courts have recognized MERS's authority to act as a nominee. *See, e.g., Kotsopoulos v. Mortgage Electronic Registration Systems, Inc.*, 2007 WL 905094 (D.S.C. March 22, 2007) (dismissing borrower's allegations that MERS had no legal or equitable interest in the note and mortgage). In addition, it has previously been established that BANA had ability to enforce the Note as both the noteholder and loan servicer. Therefore, as the evidence clearly establishes that BANA made no false representations concerning the Assignment or its ability to foreclose, BANA is entitled to summary judgment.

Finally, Defendants have also fallen far short of the necessary standard to state any claim for fraud against BANA. Statements such as "the publicly filed false mortgage assignments enabled all of the Counter-Defendants to perpetrate the fraudulent foreclosure" and "Counter-Defendants fraudulently concealed their wrongdoings" (*See* Compl. ¶ 33), are "[m]ere general averments of fraud" and "do not constitute a statement upon which the Court can pronounce judgment." *State v. Jaques*, 65 S.C. 178, 184, 43 S.E. 515, 517 (S.C. 1903).

Accordingly, this Court should grant BANA's Motion for Summary Judgment on Defendants' Seventh and final cause of action.

CONCLUSION

Defendants have not presented a single genuine issue of material fact that would make the causes of action asserted in their Counterclaim suitable for trial. Based on the foregoing, BANA respectfully requests that this Court grant its motion, entering judgment in favor of BANA on each of Defendants' causes of action as a matter of law.

Respectfully submitted,

Bank of America, N.A.

By Counsel

Brian A. Calub 3/12/2016

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Countrywide Home Loans Servicing, L.P.*

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Federal National Mortgage Association,
PLAINTIFF,

v.

John D. Dalen, Julie A. Dalen, and
Wawtackace Hills Property Owners
Association,
DEFENDANT AND COUNTERCLAIM
PLAINTIFFS

v.

Bank of America, N.A., successor by
merger to BAC Home Loans Servicing, L.P.
f/k/a Countrywide Home Loans
Servicing, L.P.,
COUNTERCLAIM DEFENDANT.

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-37-1056

NOTICE AND DEMAND

and

MOTION TO DISMISS for LACK of
SUBJECT MATTER JURISDICTION

FILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2016 MAY -5 A 10:54

NOTICE AND DEMAND and

MOTION TO DISMISS for LACK of SUBJECT MATTER JURISDICTION

Now comes the defendant(s) John and Julie Dalen, and hereby DEMANDS an order dismissing the complaint under SCRCP 12(b) (1), 12 (h) (3).

The Court lacks subject matter jurisdiction. No contract (loan) between the Plaintiff and the Defendants has been filed with this court. If such a contract (loan) exists, Defendants demand that it be produced. A promissory note and a mortgage are not a contract (loan). Any such contract (loan), if one exists, would be void under the doctrine of ULTRA VIRES, as it would be an illegal transaction. (See Exhibit A, Title 12 Banks and banking CFR Ch. 1 sec. 7.4008 (a) Lending,) "A national bank may make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate...."

Further, there is no controversy or case between the Defendants, John and Julie Dalen, and FNMA.

The Defendant(s) John and Julie Dalen have terminated our contract with our attorney, William Sloan, Esq. We wish to proceed in managing our case from here forward, and hereby notify the court that we are no longer being represented by an attorney. This motion is not an attempt to delay these proceedings, but is necessary to protect our property rights. We do not

agree with our former attorney as to how to protect our rights and so we have terminated our contract with said attorney.

We wish the court to take notice of the following:

- Defendants have just recently become aware of the true nature of the fraud that has been perpetrated on an unsuspecting public, and the courts, and believe that it is in the public interest that this motion be given a proper hearing, with adequate time for all parties to study and respond to the issues raised. A trial cannot proceed until the matter of the court's jurisdiction is settled. "Jurisdiction, once challenged, cannot be assumed and must be decided." *Maine v. Thiboutot*, 100 S.Ct. 250. See also substantial case law supporting this assertion, included with this motion.
- Defendants have terminated our contract with our attorney and are no longer represented by an attorney. We wish to manage our case from this point on. We have requested the file maintained by our former attorney and will need time to assess the documents contained therein.
- We wish to file a motion for the court to reconsider its previous grant of summary judgment on our counterclaims to Bank of America at a March 23rd 2016 hearing, but as of this writing, May 2, 2016, no final order has been filed by the court. We believe that this ruling was made in error, certainly in light of the issues raised in our motion for lack of subject matter jurisdiction, as it relates to the issue of the bank's standing to bring this action, and that our counterclaims should be sent back to circuit court for trial by jury as a matter of right.
- We believe that the plaintiffs in this action have violated our Constitutional rights under Federal law (USC Title 42, sec.1983) and State law (Title 16, Chapter 5 SC Code of Laws) as well as Federal RICO statute violations. (See *Sedima, SPRL v. Imrex Co.*, 473 US 479 (1985).)
- Defendant John Dalen has mailed a Qualified written request to FNMA, and Bank of America, on February 27, 2016, which receipt of has been acknowledged but no other response to the questions put forth has been received. We believe that their silence constitutes an admission that the plaintiff(s) have no right to enforce any alleged loan or any right to foreclose on my home. (copy labeled exhibit D)

- The defendants, John and Julie Dalen, are willing to settle this matter without the need for further court action and are willing to make good faith offers of settlement.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

An act is said to be ultra vires when it is not within the scope of the powers of the corporation to perform it under any circumstances or for any purpose. The extent and limitations of the doctrine of ultra vires are clearly defined. One is that a contract by which a corporation disables itself from performing the functions and duties undertaken and imposed by its charter is... ultra vires. A charter not only grants rights, but it also imposes duties. An acceptance of those rights is an assumption of those duties... it is a contract which binds the corporation not to abandon the discharge of those duties.

The second is that the powers of a corporation are such as its charter confers, and an act beyond the measure of those powers is ultra vires. Consequently, when it assumes to do that which it has not been empowered by the state to do, its assumption of power is in vain, and the courts will construe such an act a nullity, and the contract is ultra vires. (See: The Law on Ultra Vires Acts and Contracts of Private Corporations, by Frank A. Mack, Marquette Law Review, Vol. 14 June 1930.)

A national bank's charter requires that they protect customer's money first, and then make money second. National banks are only allowed to make money in order to protect people's money so one serves the other, but the priority is to protect. The banking industry was laid to blame for the financial crises of 2008 by a congressional committee, for failing to protect the people's money. (See report on cd that is a part of the court file of this case.)

The law is well settled that there can never be a recovery upon an illegal contract.

CASE LAW IN SUPPORT OF THIS MEMORANDUM

- "A contract made by a corporation beyond the scope of corporate powers is unlawful and void." (McCormick v. Market National Bank, 165 U.S. 538)

- "Act is ultra vires when corporation is without authority to perform it under any circumstances or for any purpose. By doctrine of ultra vires a contract made by a corporation beyond the scope of its corporate powers is unlawful." (Community Fed S&L v. Fields, 128 F 2nd 705)
- "A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting a property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." Central Transp. Co. v. Pullman, 139 U.S. 60, 11 S. Ct. 478, 35 L. Ed. 55.
- Justice Marshall said, "The doctrine of ultra vires is a most powerful weapon to keep private corporations within their legitimate spheres and to punish them for violations of their corporate charters, and is probably not invoked too often." Zinc Carbonate Co. v. First National Bank, 103 Wis. 125, 79 NW 229. American Express Co. v. Citizens State Bank, 194 NW 430.
- "It has been well settled beyond controversy that a national bank, under federal law being limited in its powers and capacity, cannot lend its credit by guaranteeing the debts of another. All such contracts entered into by its officers are ultra vires..." Howard and Foster Co. v. Citizens National Bank of Union, 133 SC 202, 130 SE 759 (1926).

"If a bank could lend its credit as well as its money, it might, if it received compensation and was careful to put its name only to solid paper, make a great deal more than any lawful interest on its money would amount to. If not careful, the power would be the mother of panics ... Indeed, lending credit is the exact opposite of lending money which is the real business of a bank, for while the latter creates a liability in favor of the bank, the former gives rise to a liability of the bank to another." (Morse Banks and Banking 5TH Ed. Sec. 65; Magee, Banks and Banking, 3rd Ed. Sec 248.) (American Express Co. v. Citizens State Bank, 194 NW 429)

- "If any part of the consideration for a promise be illegal, or if there are several considerations for an unseverable promise, one of which is illegal, the promise,

whether written or oral, is wholly void, as it is impossible to say what part or which one of the considerations induced the promise." (Menominee River Co. v. Augustus Spies and C Co. 1122., 147 Wis. 550, 279 NW)

Points to consider:

- 1) If a party breaches its authority, by entering into an agreement that it knows it is not allowed by law to execute, is it moral (equitable) to allow that party to enforce the agreement?
- 2) Is it moral (equitable) to force a person to pay on a loan, when that person did not know that the bank did not have the legal authority to issue credit or to become surety?
- 3) Is it moral (equitable) for a bank to place a negative mark on a credit report, when they did not have the authority to enter into the agreement in the first place, and that any deficit in payment has been insured by a third party insurance company and can be written off as a claim?

In addition, consider also that moral arguments, arguments based in equity, verses legal arguments, based in law, are only upheld if the party seeking to enforce the agreement comes to court with "clean hands." The "clean hands doctrine" means that if a bank wishes to enforce an agreement based on equity, then they must have acted equitably. In the case of credit, if the banks know that the law prevents them from loaning credit (over one hundred years of case law on this point) and they do it anyway, they do not have clean hands, and they cannot argue their case in equity. They must then argue in law.

But the law prevents them from loaning credit! So not only is the contract (if one exists) void, under the doctrine of ultra vires, even if the borrower received a benefit, the borrower was not unjustly enriched.

As stated earlier, a promissory note is not a contract. A mortgage is not a contract. When is the contract that backs the alleged loan? There is no such contract. What actually has happened is that the promissory note, executed by John Dalen, was immediately monetized by stamping "pay to the order of" on the reverse of the note, which was then deposited as cash into a deposit account at a bank. The borrower was never told that this occurred.

The next thing that happens, again without the knowledge of the buyer, is that the bank opens a transaction account based on the cash deposit of the buyer, and from this transaction account, using the bank's name on a bank check, the check is issued to the seller in the agreed amount according to the sale figures. The numbers are just bookkeeping entries, which simply debit the depositor's account by the amount of the bank check. The seller leaves the office with check in hand, which he proceeds to deposit in his checking account, whereupon his bank balance increases via a bookkeeping entry, while the issuing bank's transaction account is debited via a bookkeeping entry. (See Exhibits B and C, Modern Money Mechanics, published by Federal Reserve Bank of Chicago.)

The next step in this fraudulent transaction occurs when the bank, now in possession of a large mortgage obligation, sells this mortgage obligation to a lender, such as FNMA. The bank, in this case Countrywide, since acquired by Bank of America, receives full cash payment, again via a bookkeeping entry, and is appointed "servicer" of the loan for its entire period of existence. But the buyer, John Dalen, possesses no knowledge that he actually funded his own transaction through his own promissory note, and was never told that this was the basis of the entire transaction, or that he still has a demand deposit account at the bank from which the check to the buyer originated via the transaction account.

So the entire arrangement is unconscionable from the beginning. There was never any valid contract, so that no obligation could ever have arisen based upon its terms. The bank has clearly become unjustly enriched by means of the fraudulently prepared documents which have cleverly and deviously concealed the true, illegal nature of the transaction. The bank was never in danger of having incurred any risk whatsoever, (no consideration) and was enriched through the sale to the true purchaser of the mortgage, while not handing over the money to the actual issuer of the promissory note as the "consideration" for the creation of the mortgage.

The bank's charter will clearly reveal and confirm that such acts of concealment, conversion, misrepresentation etc. constitute an act that is ultra vires. The bank is fully liable for these transgressions, and should have its charter revoked.

Where do we find ourselves?

- The bank (Countrywide, since acquired by Bank of America) has sold an invalid mortgage to FNMA.

- The mortgage is worthless as collateral, and can no longer be used as a component of the mortgage-backed securities bundle that has already been sold into the marketplace by FNMA.
- John Dalen has no obligation to FNMA, as FNMA was never a party to the sale. The bank is the party that benefited from the payment of cash provided by FNMA, and the bank must therefore make FNMA whole by return of the value by a lawful and legitimate means.

In addition to all of the above:

The parties to any binding contract must mutually agree to the essential terms of the contract. West Coast Airlines, Inc. v. Miner's Aircraft & Engine Serv., Inc., 66 Wash. 2d 513, 40 P.2d 833 (1965); Lakeside Pump & Equipment Inc. v. Austin Construction Co., 89 Wash. 2d 831, 576 P.2d 392.

Plaintiff provides no evidence of any offer to the defendant, and provides no evidence that the defendant accepted any certain terms. Offer and acceptance are the tools by which courts and contract negotiators arrive at the illusive contractual concept of "a meeting of the minds." Merritt-Chapman & Scott Corp. v. Gunderson Bros. Eng'r Corp., 305 F.2d 659, 662 (9th Cir. 1962).

A valid contract requires a meeting of the minds. The complaint includes no evidence of any meeting of the minds as to any certain terms. RCW 62A.2-204(1); Euclid Eng'r Corp. v. Illinois Power Co., 79 Ill. App. 2d 145, 223 N.E.2d 409 (1967); 3 Bender, Sales and Bulk Transfers Under UCC § 3.05.

"A contract is not formed unless the parties have a meeting of the minds, or, as it is sometimes said, unless the parties mutually assent." City of Everett v. Sumstad's Estate, 95 Wn.2d 853, 854, 631 P.2d 366 (1981); Ottgen v. Clover Park Technical College, 84 Wn. App. 214, 219, 928 P.2d 1119 (1996); Restatement (Second) of Contracts 17(1) (1979); Peck v. Walton, 92 Wash.App. 1012

No contract can be formed without an unequivocal, mutual assent to any one contract proposal. Rorvig v. Douglas, 123 Wash. 2d 854, 873 P.2d 492. Again, plaintiff offers no evidence of any offer or acceptance of any certain terms. The complaint fails to include any evidence of a mutual and unequivocal assent to any contract term or proposal.

The plaintiff offers no affidavit, no testimony, no evidence that it lent money to the defendant, no evidence that the defendant ever agreed to borrow any money from the plaintiff.

WHEREFORE defendant respectfully Demands an order dismissing plaintiff's complaint, as this Court lacks subject matter jurisdiction, per SCRCP 12 (b) (1), 12 (h) (3).

DATED: May 2, 2016.

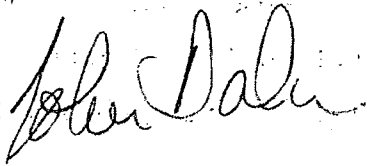
John Dalen

109 Wood Valley Dr.

Westminster, South Carolina, 29693

864-647-4705

Signed:

A handwritten signature in cursive script, appearing to read "John Dalen", written over a horizontal line.

STATE OF SOUTH CAROLINA

OCONEE COUNTY

Federal National Mortgage Association,

Plaintiff,

v.

John D. Dalen, Julie A. Dalen and Wawtackace
Hills Property Owners Association,

Defendant and Counterclaim Plaintiffs,

v.

Bank of America, N.A., successor by merger to
BAC Home Loans Servicing, L.P. f/k/a
Countrywide Home Loans Servicing, L.P.,

Counterclaim Defendant.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-37-1056

DEFENDANT AND COUNTERCLAIM PLAINTIFFS'
NOTICE OF MOTION AND
MOTION FOR RECONSIDERATION OF
ORDER GRANTING COUNTERCLAIM
DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT

FILED OCONEE COUNTY, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2016 AUG - 8 A 10:54

**DEFENDANT AND COUNTERCLAIM PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR RECONSIDERATION OF ORDER GRANTING PLAINTIFF'S/COUNTERCLAIM DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

Motion is hereby respectfully made by Defendants/Counterclaim Plaintiffs for this court to reconsider its order dated July 28, 2016, granting counterclaim defendant's Renewed Motion for Summary Judgment. Defendants feel the court should most carefully weigh its judgment. We, John D. Dalen and Julie A. Dalen, Defendants/Counterclaim Plaintiffs in the above-captioned action, hereby move the court to deny Counterclaim defendant's Motion for Summary Judgment. Counterclaim Defendant has provided no new evidence or facts as they claim to justify renewed motion for summary judgment. Counterclaim Defendant's Finding of Facts are disputed and genuine issues of material fact exist. We respectfully request the Court to take judicial notice of the following:

- a) The United States Supreme Court, in *Haines v. Kerner* 404 U.S. 519 (1972), said that all litigants defending themselves must be afforded the opportunity to present their evidence and that the Court should look to the substance of the complaint rather than the form.
- b) In *Platsky v. CIA*, 953 F.2d 26 (2nd Cir. 1991), the Circuit Court of Appeals allowed that the District Court should have explained to the litigant proceeding without a lawyer the correct form to the litigant so that he could have amended his pleadings accordingly. Counterclaim Defendants respectfully reserve the right to amend their pleadings.
- c) Constitutional provisions, both state(s) and federal give full faith and credit to judicial proceedings in other states – effective proceedings as evidence or as a bar to further litigation. *M'Elmoyle v. Cohen* 13 Pet. (38 U.S.) 312; 34 C.J. p.1137 and *Chicago & Alton R. Co. v. Wigginsferry Co.*, 108 U.S. 18 (1 Sup. Ct. 614). In ascertaining a particular state's substantive law [common law] when the highest court of that state has not spoken, a federal court should "consider relevant cases from jurisdictions other than [the subject state] in an effort to predict 'what would be the decision of reasonable intelligent lawyers,' sitting as judges of the highest . . . Court [of that state], and fully jurisprudence." Further, *"[i]t is well established that the court will honor the parties' choice of law where there is a reasonable basis for the choice or the chosen state has some relation to the agreement."* *Depositors Trust Co. v. Hudson Gen. Corp.*, 485 F. Supp. 1355, 1359 (E.D.N.Y. 1980).

THE FACTS OF THE CASE

1) Counterclaim Defendant's Finding of Facts #12:

A Massachusetts Supreme Court ruling cited as *US Bank National Association vs. Ibanez* (SJC – 10694), wherein it was ruled unanimously that for a bank to foreclose, it must demonstrate that it is the real party of interest through perfection of chain of title for both the Deed of Trust/mortgage and the Promissory Note. Referring to Plaintiff's Finding of Facts #12, BANA'S Motion for Summary Judgment was denied on July 9, 2014 because the judge found that there were issues of material fact. Judge Macauley has also stated that South Carolina law (see SC Code of Laws Title 36 Chapter 3 Commercial Code Negotiable Instruments) required Plaintiff to prove it was the real party in interest through perfection of the chain of

title from the originator to the party claiming the right to foreclose. Evidence obtained through discovery admissions include: that the loan was securitized, the loan was sold to a trust, and later removed from the trust. Plaintiff's version of the chain of title does not include these transactions. Plaintiff has brought fraud upon the court with its purported chain of title, and the facts show this chain of title to be false. This is a genuine issue of material fact and summary judgment is inappropriate.

- 2) Defendants/counterclaim plaintiffs further dispute BANA'S Findings of Fact #1, #3, #4, #5, #6, #7, #8, and #11:

The facts show that these statements are false and are in fact fraud upon the court. Issues of material fact exist and therefore summary judgment is improper. In *Everhome Mortgage Co. v. Rowland*, No. 07AP-615, 2088 WL 747698, at *3 (Ohio Ct. App. 2008) (holding that Plaintiff was not entitled to summary judgment because a genuine material issue of fact remained as to "how or when it became the holder of the note and mortgage"); *First Union Nat'l Bank v. Hufford*, 767 N.E.2d 1206, 1210 (Ohio Ct. App. 2001) (finding that the Plaintiff First Union National Bank did not produce "sufficient evidence explaining or demonstrating its right to the note or mortgage" other than "inferences and bald assertions"). This is a genuine issue of material fact and summary judgment is inappropriate.

- 3) Standing to sue is a fundamental requirement in instituting an action

Joytime Distributors & Amusement Co., Inc. v. State, 338 S.C. 634, 639, 528 S.E. 2d 647, 649 (10/14/1999). "It is fundamental in American jurisprudence that in order to bring a lawsuit against an opposing party, one must have standing to do so. Without standing, a party is not properly before the court to advance a cause of action." *Farm Bureau Ins. Co. of Ark. v. Running M. Farms, Inc.* 237 S.W.3d 32, 36 (Ark. 2006). "Without evidence demonstrating the circumstances under which it received an interest in the note and mortgage, Everhome cannot establish itself as the holder." *Everhome Mortgage Co. v. Rowland*, No. 07AP-615, 2008 WL 747698, at *3 (Ohio Ct. App. 2008. See also *Wash. Mut. Bank v. Green*, 806 N.E.2d 604 (Ohio Ct. App. 2004) (holding that Plaintiff had not sufficiently demonstrated that it was the holder of the note and mortgage and thus summary judgment was inappropriate). BANA cannot or has not provided a true chain of title showing it is the PETE (Party Entitled To

Enforce), but instead has "manufactured" a chain of title for the purpose of illegally foreclosing on my property. Nos. 6, 7, and 8 of Counterclaim Defendant's Statement of Facts are evidence of fraud because BANA lacks standing to foreclose in this case. Further, specifically referring to #8, since the chain of title presented by BANA is fraud upon the court, the assignment(s) are not proper. Pertaining to #4, BANA was not the holder of the note, or mortgage, at the time it filed the complaint, and this court lacks subject matter jurisdiction to continue this foreclosure. A separate motion has been filed regarding this issue. This is a genuine issue of material fact and summary judgment is inappropriate.

4) **BANA'S Assignment of Mortgage has a robo-signed notary signature**

Again pertaining to #8, handwriting analysis was conducted on the notary signature and was inconclusive. However, the document was notarized in California, and California law requires the notary to sign ALL documents with the same signature as was used on the application to become a notary. This requirement is in place to ensure that notary signatures can be authenticated. The signature on the assignment to BANA voids the assignment under California law, as the signature does not comply with the law. It is therefore invalid in any court proceeding. This assignment of mortgage is not proper. This is a genuine issue of material fact and summary judgment is inappropriate. (See Exhibit C, Assignment of Mortgage, Exhibit D, Notary Public Oath, and Exhibit E, Notary Public Bond, attached.)

5) **Fraud on the Court**

As set forth in *Cox v. Burke*, 706 So. 2d 43, 47 (Fla. 5th DCA 1998): "The basic standards governing fraud on the court are reasonably straightforward."

The requisite fraud on the court occurs where "it can be demonstrated clearly and convincingly that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989). . . . The trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when a plaintiff has perpetrated a fraud on the court, or where a party refuses to comply with court orders. *Kornblum v. Schneider*, 609 So. 2d 138,

139 (Fla. 4th DCA 1992). The (trial) judge must consider the proper mix of factors and juxtapose them reasonably. "Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." Independent Oil and Chemical Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co. 864 F.2d 927, 929 (1st Cir. 1988). This is a genuine issue of material fact and summary judgment is inappropriate.

- 6) Counterclaim plaintiffs are not in default. We are unable to determine or identify the right party with whom to renegotiate terms or seek modification. We cannot track payments or have confidence that any payoff is complete or cannot find the correct entity to provide assurance of complete payoff. See Arkansas Law Review, Volume 66, Number 1, Donald J. Kochan, page 290. This is a genuine issue of material fact and summary judgment is inappropriate.
- 7) Per rule 56(e) SCRCF, we are presenting specific facts showing that there are genuine issues for trial, and that, despite repeated denials of discoverable evidence requested by the Defendants/counterclaimants, there is ample evidence in the record to support our claims. This is a genuine issue of material fact and summary judgment is inappropriate.

MEMORANDUM OF LAW

The point at issue in this Civil Action is whether or not the Plaintiff/Counterclaim Defendant, hereinafter referred to as BANA, has standing to proceed with foreclosure. BANA has the presumption of law that they do have standing yet have not offered any proof of the right of enforcement. This presumption is hereby formally rebutted. The Defendants move the Court to compel the Plaintiff to prove, verify and validate whether or not they have standing to enforce the debt. Material to the arguments of this case is the evidence contained on the original wet-ink signature Promissory Note. The original note is a critical piece of evidence that establishes the following: (1) who is the current Holder in Due Course, and (2) whether the Plaintiff is the current Holder in Due Course.

While it is true that the Defendants signed a note in 2007, that Note is likely to have been sold and resold numerous times as part of the securitization process. Material to Defendant's argument is "Who was it sold to and is the Plaintiff the Holder in Due Course, and if not, who is?" Specifically, does the Plaintiff have the authority to enforce the negotiable instrument?

While it is not normally required of the Plaintiff to provide proof of claim in the normal conduct of a foreclosure proceeding, the Fair Debt Collections Act is enacted when the debt is in dispute and the right of enforcement is being challenged.

The authority to foreclose is derived directly from the negotiable instrument's right of enforcement. As the issue at hand is the Promissory Note, which is a negotiable instrument, the matter must be governed under the UCC (Uniform Commercial Code Negotiable Instruments) SC Code of Laws Title 36 Chapter 3. The Commercial Codes cited are on point and relevant to the issue at hand. The Defendants have presented crucial evidence that indicates the Plaintiff is not the rightful owner in due course. In order to avoid duplication adding to the already voluminous record of this case, we are attaching to this Motion, as Exhibit A, a 6-page overview of the Exhibits presented during a hearing in front of Judge Alexander S. Macauley on February 19, 2014, and also a 22-page Exhibits Addendum, Exhibit B, itemizing pertinent issues related to the Exhibits. This hearing was held to hear Plaintiff's initial Motion for Summary Judgment.

The Plaintiff is attempting to collect a debt that is in dispute. We assert the following regarding Bank of America, N.A., Successor by Merger to Countrywide Home Loan Servicing, L.P.:

- 1) Bank of America, N.A. has no right, title or beneficial interest in the note or mortgage
- 2) Bank of America, N.A. is not the Secured Creditor, and therefore has no standing to foreclose
- 3) Bank of America, N.A. is only the Servicer
- 4) Bank of America, N.A. has falsely conveyed the Mortgage Assignment misrepresenting itself as the Lender/Creditor
- 5) Bank of America, N.A. has violated FDCPA 15 U.S.C. having no right, title or beneficial interest in the note or mortgage Section 1692 f(6)(A):
 - a) The FDCPA prohibits the "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if . . . there is no present right to possession of the property claimed as collateral through an enforceable security interest."

- b) The FDCPA also allows a plaintiff to recover "any actual damage sustained" as a result of a violation of the statute. 15 U.S.C. Section 1692 k(a)(1). Actual damages under the FDCPA include damages for emotional distress. Johnson v. Eaton, 880 F.3d 148, 152 (5th Cir. 1996), noting that the FDCPA not only requires that the debt collector compensate the debtor for any monetary damages, but also for "emotional distress or other injury that the debtors can prove the debt collector caused."

Furthermore under the United States Supreme Court decision of Carpenter v. Longan, 83 U.S. 16 Wall, 271 271 (1872), the Deed of Trust or mortgage follows the Promissory Note. Where the promissory note goes, the Deed of Trust/mortgage must follow. Page 83 U.S. 274: The note and mortgage are inseparable; the former as essential, the latter as an incident. A negotiation or sale of the note carries the mortgage with it, while an assignment of the latter (mortgage) alone is a nullity.

The ownership of the mortgage and subsequent assignments follow the promissory note, and not an arbitrary assignment of MERS. The Massachusetts Supreme Court has ruled that before the "lender" may foreclose on a subject property, the "lender" must provide evidence of perfected chain of title in both the mortgage as well as the promissory note. Blank assignments of the promissory note cannot be construed as evidence of perfected interest. Neither is possession without proper assignment: US Bank National Association vs. Ibanez, (SJC – 10694). Further, notes are sold or negotiated, not assigned.

The Defendants, upon information and belief, have reason to believe the following:

- a) The mortgage note has been paid in whole or in part by one or more undisclosed party/parties who prior to or contemporaneously, with the closing of the "loan," paid the originating lender in exchange for certain unrecorded rights to the revenues arising out of the loan documents.
- b) In connection with the matters which are the subject of paragraph "a" as above, the plaintiff (foreclosing party) has no financial interest in the Note or Mortgage.

- c) The original note was destroyed or was transferred to a structured investment vehicle which may be located offshore, which also has no interest in the Note or Mortgage or revenue therefrom.
- d) The revenue stream deriving from the Note/Mortgage was eviscerated upon one or more assignments of the Note/Mortgage to third parties and parsing of obligations as part of the securitization process, some of whom are joined as co-obligators/co-obligatees, in connection with the closing.
- e) To the extent which Plaintiff has been paid on the underlying obligation or has no legal interest therein, or in the Note or Mortgage, or does not have lawful possession of the Note or Mortgage, Plaintiff's allegations of possession and capacity to institute foreclosure constitute a fraud upon the Court. Based upon one or more of the affirmative defenses set forth above, Defendants John and Julie Dalen are entitled to a dismissal of the foreclosure claim with prejudice.

If the lender is allowed to proceed without proof, there is a possibility another institution which may have bought our note may attempt to collect the same debt from us again. Courts across the country are becoming more sympathetic to homeowners because of the prevalence of predatory lending and servicing. They are holding the lender to the law, requiring them to produce evidence that they are the true owners of the Note.

Not only does the foreclosing party need to physically hold the note, but the note must be properly endorsed and transferred every time a mortgage is sold. A clear chain of title must be demonstrated to make the note valid. This is to protect borrowers from fraud – no one can manufacture a note, claim to be a creditor, and then take a homeowner's property. This is especially important when mortgages are securitized and bought and sold a dozen times – if there is no clear chain of title, the borrower can never be sure who is really the creditor. In cases where the note has been sold to a trust, the procedures of transferring mortgages and sales of notes must be documented.

SECURITIZATION

Through discovery, by Plaintiff/counterclaim Defendant's own admissions, and documents produced including the PSA (Pooling and Servicing Agreement) associated with this loan, Counterclaimants John and Julie Dalen have established that the chain of title as presented by the Counterclaim Defendant cannot be true. The purported transfers or assignments are in fact servicing agreement assignments. The note in question has been securitized and was sold to a trust. To show exactly what a trust, by law, always requires, included here is an excerpt from attorney Max Gardner's Dirty Dozen Rules for Ownership of the Mortgage Note:

1) An unbroken chain of transfers and assignments....

In the case of a Residential Mortgage-Backed Securities Trust, it is always necessary for the Trust to establish an unbroken chain of transfers of the mortgage note from the originator to the trust. The objective of the securitization process is to make the mortgage notes as "bankruptcy remote" as is legally possible from any claims against the originator.... The operative document for the mandatory note transfer rules in connection with mortgage notes is the PSA (Pooling and Servicing Agreement).... Also, a mortgage note is transferred by negotiation. Negotiation means the transfer of possession by a person other than the issuer to a person who thereby becomes the holder.

2) Originator to sponsor to depositor to trust.

In the simplest securitized model, the parties to the mandatory chain of transfers include the originator, the sponsor, the depositor and the designated Trustee for the Trust. Almost every trust is organized as a common law trust under the laws of Delaware or New York....

3) Endorsement and transfer of the original note.

The original mortgage notes may be endorsed to a named transferee by each necessary party in the chain of transfers but:

- a) Generally, endorsements must appear at foot of the note if there is room for such endorsements;
- b) If there is not sufficient room at foot or end of the note for such endorsements, then they may appear on an allonge, which must be permanently affixed to the note;

- c) The endorsements are not required to be notarized;
 - d) The endorsements do not have to be dated but must be signed by an authorized agent of transfer;
 - e) If endorsed by an authorized agent, then some proof of the agency should be referenced and/or attached to the note; and
 - f) The Trust should have a designated document custodian who holds the original notes for the Trust as well as all of the delivery and receipt certificates regarding the notes.
- 4) Original notes endorsed in blank. Original notes may be endorsed by the originator but:
- a) If the first endorsement is in "blank" (no payee is named or designated) then the note becomes a "bearer instrument" by operation of law;
 - b) There must be both a delivery and an acceptance receipt to document the transfer and delivery of the bearer note from the originator to the sponsor;
 - c) There must be a delivery and an acceptance receipt to document the transfer and delivery of the bearer note from the sponsor to the depositor;
 - d) There must be a delivery and an acceptance receipt to document the transfer and delivery of the bearer note from the depositor to the Trust; and
 - e) The designated document custodian for the Trust should maintain possession of all such documents including the original bearer note. There should only be one original note.
- 5) The Pooling and Servicing Agreement.
- The Pooling and Servicing Agreement includes origination and cut-off dates for mortgage notes and transfer and delivery dates for the notes to the Trust but:
- a) The Trust has no authority to accept an equitable transfer of a note. Since each transfer must be a true sale for purposes of creating the bankruptcy remote structure, all transfers must follow the steps designated in the structure;
 - b) The Trust has no authority to claim an equitable interest in a note that has not been transferred to the Trust pursuant to strict terms and guidelines of the Pooling and Servicing Agreement;

- c) All steps in the transfer process must be true and complete sales between the parties in order to qualify the Trust for what is called REMIC qualification under the Internal Revenue Code;
 - d) The Trust has no authority to accept a note for no consideration as collateral for a mortgage loan obligation since each transfer must be a true and bona fide sale between the parties....
- 6) **Assignments of the Mortgage or the Deed of Trust**
Assignments relate to real property instruments and have nothing to do with negotiable instruments or other non-negotiable instruments, which are regulated by Article 3 of the Uniform Commercial Code.
- 7) **Assignments Strictly Regulated by State Property Law**
Assignments are strictly regulated by applicable state law. The following are important concepts as they apply to assignments:
- a) Statute of Frauds applies to assignments since these are real property instruments. You cannot assign a mortgage or deed of trust in blank. There is no such thing as a bearer assignment with respect to a mortgage or deed of trust. An "incomplete instrument" is a real estate document that would fail to transfer any statutory rights to the grantee;
 - b) Assignments in the context of Residential Mortgage-Backed Securitized Trust apply only to mortgages and deeds of trust. You cannot assign a note, just like you cannot assign a mortgage or deed of trust in blank. There is no such thing as a "bearer" mortgage or a "bearer" deed of trust;
 - c) The authority of the assignor must be independently established of record for the assignment of a mortgage or deed of trust to be valid....
- 8) **Holder in Due Course Doctrine**
The "Holder in due course" doctrine relates to the notes and has nothing to do with the mortgage or deed of trust. In order to assert a "holder in due course" status, the transfer of the note to the Trust via the required chain must occur before the note is in default and the transferee must take the note without knowledge or notice of any claims or defects in the

document. If the note is in default during any link in the transfer process, the holder in due course status is lost.

9) The A to D Invalid Assignment

Any assignment of a mortgage or deed of trust from the originator directly to the Trust is per se invalid. This is the case because such an assignment would disregard two essential players in the chain of assignments – the sponsor and the depositor. Since this aspect of the securitization process is controlled by applicable state real estate law, the Trust would have to be able to establish “good title” to the mortgage or deed of trust from the depositor. This could never be established with an originator assignment directly to the Trust assignment.

10) The A to D Invalid Negotiation of the Note

Any transfer of the mortgage note from the originator directly to the Trust would likewise be per se invalid. This is the case because such a transfer would disregard the “true sale” of the same note from the originator to the sponsor and the subsequent true sale from the sponsor to the depositor. Any “late” transfer of the note from the originator to the Trust would also be invalid because at that point in time the originator would have no ownership rights in the note. Under the Pooling and Servicing Agreement, the Trust may only purchase the note from the depositor. And, since each transfer must constitute a true and complete sale between the parties, consistent with the Pooling and Servicing Agreement, the Trust must be able to establish an unbroken chain of transfers and deliveries from the originator to the Trust. These rules apply whether or not the notes are endorsed to a named payee in each instance or are endorsed in blank at any process in the chain of transfers.

11) Affidavits

With respect to affidavits, simply attaching documents without first laying a proper evidentiary foundation for the admission of the documents is simply hearsay. Statements such a person collects and maintains as records and documents of a third party do not satisfy the business records exception to the hearsay rule. The affiant must be able to state that the attached documents are created or maintained in the regular course of the affiant’s business, that their creation and maintenance are part of the regular course of the affiant’s business, and that the records were created at or about the time the transaction was

recorded. The mere filing of records or documents maintained by other entities is insufficient to qualify the documents as business records.

12) Destroyed or Lost Notes (N/A)

CONCLUSION

Defendants/Counterclaim Plaintiffs, John and Julie Dalen believe that our 14th Amendment Rights to Due Process of Law are being violated in this action. Due process is violated when banks are allowed to skirt the law or are excused from compliance in the name of expediency. Quoting Judge Learned Hand, "A judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert."

From Ibanez II, 2009 WL 3297551, at *12, "[T]he court is not bound by the legal conclusions in [Plaintiffs'] complaint. Rather, 'it has the duty to enter a judgment that is lawful in light of the facts established even in the absence of a contest before him' and even when that judgment may be unfavorable to the moving party."

We have been before judges who do not understand the securitization process, don't know what MERS is or how it relates to our case, making rulings based on assumptions and manufactured documents. Without this understanding, judges are allowing banks to continue to commit fraud upon the court and they are illegally foreclosing on homeowners. The Defendants/counterclaim Plaintiffs have repeatedly challenged BANA's purported assignment of the mortgage and standing. We have repeatedly been denied discovery of documents that would prove our case.

Because of the complexity of the securitization process and the lack of awareness among judges and lawyers, we have provided to the court numerous law review articles on the subjects of MERS, securitization, and how these relate to the current foreclosure process. These are all in the case file, and with this motion we are including an additional Law Review article as Exhibit F, from the University of Iowa College of Law, 2011, by Timothy A. Froehle, entitled Standing in the Wake of the Foreclosure Crisis: Why Procedural Requirements Are Necessary to Prevent Further Loss to Homeowners.

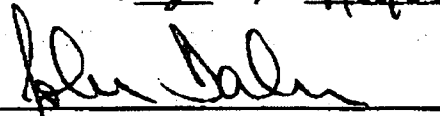
Also included is an article from Butler, Liberty Law Firm, Exhibit G, which is entitled Foreclosure Fraud. Both of these articles lay out scenarios that parallel our case. We believe our judge should review these articles to ensure that he has a good understanding of the securitization process and how it relates to foreclosure cases such as ours.

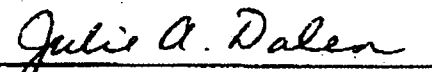
Judge Christopher A. Bokyo stated in his In re Foreclosure cases opinion: "There is no doubt every decision made by a financial institution in the foreclosure process is driven by money.... There is nothing improper or wrong with... making profit, to the contrary, they should be rewarded for sound business and legal practices. However, unchallenged by underfinanced opponents, the institutions worry less about jurisdictional requirements and more about maximizing returns. . . . Finally put to the test, their weak legal arguments compel the Court to stop them at the gate." Foreclosure Cases (Foreclosure Cases I), Nos. 1:07CV2282 et al., 2007 WL 323430, at *3 (N.D. Ohio 2007).

WHEREFORE Defendants respectfully move the court for an order denying plaintiff's/counterclaim defendant's Motion for Summary Judgment, and dismissal of plaintiffs complaint with prejudice, for fraud, lack of standing, and lack of subject matter jurisdiction. We also move the court for an order under Rule 56, granting Defendants/counterclaim plaintiffs' summary judgment on our counterclaims due to counterclaim defendant's fraud upon the Court along with costs and penalties as the Court determines is just and proper and/or in the alternative, send our counterclaims back to Circuit Court for trial by jury as a matter of law.

Submitted by John D. Dalen and Julie A. Dalen

DATED this 8 day of August, 2016


John D. Dalen, Defendant


Julie A. Dalen, Defendant

109 Wood Valley Drive
Westminster, SC 29693
864 647 4705

STATE OF SOUTH CAROLINA

OCONEE COUNTY

Federal National Mortgage Association,
Plaintiff,

v.

John D. Dalen, Julie A. Dalen and
Wawtockace Hills Property
Owners Association,

Defendants Pro Per

v.

Bank of America, N.A., successor by merger to
BAC Home Loans Servicing, L.P. f/k/a
Countrywide Home Loans Servicing, L.P.,

Counterclaim Defendant

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-37-1056

DEFENDANTS

NOTICE OF MOTION AND

MOTION TO DISMISS FOR LACK OF

SUBJECT MATTER JURISDICTION

AND DENIAL OF DUE

PROCESS OF LAW

FILED OCOKEE COUNTY, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2011 FEB 22 A 8:50

**DEFENDANT(S) NOTICE OF MOTION AND
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR
DENIAL OF DUE PROCESS OF LAW**

COMES NOW John D. Dalen, Defendant in the above titled case, upon Motion to dismiss Plaintiffs complaint on the grounds that the Defendants' rights to due process of law have been and are being violated. The Plaintiff(s) do not have standing to foreclose on Defendants' property, and have perpetuated fraud upon the court; and therefore, this court lacks subject matter jurisdiction. Once challenged, subject matter jurisdiction must be proven by the court; it cannot be waived.

MANDATORY JUDICIAL NOTICE

Defendant(s), per rule 201 sec. (d), (e) and (f) move the court to take judicial notice of the following:
Once challenged, subject matter jurisdiction must be proven by the court; it cannot be waived.

- 1) It is clear that a judge who acts in the absence of subject matter jurisdiction may be held liable for his judicial acts. *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099, (1978), *Bradley v. Fisher*, 80 U.S. 335 (1872).
- 2) Where an individual official would be expected to know that certain conduct would violate statutory or constitutional rights he should be made to hesitate. *Harlow v. Fitzgerald*, 102 S. Ct. at 2739 and *Scott v. Dixon* 720 F.2d 1542 (11th Cir. 1983).
- 3) Where a judge presumes to exercise jurisdiction beyond understood boundaries, that judge is not entitled to immunity. *Dykes v. Housemann*, 743 F.2d 1488 (11th Cir. 1984).
- 4) A judge's private, prior agreement to decide in favor of one party is not a judicial act. *Lopez v. Vanderwater*, 620 F.2d 1229 (7th Cir. 1980).
- 5) If a court lacks jurisdiction over a party, then it lacks "all jurisdiction" to adjudicate that party's rights, whether or not the subject matter is properly before it. *Kulko v. Superior Court*, 436 U.S. 84, 98 S. Ct. 1690 (1978).
- 6) Ex parte proceeding would be a flagrant violation of due process, rendering any order null and void. *In re: Wellman*, 3 Kan.App. 100, 45 P. 726, (1896).
- 7) When want of jurisdiction is known to the judge, no excuse is permissible. *Turner v. Raynes*, 611 F.2d92, (5th Cir. 1980).
- 8) Willful misconduct in office or willful and persistent failure to perform his official duties by a judge of the United States shall constitute conduct inconsistent with the good behavior required by article III of the Constitution and shall because for the removal of that judge." When judges act when they do not have jurisdiction to act, or they enforce a void order (an order issued by a judge without jurisdiction), they become trespassers of the law, and are engaged in treason.
- 9) The Court in *Yates v. Village of Hoffman Estates, Illinois*, 209 F. Supp. 757 (N.D. TIL 1962) held that "not every action by a judge is in exercise of his judicial function it is not a judicial function for a judge to commit an intentional tort even though the tort occurs in the courthouse." When a judge acts as a trespasser of the law, when a judge does not follow the law, the judge loses subject-matter jurisdiction and the judges' orders are void, of no legal force or effect.
- 10) The U.S. Supreme Court, in *Scheuer v. Rhodes*, 416 U.S. 232, 94S.Ct. 1683, 1687 (1974) stated that "when a state officer acts under a state law in a manner violative of the Federal constitution, he "comes into conflict with the superior authority of that Constitution, and he is

in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." By law, a judge is a state officer. The judge then acts not as a judge, but as a private individual (in his person).

- 11) The Illinois Supreme Court has held that "if the magistrate has not such jurisdiction, then he and those who advise and act with him, or execute his process, are trespassers." *Von Kettler et.al. v. Johnson*, 57 Ill. 109 (1870).
- 12) Under Federal law which is applicable to all states, the U.S. Supreme Court stated that if a court is "without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers." *Elliot v. Piersol*, 1 Pet. 328, 340, 26 U.S. 328, 340 (1828).
- 13) The Illinois Supreme Court held that if a court "could not hear the matter upon the jurisdictional paper presented, its finding that it had the power can add nothing to its authority, - it had no authority to make that finding." *The People v. Brewer*, 128 Ill. 472, 483 (1928).
- 14) When a judge acts as a trespasser of the law, when a judge does not follow the law, the judge loses subject-matter jurisdiction and the judges' orders are void, of no legal force or effect.

Bank of America, N.A. and FNMA and the law firms representing the banks are engaged in an illegal foreclosure violating the rights of John and Julie Dalen. We have been denied due process of law in this action. **John and Julie Dalen do not consent to these proceedings, demand their rights under the Common Law, including the right to a trial by jury.** Plaintiff(s) are engaged in fraud in an attempt to unlawfully seize Defendants' property.

- 15) *Hurtado v. California*, 110 U.S. 516, 3 Sup. Ct. 111, 292, 28 L.Ed. 232 (1884)

Due process of law is process according to the law of the land Due process of law in the latter (the Fifth Article of Amendment to the Constitution) refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed and interpreted according to the principles of the common law.... Mr. Justice Matthews, delivering the opinion of the court....

* Note that the 14th Amendment insured that all of the above applies to the states.

16) An affirmance results when a judge acts in the clear absence of all jurisdiction, i.e., of authority to act officially over the subject matter in hand, the proceeding coram non iudice. In such a case the judge has lost his judicial function, has become a mere private person, and is liable as a trespasser for the damages resulting from his unauthorized acts. Such has been the law from the days of the case of *The Marshalsea*, 10 Coke 68. It was recognized as such in *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335, 351, 20 L. Ed. 646. In *State ex rel. Egan v. Wolever*, 127 Ind. 306, 26 N.E. 762, 732, the court said: 'The converse statement of it is also ancient. Where there is no jurisdiction at all there is no judge; the proceeding is as nothing.' *Manning v. Ketcham*, 58 F.2d 948 (1932).

17) *McNutt v. GMAC*, 298 US 178

"The burden of proof of jurisdiction lies with the asserter."

18) *Wuest v. Wuest*, 127 P2d 934, 937. *Outboard Marine Corp. v. Thomas*, 610 F. Supp. 1234, 1242 (N.D. Ill., 1985)

"A departure by a court from those recognized and established requirements of law, however close apparent adherence to mere form in method of procedure, which has the effect of depriving one of a constitutional right, is an excess of jurisdiction."

19) The United States Supreme Court has clearly, and repeatedly, held that any judge who acts without jurisdiction is engaged in an act of treason. *U.S. v. Will*, 449 U.S. 200, 216, 101, S. Ct. 471, 66 L. Ed. 2d 392, 406 (1980); *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 404, 5 L. Ed. 257 (1821)

20) "Officials and judges are deemed to know the law and sworn to uphold the law; officials and judges cannot claim to act in good faith in willful deprivation of law, they certainly cannot plead ignorance of the law, even the Citizen cannot plead ignorance of the law, the courts have ruled there is no such thing as ignorance of the law, it is ludicrous for learned officials and judges to plead ignorance of the law therefore there is no immunity, judicial or otherwise, in matters of rights secured by the Constitution for

the United States of America.” Owen vs. City of Independence, 100 S. Ct. 1398; Maine vs. Thiboutot, 100 S. Ct. 2502; and Hafer vs. Melo, 502 U.S. 21

21) Rubinstein v. Collins, 20 F. 3d 160, 1990

“Failure to disclose material information necessary to prevent a statement from being misleading, or making representation despite knowledge that it has no reasonable basis in fact, are actionable as fraud under law.”

Pertaining to the order of the court dated July 28, 2016, which grants counterclaim defendant’s Renewed Motion for Summary Judgment, Defendants inform the court that this action has violated their rights to due process of law. This court did not have subject matter jurisdiction to rule in this matter. Bank of America, N.A., acting as agent for FNMA has committed fraud upon this court. FNMA is continuing the fraud with their manufactured assignment. The evidence clearly shows, as pointed out in the following paragraphs that the Plaintiffs have manufactured a fraudulent chain of title in order to foreclose on Defendants’ property.

22) Counterclaim defendant’s Motion for Summary Judgment was granted in error.

23) Plaintiff(s) are not the real party in interest, and through their agents/law firms have engaged in a conspiracy to defraud Defendants of their property.

24) Because Plaintiff(s) have brought fraud upon the court, this court lacks subject matter jurisdiction over Plaintiff(s)’ complaint.

25) The terms of the Pooling and Servicing Agreement (PSA) prevent anyone from transferring or assigning anything to the subject trust after the trust’s closing date.

26) The note and mortgage were never transferred to the trust by any signatory to the trust.

27) Absent a valid assignment/transfer of the mortgage/note to the trust, the Plaintiff(s) lack both standing and capacity to bring this action.

- 28) Pursuant to the terms of the PSA, the investor beneficiaries are precluded from ratifying any ultra vires acts of the trustee, and thus all such acts are void not voidable.
- 29) Defendant John Dalen is a third party beneficiary of the PSA.
- 30) In mortgage foreclosures, prove up of the chain of title requires presentment of the original promissory note and general account and ledger statement. Claim of damages, to be admissible as evidence, must incorporate records such as a general ledger and accounting of an alleged unpaid promissory note. The person responsible for preparing and maintaining the account general ledger must provide a complete accounting which must be sworn to and dated by the person who maintained the ledger.
- 31) The United States Supreme Court, in *Haines v. Kerner* 404 U.S. 519 (1972), said that all litigants defending themselves must be afforded the opportunity to present their evidence and that the Court should look to the substance of the complaint rather than the form.
- 32) In *Platsky v. CIA*, 953 F.2d 26 (2nd Cir. 1991), the Circuit Court of Appeals allowed that the District Court should have explained to the litigant proceeding without a lawyer the correct form to the litigant so that he could have amended his pleadings accordingly. Defendants respectfully reserve the right to amend their pleadings.
- 33) Constitutional provisions, both state(s) and federal give full faith and credit to judicial proceedings in other states – effective proceedings as evidence or as a bar to further litigation. *M'Elmoyle v. Cohen* 13 Pet. (38 U.S.) 312; 34 C.J. p.1137 and *Chicago & Alton R. Co. v. Wigginsferry Co.*, 108 U.S. 18 (1 Sup. Ct. 614). In ascertaining a particular state's **substantive law** [common law] when the highest court of that state has not spoken, a federal court should "consider relevant cases from jurisdictions other than [the subject state] in an effort to predict 'what would be the decision of reasonable intelligent lawyers,' sitting as judges of the highest . . . Court [of that state], and fully jurisprudence." Further, "[i]t is well established that the court will honor the parties' choice of law where there is a reasonable basis for the choice or the chosen state has some relation to the agreement." *Depositors Trust Co. v. Hudson Gen. Corp.*, 485 F. Supp. 1355, 1359 (E.D.N.Y. 1980).

FRAUD ON THE COURT

- 34) As set forth in *Cox v. Burke*, 706 So. 2d 43, 47 (Fla. 5th DCA 1998): “The basic standards governing fraud on the court are reasonably straightforward.” The requisite fraud on the court occurs where “it can be demonstrated clearly and convincingly that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party’s claim or defense.” *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989). . . . The trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when a plaintiff has perpetrated a fraud on the court, or where a party refuses to comply with court orders. *Kornblum v. Schneider*, 609 So. 2d 138, 139 (Fla. 4th DCA 1992). The (trial) judge must consider the proper mix of factors and juxtapose them reasonably. **“Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.”** *Independent Oil and Chemical Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co.* 864 F.2d 927, 929 (1st Cir. 1988).
- 35) Furthermore under the United States Supreme Court decision of *Carpenter v. Longan*, 83 U.S. 16 Wall, 271 271 (1872), the Deed of Trust or mortgage follows the Promissory Note. Where the promissory note goes, the Deed of Trust/mortgage must follow. Page 83 U.S. 274: The note and mortgage are inseparable; the former as essential, the latter as an incident. **A negotiation or sale of the note carries the mortgage with it, while an assignment of the latter (mortgage) alone is a nullity.**
- 36) The ownership of the mortgage and subsequent assignments follow the promissory note, and not an arbitrary assignment of MERS. The Massachusetts Supreme Court has ruled that before the “lender” may foreclose on a subject property, the “lender” must provide evidence of perfected chain of title in both the mortgage as well as the promissory note. Blank assignments of the promissory note cannot be construed as evidence of perfected

interest. Neither is possession without proper assignment: US Bank National Association vs. Ibanez, (SJC – 10694). Further, notes are sold or negotiated, not assigned.

37) The Defendants, upon information and belief, have reason to believe the following:

- a) The mortgage note has been paid in whole or in part by one or more undisclosed party/parties who prior to or contemporaneously, with the closing of the "loan," paid the originating lender in exchange for certain unrecorded rights to the revenues arising out of the loan documents.
- b) In connection with the matters which are the subject of paragraph "a" as above, the Plaintiff (foreclosing party) has no financial interest in the Note or Mortgage.
- c) The original note was destroyed or was transferred to a structured investment vehicle which may be located offshore, which also has no interest in the Note or Mortgage or revenue therefrom.
- d) The revenue stream deriving from the Note/Mortgage was eviscerated upon one or more assignments of the Note/Mortgage to third parties and parsing of obligations as part of the securitization process, some of whom are joined as co-obligators/co-obligatees, in connection with the closing.
- e) **To the extent which Plaintiff has been paid on the underlying obligation or has no legal interest therein, or in the Note or Mortgage, or does not have lawful possession of the Note or Mortgage, Plaintiff's allegations of possession and capacity to institute foreclosure constitute a fraud upon the Court. Defendants John and Julie Dalen are entitled to a dismissal of the foreclosure claim with prejudice.**

38) If the lender is allowed to proceed without proof, there is a possibility another institution which may have bought our note may attempt to collect the same debt from us again. Courts across the country are becoming more sympathetic to homeowners because of the prevalence of predatory lending and servicing. They are holding the lender to the law, requiring them to produce evidence that they are the true owners of the Note.

39) Not only does the foreclosing party need to physically hold the note, but the note must be properly endorsed and transferred every time a mortgage is sold. A clear chain of title must be demonstrated to make the note valid. This is to protect borrowers from fraud – no one can manufacture a note, claim to be a creditor, and then take a homeowner's property. This is especially important when mortgages are securitized and bought and sold a dozen times – if there is no clear chain of title, the borrower can never be sure who is really the creditor. In cases where the note has been sold to a trust, the procedures of transferring mortgages and sales of notes must be documented.

SECURITIZATION

40) Through discovery, by Plaintiff(s)' own admissions, and documents produced including the PSA (Pooling and Servicing Agreement) associated with this loan, John and Julie Dalen have established that the chain of title as presented by the Plaintiff cannot be true. The note in question has been securitized and was sold to a trust. To show exactly what a trust, by law, always requires, included here is an excerpt from attorney Max Gardner's Dirty Dozen Rules for Ownership of the Mortgage Note:

a) An unbroken chain of transfers and assignments....

In the case of a Residential Mortgage-Backed Securities Trust, it is always necessary for the Trust to establish an unbroken chain of transfers of the mortgage note from the originator to the trust. The objective of the securitization process is to make the mortgage notes as "bankruptcy remote" as is legally possible from any claims against the originator.... The operative document for the mandatory note transfer rules in connection with mortgage notes is the PSA (Pooling and Servicing Agreement).... Also, a mortgage note is transferred by negotiation. Negotiation means the transfer of possession by a person other than the issuer to a person who thereby becomes the holder.

b) Originator to sponsor to depositor to trust.

In the simplest securitized model, the parties to the mandatory chain of transfers include the originator, the sponsor, the depositor and the designated Trustee for the Trust. Almost every trust is organized as a common law trust under the laws of Delaware or New York....

c) Endorsement and transfer of the original note.

The original mortgage notes may be endorsed to a named transferee by each necessary party in the chain of transfers but:

- 1) Generally, endorsements must appear at foot of the note if there is room for such endorsements;
- 2) If there is not sufficient room at foot or end of the note for such endorsements, then they may appear on an allonge, which must be permanently affixed to the note;
- 3) The endorsements are not required to be notarized;
- 4) The endorsements do not have to be dated but must be signed by an authorized agent of transfer;
- 5) If endorsed by an authorized agent, then some proof of the agency should be referenced and/or attached to the note; and
- 6) The Trust should have a designated document custodian who holds the original notes for the Trust as well as all of the delivery and receipt certificates regarding the notes.
- 7) Original notes endorsed in blank. Original notes may be endorsed by the originator but:
 - a) If the first endorsement is in "blank" (no payee is named or designated) then the note becomes a "bearer instrument" by operation of law;
 - b) There must be both a delivery and an acceptance receipt to document the transfer and delivery of the bearer note from the originator to the sponsor;
 - c) There must be a delivery and an acceptance receipt to document the transfer and delivery of the bearer note from the sponsor to the depositor;
 - d) There must be a delivery and an acceptance receipt to document the transfer and delivery of the bearer note from the depositor to the Trust; and

e) The designated document custodian for the Trust should maintain possession of all such documents including the original bearer note. There should only be one original note.

f) The Pooling and Servicing Agreement.

The Pooling and Servicing Agreement includes origination and cut-off dates for mortgage notes and transfer and delivery dates for the notes to the Trust but:

- 1) The Trust has no authority to accept an equitable transfer of a note. Since each transfer must be a true sale for purposes of creating the bankruptcy remote structure, all transfers must follow the steps designated in the structure;
- 2) The Trust has no authority to claim an equitable interest in a note that has not been transferred to the Trust pursuant to strict terms and guidelines of the Pooling and Servicing Agreement;
- 3) All steps in the transfer process must be true and complete sales between the parties in order to qualify the Trust for what is called REMIC qualification under the Internal Revenue Code;
- 4) The Trust has no authority to accept a note for no consideration as collateral for a mortgage loan obligation since each transfer must be a true and bona fide sale between the parties....

5) Assignments of the Mortgage or the Deed of Trust

Assignments relate to real property instruments and have nothing to do with negotiable instruments or other non-negotiable instruments, which are regulated by Article 3 of the Uniform Commercial Code.

6) Assignments Strictly Regulated by State Property Law

Assignments are strictly regulated by applicable state law. The following are important concepts as they apply to assignments:

- g) Statute of Frauds applies to assignments since these are real property instruments. You cannot assign a mortgage or deed of trust in blank. There is no such thing as a bearer assignment with respect to a mortgage or deed of trust. An "incomplete instrument" is a real estate document that would fail to transfer any statutory rights to the grantee;
- h) Assignments in the context of Residential Mortgage-Backed Securitized Trust apply only to mortgages and deeds of trust. You cannot assign a note, just like

you cannot assign a mortgage or deed of trust in blank. There is no such thing as a “bearer” mortgage or a “bearer” deed of trust;

i) The authority of the assignor must be independently established of record for the assignment of a mortgage or deed of trust to be valid....

j) Holder in Due Course Doctrine

The “Holder in due course” doctrine relates to the notes and has nothing to do with the mortgage or deed of trust. In order to assert a “holder in due course” status, the transfer of the note to the Trust via the required chain must occur before the note is in default and the transferee must take the note without knowledge or notice of any claims or defects in the document. If the note is in default during any link in the transfer process, the holder in due the course status is lost.

41) The A to D Invalid Assignment

Any assignment of a mortgage or deed of trust from the originator directly to the Trust is per se invalid. This is the case because such an assignment would disregard two essential players in the chain of assignments – the sponsor and the depositor. Since this aspect of the securitization process is controlled by applicable state real estate law, the Trust would have to be able to establish “good title” to the mortgage or deed of trust from the depositor. This could never be established with an originator assignment directly to the Trust assignment.

42) The A to D Invalid Negotiation of the Note

Any transfer of the mortgage note from the originator directly to the Trust would likewise be per se invalid. This is the case because such a transfer would disregard the “true sale” of the same note from the originator to the sponsor and the subsequent true sale from the sponsor to the depositor. Any “late” transfer of the note from the originator to the Trust would also be invalid because at that point in time the originator would have no ownership rights in the note. Under the Pooling and Servicing Agreement, the Trust may only purchase the note from the depositor. And, since each transfer must constitute a true and complete sale between the parties, consistent with the Pooling and Servicing Agreement, the Trust must be able to establish an unbroken chain of transfers and deliveries from the originator to the Trust. These rules apply whether or not the notes are

endorsed to a named payee in each instance or are endorsed in blank at any process in the chain of transfers.

43) Affidavits

With respect to affidavits, simply attaching documents without first laying a proper evidentiary foundation for the admission of the documents is simply hearsay. Statements such a person collects and maintains as records and documents of a third party do not satisfy the business records exception to the hearsay rule. The affiant must be able to state that the attached documents are created or maintained in the regular course of the affiant's business, that their creation and maintenance are part of the regular course of the affiant's business, and that the records were created at or about the time the transaction was recorded. The mere filing of records or documents maintained by other entities is insufficient to qualify the documents as business records.

CONCLUSION

Defendants John and Julie Dalen believe that our 14th Amendment Rights to Due Process of Law are being violated in this action. Due process is violated when banks are allowed to skirt the law or are excused from compliance in the name of expediency. Quoting Judge Learned Hand, "A judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert."

From Ibanez II, 2009 WL 3297551, at *12, "[T]he court is not bound by the legal conclusions in [Plaintiffs'] complaint. Rather, 'it has the duty to enter a judgment that is lawful in light of the facts established even in the absence of a contest before him' and even when that judgment may be unfavorable to the moving party."

We have been before judges who do not understand the securitization process, don't know what MERS is or how it relates to our case, making rulings based on assumptions and manufactured documents. Without this understanding, judges are allowing banks to continue to commit fraud upon the court and they are illegally foreclosing on homeowners. The Defendants have repeatedly challenged BANA's purported assignment of the mortgage and standing. We have repeatedly been denied discovery of documents that would prove our case. Further, since the assignment of mortgage

to Bank of America is fraud, Bank of America cannot assign what it does not own to FNMA. This is a continuation of the fraud upon the Court and upon the Defendants.

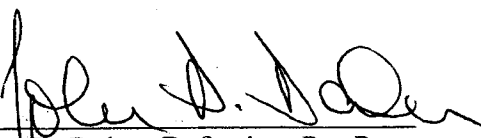
Because of the complexity of the securitization process and the lack of awareness among judges and lawyers, we have provided to the court numerous law review articles on the subjects of MERS, securitization, and how these relate to the current foreclosure process. These are all in the case file. We believe the judge should review these articles to ensure that he has a good understanding of the securitization process and how it relates to foreclosure cases such as ours.

Judge Christopher A. Bokyo stated in his In re Foreclosure cases opinion: "There is no doubt every decision made by a financial institution in the foreclosure process is driven by money.... There is nothing improper or wrong with... making profit, to the contrary, they should be rewarded for sound business and legal practices. However, unchallenged by underfinanced opponents, the institutions worry less about jurisdictional requirements and more about maximizing returns. . . . Finally put to the test, their weak legal arguments compel the Court to stop them at the gate." Foreclosure Cases (Foreclosure Cases I), Nos. 1:07CV2282 et al., 2007 WL 323430, at *3 (N.D. Ohio 2007).

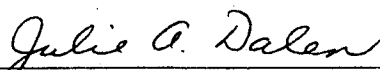
WHEREFORE Defendants move the court to dismiss Plaintiff(s)' complaint with prejudice for bringing fraud upon the court, lack of standing and lack of subject matter jurisdiction and denial of due process of law. Defendants John and Julie Dalen now place all parties to this suit on actual, implied and constructive notice that Defendants will be filing Actions and Claims at Law, in a court of record, to defend our substantive, natural, and common law rights, and recover damages incurred due to this unlawful foreclosure and the actions of the Plaintiffs.

Submitted by John D. Dalen and Julie A. Dalen

DATED this 22 day of February, 2017


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In
The Superior Court of Record of the county of Oconee
At
STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF OCONEE TENTH JUDICIAL CIRCUIT COURT BUILDING

John D. Dalen and Julie A. Dalen,)

PLAINTIFF(S))

Vs.)

Federal National Mortgage Association;)

Bank of America, N.A., successor by)

merger to BAC Home Loans Servicing, L.P.)

f/k/a Countrywide Home Loans Servicing,)

L.P.;)

Rogers Townsend & Thomas, PC;)

Charles S. Gwynne Jr.;)

McGuire Woods LLP;)

Brian A. Calub, Esq.;)

Korn Law Firm;)

Dean A. Hayes, Esq.;)

Ellis B. Drew;)

Steven C. Kirven.)

DEFENDANTS)

Case Number: 2011-37-1056

DECLARATION AT LAW

Claim of trespass on the case (fraud);

Claim of trespass on the case

(abuse of process);

Claim of trespass on the case

(Denial of Due Process of Law);

Claim of trespass on the case

(exceeding jurisdiction);

Action for Quiet Title.

Trial by jury demanded

(attested)

(verified)

(sealed)

2011 FEB 27 A 8:50

FILED OCONEE COUNTY, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT

5

DECLARATION AT LAW FOR THE FOLLOWING CLAIMS:

TRESPASS ON THE CASE (FRAUD); TRESPASS ON THE CASE (ABUSE OF PROCESS);

TRESPASS ON THE CASE (DENIAL OF DUE PROCESS OF LAW);

TRESPASS ON THE CASE (EXCEEDING JURISDICTION); ACTION FOR QUIET TITLE

- 1) COMES NOW John Dennis House of Dalen, a man, donor, grantor, settlor, sole lawful executor, and sole lawful Haeres/Heir/Herus of the JOHN DENNIS DALEN legal Estate, and Julie Ann House of Dalen, a woman, donor, grantor, settlor, sole lawful executrix, and sole

lawful Haeres/Heir/Herus of the JULIE ANN DALEN legal Estate, who are both people of the State of South Carolina, (hereinafter collectively "Plaintiffs and singularly "Plaintiff") and in this Superior Court of Record, (hereinafter "Superior Court") summon Federal National Mortgage Association; Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P.; Rogers Townsend & Thomas, PC; Charles S. Gwynne Jr.; McGuire Woods LLP; Brian A. Calub, Esq.; Korn Law Firm; Dean A. Hayes, Esq.; Ellis B. Drew; Steven C. Kirven, (hereinafter collectively "Defendants" and singularly "Defendant") to answer Plaintiffs Claim of trespass; Claim of trespass on the case (fraud); Claim of trespass on the case (misrepresentation); Claim of trespass on the case (Denial of Due Process of Law); Claim of trespass on the case (exceeding jurisdiction) to wit:

- 2) Defendants Federal National Mortgage Association, Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P., Rogers Townsend and Thomas, PC, Charles S. Gwynne Jr., McGuire Woods LLP, Brian A. Calub, Esq., Korn Law Firm, Dean A. Hayes, Esq., Ellis B. Drew, and Steven C. Kirven have brought fraud upon THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT COUNTY OF OCONEE STATE OF SOUTH CAROLINA (hereinafter "Inferior court") in the filing of their complaint against Plaintiffs therein by misrepresentation of the facts, failing to provide proof of being the holder in due course of the instrument which they bring suit upon, failing to provide proof that anyone but Plaintiffs credit was used to create the securities which they are attempting to claim, failure to provide proof that they are a real party in interest regarding the securities that were created from Plaintiffs credit, violating the pooling and servicing agreement by failing to transfer the instruments in question into the trust, thus denying the Inferior Court subject matter jurisdiction, because "A deception practiced on one person does not give a cause of action to another." Maxim of Law. See Black, Law. Dict. 10th page 1900, and because "An agreement induced by fraud will not stand." Maxim of Law. See Black, Law. Dict. 10th page 1909, and because "No action arises out of a wrongful consideration." Maxim of Law. See Black, Law. Dict. 10th page 1913, and because "It is fraud to conceal a fraud." Maxim of Law. See Black, Law. Dict. 10th page 1915, and because "What is void in the beginning does not become valid by passage of time." Maxim of Law. See Black, Law. Dict. 10th page 1953.

- 3) This Superior Court has jurisdiction to hear the claims of Plaintiffs. Jurisdiction of this Superior Court arises from actions committed by the Defendants in the Inferior court, to deny Plaintiff(s) due process of law by bringing fraud upon the Inferior court in an attempt to unlawfully foreclose on Plaintiffs' property, located at: Oconee County, State of South Carolina, lot number Twenty Eight (28), Block "A" Wawtockace Hills n/k/a Westlake Estates, as shown more fully described on a plat thereof prepared by Stephen R. Edwards. PLS #19881 dated July 31, 2006 and recorded in Plat Book B172, at page 10, records of Oconee County, South Carolina. Defendant(s) are not the real party in interest, and through their agents/law firms have engaged in a conspiracy to defraud Plaintiffs of their property.

FACTS OF THE CASE

- 4) Plaintiff signed a note with Quicken Loans, Inc. on or about December 20, 2007.
- 5) Plaintiff was not made aware that the note was to be used to create the funds for the loan. In essence, Plaintiff John Dalen, upon information and belief, in fact funded his own loan.
- 6) Plaintiff John Dalen is a third party beneficiary of the PSA. See **EXHIBITS B, E**.
- 7) Plaintiff was never told the loan was to be securitized, sold, assigned, and resold numerous times.
- 8) The note and mortgage were never transferred to the trust by any signatory to the trust. See **EXHIBIT H**.
- 9) In deposition evidence **Exhibit A** the designated witness for Bank of America, N.A., Zachary Chromiak on September 12, 2014 confirmed that FNMA became the owner of the note on January 14, 2008.
- 10) In **EXHIBIT B**, Plaintiff's Answers to Request for Admissions, Answers to Interrogatories, Bank of America, N.A. denied the note had been securitized whereas FNMA confirmed that the Note had been securitized. This Exhibit is rife with examples of fraud and misrepresentation, the types of illegal activities the banks were sued for in **EXHIBIT K**.
- 11) Bank of America, N.A. filed lis pendens with its complaint on October 31, 2011 – **Exhibit C**.

- 12) In Defendants complaint, Bank of America, N.A. claims an assignment of mortgage dated May 9, 2011 transferred the note and mortgage to BAC Home Loans Servicing and Countrywide Home Loans Servicing – **Exhibit D.**
- 13) By corporate merger, Bank of America, N.A. in its complaint claims to have acquired status as present lien holder and plaintiff – **Exhibit D.**
- 14) Because it is a security, the note has been separated from the mortgage and is no longer a secured loan. See **EXHIBITS B, E** and John Dalen thereby claims the proceeds as an undisclosed third party beneficiary.
- 15) Evidence of the trust agreement is the Pooling and Servicing Agreement (PSA). Plaintiff obtained a copy of the PSA associated with this loan by order of Judge Alexander Macauley on June 18, 2013 – **Exhibit E.**
- 16) A letter from Korn Law Firm attorney, Dean A. Hayes to Judge Macauley delivering the PSA to the court states that the loan was reclassified out of the trust as of March 21, 2011– **Exhibit F.**
- 17) The assignments claimed by Bank of America, N.A. are manufactured by Bank of America, N.A. to facilitate an unlawful foreclosure, thus bringing fraud upon the court and the Plaintiff.
- 18) The assignment dated May 9, 2011 is evidence of that fraud – **Exhibit G.**
- 19) The chain of title is broken. No assignment or transfer to the trust is recorded or noted on the back of the note. No assignment from the trust to any entity is recorded or noted on the back of the note – **EXHIBIT H.**
- 20) The notary signature on the assignment dated May 9, 2011 is not valid because California law requires notaries to sign using the signature they used to sign their application for notary – **Exhibit I.**
- 21) The notary, Jennie Kogak admits to “high volume notary services for Bank of America” signing up to 350 plus documents per day – **Exhibit J.**

- 22) Bank of America, N.A. settled a lawsuit with all 50 States Attorneys General. Among the complaints in that lawsuit was that Bank of America engaged in document manufacturing and robo-signing – **Exhibit K.**
- 23) The assignment dated May 9, 2011 contains a signature for a MERS Vice President. The signee is Youda Crain. MERS has no employees, and Youda Crain, upon information and belief, is/was an employee of Bank of America, N.A – **Exhibit G..**
- 24) The assignment dated May 9, 2011 contains the words “for value received” and this is untrue as no value was exchanged – **Exhibit G.**
- 25) Plaintiffs have been denied a jury trial by the defendant(s). Plaintiffs' previous counterclaims against Bank of America, N.A. were improperly dismissed in the granting of summary judgment to Bank of America.
- 26) Once challenged, subject matter jurisdiction must be proven by the court; it cannot be waived. Bank of America, N.A. and FNMA as well as Ellis B. Drew and Steven C. Kirven and the law firms representing the banks are engaged in an illegal foreclosure violating the rights of John and Julie Dalen. We have been denied due process of law in this action. John and Julie Dalen demand their rights under the Common Law, including the right to a trial by jury. Defendants are engaged in fraud in an attempt to unlawfully seize Plaintiffs' property.

LAW OF THE CASE

The law of the case is hereby decreed as follows:

- 27)"The very meaning of 'sovereignty' is that the decree of the sovereign makes law." American Banana Co. v. United Fruit Co., 29 S.Ct. 511, 513, 213 U.S. 347, 53 L.Ed. 826, 19 Ann.Cas. 1047.

THE COURT:

- 28)COURT. The person and suit of the sovereign; the place where the sovereign sojourns with his regal retinue, wherever that may be. [Black's Law Dictionary, 5th Edition, 318.]

29)COURT. An agency of the sovereign created by it directly or indirectly under its authority, consisting of one or more officers, established and maintained for the purpose of hearing and determining issues of law and fact regarding legal rights and alleged violations thereof, and of applying the sanctions of the law, authorized to exercise its powers in the course of law at times and places previously determined by lawful authority. [Isbill v. Stovall, Tex.Civ.App., 92 S.W.2d 1067, 1070; Black's Law Dictionary, 4th Edition, page 425]

30)COURT OF RECORD. This Superior Court is a "court of record" and it is a judicial tribunal having the following attributes "a-e" defined below with authorities cited:

31)a) A judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it [Jones v. Jones, 188 Mo.App. 220, 175 S.W. 227, 229; Ex parte Gladhill, 8 Metc. Mass., 171, per Shaw, C.J. See, also, Ledwith v. Rosalsky, 244 N.Y. 406, 155 N.E. 688, 689] [Black's Law Dictionary, 4th Ed., 425, 426]

b) Proceeding according to the course of common law [Jones v. Jones, 188 Mo. App. 220, 175 S.W. 227, 229; Ex parte Gladhill, 8 Metc. Mass., 171, per Shaw, C.J. See, also, Ledwith v. Rosalsky, 244 N.Y. 406, 155 N.E. 688, 689] [Black's Law Dictionary, 4th Ed., 425, 426]

c) Its acts and judicial proceedings are enrolled, or recorded, for a perpetual memory and testimony. [3 Bl. Comm. 24; 3 Steph. Comm. 383; The Thomas Fletcher, C.C.Ga., 24 F. 481; Ex parte Thistleton, 52 Cal 225; Erwin v. U.S., D.C.Ga., 37 F. 488, 2 L.R.A. 229; Heining v. Davis, 96 Ohio St. 205, 117 N.E. 229, 231] [Black's Law Dictionary, 4th Ed., 425, 426]

d) Has power to fine or imprison for contempt. [3 Bl. Comm. 24; 3 Steph. Comm. 383; The Thomas Fletcher, C.C.Ga., 24 F. 481; Ex parte Thistleton, 52 Cal 225; Erwin v. U.S., D.C.Ga., 37 F. 488, 2 L.R.A. 229; Heining v. Davis, 96 Ohio St. 205, 117 N.E. 229, 231.][Black's Law Dictionary, 4th Ed., 425, 426]

e) Generally possesses a seal. [3 Bl. Comm. 24; 3 Steph. Comm. 383; The Thomas Fletcher, C.C.Ga., 24 F. 481; Ex parte Thistleton, 52 Cal 225; Erwin v. U.S., D.C.Ga., 37 F.

488, 2 L.R.A. 229; *Heininger v. Davis*, 96 Ohio St. 205, 117 N.E. 229, 231.] [Black's Law Dictionary, 4th Ed., 425, 426]

32) The word "magistrate" does not necessarily imply an officer exercising any judicial functions, and might very well be held to embrace notaries and commissioners of deeds. *Shultz v. Merchants' Ins. Co.*, 57 Mo. 336.

33) ...no statutory or constitutional court (whether it be an appellate or Supreme Court) can second guess the judgment of a court of record. "The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it." *Ex BUSTAMONTE*, 412 U.S. 218, 255 (1973)]

34) "Inferior courts" are those whose jurisdiction is limited and special and whose proceedings are not according to the courts of the common law. *Ex Parte Kearny*, 55 Cal. 212; *Smith v. Andrews*, 6 Cal. 652.

35) To constitute a court as a superior court as to any class of actions, within the common-law meaning of that term, its jurisdiction of such actions must be unconditional, so that the only thing requisite to enable the court to take cognizance of them is the acquisition of jurisdiction of the persons of the parties. *Simmons v. De Bare*, 4 Bosw., N.Y., 547

36) Due process of law is process according to the law of the land Due process of law in the latter (the Fifth Article of Amendment to the Constitution) refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed and interpreted according to the principles of the common law.... Mr. Justice Matthews, delivering the opinion of the court.... 34) *Hurtado v. California*, 110 U.S. 516, 3 Sup. Ct. 111, 292, 28 L.Ed. 232 (1884)

* Note that the 14th Amendment insured that all of the above applies to the states.

37) "...at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects...with none to govern but

themselves....". CHISHOLM v. GEORGIA (US) 2 Dall 419, 454, 1 L Ed 440, 455 @DALL (1793) pp 471-472.

38)"The people of this State, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to the King by his prerogative." Lansing v. Smith, 4 Wend. 9 (N.Y.) (1829). 21 Am. Dec. 89.

39)A consequence of this prerogative is the legal *ubiquity* of the king. His majesty in the eye of the law is always present in all his courts, though he cannot personally distribute justice. (Fortesc.c.8. 2Inst.186) His judges are the mirror by which the king's image is reflected. 1 Blackstone's Commentaries, 270, Chapter 7, Section 379.

40) Rubinstein v. Collins, 20 F. 3d 160, 1990

"Failure to disclose material information necessary to prevent a statement from being misleading, or making representation despite knowledge that it has no reasonable basis in fact, are actionable as fraud under law."

41) Furthermore under the United States Supreme Court decision of Carpenter v. Longan, 83 U.S. 16 Wall, 271 271 (1872), the Deed of Trust or mortgage follows the Promissory Note. Where the promissory note goes, the Deed of Trust/mortgage must follow. Page 83 U.S. 274: The note and mortgage are inseparable; the former as essential, the latter as an incident. **A negotiation or sale of the note carries the mortgage with it, while an assignment of the latter (mortgage) alone is a nullity.** Defendant(s)' assignment of mortgage by MERS Corp. claims to assign the note also and this is an impossibility for at least two reasons: MERS does not have any interest in the note or authority to negotiate the note, and notes must be negotiated, not assigned.

COUNT ONE: TRESPASS ON THE CASE (FRAUD

42) Paragraphs 4 through 41 are included by reference as though fully stated herein.

Defendant(s) conspired to injure, oppress, threaten and intimidate Plaintiff(s), two of the people of the State of South Carolina in the free exercise and enjoyment of Plaintiff(s)

unalienable right to be left alone with a right to the due process of law. Defendant(s) were repeatedly noticed that their written conclusions were false and damaging. Defendant(s) refused to correct their false statements and continued to intimidate and harass Plaintiff(s) to submit and pay erroneous bills.

In their judicial foreclosure action, the defendants cannot be the real party in interest, and have no standing to foreclose because under U.S. Securities and Exchange Commission rules and Title 26 REMIC rules, the loan is an unsecured debt, owned without recourse by another entity, namely, the owners of the certificates created by the Trust agreement dated June 1, 2007, Amended and restated 2007 Single-Family Master Trust Agreement January 1, 2009.

43) The PSA states in relevant parts to this case as follows:

This amended and restated 2007 Single-Family Master Trust agreement is executed by Federal National Mortgage Association ("Fannie Mae"), in its corporate capacities as Issuer, Master Servicer, and Guarantor, and in its capacity as Trustee.

44) PSA Section 2.1(1) Transfer and conveyance of Mortgage loans.

By delivering at least one Certificate of a Trust in the manner described in Section 3.1, the issuer unconditionally, absolutely and irrevocably sets aside, transfers, assigns, sets over and otherwise conveys to the Trustee, on behalf of related Holders, all of the Issuer's right, title, and interest in and to the Mortgage loans in the related pool, together with any pool proceeds.

45) Evidence obtained through discovery and deposition shows that FNMA became the owner of the loan in January of 2008. Admissions in discovery by FNMA show that the note was securitized.

46) According to the agreement (PSA) between the original lender and its assigns/seller and buyer, it is "not the intention of such parties that such transfer be deemed the grant of a security interest in the Mortgage loans by the depositor to the Trustee to secure a debt or other obligation of the depositor." Section 2.1(3)

In other words, the ultimate seller in the chain of title and the buyer intend that the loan be separated "without recourse" from the mortgage. The loan is now no longer secured by the mortgage or the property. The loan is now itself a security for the investors under the United States Securities and Exchange Commission (SEC) promulgated law. By doing that, there are certain tax advantages granted by Title 26 United States Code relating to REMIC'S.

- 47) Because the Note and Mortgage are irrevocably (without recourse) separated, the present owner of the loan cannot foreclose on the property, nor may the present owner delegate a power greater than what it possesses.
- 48) The PSA confirms that the loan has been securitized. The real and only party to have standing is the actual investor(s) of the certificates. The Mortgage and the Note have been separated: the Note has been turned into a "share" and divided into parts equivalent to investors. To maximize value and lower risks of pooling payments on fixed assets allows for increased liquidity and thus aids the total market. But, in so doing, there is no actual individual beneficial Note owner. Because the Mortgage is divided from the Note, the foreclosure action has no force as noted in *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W. 3d 619,623, 2009 WL 531057 (Mo. App., 2009).
- 49) For those reasons Defendant(s) have no right to foreclose on the land. The original lender, cited in the Mortgage by defendant(s), sold the loan, either directly or through a chain of sales, without recourse, to FNMA, who then securitized the Note and sold beneficial interests to investors through the 2007 single-family master trust agreement (PSA). Defendant(s) do not own the land or the Note or the Mortgage. The Note and the Mortgage are each separately owned, without recourse by the Trust. Article II, Section 2.1 of the PSA (pooling and servicing agreement) specifically designates that the 2007 single family master trust agreement is the trust into which the Note is converted into a stock or equivalent without recourse.
- 50) Once the Note is sold without recourse as a stock or equivalent, it is no longer a secured note. When securitized under U.S. Securities and Exchange Commission rules, the Note forever loses its security component (mortgage), and the right to foreclose the mortgage is forever lost. To foreclose without said right is an injury to the Plaintiff. If both the Note and

the stock or equivalent exist at the same time, that is known as "double dipping", a form of securities fraud by the defendant(s), and its principal. That is because the lender sold the loan, is paid, and now the ex-owners are attempting to collect on the loan a second time ("double dipping").

- 51) The lending practices show fraud, because the borrower had neither knowledge nor inclination of these practices being performed by all entities and their agents. The foreclosing trustee should exercise a close review of the facts in this case, before moving forward with this foreclosure.
- 52) The defendant(s) and others acting in concert with defendant(s) have publicly clouded title to the land and libeled our standing and good name in the credit community.
- 53) Because the Note was sold, pooled and converted into a security, stock or equivalent, the alleged holder can no longer claim that it is the real party in interest for purposes of foreclosure. Further, once the Note is converted into a stock or stock equivalent, it is no longer a Note. If both the Note and the stock were to exist at the same time, that is known as double dipping. Double dipping is a form of securities fraud because more than one entity is attempting to claim the full face value.
- 54) Defendant(s) owed Plaintiff a legal duty to exercise reasonable care and instead defendant(s) breached their duty of care and Plaintiff(s) suffered damages as a direct result of the breach.

COUNT TWO: TRESPASS ON THE CASE

DENIAL OF DUE PROCESS

- 55) Plaintiff restates the foregoing paragraphs 4 through 54.

Defendants illegally perverted the legal system against Plaintiff(s). Defendants had ulterior motive(s) in exercising perverted use(s) of the system; Plaintiff(s) suffered damages as a direct result of the actions of the Defendants and the Inferior Court. Defendant(s) publicized Plaintiff(s)' private affairs by reporting an illegal lien without due process of law, to credit agencies causing economic damages to Plaintiff(s).

COUNT THREE: TRESPASS ON THE CASE
ABUSE OF PROCESS

56) Plaintiff restates the foregoing paragraphs 4 through 54.

Defendants had an obligation to take corrective action but failed to exercise reasonable care. Defendants by their abuse of process created a chilling effect, putting in jeopardy life, limb and property, causing Plaintiff(s) to suffer harm resulting from Defendant's failure to exercise reasonable care to perform the services Defendants were obligated to perform.

COUNT FOUR: TRESPASS ON THE CASE
EXCEEDING JURISDICTION

57) Plaintiff restates the foregoing paragraphs 4 through 54.

An affirmance results when a judge acts in the clear absence of all jurisdiction, i.e., of authority to act officially over the subject matter in hand, the proceeding coram non judice. In such a case the judge has lost his judicial function, has become a mere private person, and is liable as a trespasser for the damages resulting from his unauthorized acts. Such has been the law from the days of the case of The Marshalsea, 10 Coke 68. It was recognized as such in Bradley v. Fisher, 13 Wall. (80 U.S.) 335, 351, 20 L. Ed. 646. In State ex rel. Egan v. Wolever, 127 Ind. 306, 26 N.E. 762, 732, the court said: 'The converse statement of it is also ancient. Where there is no jurisdiction at all there is no judge; the proceeding is as nothing.' Manning v. Ketcham, 58 F.2d 948 (1932).

58) McNutt v. GMAC, 298 US 178

"The burden of proof of jurisdiction lies with the asserter."

59) Wuest v. Wuest, 127 P2d 934, 937. Outboard Marine Corp. v. Thomas, 610 F. Supp. 1234, 1242 (N.D. Ill., 1985)

"A departure by a court from those recognized and established requirements of law, however close apparent adherence to mere form in method of procedure, which has the effect of depriving one of a constitutional right, is an excess of jurisdiction."

- 60) The United States Supreme Court has clearly, and repeatedly, held that any judge who acts without jurisdiction is engaged in an act of treason. U.S. v. Will, 449 U.S. 200, 216, 101, S. Ct. 471, 66 L. Ed. 2d 392, 406 (1980); Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 404, 5 L. Ed. 257 (1821)

CONCLUSION

- 61) Because Defendant(s) have brought fraud upon the Inferior Court, said Court lacks subject matter jurisdiction over Defendant(s) complaint.
- 62) Bank of America, N.A. filed lis pendens with its complaint on October 31, 2011 clouding title to Plaintiff's land.
- 63) Absent a valid assignment/transfer of the mortgage/note to the trust, the Defendant(s) lack both standing and capacity to bring an action against Plaintiffs.
- 64) Pursuant to the terms of the PSA, the investor beneficiaries are precluded from ratifying any ultra vires acts of the trustee, and thus all such acts are void not voidable.
- 65) In mortgage foreclosures, for one to prove chain of title requires presentment of the original promissory note and general account and ledger statement. Claim of damages, to be admissible as evidence, must incorporate records such as a general ledger and accounting of an alleged unpaid promissory note. The person responsible for preparing and maintaining the account general ledger must provide a complete accounting which must be sworn to and dated by the person who maintained the ledger.

SMS Financial LLC v. Abco Homes, Inc. No.98-50117 February 18, 1999 (167 F. 3d. 235; 5th Circuit Court of Appeals.) Where the complaining party cannot prove the existence of the note, then there is no note. To recover on a promissory note, the plaintiff must prove: (1) the

existence of the note in question; (2) that the party sued signed the note; (3) that the plaintiff is the owner or holder of the note; and (4) that a certain balance is due and owing on the note. Since no one is able to produce the "instrument" there is no competent evidence before the Court that any party is the holder of the alleged note or the true holder in due course.

New Jersey common law dictates that the plaintiff prove the existence of the alleged note in question, prove that the party sued signed the alleged note, prove that the plaintiff is the owner and holder of the alleged note, and prove that certain balance is due and owing on any alleged note. Federal Circuit Courts have ruled that the only way to prove the perfection of any security is by actual possession of the security. See; Matter of Staff Mortg. & Inv. Corp., 550 F.2d 1228 (9th Cir 1977), "Under the Uniform Commercial Code, the only notice sufficient to inform all interested parties that a security interest in instruments has been perfected is actual possession by the secured party, his agent or bailee." Bankruptcy Courts have followed the Uniform Commercial Code. In Re Investors & Lenders, Ltd. 165 B.R. 389 (Bkrcty.D.N.J.1994), Unequivocally the Court's rule is that in order to prove the "instrument", possession is mandatory.

In addition to the note, another element of proof is necessary – an accounting that is signed and dated by the person responsible for the account. Claim of damages, to be admissible as evidence, must incorporate records such as a general ledger and accounting of an alleged unpaid promissory note, the person responsible for preparing and maintaining the account general ledger must provide a complete accounting which must be sworn to and dated by the person who maintained the ledger. See Pacific Concrete F.C.U. V. Kauanoe, 62 Haw. 334, 614 P.2d 936 (1980), GE Capital Hawaii, Inc. v. Yonenaka 25 P.3d 807, 96 Hawaii 32, (Hawaii App 2001), Fooks v. Norwich Housing Authority 28 Conn. L. Rptr. 371, (Conn. Super.2000), and Town of Brookfield v. Candlewood Shores Estates, Inc. 513 A.2d 1218, 201 Conn.1 (1986).

66) Because the note was securitized and placed in a trust/REMIC it is no longer a secured note, but is in fact "securitized". This means it has become a security and can never be converted back to a note. Under FAS 140, which is the generally accepted accounting method used by the financial industry, the original lender sold it to the REMIC and forever

lost their rights to enforce the note. By pooling and tranching, the note was converted from negotiable to a non-negotiable instrument. (See Article VIII Uniform Commercial Code.)

REMIC rules are very specific; to qualify as a REMIC under federal and state tax codes the SPV (Special Purpose Vehicle) had to meet very stringent requirements. With respect to RMBS (Residential Mortgage-Backed Securities), the controlling trust document is known as the PSA (Pooling and Servicing Agreement). One function of the PSA is to establish the rules governing the trust such that the trust's activities and management conform to IRC 860, the section of the IRS code that gives the REMIC its tax-free pass-through status.

Once the loan has been written off, it is discharged. Once a loan has been securitized, re-attachment is impossible for the following reasons:

- a) Permanent conversion: The promissory note has been converted into a stock as a permanent fixture. Its nature is forever changed. It is now and forever a stock. It is treated as a stock and governed as a stock under the SEC (Securities and Exchange Commission). Since the mortgage secures the promissory note, once the note is destroyed, the mortgage secures nothing; therefore the mortgage is invalid.
- b) The asset has been written off. Once an asset is written off, the debt is discharged since the owner of the asset has received compensation for the discharge in the form of tax credits from the IRS. The debt has been settled. The servicer acts as a debt collector of an unsecured note. The servicer is deceiving the Court, the County and the borrower when it tries to re-attach the note to the mortgage as if nothing has happened -- it's called "adhesion".
- c) Broken chain of assignment. Under the Uniform Commercial Code (UCC) the promissory note is a one of a kind instrument. All assignments have to be done as a permanent fixture onto the original promissory note. The original note has the only legally-binding chain of title. Without a proper chain of title, the instrument is faulty.

Once the loan has been securitized, the note is no more. Anything the lender brings to Court as evidence is prima facie evidence of fraud. The attorney(s) for the lender are accessory to the fraud either through ignorance or willful intent.

- 67) The chain of title is broken. No assignment or transfer to the trust is recorded or noted on the back of the note. No assignment from the trust to any entity is recorded or noted on the back of the note – **Exhibit H**.
- 68) Defendant(s) and the unidentified principle have no standing to foreclose on the loan in which they have no ownership interest.
- 69) Because the assignment to Bank of America is improper, and in fact invalid and fraud upon the court, Bank of America had no ability to assign the note and mortgage to FNMA.

Pertaining to the order of the court dated July 28, 2016, which grants Counterclaim defendant Bank of America, N.A.'s Renewed Motion for Summary Judgment; Plaintiffs inform the court that this action has violated Plaintiffs' rights to due process of law. This court did not have subject matter jurisdiction to rule in this matter. Bank of America, N.A., acting as agent for FNMA has committed fraud upon this court. FNMA is continuing the fraud with their manufactured assignment. As shown in paragraphs 4 through 26 above, the evidence clearly shows that Defendant(s) has/have manufactured a fraudulent chain of title in order to foreclose on Plaintiffs' property.

- 70) The ownership of the mortgage and subsequent assignments follow the promissory note, and not an arbitrary assignment of MERS. The Massachusetts Supreme Court has ruled that before the "lender" may foreclose on a subject property, the "lender" must provide evidence of perfected chain of title in both the mortgage as well as the promissory note. Blank assignments of the promissory note cannot be construed as evidence of perfected interest. Neither is possession without proper assignment: US Bank National Association vs. Ibanez, (SJC – 10694). Further, notes are sold or negotiated, not assigned.

The Plaintiff(s), upon information and belief, have reason to believe the following:

- a) The mortgage note has been paid in whole or in part by one or more undisclosed party/parties who prior to or contemporaneously, with the closing of the "loan," paid the originating lender in exchange for certain unrecorded rights to the revenues arising out of the loan documents.

- b) In connection with the matters which are the subject of paragraph "a" as above, the plaintiff (foreclosing party) has no financial interest in the Note or Mortgage.
- c) The original note was destroyed or was transferred to a structured investment vehicle which may be located offshore, which also has no interest in the Note or Mortgage or revenue therefrom.
- d) The revenue stream deriving from the Note/Mortgage was eviscerated upon one or more assignments of the Note/Mortgage to third parties and parsing of obligations as part of the securitization process, some of whom are joined as co-obligators/co-obligatees, in connection with the closing.
- e) **To the extent which Defendant(s) has been paid on the underlying obligation or has no legal interest therein, or in the Note or Mortgage, or does not have lawful possession of the Note or Mortgage, defendant(s)' allegations of possession and capacity to institute foreclosure constitute a fraud upon the Court.**

- 71) If the lender is allowed to proceed without proof, there is a possibility another institution which may have bought our note may attempt to collect the same debt from us again. Courts across the country are becoming more sympathetic to homeowners because of the prevalence of predatory lending and servicing. They are holding the lender to the law, requiring them to produce evidence that they are the true owners of the Note.
- 72) Not only does the foreclosing party need to physically hold the note, but the note must be properly endorsed and transferred every time a mortgage is sold. A clear chain of title must be demonstrated to make the note valid. This is to protect borrowers from fraud – no one can manufacture a note, claim to be a creditor, and then take a homeowner's property. This is especially important when mortgages are securitized and bought and sold a dozen times – if there is no clear chain of title, the borrower can never be sure who is really the creditor. In cases where the note has been sold to a trust, the procedures of transferring mortgages and sales of notes must be documented.
- 73) From Ibanez II, 2009 WL 3297551, at *12, "[T]he court is not bound by the legal conclusions in [Plaintiffs'] complaint. Rather, 'it has the duty to enter a judgment that is lawful in light of the facts established even in the absence of a contest before him' and even when that judgment may be unfavorable to the moving party."

74) Judge Christopher A. Bokyo stated in his In re Foreclosure cases opinion: "There is no doubt every decision made by a financial institution in the foreclosure process is driven by money.... There is nothing improper or wrong with... making profit, to the contrary, they should be rewarded for sound business and legal practices. However, unchallenged by underfinanced opponents, the institutions worry less about jurisdictional requirements and more about maximizing returns. . . . Finally put to the test, their weak legal arguments compel the Court to stop them at the gate." Foreclosure Cases (Foreclosure Cases I), Nos. 1:07CV2282 et al., 2007 WL 323430, at *3 (N.D. Ohio 2007).

75) WHEREFORE, Plaintiff lawfully moves this Court of Record for a judgment as follows: to find that Plaintiff has the right to own the land, and without encumbrance as security for the loan, and seeks an order from the Superior court ordering the same.

76) Further, Plaintiff moves the court to issue an enforceable order requiring ceasing of all foreclosure proceedings against the land, with prejudice. Plaintiff seeks an order from the Superior Court confirming Defendants Ellis B. Drew and Steven C. Kirven have violated Plaintiff(s)' right to due process of law, an order dismissing all proceedings in the Inferior Court with prejudice due to lack of subject matter jurisdiction and fraud upon the Court and Plaintiff(S). Furthermore, we seek an order from this Superior Court for sanctions against Ellis B. Drew and Steven C. Kirven, as the Court deems proper, and sanctions against the remaining defendant banks and attorneys representing them as the Court deems proper for bringing fraud upon the Court and the plaintiff(s).

COUNT FIVE: ACTION FOR QUIET TITLE

77) Plaintiff is domiciled on the Land and seeks a determination from the Superior Court that he is the allodial owner, i.e. Title Holder of the Land in allodium based upon the determination of the three counts above against the Defendant(s) named above who are making adverse claims to the title.

78) Plaintiff knows of no other person required to be named as a defendant. Plaintiff asserts this claim against other defendants "styled as all persons unknown, claiming any legal or

equitable right, title, estate, lien, or interest in the Property described in the complaint adverse to plaintiff's title, or any cloud upon plaintiff's title thereto." Further, Plaintiff knows of no validity of any adverse claim. The State is not a party to this action.

- 79) Plaintiff has served defendant(s) Ellis B. Drew and Steven C. Kirven at their Anderson County Courthouse address, and FNMA and Bank of America, N.A. at the offices of their attorneys of record, and as well the attorneys of record were served at those same addresses.
- 80) There is no known or unknown defendant who is in open and actual possession of the Land. Plaintiff is in open and actual possession of the Land.
- 81) Plaintiff(s) are ignorant of the true names and capacities of any other defendants and, when ascertained, will amend this action to allege their true names and capacities, and Plaintiffs are informed and believe that, at all times herein mentioned, each of said other defendants (excepting Ellis B. Drew and Steven Kirven) is the agent and employee of each of the remaining defendants and is at all times acting within the purpose and scope of such agency and employment.
- 82) Plaintiff(s) are informed and believe and thereupon allege that Defendant(s) claims an interest in the Land adverse to Plaintiffs herein. However, the claim of said Defendant(s) is without any right whatsoever, and said Defendant(s) have no lawful, legal or equitable right, claim, or interest in said Land.
- 83) The effective date of Title sought is January 14, 2008. That is the date that FNMA became owner of the Note which was then split from the mortgage without recourse in accordance with the terms of the PSA and Title 26 United States Code concerned with REMICs.
- 84) Plaintiff(s) are at all times herein mentioned the owner and/or entitled to possession of the Property. Plaintiff(s) are informed and believe and thereupon allege that Defendant(s) claims an interest in the Land adverse to Plaintiff(s)' herein. However, said claim of said Defendant(s) are without any right whatsoever, and said Defendant(s) have not lawful right, equitable right, title, estate, lien, nor interest in said Land. Defendant(s) said claim constitutes a cloud upon the title of the Land. The reasons for the allegation are fully stated in the above *Four Counts*.

- 85) After the Court settles the *Four Counts* above, Plaintiff(s) request that the above-entitled Court of Record resolve the issue of quieting the title to the Land in accordance with South Carolina Code of Laws, Title 15, Chapter 67, Recovery of Real Property, Article One.
- 86) Plaintiff(s) therefore demand that the Superior Court enter an order that the title to the subject Land is held by Plaintiff(s) alone and that the Defendant(s) be declared to have no estate, right, title or interest in the subject Land and that said Defendant(s) be forever enjoined from asserting any estate, right, title or interest in the subject Land adverse to Plaintiff herein.
- 87) For these causes of action and claims therefore Plaintiff brings his suit.
- 88) WHEREFORE, Plaintiff(s) require(s) relief and judgment against Defendant(s) as follows:
- 89) That the title to the subject Land is to be held by Plaintiff(s) alone against the adverse claims to the Title of the Land by the Defendant, and that the Defendant herein and other unknown claimants, be declared to have no estate, right, title or interest in the subject Land and that said Defendant, and each of other unknown claimants, be forever enjoined from asserting any estate, right, title or interest in the subject Land adverse to Plaintiff.
- 90) For a declaration and determination that Plaintiff is the rightful holder of allodial title the Land.
- 91) For a declaratory judgment that Defendant(s) have acted arbitrarily, capriciously, and have abused its discretion, and have acted ultra vires not in accordance with law, but under color of law, which resulted in injury to Plaintiff(s)'s right to a good name and community status;
- 92) For general damages equal to the claimed balance of the debt, namely \$160,000; or as determined by the Court;
- 93) For punitive damages equal to two times the general damages for fraud and extortion accompanied by the threat of use of force (i.e. trespass).
- 94) For costs of suit herein incurred;

95) For such other and further relief as the court may deem proper.

DEMAND FOR JURY TRIAL

96) Under the Constitution, Amendment VII states "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Plaintiff(s) demand trial by jury.

RULES OF THE COURT

97) The rules of this court are the rules of civil procedure of South Carolina to the extent that said rules are not repugnant or in conflict with any substantive common law rules or rights, and to the extent that said rules are not repugnant or in conflict with any other rules decreed herein.

98) The rules shall be construed and administered to secure the just, speedy, and inexpensive determination of the actions, claims, writs, and orders of this Superior Court of Record.

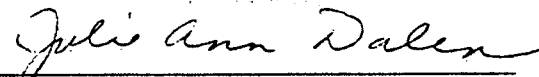
VERIFICATION

I, the undersigned, am a Plaintiff Pro Per in the above-entitled actions and claims. I have read the foregoing *causes of action* and claims and know the contents thereof and will verify the same in open court if called as a witness, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration at law is executed at Oconee County, South Carolina.

February 27, 2017

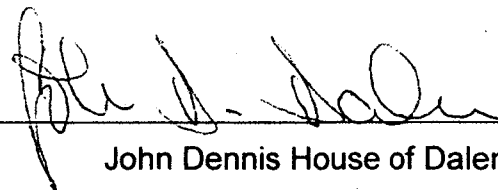
109 Wood Valley Drive
Westminster, South Carolina 29693
Ph. 864.647.4705


John Dennis House of Dalen Pro Per


Julie Ann House of Dalen Pro Per

Teste meipso: John Dennis House of Dalen,
sovereign of the court, holder of the
seal of this court, with said seal thereof,
hereunto affixed, attested by his own hand,
who stands upon the land, Republic of South Carolina this

27 Day of February in the Year Two Thousand Seventeen.


John Dennis House of Dalen
Estate dignitary – Paterfamilias
Plaintiff

Seal:



STATE OF SOUTH CAROLINA
OCONEE COUNTY

Federal National Mortgage Association,
PLAINTIFF
V.

John D. Dalen and Julie A. Dalen
DEFENDANTS PRO PER
V.

Bank of America, N.A. Successor by merger to
BAC Home Loans Servicing, L.P.
f/k/a Countrywide Home Loans Servicing, L.P.,
COUNTERCLAIM DEFENDANTS

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-37-1056

**OBJECTION AND NOTICE OF
MOTION, AND MOTION FOR
NEW TRIAL AND/OR
AMENDMENT OF JUDGMENT ON
GROUNDS OF FRAUD AND DENIAL
OF DUE PROCESS OF LAW**

**OBJECTION AND NOTICE OF MOTION, AND MOTION FOR NEW TRIAL and/or
AMENDMENT OF JUDGMENT ON GROUNDS OF FRAUD
AND DENIAL OF DUE PROCESS OF LAW**

John and Julie Dalen respectfully object to the attached order of the court and request the court per Rule 59(a)(e) of the South Carolina Rules of Civil Procedure (SCRCP) to grant a new trial or amend the judgment of the court due to fraud and denial of due process of law.

BRIEF IN SUPPORT

I. The Master's decision is a fraud on its face to wit:

1. The Master's decision violates due process by presuming to have lawful authority to invade the province of the jury and evaluate testimony, rule on facts which are in dispute, and presume facts which were never in evidence. Due to the fraud brought on the court by

the filing of fraudulent documents by the plaintiffs, the court had no subject matter jurisdiction to proceed with a trial. Proceeding with the trial thus violated defendants' rights to due process of law and plaintiffs had no standing or capacity to foreclose.

2. The Master's decision references a "promissory note" which neither Bank of America, N.A. nor F NMA are in de facto, de jure possession of rising to a level of securities fraud in violation of 18 U.S.C. § 513 & 1962.

3. The Master's decision fraudulently claims that a mortgage is a lien upon premises. This Court is charged with the knowledge that a mortgage is a lien on a promissory note; a note which in these proceedings has been securitized and the attempt to reattach the note to the mortgage after securitization is evidence rising to a level of fraud in violation of 18 U.S.C. § 513 & 1962.

4. The Master's decision presumes damages in fact; the rule of law requires: business records in the form of an account and general ledger statement ascribed to, subject to cross examination (authenticated) by a competent fact witness who either made the record or supervised the making of the record while employed in the business.

NOTICE: Bank of America, N.A. and FNMA failed to show the court that their claims were supported by business records which survived through the business records hearsay exception by being made in the regular course of their business and were attested to by the person who either made the record or supervised the making of the record while employed

by Bank of America, N.A. or FNMA. This jurisdictional failing, also known as fraud on the court, alone, bears on this court the duty to overturn the judgment.

MEMORANDUM OF LAW

II. In support of the point of law that the court cannot pass on the question of standing.

5. Although neither side raises the issue here, we are required to address the issue even if the courts below have not passed on it; see *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Even if the parties fail to raise the issue before us, see *FW/PBS v. City of Dallas*, 493 U.S. 215, 231 (1990), the federal courts are under an independent obligation to examine their own jurisdiction, and standing “is perhaps the most important of (the jurisdictional) doctrines.” See *Allen v. Wright*, 468 U.S. 737, 750 (1984).

6. From *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934): “[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,” even though the parties are prepared to concede it. “Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review.” [Footnote 4] *Mansfield, C. & L.M. Ry Co. v. Swan*, 111 U. S. 379, 111 U. S. 382.

7. From *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986):

Held: Respondent had no standing to appeal, and therefore the Court of Appeals had no jurisdiction to hear his appeal. Pp. 475 U. S. 541-549.

(a) Federal courts have only the power that is authorized by Article III of the Constitution and the federal statutes enacted pursuant thereto. Every federal appellate court must satisfy itself that the party seeking to invoke its jurisdiction has a sufficient stake in the outcome of the litigation to support that jurisdiction. Pp. 475 U. S. 541-543.

8. Regarding Standing:

From *Juidice v. Vail*, 430 U.S. 327, 331, 332 (1977) “And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it.”

It is a long-settled principle that standing cannot be “inferred argumentatively from averments in the pleadings,” *Grace v. American Central Ins. Co.*, 109 U.S. 278, 284 (1883), but rather “must affirmatively appear in the record.” *Mansfield C. & L. M. R. Co., v. Swan*, 111 U.S. 379, 382 (1884). See *King Bridge Co. v. Otoe County*, 120 U.S. 225, 226 (1887) (facts supporting Article III jurisdiction must “appea[r] affirmatively from the record”). And it is the burden of the “party who seeks the exercise of jurisdiction in his favor,” *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936), “clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the

dispute.” *Warth v. Seldin*, 422 U.S. 490, 518 (1975). Thus, petitioners in this case must “allege . . . facts essential to show jurisdiction. If [they] fail[] to make the necessary allegations, [they have] no standing.” *McNutt*, supra, at 189.

III. In support of the point of law that proper chain of title is necessary to vindicate the rights of mortgagee or holder in due course and that the authenticated account and general ledger statement of the mortgagee or holder-in-due-course is absolutely essential to foreclose a mortgage on a promissory note.

9. A conclusory affidavit is not competent summary judgment proof that the affiant is the owner or holder of a note. See Tex. R. Civ. P. 166 a (f); Tex. Div.-Tranter, Inc. v. Carrozza, 876 S.W. 2d 312, 314 (Tex.1994); Brownlee v. Brownlee, 665 S.W. 2d 111, 112 (Tex.1994); Geiselman, 965 S.W. 2d at 537) (affidavit of vice president of assignee of promissory note that assignee was legal owner of notes allegedly transferred from FDIC and lost was incompetent summary judgment evidence where there was no testimony in affidavit to account for loss or destruction of notes); Jernigan, 803 S.W. 2d at 777 (appellant’s bare allegation of ownership of note with gap and inconsistency in chain of title held insufficient to establish ownership as a matter of law).

10. In mortgage foreclosures, prove up of the claim requires presentment of the original promissory note and general account and ledger statement. Claim of damages, to be admissible as evidence, must incorporate records such as a general ledger and accounting of an alleged unpaid promissory note, the person responsible for preparing and maintaining

the account general ledger must provide a complete accounting which must be sworn to and dated by the person who maintained the ledger. See *Pacific Concrete F.C.U. V. v. Kauano*, 62 Haw. 334, 614 P.2d 936 (1980), *GE Capital Hawaii, Inc. v. Yonenaka* 25 P. 3d 807, 96 Hawaii 32, (Hawaii App 2001), *Fooks v. Norwich Housing Authority* 28 Conn. L. Rptr. 371, (Conn. Super. 2000), and *Town of Brookfield v. Candlewood Shores Estates, Inc.* 513 A. 2d 1218, 201 Conn. 1 (1986). See also *Solon v. God bole*, 163 Ill. App. 3d 845, 114 Ill. Dec. 890, 516 N. E. 2d 1045 (3 Dist. 1987).

From the transcript of a hearing in this case held on May 28, 2013, page 29 lines 12-18 and page 30 line 2, Judge Alexander MacCauley stated "in South Carolina we require documentary evidence of assignments, and you might say the trail of how we get there. In other words, you can't skip from one place to the other by some immaculate conversion of one party to another party. So you've got to have it documented and so maybe that's what he's talking about." (See **Exhibit L** which we are adding to previously submitted exhibits.) In this hearing, Judge MacCauley also inquired as to whether there was an assignment that was properly assigned (see page 30, line 2). From the beginning starting with our Motion to Dismiss prior to our Answer and throughout the course of these proceedings, defendants John and Julie Dalen have challenged plaintiffs' assignment of mortgage and therefore their standing and capacity to foreclose. The plaintiffs' assignments of mortgage are in fact evidence of the fraud upon the court and the defendants. The assignment is not proper and is a manufactured document and contains evidence of robo-signing. (See notary signature

on first assignment of mortgage submitted by Bank of America.) The Trial Court granting summary judgment to Bank of America was improper for this reason alone.

11. This court is reminded of the proper handling of a jurisdictional challenge. The Federal Practice and Procedure § 3522 clearly establishes that **once jurisdiction has been challenged, it is presumed that the court lacks jurisdiction unless or until the evidentiary sufficiency is provided and submitted to the record.** The presumption is that a court lacks jurisdiction on a particular issue until it has been demonstrated that jurisdiction over the subject matter exists.

The facts showing the existence of jurisdiction must be affirmatively in the record. If jurisdiction is challenged, the burden is on the party claiming jurisdiction to demonstrate that the court has jurisdiction over the subject matter. The limits upon jurisdiction must be neither disregarded nor evaded. The requirement to submit admissible evidence upon the record proving jurisdiction once jurisdiction is challenged is mandatory. The Supreme Court of the United States as well as lower courts have consistently reaffirmed the requirement that once jurisdiction is challenged those who claim jurisdiction must submit the evidence to prove the validity of the claim. See *Twining v. New Jersey*, 211 U.S. 78, 29 S. Ct. 14, 24 (1908), *Old Wayne Mutual Life Association v. McDonough*, 204 U.S. 8, 27 S. Ct. 236 (1907), *Scott v. McNeal*, 154 U.S. 34, 14, S. Ct. 1108 (1894), *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877), *Hagen v. Lavine*, 415 U.S. 528, at 533, 39 L. ed. 577, 94 S. Ct. 1372 (N.Y. March 28, 1974), *United States v. Roger*, 23 F. 658 (W.D. Ark. 1885), *State of Maine v. Thiboutot*,

448 U.S. 1, 100 S. Ct. 2502 (1980), *McNutt v. General Motors Acceptance Corp. of Indiana, Inc.*, 298 U.S. 178, 80 L. Ed. 1135, 56 S. Ct. 780 (1936), (jurisdiction may never be presumed), *Special Indemnity Fund v. Pruitt*, 205 F. 2d. 306, 201 Okl. 308, (jurisdiction must be affirmatively shown), *United States v. Chairito*, 69 F. Supp. 317 (D. Or. 1946) (jurisdiction cannot be presumed), *Standard v. Olesen*, 98 L. Ed. 1151, 74 S. Ct. 768 (1954), *Garcia v. Dail*, 286 S.W. 2d. 524, 15 528, (Tex. C.A. 1980) (lack of jurisdiction requires dismissal), *Burks v. Laskar*, 441 U.S. 471 (1979), and Title 5 U.S.C. § 556 & 558 (b).

12. Further we direct the court to a previously filed motion that was not ruled on by the trial court. The motion **JUDICIAL NOTICE OF ADJUDICATIVE FACTS** (attached) was filed per Rule 201(d)(e)(f) of the South Carolina Rules of Evidence which states that judicial notice of adjudicated facts can be brought before the court at any time, was apparently dismissed by Judge Kirven over defendants' objections because it had not been filed ten days prior to the trial. We also submitted with this motion (copy attached) a recent State Supreme Court case from Hawaii that was filed just days prior to our trial and which closely parallels our case. This Hawaii case was an appeal claiming unlawful foreclosure by Bank of America, N.A. and which also claimed that fraud and manufactured documents were used to foreclose on the defendants' property.

Exhibits A through K were previously filed with the court along with a Declaration of Claims for fraud upon the court for subject matter jurisdiction and denial of due process

of law. This is an Action at Law under the Common Law. The United States Constitution, when referring to due process of law, is referring to due process under the Common Law. The proceedings of the Trial Court violated our rights to due process of law by denying us our right to a trial by jury as guaranteed by Amendment VII of the U.S. Constitution; this is an inalienable right which means that there can be no rule making that would abrogate it. See *Miranda v. Arizona*. The Master referred to this filing as "frivolous". In the foreclosure trial that was held March 2, 2017, the court was operating under Civil Law i.e. Statutory Law. We have demanded, and continue to demand, our rights under the U.S. Constitution and the Common Law. We therefore wish to proceed with our Declaration of Claims and, as a Defendant in said claims, Judge Kirven should recuse himself from hearing this motion. We will be filing a Writ of Error regarding the Judge's Order of Foreclosure. We are now in a situation where we have a dual court – one inferior court operating under Statutory Civil Law and the other operating as a Superior Court of Record under the Common Law.

13. The following is an explanation of "Securitization", which is fundamental to the standing of the plaintiffs and has been repeatedly raised by the defendants (please see Motion of Adjudicated Facts which is attached) to show that the plaintiffs lack standing and the capacity to foreclose as a matter of law:

A lawful foreclosure cannot occur against a mortgage whose note has been securitized because of the lack of an actual damaged party who has standing to state a claim. No standing, no jurisdiction. A note that has been securitized and submitted to an entity qualifying as a REMIC and organized as a Qualified Special Purpose Entity (FNMA), is not enforceable. Securitization takes a commonplace, mundane transaction and makes very strange things happen. In the securitized mortgage note, there is no party who has the lawful right to enforce a foreclosure, and the payments alleged to have been in default have, in fact, been paid to the party to whom such payments were due. Additionally, in the case of a securitized note, there are rules and restrictions that have been imposed upon the purported debtor that are extrinsic to the note and mortgage* as executed by the mortgagor and mortgagee, rendering the note and mortgage unenforceable. This explanation will demonstrate how securitization is a failed attempt to use a note and a mortgage for purposes for which neither was ever intended.

Securitization consists of a four-way amalgamation. It is partly: 1) a refinancing with a pledge of assets, 2) a sale of assets, 3) an issuance and sale of registered securities which can be traded publicly, and 4) the establishment of a trust managed by third party managers. Enacted law and case law apply to each component of securitization. However, specific enabling legislation to authorize the organization of a securitization and to harmonize the operation of these diverse components does not exist.

Why would anyone issue securities collateralized by mortgages using the structure of a securitization? Consider the following benefits...those who engage in this practice are able to:

- 1) Immediately liquidate an illiquid asset such as a 30-year mortgage
- 2) Maximize the amount obtained from a transfer of the mortgages and immediately realize the profits right away
- 3) Use the liquid funds to enter into new transactions and to earn profits that are new transactions, and the profits associated with the new transactions...and so on)
- 4) Maximize earnings by transferring the assets so that the assets cannot be reached by the creditors of the transferor institution or by the trustee in the event of bankruptcy. (By being "bankruptcy-remote" the value to investors of the illiquid assets is increased and investors are willing to pay more.)
- 5) Control management of the illiquid asset in the hands of the transferee by appointing managers who earn service fees and may be affiliated with the transferor
- 6) Be able to empower the transferor by financially supporting the transferred asset by taking a portion of the first losses experienced, if any, from default, and entering into agreements to redeem or replace mortgages in default and to commit to providing capital contributions, if needed, in order to support the financial condition of the transferee (in other words, provide a 100% insured protection against losses)

7) Carry the reserves and contingent liability (for the support provided in paragraph #6 off the balance sheet of the transferor, thereby escaping any reserve requirements imposed upon contingent liabilities that would otherwise be carried on the books

8) Avoid the effect of double taxation of, first, the trust to which the assets have allegedly been transferred and, second, the investor who receives income from the trust

9) Insulate the transferor from liability and moves the liability to the investors

10) Leverage the mortgage transaction by creating a mortgage backed certificate that can be pledged as an asset which can be re-securitized and re-pledged to create a financial pyramid

11) Create a new financial vehicle so mind numbingly complicated that almost no one understands what is going on. The obvious benefit of this (#11) is that courts are predisposed to disbelieve the allegation that a securitized note is no longer enforceable.

*** To a reasonable person, the claim that a mortgage note is unenforceable merely because it has been securitized does sound somewhat outlandish. The more complex and difficult the securitized arrangement is to explain and perceive, the more likely a judgment in favor of the "lender" will be in litigation.**

Simply stated, the vast majority of litigants – and judges – have not been properly informed as to the true nature of this type of transaction. This is said not to insult anyone. Quite to the contrary, this is just to say that the true identity of the real party in interest is able to be obfuscated in the labyrinth of the securitization scheme such that whoever steps

forward claiming to be that party and showing documentation appearing to be legitimate is assumed to have standing, and there are too few knowledgeable challengers of that mistaken assumption.

So much more; so, in the case of the “layman” homeowner, most homeowners have no idea that the transaction being referred to as a debt and as an obligation that they must pay or be subject to foreclosure, has actually already been paid...and not just once!

In cases where a default has been alleged, the securitized note has likely already been satisfied (not just sold and/or assigned) four or five times over. Securitization is the product of the genius of the abuse of capitalism. As long as profits continue to be made, all participants do very well from this creative new financial arrangement, but increasing foreclosures weakens the entire economy, devastating the communities in which they are concentrated. (See U.S. government's *The Financial Crisis Inquiry Report*, Submitted by The Financial Crisis Inquiry Commission pursuant to Public Law 111-21, January 2011)

CONCLUSION

All of the above and all of the facts of the case as noted in the afore-mentioned motion we filed for Judicial Notice of Adjudicated Facts are supported by documents we filed as well as Exhibits we filed with the court prior to the foreclosure hearing and the Exhibits filed by FNMA at that hearing which was held March 2, 2017.

FNMA provided no competent fact witness to prove their claim. FNMA did not provide a proper chain of title to prove their right to enforce the note. The Exhibits that have been submitted by Bank of America, N.A. during the course of these proceedings and by FNMA at the trial are in fact evidence of fraud.

Defendants John and Julie Dalen have filed, under South Carolina Rules of Evidence, as expert testimony, numerous law review articles by prominent law professors, some of whom had testified before Congress regarding the financial collapse of 2008. Because of the complexity of this issue, these law review articles were submitted to help explain the problems created by the securitization process as well as the fraud that has become commonplace in foreclosures across the nation.

The banks profited from the securitization process. They have sold and resold our note and therefore the note has been paid. The bank cannot possibly have suffered any loss, and therefore cannot claim deficiency or even have standing and capacity to foreclose.

For all of the above reasons, the facts on the record show that this is an unlawful foreclosure. Bank of America never had standing or capacity to foreclose, and in fact manufactured fraudulent documents in order to deceive the court and the defendants.

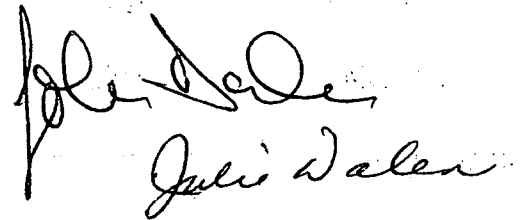
The court granted summary judgment to Bank of America in error. Even if the fraud upon the court were not painfully evident, there would still be glaring issues of material fact. Additionally, the court does not have subject matter jurisdiction due to the fraud perpetrated by both Bank of America and FNMA as well as their law firms.

On the issue of due process being denied to defendants John and Julie Dalen, the Supreme Court has ruled repeatedly that the law of the land guarantees to every citizen the right to a jury trial per Amendment 7 (as well as due process of law). As the Constitution contemplates it, due process of law is common law, and jury trials are guaranteed, among the inalienable rights of every citizen; there can be no rule making i.e. statutory rules that can cause one to lose that right. See *Miranda v. Arizona*.

We request the court per Rule 59(a)(e) of the South Carolina Rules of Civil Procedure (SCRCP) to grant a new trial with trial by jury or amend the judgment of the court due to fraud and denial of due process of law to dismiss plaintiffs' complaint with prejudice, and grant general damages equal to the claim balance of the debt, namely \$206,295.91 and punitive damages equal to two times the general damages for fraud and extortion and for costs of suit herein incurred.

Dated March 14, 2017

Respectfully Submitted,

Handwritten signatures of John and Julie Dalen. The signature of John Dalen is on top, and the signature of Julie Dalen is below it.

John and Julie Dalen, Defendants Pro Per

109 Wood Valley Drive
Westminster, SC 29693
864.647.4705

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-37-1056

**JUDICIAL NOTICE of
ADJUDICATIVE FACTS**

**Bank of America, N.A. Successor by merger to
BAC Home Loans Servicing, L.P.
f/k/a Countrywide Home Loans Servicing, L.P.
COUNTERCLAIM DEFENDANTS**

FILED OCOBEE COUNTY, SC
BEVERLY HAWTHFIELD
CLERK OF COURT
2017 MAR 15 A 9:31

JUDICIAL NOTICE OF ADJUDICATIVE FACTS

THE FACTS OF THE CASE

John and Julie Dalen respectfully request the court per Rule 201(d)(e)(f) of the South Carolina Rules of Evidence to please take notice of the following adjudicated facts -- "facts about the particular event which gave rise to the lawsuit and... [help] explain who did what, when, where, how and with what motive and intent." *Note; paragraph one; Rule 201

All of the following itemized facts listed below are supported by documents in the record, as well as the Exhibits we filed with the court prior to the foreclosure hearing and the Exhibits filed by FNMA at that hearing which was held March 2, 2017:

- 1) FNMA purchased the note from Quicken Loans on January 14, 2008. See deposition of Zachary Chromiak (**Exhibit A**) and Admissions and Interrogatories (**Exhibit B**). Because of this fact, there's no way Bank of America, N.A. could have been assigned the note or mortgage per their assignment dated May 9, 2011 because Quicken Loans no longer had any interest in the note or mortgage. Also, **FNMA Exhibit 1** shows no endorsement from Quicken to FNMA.
- 2) FNMA securitized the note. See **Exhibit B**. Securitization of the note moves the note from Article 3 of the UCC to Article 8, dealing with securities. This transforms the note into a security/stock which is forever a stock and no longer secured, is separated from the mortgage, and it cannot be reattached to the security/mortgage.
- 3) Bank of America, acting as servicer for FNMA, files foreclosure on behalf of FNMA (the investor) on October 31, 2011. However, this complaint hides the fact that Bank of America is acting on behalf of FNMA and leads the court and the defendants to believe that Bank of America is the holder of the note with rights to foreclose. (One of the unlawful acts that Bank of America was sued for by all 50 States Attorneys General. **Exhibit K**)
- 4) Bank of America uses assignment of mortgage dated May 9, 2011 as proof of standing. As stated above in #1 this is not possible as Quicken Loans no longer owned the note or mortgage, having sold the note and mortgage to FNMA in January of 2008. Throughout this action, Defendants John and Julie Dalen have challenged the standing of Bank of America based on a fraudulent assignment of mortgage. We have challenged the chain

of title as well as the assignment. The note and the mortgage are both evidence of the fraud perpetrated by Bank of America and FNMA, as well as the attorneys representing them, on this court and the defendants, John and Julie Dalen.

- 5) FNMA is still the investor, owner of the note since January 14, 2008. FNMA was repeatedly referred to throughout the course of this action as the "investor." Numerous documents have been submitted as exhibits that confirm FNMA is the owner of the note. Bank of America was only acting as servicer, agent for FNMA when they filed the foreclosure. The note that has a blank endorsement is undated and purports to endorse the note from Quicken Loans to Countrywide Bank. There is no other endorsement. See FNMA's Exhibit 1.
- 6) There is no power of attorney on record authorizing Bank of America to act as agent for FNMA.
- 7) FNMA Exhibit 1, "the note" has no endorsements to FNMA or from FNMA. Since FNMA purchased the note on January 14, 2008, a proper chain of title reflecting this fact should appear as an endorsement on the back of the note. FNMA's Exhibit 3 includes an assignment of mortgage from Bank of America to FNMA. Since the assignment from Quicken Loans to Bank of America is not valid, the assignment to FNMA is not valid; again, there is no endorsement on the note reflecting this transaction.
- 8) Regarding the assignment of mortgage, FNMA's Exhibit 3 from Quicken Loans to Bank of America on May 9, 2011, Quicken had already sold the note to FNMA who securitized it on January 14, 2008. How is it possible for Quicken to assign a note and mortgage to

Bank of America after having already sold it to FNMA? Why does the note not contain any other endorsements reflecting these transfers? Where is the chain of title?

- 9) The notary signature on the assignment of mortgage dated May 9, 2011 is not a valid signature under California law and is in fact evidence of robo-signing. (See our **Exhibits I and J** as well as **Exhibit K**, the lawsuit filed by the 50 States Attorneys General which lists robo-signing as one of the unlawful acts of Bank of America.)

We are attaching copies of recently published State Supreme Court decisions regarding foreclosure for your review:

- 1) In the Supreme Court of the State of Hawaii, Bank of America, N.A. vs. Grisel Reyes-Toledo, SCWC-15-0000005 dated 28 – February – 2017, for publication in *West's Hawai'i Reports and Pacific Reporter*, "This case raises issues of standing and appellate jurisdiction that pertain to foreclosure proceedings." Your Honor this case closely parallels the facts of our case and we hope you will consider it carefully.
- 2) From the Supreme Court of Missouri, David and Crystal Holm v. Wells Fargo Home Mortgage, Inc., and Federal Home Loan Corporation (Freddie MAC), "a wrongful foreclosure action against Wells Fargo Home Mortgage, Inc., for allegedly foreclosing on their home without right."
- 3) In another case from Hawaii, the Supreme Court of the State of Hawaii, Russell L. Hungate vs. the Law Office of David B. Rosen, a Law Corporation, David B. Rosen, and Deutsche Bank National Trust Company, "On appeal, we consider whether the circuit court wrongly dismissed Hungate's claims alleging Deutsche Bank and Rosen violated

statutory, contractual, and common law duties, and committed unfair or deceptive acts or practices"

CONCLUSION

FNMA provided no competent fact witness to prove their claim. FNMA did not provide a proper chain of title to prove their right to enforce the note. The Exhibits that have been submitted by Bank of America, N.A. during the course of these proceedings and by FNMA at the trial are in fact evidence of fraud.

Defendants John and Julie Dalen have filed, under South Carolina Rules of Evidence, as expert testimony, numerous law review articles by prominent law professors, some of whom had testified before Congress regarding the financial collapse of 2008. Because of the complexity of this issue, these law review articles were submitted to help explain the problems created by the securitization process as well as the fraud that has become commonplace in foreclosures across the nation.

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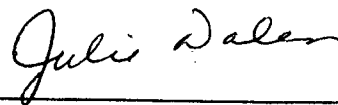
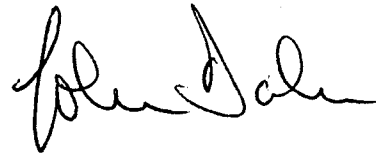
For all of the above reasons, the facts on the record show that this is an unlawful foreclosure. Bank of America never had standing or capacity to foreclose, and in fact manufactured fraudulent documents in order to deceive the court and the defendants.

The court granted summary judgment to Bank of America in error. Even if the fraud upon the court were not painfully evident, there would still be glaring issues of material fact. Additionally, the court does not have subject matter jurisdiction due to the fraud perpetrated by both Bank of America and FNMA as well as their law firms.

On the issue of due process being denied to defendants John and Julie Dalen, the Supreme Court has ruled repeatedly that the law of the land guarantees to every citizen the right to a jury trial per Amendment 7 (as well as due process of law). As the Constitution contemplates it, due process of law is common law, and jury trials are guaranteed, among the inalienable rights of every citizen; there can be no rule making i.e. statutory rules that can cause one to lose that right. See *Miranda v. Arizona*.

Dated March 4, 2017

Respectfully Submitted,



John and Julie Dalen, Defendants Pro Per
109 Wood Valley Drive
Westminster, SC 29693
864.647.4705

Cc: South Carolina Attorney General Alan Wilson

ORIGINAL

State of South
Carolina
County of Oconee

) In the Court of Common Pleas
)
) Case No: 2011CP3701056

Bank of America
NA-sbm, et al.,

Plaintiffs,

-vs-

John D. Dalen, et
al.,

Defendants.

) Transcript of Record
) Motions Hearing
)
)
)
)
)
)

May 28, 2013
Walhalla, South Carolina

B e f o r e:

The Honorable Alexander S. Macaulay, Judge.

A p p e a r a n c e s:

M. Christopher Truluck, Esq.
Attorney for the Plaintiffs

John D. Dalen
Self-Represented Defendant

Robin Sue Hild, FCRR, RPR
10th Circuit Court Reporter

1 MR. DALEN: Okay. Like I said, we have a right to
2 this information under 26(b)(1), the requests that are
3 reasonable and calculated to lead to the discovery of
4 admissible evidence. That's what discovery is all
5 about. The failure of the Court to compel discovery is
6 detrimental to our case, and we believe it is without
7 cause. We object to the Court's handling of the
8 discovery process in this case.

9 According to the Form 4 Order -- which, by the way,
10 I didn't even know what that was when they told me, I
11 didn't know it was an Order. I thought it was just to
12 transfer it to this Court but it turns out it was an
13 Order, or I would have objected to it at the time.
14 Anyway, according to the Form 4 Order written by
15 Plaintiffs' attorneys, we are restricted to argue only
16 for the pooling and servicing agreement. We object to
17 this restriction and we move the Court to rule on all of
18 our requests for discovery that date back to the May
19 21st, 2012, hearing. We are entitled to an Order from
20 this Court to either compel production or deny the
21 request. If denied we are entitled to a reason for the
22 denial.

23 Defendants further move this Court to revisit
24 Defendants' Motion to Dismiss filed pre answer to this
25 Complaint as Plaintiffs have provided no proof of claim

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1 or evidence to support their claim, whereas Defendants
2 have provided considerable evidence, much of it from
3 Plaintiffs' own documents and statements that call into
4 question the validity of Plaintiffs' claim and even
5 contradict the claim.

6 This afternoon we also filed a Motion For
7 Evidentiary Hearing because we are demanding proof of
8 claim.

9 Again, on May 12th, on May 12th. ---

10 MS. DALEN: 21st.

11 MR. DALEN: On May 21st, I'm sorry, we motioned the
12 Court to compel the following. If you don't mind, I
13 will go through a list of all the things that we
14 requested and why we requested them. And one of them
15 was the pooling and servicing agreement. A, we
16 requested a Motion to Compel Plaintiff's attorneys to
17 submit an Affidavit stating whether they are
18 representing the holder in due course and the creditor
19 in this matter. The Court never ruled for or against.
20 Documents included with this Motion include statements
21 from Bank of America NA stating they are the servicer of
22 the loan and point to Fannie Mae as the holder of the
23 note. Contradicting claims made in the Complaint. Also
24 included are articles from news outlets concerning Bank
25 of America and a history of robo signing and related

1 foreclosure fraud cases. The document concerning
2 secured transaction (phonetic) was also attached.
3 Plaintiff has denied being a debt collector and denied
4 the note has been securitized in our request for
5 admissions. The existing of a pooling and servicing
6 agreement proves otherwise. There would not be a
7 pooling and servicing agreement if the note had not been
8 securitized because that's what a pooling and servicing
9 agreement is. So all it lists is ample reason to
10 request an Affidavit from the Plaintiffs' attorneys who
11 have a duty to vet cases they bring before this Court.

12 We also submitted to the Court at the May 22, [sic]
13 2012, hearing our Motion to Compel Production of seven
14 documents, of which the Court ruled only on ---

15 MS. DALEN: May 21st.

16 MR. DALEN: May 21st, I'm sorry.

17 THE COURT: On May 21st, 2013, you also asked for
18 other documents?

19 MRS. DALEN: 2012.

20 MR. DALEN: 2012. And every hearing after this was
21 going back to the 21st hearing, trying to get the Court
22 to rule on all of our requests.

23 THE COURT: You have to remember we now have two
24 May the 21sts. We have 2012 and 2013 so you have to
25 help the Court. Now you are going back to what was

1 requested in addition to the pooling and servicing
2 agreement in 2012 and you say there are seven other
3 documents.

4 MR. DALEN: The seventh document was the pooling
5 and servicing agreement. The first document was the
6 note.

7 THE COURT: Let's do this. If you don't mind,
8 Mr. Dalen, because I'm not, whatever the case is, the
9 Order that I'm operating under is the one that says I am
10 to limit it to the pooling and servicing agreement.
11 Let's deal with that first and then we'll see if there
12 is anything else I need to do.

13 MR. DALEN: Okay.

14 THE COURT: Now what do you want? You want the
15 pooling and servicing agreement?

16 MR. DALEN: We want the pooling and servicing
17 agreement.

18 THE COURT: All right. Now let me suggest two
19 things. One, let's make a copy of your statement there.

20 MR. DALEN: I handed one to you. I have one to
21 give to you.

22 THE COURT: Well, that would be nice. I was just
23 gonna request it now so I could make it a part of the
24 file.

25 MR. DALEN: I have one for the Plaintiff, also.

1 THE COURT: That would be good, too. That's just
2 it. Again, it's one of those things, and I'm not here
3 to advise you about the practice of law because I
4 haven't practiced law in 20 years. But, if you make a
5 part of the record your remarks, then they become a part
6 of the record itself so you don't have to read them.

7 MR. DALEN: Right. But, see, when I don't read
8 them, then the Court doesn't act on it and what am I
9 supposed to do?

10 THE COURT: Well, you just worry about what you
11 need to do and I'll worry about what I need to do, all
12 right?

13 MR. DALEN: Okay.

14 THE COURT: Thank you very much.

15 All right, Mr. Truluck, why don't you produce the
16 pooling and servicing agreement?

17 MR. TRULUCK: Your Honor, for several reasons
18 actually. Your Honor, relying on the case law to
19 explain why it's not relevant, because Mr. Dalen doesn't
20 have any cause of action or any remedy as a result of
21 any agreement between my client, the Plaintiff, and
22 Fannie Mae, that's a pooling and servicing agreement
23 between them. And, Your Honor ---

24 THE COURT: In other words, your client was not a
25 party to this pooling and servicing agreement?

1 MR. TRULUCK: No, Your Honor.

2 THE COURT: Who services the loan?

3 MR. TRULUCK: It's serviced by Bank of America,
4 Your Honor.

5 THE COURT: And that's your client?

6 MR. TRULUCK: Yes, Your Honor.

7 THE COURT: That's who is suing these people?

8 MR. TRULUCK: Yes, Your Honor.

9 THE COURT: And you are saying you are not
10 controlled by that servicing agreement?

11 MR. TRULUCK: No, no, no. My client, whatever
12 agreement they have, they have to honor with Fannie Mae.
13 The problem is that Mr. Dalen believes that that has
14 some bearing on his rights. This is an agreement
15 between the two of them ---

16 THE COURT: In other words, they have no
17 responsibility to Fannie Mae as to how they service the
18 agreement?

19 MR. TRULUCK: Bank of America.

20 THE COURT: They can do something wrong; in other
21 words, rob him, take the money from him at the force of
22 arms and it would be all right because we don't know if
23 it's in the agreement or not.

24 MR. TRULUCK: Well, Your Honor, in that case ---

25 THE COURT: I mean, does the servicing agreement

1 between one party and a third party make it appropriate
2 or even authorize them to do something illegal?

3 MR. TRULUCK: No, Your Honor, not at all.

4 THE COURT: I mean, how do we know that?

5 MR. TRULUCK: Even if it was authorized, it would
6 still be illegal, Your Honor, and by contract law
7 wouldn't be allowed in that event.

8 THE COURT: Contract between whom?

9 MR. TRULUCK: The pooling and servicing agreement
10 is between Fannie Mae and Bank of America.

11 THE COURT: Well, but your note is what? Who has
12 the note?

13 MR. TRULUCK: Well, the note is, not only has it
14 been viewed by Mr. Dalen in person, it's at our firm
15 right now, and I suspect the holder of the note ---

16 THE COURT: Where did you get the note from?

17 MR. TRULUCK: We received it from my client, Your
18 Honor, Bank of America.

19 THE COURT: Bank of America?

20 MR. TRULUCK: Yes, Your Honor.

21 THE COURT: And Bank of America had entered into
22 some sort of agreement with Countrywide?

23 THE WITNESS: Yes, Your Honor. As a result of the
24 Fannie Mae-Freddie Mac involvement, it is my
25 understanding that there should be a servicing agreement

1 between the two parties, yes. The problem is, Your
2 Honor, that Mr. Dalen ---

3 THE COURT: Why don't you have one?

4 MR. TRULUCK: I'm not in possession of one, Your
5 Honor.

6 THE COURT: Why don't you have possession? I mean,
7 if there is one, somehow -- why don't we do this?
8 Inasmuch as I'm sure that Bank of America and
9 Countrywide and Fannie Mae are all good arbiters of what
10 should be done. However, we pay judges sometimes to
11 provide the review. Why don't we just provide the
12 pooling and servicing agreement that you have and let
13 the Court decide if it's relevant?

14 MR. TRULUCK: Your Honor, if I may submit an
15 objection, a respectful objection. Your Honor,
16 obviously I do not have it. If I had it ---

17 THE COURT: How about if I say this? If you don't
18 produce, if you don't make some effort or explanation of
19 the reason not to participate in the discovery, that
20 might lead to relevant and admissible evidence --
21 because that's what discovery does. It doesn't require
22 you to make a determine whether it's relevant and
23 material, it's for the Court to determine whether or not
24 it leads to relevant material. What I suggest for you
25 and your client, that you produce what you have, unless

1 there is some reason not to produce it, other than your
2 interpretation of the law, that your case might be
3 dismissed.

4 MR. TRULUCK: I understand that, Your Honor. And,
5 if I may just say so that I can make sure that I
6 represent my client well, is, Your Honor, in relying on
7 I couldn't find a case on point so far, so I was relying
8 on the South Carolina District Bankruptcy case. This
9 same issue came up with regard to a pooling and
10 servicing agreement, a refute of a claim much like
11 Mr. Dalen is submitting in his Answer and Counterclaim.
12 And it stated, and I'm quoting, (reading):

13 However, this Court is swayed by recent authority
14 finding that debtors who are not parties or third-party
15 beneficiaries or PSAs, pooling and servicing agreements
16 lack standing to challenge the validity or
17 non-compliance ---

18 THE COURT: And who was this?

19 MR. TRULUCK: Which court, Your Honor?

20 THE COURT: Yes, sir...

21 MR. TRULUCK: This is the South Carolina Bankruptcy
22 Court, Your Honor.

23 THE COURT: South Carolina Bankruptcy. So that's
24 the Federal Court?

25 MR. TRULUCK: Yes, Your Honor.

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1 determine whether or not it's appropriate for your
2 client to make any submission there.

3 MR. TRULUCK: Yes, Your Honor.

4 THE COURT: An Affidavit. Maybe they don't want to
5 issue the Affidavit.

6 MR. TRULUCK: And, Your Honor, it appears that
7 that's never clearly been asked for by Motion. I do
8 recall a letter mentioning it; a second letter, but by
9 way of Motion he never formally moved in those two. So
10 I'm concerned about the Rules in that regard, as well,
11 Your Honor.

12 THE COURT: What's the Rule that you're concerned
13 about?

14 MR. TRULUCK: Well, Your Honor, he never gave us
15 reasonable notice he moved to compel. Now ---

16 THE COURT: I'll tell you what. Inasmuch as you
17 are questioning the timeliness of the motion, I'm going
18 to give you extra time. How much time do you think you
19 need?

20 MR. TRULUCK: I have no idea on that, Your Honor.
21 I can only tell you I'll do my best to comply with --

22 THE COURT: I don't know how to do our best.

23 MR. TRULUCK: Honestly, Your Honor, I've never seen
24 a pooling and servicing agreement.

25 THE COURT: Maybe that's why I'm a little bit

1 nonplussed that you should take the position that you
2 know better whether it's inadmissible and irrelevant.
3 I like to look at things before determining whether or not
4 it's admissible in a court of law.

5 MR. TRULUCK: Yes, Your Honor.

6 THE COURT: All right. How much time do you need?
7 If it's not enough, you can ask for a continuance.

8 MR. TRULUCK: Would 30 days be appropriate?

9 THE COURT: That would be appropriate.

10 MR. TRULUCK: I'm sorry. If I may further impose
11 on you, could we request that Your Honor would review
12 it? I don't know what sort of sensitive information is
13 in there, and I'm...

14 THE COURT: That's always an objection on
15 limitation. You can make some objection to it as
16 being -- one potential witness said recently in a
17 proceeding that it might be violative of the Fifth
18 Amendment, or it could be lawyer-client or something
19 else and I'll be glad to do that. And you can submit it
20 for an in-camera review.

21 MR. TRULUCK: Thank you, Your Honor.

22 THE COURT: Very good. All right. 30 days. Which
23 would be -- I'm sorry to be so short with you, but I'm
24 little bit new to the case and I certainly don't want to
25 try everything that needs to be done in one afternoon

1 were talking about that these things have, that this is
2 entirely another case, but we had several lawyers here
3 and we were talking about how the rules apply in
4 different cases and in different states, different
5 jurisdictions.

6 MR. DALEN: Would it be helpful if I explain what
7 the pooling and servicing agreement is? Because I just
8 think he really doesn't understand what it is.

9 THE COURT: That would be good. We've got some
10 time now.

11 MR. DALEN: Okay. A pooling and servicing
12 agreement is a contract that creates a residential
13 mortgage-backed securitization trust. It establishes
14 the obligations and authority of the master servicer and
15 the primary servicer. The PSA, the pooling and
16 servicing agreement, establishes mandatory rules and
17 procedures for the sales and transfers of the mortgages
18 and the mortgage notes from the originator to the trust.
19 And this was very important to my case to know where
20 that note has been, how it was transferred and when it
21 was done according to the rules of the PSA.

22 Now, the pooling and servicing agreement, the
23 Plaintiffs claim that that was proprietary information.
24 Most pooling and servicing agreements are required to be
25 filed with the SEC and they are posted on line, anybody

1 can look at them. All you have to do is go to the SEC
2 website and you can look up pooling and you can look up
3 all pooling and servicing agreements that are filed.
4 However, when the note is held by Fannie Mae, they have
5 an exemption and they are not required to file it with
6 the SEC, and that is why I need the Court to order them
7 to produce it. If Fannie Mae did not hold the note,
8 they would have been required to file it on line and I
9 could have looked it up myself, but I could have looked
10 at everything in the PSA. So I don't see where there is
11 a proprietary thing there. It's a matter of public
12 record. Anybody can look at it, stuff with Fannie Mae.
13 So that's all I have to say on that.

14 THE COURT: All right. Well, do you understand now
15 what's being done?

16 MR. DALEN: Well, I'm assuming you are going to in
17 camera, you're gonna look at it and then you're gonna
18 decide whether I can see it.

19 THE COURT: Right.

20 MR. DALEN: Okay.

21 THE COURT: And, if you can see it, and, of course
22 that means that it's discovered to you.

23 MR. DALEN: Okay. Well, I will be allowed to look
24 at it and --

25 THE COURT: Well, after I look at it. If it has

1 something that is inadmissible and not leading to
2 anything that would be relevant or material or is
3 protected by some privilege or something like that.

4 MR. DALEN: I think you can see then --

5 THE COURT: I can't see in a poke. I'm sorry. I
6 had a little bag in front of me, open it up and see
7 what's in it.

8 MR. DALEN: Bank of America has claimed that they
9 did not securitize the note. And the PSA, the existence
10 of it, the mere existence of it, whether I get to see it
11 or not, proves that they did.

12 THE COURT: Well, let me tell you another little
13 term that we have in the law in South Carolina. Res
14 ipsa loquitur, which means the thing speaks for itself.

15 MR. DALEN: Right.

16 THE COURT: That's not the law in South Carolina.
17 In other words, we do not just say that something is one
18 thing, that it's proof of another.

19 MR. DALEN: That's all the more reason to see it.
20 Right?

21 THE COURT: That's more reason why you don't.
22 Because you want to have whatever you, and you being the
23 person who would be moving on something, you want to
24 have your proof, not that something else was done.

25 MR. DALEN: Okay.

1 THE COURT: I'm sorry. I'm not here to give you an
2 education, I'm trying to give you the relief that you
3 are entitled to.

4 MR. DALEN: Right.

5 THE COURT: And if you're not entitled to it, then
6 you have a recourse at that time. All right?

7 MR. DALEN: Okay.

8 THE COURT: All right. Very good.

9 MR. DALEN: Can we address the other issues now or
10 not?

11 THE COURT: The only other issue I have is what I
12 just addressed.

13 MR. DALEN: I'm motioning the Court to review all
14 of my requests.

15 THE COURT: I deny your Motion because it was not
16 timely.

17 MR. DALEN: Okay. I filed them and I asked.

18 THE COURT: You filed them yesterday.

19 MR. DALEN: Okay.

20 THE COURT: Ten days. Has he been served with your
21 Motion?

22 MR. DALEN: I just filed it this morning for the
23 evidentiary hearing.

24 THE COURT: He hasn't been served. You don't quite
25 understand, sir. That's why we have laws that say that

1 you just can't walk into a courtroom and demand whatever
2 you want. Both sides get an opportunity to be heard.

3 MR. DALEN: This was filed way back.

4 THE COURT: You just told me it was filed this
5 morning.

6 MR. DALEN: I'm talking about the evidentiary
7 hearing.

8 THE COURT: That's what I was asking. If you want
9 an evidentiary hearing, he's entitled that notice has to
10 be made.

11 MR. DALEN: I just filed it and he will be
12 receiving the notice.

13 THE COURT: Well, good. Then once that's done,
14 that will be heard. Do you want me to have a hearing
15 tonight on something he wants heard? It doesn't work
16 that way.

17 MR. DALEN: This is a different issue, the Motion
18 to Compel. It goes back to May 21st.

19 THE COURT: Well, this is what I heard, the Motion
20 to Compel, which is the Order on April the 9th, 2013,
21 that said the Defendant on May the 28th, 2013, a hearing
22 shall be held only on the issue of whether Plaintiff
23 must provide the Defendant with the pooling and
24 servicing agreement. Do you want me to violate the law
25 of this court and do something that Judge Maddox did not

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1 order me to do? No, you don't.

2 MR. DALEN: I don't. No. I don't know how this
3 works.

4 THE COURT: Let's be satisfied with what we have
5 and move from there, all right?

6 MR. DALEN: I will do that.

7 THE COURT: Now, is there any question in your
8 mind? You are apparently gonna be served with some sort
9 of Motion that you're gonna have to respond to as well.
10 Do you understand that?

11 MR. TRULUCK: Yes, Your Honor.

12 THE COURT: All right. Any question about any of
13 these things? Except that we're not gonna all be
14 satisfied.

15 (There was no response.)

16 THE COURT: All right. There's a Motion for
17 Reference, is that what I understand?

18 MR. TRULUCK: Yes, Your Honor.

19 THE COURT: Is that in this same case?

20 MR. TRULUCK: Yes, Your Honor.

21 THE COURT: It's been noticed. What is it?

22 MR. TRULUCK: Your Honor, we are asking the matter
23 respectfully be referred. Mr. Dalen filed an Answer and
24 Counterclaim. We do recognize that in that Answer and
25 Counterclaim he did request a jury trial. However, Your

1 Honor, pursuant to the Wells Fargo v. Smith case, we
2 believe that he is not entitled to a jury trial for two
3 reasons, Your Honor. None of the counterclaims are
4 legal and compulsory. In fact, I believe, again as an
5 advocate, but I do believe fairly none of them amount to
6 counterclaims, except possibly one which I believe is
7 insufficiently pled --

8 THE COURT: I don't have it. It's not before me.
9 Is it a part of this file? You are saying that you have
10 a Motion to deny the counterclaim?

11 MR. TRULUCK: No, Your Honor, we just have a Motion
12 to have the matter referred. I don't believe that the
13 amount of counterclaims, in any event, Your Honor, I
14 still believe, Your Honor, that they're not legal.

15 THE COURT: You very candidly said that. Again,
16 let's take care of one thing at a time and we'll see.
17 But if you've got -- I certainly don't want to do it
18 piecemeal. I'm not sure if you can do something that
19 does require a jury trial to be referred.

20 MR. TRULUCK: Your Honor, and that one I'm being
21 candid about is not compulsory. It's a violation of
22 failure to move by him of the assignment for the
23 mortgage which has no bearing on our right to foreclose.
24 Again, Your Honor, I'm not admitting that it's not well
25 pled enough, but I'm just saying that's the only one

1 that even comes close. The rest all revolve around this
2 allegation that there is an improper securitization
3 and/or transfer of the note and that we don't have the
4 right to foreclose. Mr. Dalen even in court before
5 Judge Maddox at the last hearing admitted that he owed
6 on the note, he just disputed as to whom. And all the
7 counterclaims, Your Honor, they're not counterclaims --

8 **THE COURT:** We have a certain rule again -- you can
9 sit down, too. That's a rule we have in South Carolina.
10 In North Carolina lawyers sit. In South Carolina the
11 lawyer who is addressing the Court or responding to the
12 Court stands. But in South Carolina we require
13 documentary evidence of assignments, and you might say
14 the trail of how we get there. In other words, you
15 can't skip from one place to the other by some
16 immaculate conversion of one party to another party. So
17 you've got to have it documented and so maybe that's
18 what he's talking about.

19 **MR. TRULUCK:** And in this case, Your Honor, I do
20 believe we've provided him with that. Again, he viewed
21 the original note and mortgage at our firm.

22 **THE COURT:** Is there an assignment?

23 **MR. TRULUCK:** I don't know that we would have it in
24 the file -- I suspect we would, but we wouldn't have
25 given that to him in discovery. I haven't checked that

1 but I'm pretty sure.

2 THE COURT: And if it was properly assigned.

3 MR. TRULUCK: Yes, Your Honor. In any event every
4 counterclaim, barring the one which, Your Honor, is
5 permissive and would require to remain standing in this
6 court, I respectfully submit the matter should be
7 transferred because the jury trial was not properly
8 requested and it was not supported in an equity action
9 by a legal counterclaim.

10 THE COURT: He hasn't requested a jury trial?

11 MR. TRULUCK: He did, Your Honor, but I'm saying it
12 was not properly requested.

13 THE COURT: Thank you.

14 MR. TRULUCK: Not met with the proper
15 counterclaims. There are defenses; they're permissive,
16 Your Honor. There's not a single counterclaim in there,
17 Your Honor, that is compulsory. And not to mention,
18 Your Honor, almost every single issue that he builds off
19 he's already been cited on, basically 12(b)(6) and
20 12(b)(1) lack of standing issues --

21 THE COURT: You got 12(b)(6) Orders?

22 MR. TRULUCK: Your Honor, I have Orders here. This
23 was his initial Motion to Dismiss, and that's what it
24 was the nature of. And I didn't attend the hearing but
25 my colleague, Mr. Hayes, did, and that was his notation,

1 and that would be in line with the initial Motion. So
2 he didn't really argue the initial issues about the ---

3 THE COURT: Well, is there an Order dismissing his
4 counterclaim?

5 MR. TRULUCK: No, Your Honor, only denying his
6 Motion to Dismiss. We have not moved to dismiss his
7 counterclaim. We do not believe he is entitled to a
8 jury trial, Your Honor.

9 THE COURT: I understand. All right. That's very
10 well taken.

11 Let's see what we've got. Now, I don't want to
12 overload Judge Maddox's prerogative with too many
13 things right now. Of course, your Motion to Refer will
14 always be available. So let's go ahead, and if the case
15 is referred, let's have a complete case referred, not
16 piecemeal.

17 MR. TRULUCK: So the Motion to Refer would be
18 continued for a time so that we're both properly
19 noticed --

20 THE COURT: I'll deny it, but you can renew it at
21 the appropriate time. I just say I deny it at this time
22 because it's not timely.

23 MR. TRULUCK: Yes, sir.

24 THE COURT: I mean, in other words, there are
25 things discovered as well as, is his counterclaim

1 MR. TRULUCK: And I don't mean it that way --

2 THE COURT: So if that's where you think you are,
3 then go ahead and appeal it.

4 MR. TRULUCK: No, Your Honor. I didn't mean to
5 imply that at all. I meant --

6 THE COURT: Well, then otherwise, anytime you move
7 for a reference and he should object and says the Judge
8 ruled on that back on May the 28th, 2013, you can, one,
9 say not, and which would not be correct, that I didn't
10 rule. The only thing I ruled on was that there has been
11 no determination whether or not your counterclaim is
12 viable.

13 MR. TRULUCK: Thank you, Your Honor.

14 THE COURT: It doesn't address his request for
15 reference. Also, a reference can be made at any time
16 under a change of circumstances, so you can argue that
17 to a new judge --

18 MR. TRULUCK: Thank you, Judge.

19 THE COURT: -- and most of us understand it.

20 MR. TRULUCK: Thank you, Judge.

21 THE COURT: Okay. Thank you.

22 MR. DALEN: Just for the record, I do object to the
23 Order of Reference.

24 THE COURT: Okay. Very good. That's probably very
25 appropriate you do that on the record. Thank you.

1 By the way, put in there that Motion for Order of
2 Reference is denied at this time.

3 MR. TRULUCK: Thank you, Your Honor. That's all I
4 asked for, Your Honor.

5 (Court adjourned at 4:30 p.m.)

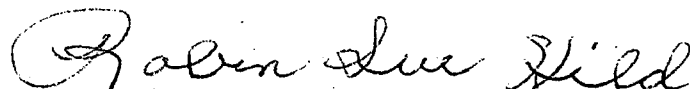
Certificate of Court Reporter

I, the undersigned, Robin Sue Hild, Official Court Reporter for the Tenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Oconee County, South Carolina, on the 28th day of May, 2013.

There may be quoted material which was read into the record by counsel or other persons. Such quoted material is transcribed as read by the reader.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

January 17, 2015



Robin Sue Hild, FCRR, RPR
10th Circuit Court Reporter

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE)

FEDERAL NATIONAL MORTGAGE)
ASSOCIATION,)

PLAINTIFF,)

VS)

2011-CP-37-01056

JOHN D. DALEN, JULIE A. DALEN AND)
AND WAWTOCKACE HILLS PROPERTY)
OWNERS ASSOCIATION,)

DEFENDANTS AND COUNTERCLAIM)
PLAINTIFFS,)

VS)

BANK OF AMERICA, NA, SUCCESSOR BY)
MERGER TO BAC HOME LOANS SERVICING,)
LP F/K/A COUNTRYWIDE HOME LOANS)
SERVICING, LP,)

COUNTERCLAIM DEFENDANT.)

WALHALLA, SC
MARCH 23, 2016

TRANSCRIPT OF TESTIMONY

BEFORE THE HONORABLE ELLIS B. DREW, JR.
MASTER IN EQUITY FOR THE TENTH JUDICIAL CIRCUIT

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I N D E XWITNESSES:DIRECT CROSS REDIRECT RECROSS

NONE

E X H I B I T SFOR BANK OF AMERICA:

	<u>ID</u>	<u>EVID</u>
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26. REQUEST FOR ADMISSIONS		11
27. DEPOSITION OF ZACHERY CHROMIAK		15

NOTE: BANK OF AMERICA EXHIBITS 1-23 PREVIOUSLY FILED
WITH THE CLERK OF COURT AS AN ATTACHMENT TO COUNTERCLAIM
DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS RENEWED
SUMMARY JUDGMENT MOTION.

1 THE COURT: THIS IS CASE 2011-CP-37-1056 ENTITLED
2 FEDERAL NATIONAL MORTGAGE ASSOCIATION, PLAINTIFF VERSUS
3 JOHN A. DALEN, JULIE A. DALEN AND WAWTOCKACE HILLS PROPERTY
4 OWNERS ASSOCIATION, DEFENDANTS AND COUNTERCLAIM PLAINTIFFS,
5 VERSUS BANK OF AMERICA, NA SUCCESSOR BY MERGER TO BAC HOME
6 LOANS SERVICING, LP F/K/A COUNTRYWIDE HOME LOANS SERVICING,
7 LP, COUNTERCLAIM DEFENDANT.

8 THIS MATTER WAS REFERRED BY AN ORDER OF JUDGE
9 MCINTOSH DATED JANUARY 28, 2015. A HEARING IS BEING HELD
10 MARCH 23RD, 2016.

11 I WANT THE ATTORNEYS TO STATE THEIR NAME FOR THE
12 RECORD AND WHO THEY REPRESENT.

13 MR. CALUB: YOUR HONOR, BRIAN CALUB ON BEHALF
14 OF BANK OF AMERICA, NATIONAL ASSOCIATION.

15 THE COURT: ALL RIGHT.

16 MR. GWYNNE: YOUR HONOR, I'M CHARLIE GWYNNE HERE
17 FOR FEDERAL NATIONAL MORTGAGE ASSOCIATION AND I THINK I
18 STILL AM TECHNICALLY COUNSEL OF RECORD FOR BANK OF AMERICA
19 ALSO.

20 THE COURT: ALL RIGHT, MR. GWYNNE.

21 MR. SLOAN: BILL SLOAN, YOUR HONOR, OF SLOAN
22 LAW FIRM. I REPRESENT JOHN DALEN AND JULIE DALEN.

23 THE COURT: THANK YOU. GOING THROUGH THE FILE
24 I SEE THERE ARE CERTAIN MOTIONS PENDING. WHAT'S THE FIRST
25 MOTION?

1 MR. CALUB: YOUR HONOR, I HAVE THE MOTION FOR
2 SUMMARY JUDGMENT READY TO GO.

3 THE COURT: OKAY. ANYTHING PRIOR TO THAT?

4 MR. SLOAN: YOUR HONOR, I'M FINE WITH MR. CALUB
5 GOING FIRST WITH HIS MOTION AND, YOUR HONOR, WE ALSO HAVE A
6 MOTION TO EXTEND THE DISCOVERY PERIOD.

7 THE COURT: WELL, LET ME HEAR THAT.

8 MR. SLOAN: OKAY. THANK YOU, YOUR HONOR, IN
9 THE DALENS' DEFENSE OF THE CASE AND IN PURSUIT OF THE NOW
10 CROSS-CLAIMS AGAINST BANK OF AMERICA, THEY HAVE RETAINED A
11 DOCUMENT EXPERT NAMED MARVIN DAWSON.

12 THE COURT: I READ HIS AFFIDAVIT.

13 MR. SLOAN: YES, SIR. HE HAS LIMITED
14 INFORMATION ABOUT THE SIGNATURES OF THE NOTARY PUBLIC AND
15 HE HAS REQUESTED 15 MORE SIGNATURE SPECIMENS AND FOR THAT
16 LIMITED PURPOSE, YOUR HONOR, WE WOULD LIKE TO EXTEND
17 DISCOVERY TO THE PLAINTIFF AS WELL AS BANK OF AMERICA,
18 ASKING FOR 15 ADDITIONAL SIGNATURE SPECIMENS SO HE CAN MAKE
19 A PROPER EVALUATION WHEN HE TESTIFIES AT THE TRIAL WHICH
20 IS, I BELIEVE, CURRENTLY SCHEDULED FOR MAY 11TH.

21 THE COURT: AS I READ THE AFFIDAVIT OF THE
22 EXPERT WITNESS, AND HE CERTAINLY IS QUALIFIED, HE STATED
23 UNDER EXAMINATION AND FINDINGS THAT THIS SIGNATURE OF
24 JENNIE M. KOGAK, K-O-G-A-K, APPEARING IN DOCUMENT Q1, AND
25 UNDISPUTED SIGNATURES ATTRIBUTED TO JENNIE M. KOGAK, HE

1 FOUND SOME TO BE GENUINE AND SOME HE QUESTIONED.

2 MR. SLOAN: THAT'S CORRECT, YOUR HONOR.

3 THE COURT: ALL RIGHT. THEN, AS YOU SAID, HE
4 ASKED FOR TIME TO GET 15 OTHER SPECIMENS BEARING THIS
5 QUESTIONABLE SIGNATURE.

6 MR. SLOAN: YES, SIR.

7 THE COURT: I'M GOING TO HAVE TO DENY THE
8 MOTION TO EXTEND. THIS CASE HAS BEEN UNDER DISCOVERY A
9 LONG TIME AND HE HAS NO PROBLEM WITH ONE. HE SAYS THE
10 OTHER SIGNATURE HE CAN'T QUITE TELL. HE DOESN'T SAY IT'S
11 FALSE BUT HE DOES SAY IT MAY NOT HAVE BEEN EXECUTED BY HER
12 AND REQUESTED ADDITIONAL SPECIMENS. ALL RIGHT, I'M GOING
13 TO HAVE TO DENY THE MOTION TO EXTEND. DO YOU HAVE ANY
14 OTHER MOTIONS?

15 MR. SLOAN: NO, YOUR HONOR. MAY I MAKE A BRIEF
16 COMMENT ON THE SIGNATURE SPECIMENS THAT MR. DAWSON ---

17 THE COURT: NO, SIR. I READ HIS AFFIDAVIT.

18 MR. SLOAN: OKAY. THANK YOU, YOUR HONOR.

19 THE COURT: THANK YOU, THOUGH.

20 MR. SLOAN: THAT'S ALL THAT I HAVE AT THIS
21 TIME.

22 THE COURT: ALL RIGHT, WHERE ARE WE NOW?

23 MR. DALEN: MAY I SAY SOMETHING?

24 THE COURT: NO, SIR. YOU ARE MR. DALEN?

25 MR. DALEN: YES, SIR.

1 THE COURT: YOU'VE GOT A LAWYER HERE. THIS IS
2 JUST A MOTION HEARING. OKAY, MR. CALUB.

3 MR. CALUB: THANK YOU, YOUR HONOR. BRIAN CALUB
4 ON BEHALF OF BANK OF AMERICA, NA, THE COUNTER-DEFENDANT WHO
5 HAS FILED THE NOW PENDING MOTION FOR SUMMARY JUDGMENT.

6 AS TO THE COUNTERCLAIMS THAT WERE ALLEGED BY THE
7 DEFENDANT BORROWERS, JOHN D. DALEN AND JULIE DALEN, AGAINST
8 BANK OF AMERICA, NA, YOUR HONOR, EFFECTIVELY WHAT WE'VE GOT
9 HERE IS A "SHOW ME THE NOTE" KIND OF CASE. EFFECTIVELY
10 WHAT THE POSITION OF MR. SLOAN'S CLIENTS IS, PLEASE IGNORE
11 ESTABLISHED SOUTH CAROLINA PRECEDENT THAT RECOGNIZES A
12 HOLDER OF A NEGOTIABLE INSTRUMENT ---

13 THE COURT: HE WAS TALKING ABOUT THE
14 ASSIGNMENTS?

15 MR. CALUB: CORRECT, CORRECT. HE FOCUSES ON
16 THE ASSIGNMENTS BUT AS YOU KNOW, YOUR HONOR, BANK OF
17 AMERICA V GRABER CLEARLY ESTABLISHES THAT ONE, A SERVICER
18 IS ENTITLED TO PURSUE FORECLOSURE AND TWO, HOLDERS OF A
19 NOTE ARE ENTITLED TO PURSUE FORECLOSURE. I JUST WANT TO
20 DIRECT THE COURT'S ATTENTION THAT THESE FACTS ARE
21 INDISPUTABLE. ONE, BANK OF AMERICA WAS A HOLDER OF THE
22 NOTE AND TWO, BANK OF AMERICA WAS THE SERVICER OF MR.
23 DALEN'S NOTE AND MORTGAGE AT THE POINT IN TIME THIS
24 FORECLOSURE WAS FILED.

25 LET ME GO THROUGH THE RECORD JUST TO HIGHLIGHT

1 THAT. FIRST, WHEN WE GO THROUGH THE RECORD, ONE OF THE
2 THINGS THAT WE HAVE HERE IS EXHIBIT 13 THAT WAS ATTACHED TO
3 BANK OF AMERICA'S MEMORANDUM IN SUPPORT OF THE MOTION FOR
4 SUMMARY JUDGMENT. HERE WE HAVE AN AFFIDAVIT BY A BANK OF
5 AMERICA OFFICER THAT IS ON RECORD WITH THE COURT, MS. TARA
6 L. ANDERSON, AND IF YOU LOOK AT PARAGRAPH THREE OF THIS
7 AFFIDAVIT IT SAYS "THE RECORDS OF..." BANK OF AMERICA, NA,
8 THEY ARE USING THE SHORT NAME OF BANK OF AMERICA, NA HERE
9 IN THE AFFIDAVIT WHICH IS BANA. BUT IT SAYS, "THE RECORDS
10 OF BANA REFLECT THAT IT IS THE PRESENT HOLDER OF A NOTE AND
11 MORTGAGE GIVEN TO QUICKEN LOANS, INC BY JOHN D. DALEN IN
12 THE AMOUNT OF ONE HUNDRED EIGHTEEN THOUSAND SEVEN HUNDRED
13 FIFTY AND 00/100 (\$118,750.00) DOLLARS ON DECEMBER 20,
14 2007 AND RECORDED ON DECEMBER 21, 2007 IN BOOK 2251 AT PAGE
15 206 IN THE OFFICE OF THE REGISTER OF DEEDS FOR OCONEE
16 COUNTY".

17 SO HERE WE HAVE CLEAR EVIDENCE THAT AT THIS POINT
18 IN TIME THE FORECLOSURE HAS BEEN FILED AND IS PROCEEDING.
19 BANK OF AMERICA IS THE HOLDER. ADDITIONALLY, THERE IS NO
20 DISPUTE IN THIS CASE, AND EVEN MR. DALEN'S TESTIMONY DURING
21 HIS DEPOSITION INDICATES THAT HE ACKNOWLEDGES THAT BANK OF
22 AMERICA WAS THE SERVICER OF HIS NOTE AND MORTGAGE AT THE
23 POINT IN TIME THIS FORECLOSURE WAS FILED.

24 LET ME POINT TO YOU -- YOUR HONOR, I'M GOING TO
25 PROVIDE TO YOU A COPY OF WHAT I'VE IDENTIFIED AS A REVISED

1 EXHIBIT 6 THAT WAS ATTACHED TO THE MOTION AND MEMORANDUM IN
2 SUPPORT OF SUMMARY JUDGMENT. I'VE ALREADY TENDERED A COPY
3 TO MR. SLOAN. IT MIGHT BE EASIER -- I'VE GOT CERTAIN PAGES
4 HIGHLIGHTED IN THERE TO LOOK AT. YOUR HONOR, I DIRECT YOUR
5 ATTENTION TO, I BELIEVE IT'S THE FIFTH PAGE OF THAT PACKET
6 WHICH IS PAGE 22 OF MR. DALEN'S DEPOSITION TRANSCRIPT. THE
7 RELEVANT TESTIMONY BEGINS AT FIVE AND I'LL READ IT TO YOU
8 STARTING WITH A QUESTION BY BANK OF AMERICA'S LAWYER.

9 "Q. OKAY, LET'S START WITH COUNTRYWIDE HOME

10 LOANS. YOU ARE AWARE THAT COUNTRYWIDE

11 HOME LOANS WAS BOUGHT BY BANK OF AMERICA

12 AND WAS RENAMED TO BAC HOME LOAN SERVICING,

13 LLC, CORRECT?

14 A. THAT COUNTRYWIDE WAS RENAMED?

15 Q. YES.

16 A. OKAY. I DIDN'T KNOW THAT BUT I KNEW THAT

17 WE WERE NOW PAYING BAC.

18 Q. OKAY. SO YOU KNOW ---

19 A. I THOUGHT COUNTRYWIDE WAS JUST GONE.

20 Q. OKAY, WOULD YOU DISPUTE THAT COUNTRYWIDE

21 HOME LOANS WAS BOUGHT BY BANK OF AMERICA,

22 RENAMED TO BAC HOME LOAN SERVICING, LLC?

23 A. NO, I WOULDN'T DISPUTE IT. NO."

24 AND SO IN THAT SENSE, I BELIEVE THAT TESTIMONY

25 INDICATES THAT THERE'S NO DISPUTE THAT HE'S ACKNOWLEDGING

1 THAT BANK OF AMERICA, NA WAS THE SERVICER OF HIS LOAN.

2 ADDITIONALLY, IN THE RECORD MR. DALEN ACTUALLY
3 CONCEDED THE POINT IN HIS PLEADINGS AND I WANT TO PROVIDE
4 TO YOU A MEMORANDUM OF LAW THAT MR. DALEN SUBMITTED TO THE
5 COURT ON FEBRUARY 21, 2012.

6 IF I COULD HAVE THE COURT REPORTER MARK THIS AS BANK
7 OF AMERICA NUMBER 24. I'M JUST MARKING IT BASED ON THE
8 EXHIBITS WE'VE PREVIOUSLY SUBMITTED WITH OUR MEMORANDUM AND
9 THE LAST ONE IS 23 AND THIS IS 24.

10 THE COURT: THAT'S A COPY OF THE DEPOSITION OF
11 JOHN DALEN AND THE COURT REPORTER WILL MARK IT.

12 (BANK OF AMERICA, NA, EXHIBIT 24 IN EVIDENCE)

13 THE COURT: ALL RIGHT, PROCEED.

14 MR. CALUB: 24 WAS THE MEMORANDUM OF LAW AND
15 THE DEPOSITION OF JOHN DALEN WILL BE 25.

16 THE COURT: ADMITTED.

17 (BANK OF AMERICA, NA EXHIBIT 25 IN EVIDENCE)

18 MR. CALUB: YOUR HONOR, I'M GOING TO HAND UP TO
19 YOU WHAT'S BEEN MARKED AS EXHIBIT NUMBER 24 FOR BANK OF
20 AMERICA AND I'M DIRECTING YOUR ATTENTION TO THE SECOND PAGE
21 OF THIS MEMORANDUM. THERE'S A MARKED PARAGRAPH THERE,
22 NUMBER THREE. IN PARAGRAPH NUMBER THREE IT SAYS BANK OF
23 AMERICA IS A SERVICER. NOW THIS IS DEFENDANT'S OWN
24 LANGUAGE. I THINK BASED ON THAT CONCESSION HE SHOULD BE
25 ESTOPPED FROM ASSERTING ANY OTHER POSITION THAT BANK OF

1 AMERICA WAS THE SERVICER OF HIS NOTE AND MORTGAGE AT THE
2 TIME THIS FORECLOSURE WAS FILED AND, THEREFORE, UNDER
3 DRAPER, IT HAS STANDING TO PURSUE FORECLOSURE.

4 FINALLY, I WOULD LIKE TO ALSO SUPPLEMENT THE
5 RECORD WITH BANK OF AMERICA'S RESPONSES TO THE DALENS'
6 REQUEST FOR ADMISSIONS. WE CAN MARK THIS AS NUMBER 26, I
7 BELIEVE.

8 THE COURT: ADMITTED.

9 (BANK OF AMERICA EXHIBIT 26 IN EVIDENCE.)

10 MR. CALUB: YOUR HONOR, I'M GOING TO HAND UP
11 WHAT'S BEEN MARKED AS BANK OF AMERICA'S EXHIBIT NUMBER 26.
12 AS YOU WILL SEE HERE, THE FIRST REQUEST THAT THE DALENS
13 ASKED BANK OF AMERICA IS THIS: REQUEST NUMBER ONE. ADMIT
14 OR DENY THAT BANK OF AMERICA, NA IS A SERVICER OF THE
15 PROMISSORY NOTE OF THE SUBJECT LOAN. RESPONSE BY BANK OF
16 AMERICA. PLAINTIFF ADMITS THAT IT IS THE SERVICER OF THE
17 PROMISSORY NOTE OF THE SUBJECT LOAN.

18 THE COURT: MR. SLOAN, DO YOU HAVE COPIES OF
19 THESE DOCUMENTS WE ARE LOOKING AT?

20 MR. CALUB: THEY ARE IN THE PACKET, THAT NEW
21 PACKET I JUST GAVE TO YOU.

22 THE COURT: ALL RIGHT.

23 MR. SLOAN: OKAY. I HAVE THEM.

24 THE COURT: GO AHEAD.

25 MR. CALUB: SO HERE THIS EVIDENTIARY RECORD

1 CLEARLY ESTABLISHES THAT BANK OF AMERICA HAD STANDING TO
2 PURSUE FORECLOSURE PURSUANT TO BANK OF AMERICA V DRAPER IN
3 ITS POSITION AS A SERVICER.

4 SO THERE'S TWO WAYS BANK OF AMERICA HAD STANDING
5 TO PURSUE THIS FORECLOSURE WHEN THIS ACTION WAS FILED.
6 ONE, IT WAS THE HOLDER OF THE ORIGINAL NOTE AND MORTGAGE
7 AND NUMBER TWO, IT WAS THE SERVICER OF MR. DALEN'S NOTE AND
8 MORTGAGE.

9 I WILL ALSO NOTE THAT THIS POINT WAS NOT IGNORED
10 BY THE CIRCUIT JUDGE WHEN HE DENIED THE BORROWERS' MOTION
11 FOR SUMMARY JUDGMENT.

12 I'M GOING TO DIRECT YOUR ATTENTION TO ANOTHER
13 EXHIBIT THAT WAS ATTACHED TO OUR MEMORANDUM IN SUPPORT. IT
14 IS EXHIBIT NUMBER 21 TO BANK OF AMERICA, NA'S MEMORANDUM IN
15 SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT. ON PAGE TWO OF
16 THIS ORDER, JUDGE MCINTOSH, ---

17 THE COURT: I HAVE A COPY OF THAT.

18 MR. CALUB: YOU HAVE THAT, YOUR HONOR? VERY
19 GOOD. HERE ON PAGE TWO OF THE ORDER JUDGE MCINTOSH APPLIES
20 THE DRAPER CASE AND IN QUOTING DRAPER HE RECOGNIZED IN
21 DRAPER THE SOUTH CAROLINA COURT OF APPEALS HELD THAT A
22 SERVICER OF A LOAN IS A REAL PARTY IN INTEREST AND IS A
23 PROPER PARTY TO INITIATE FORECLOSURE.

24 NOW EFFECTIVELY HE FOUND TWO GROUNDS TO IDENTIFY
25 THAT BANK OF AMERICA HAD STANDING.

1 ONE WAS RELATED TO THE ASSIGNMENT THAT WAS ON
2 FILE WITH THE COURT, WHICH I BELIEVE THE DALENS DISPUTE,
3 PURSUANT TO THE AFFIDAVIT THAT THEY SUBMITTED TODAY.

4 BUT SECOND, AND THIS IS THE MOST IMPORTANT
5 SENTENCE, JUDGE MCINTOSH MAKES A FINDING THAT BANK OF
6 AMERICA, NA IS INDEED THE SERVICER OF THE MORTGAGE LOAN AT
7 ISSUE IN THIS CASE. HERE'S THE LANGUAGE FROM THE ORDER,
8 "FURTHERMORE, IT IS UNDISPUTED THAT PLAINTIFF IS THE
9 CURRENT SERVICER OF THE LOAN."

10 AND THEN FROM THAT LANGUAGE JUDGE MCINTOSH GOES
11 ON TO CONCLUDE THAT BANK OF AMERICA, NA, AT THIS POINT IN
12 TIME IN PURSUING THE FORECLOSURE HAD STANDING TO ASSERT THE
13 ACTION, THIS FORECLOSURE ACTION. AND THEREFORE, HE GOES ON
14 TO DENY THE MOTION FOR SUMMARY JUDGMENT.

15 I THINK THAT THE ISSUE THAT I HAVE WITH WHAT'S
16 GOING ON TODAY IS I DON'T THINK ANY OTHER CONTRARY EVIDENCE
17 IS PRESENTED TO THE RECORD THAT I'M AWARE OF TO DISPUTE AT
18 LEAST, ONE, THAT BANK OF AMERICA HELD THE NOTE AT THE POINT
19 IN TIME IT WAS PURSUING THIS FORECLOSURE AND TWO, THAT IT
20 WAS THE SERVICER. AND ON THOSE TWO VERY STRONG FACTS, THE
21 DALENS CAN'T OVERCOME THE FACT THAT BANK OF AMERICA
22 PROPERLY FILED THIS FORECLOSURE ACTION.

23 SECONDLY, AS YOU'LL SEE IN OUR MEMORANDUM, QUITE
24 FRANKLY, THE DISTRICT OF SOUTH CAROLINA, IN FOLLOWING THE
25 COMMON LAW OF THE FOURTH CIRCUIT, HAS RECOGNIZED THAT

1 GENERALLY BORROWERS DON'T HAVE THE ABILITY TO CHALLENGE AN
2 ASSIGNMENT FROM ONE LENDER TO ANOTHER FOR THE SIMPLE FACT
3 THAT AN ASSIGNMENT OF A LOAN FROM ONE LENDER TO ANOTHER IS
4 A CONTRACT BETWEEN THOSE TWO LENDERS AND AS A STRANGER TO
5 THAT TRANSACTION THE BORROWERS HAVE NO RIGHT TO QUESTION OR
6 CHALLENGE THE ASSIGNMENT OR TRANSFER TRANSACTION. SO THAT
7 WOULD BE THE THIRD REASON, AS A MATTER OF LAW, THAT THE
8 DEFENDANTS JUST CAN'T RAISE THAT ARGUMENT IN THIS ACTION.

9 AND SO WITH THAT, YOU KNOW, I'M SURE YOU'VE READ
10 MY MEMORANDUM SO I'M JUST GOING TO KIND OF HIT THE HIGH
11 POINTS OF THE OTHER ARGUMENTS THAT WE HAVE FOR ESTABLISHING
12 OUR GROUNDS FOR SUMMARY JUDGMENT ON THE OTHER CLAIMS
13 ALLEGED.

14 FIRST, THE COUNTERCLAIM PLAINTIFFS ALLEGE THAT
15 BANK OF AMERICA VIOLATED THE FAIR DEBT COLLECTION PRACTICES
16 ACT. IN THIS INSTANCE THE FAIR DEBT COLLECTION PRACTICES
17 ACT DOES NOT APPLY TO BANK OF AMERICA, NA AS WE DETAILED IN
18 OUR MEMORANDUM IN SUPPORT. THE FDCPA, WHICH IS SHORT FOR
19 THE FAIR DEBT COLLECTION PRACTICES ACT, ONLY APPLIES TO A
20 DEBT COLLECTOR AS SPECIFICALLY DEFINED UNDER THE STATUTE.

21 AS A MORTGAGE LOAN SERVICER, BANK OF AMERICA, NA,
22 AND ALSO THE HOLDER OF THE NOTE, DID NOT FIT THE CRITERIA
23 FOR A DEBT COLLECTOR AS DEFINED UNDER THE FDCPA AND,
24 THEREFORE, THE FDCPA SIMPLY DOES NOT APPLY AND BANK OF
25 AMERICA SHOULD GET SUMMARY JUDGMENT ON THAT CLAIM.

1 ADDITIONALLY, THE RECORD REFLECTS THAT BANK OF
2 AMERICA AND ITS PREDECESSORS HAVE BEEN SERVICING THE LOAN
3 SINCE JANUARY 9, 2008. IT APPEARS THAT THE LOAN WENT INTO
4 DEFAULT, THE RECORDS INDICATE, BASED ON THE CHROMIAK
5 TESTIMONY THAT IS APPENDED -- I'M SORRY, THE CHROMIAK
6 TESTIMONY WHICH I'M HANDING UP TO MAKE EXHIBIT NUMBER 27,
7 I BELIEVE. THAT'S RIGHT. THIS IS A SUPPLEMENT TO MY
8 EXHIBIT NUMBER 6 ATTACHED TO THE MEMORANDUM BUT WE'LL MARK
9 IT AS 27 FOR EASE OF REFERENCE.

10 THE COURT: ADMITTED.

11 (BANK OF AMERICA EXHIBIT 27 IN EVIDENCE)

12 MR. CALUB: THANK YOU, YOUR HONOR. I BELIEVE
13 IF YOU LOOK AT PAGE 14 OF THE CHROMIAK DEPOSITION
14 TRANSCRIPT, IT INDICATES THAT BANK OF AMERICA WAS SERVICING
15 THE LOAN ON OR ABOUT JANUARY 9, 2008, AND THEN WHEN
16 SERVICING TRANSFERRED TO COUNTRYWIDE HOME LOANS AND THAT IN
17 SOME POINT IN TIME, DECEMBER 1, 2010, THE LOAN WENT INTO
18 DEFAULT. AND SO UNDER THESE FACTS THE FDCPA WOULD NOT
19 APPLY TO BANK OF AMERICA BECAUSE IT WAS SERVICING THE LOAN
20 AT A POINT IN TIME THAT IT WAS CURRENT AS OPPOSED TO IN
21 DEFAULT.

22 NEXT, I BELIEVE THAT THE COUNTERCLAIM PLAINTIFFS
23 ALSO ALLEGED A VIOLATION OF THE REAL ESTATE SETTLEMENT
24 PROCEDURES ACT OR RESPA. FOR TWO REASONS THIS CLAIM FAILS.
25 NUMBER ONE, THE CLAIM IS TIME BARRED. I THINK WHEN YOU GO

1 THROUGH THE COUNTERCLAIMS THEY WERE TRYING TO ALLEGE THAT
2 THEY DIDN'T RECEIVE NOTICE OF SOME FORM OF SERVICE
3 TRANSFER, HOWEVER, THE RECORD INDICATES THAT THERE WAS
4 NOTICE OF A SERVICE TRANSFER AROUND JANUARY 8, 2008. I
5 BELIEVE THAT IS EXHIBIT NUMBER 5 TO THE MEMORANDUM IN
6 SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT. THERE IS A
7 NOTICE FROM QUICKEN LOANS NOTIFYING THE COUNTERCLAIM
8 PLAINTIFFS THAT THEIR NOTE AND MORTGAGE IS BEING
9 TRANSFERRED TO COUNTRYWIDE HOME LOANS. THE COUNTERCLAIMS
10 IN THIS ACTION WERE NOT FILED UNTIL FEBRUARY 21, 2012,
11 WHICH IS MORE THAN FOUR YEARS AFTER THE INITIAL JANUARY 9,
12 2008 TRANSFER OCCURRED AND THEREFORE, THE RESPA CLAIM IS
13 TIME BARRED.

14 ADDITIONALLY, QUITE FRANKLY, THE EVIDENTIARY
15 RECORD PRESENTED BY THE COUNTERCLAIM PLAINTIFFS IS THIN.
16 WE'VE NOT RECEIVED ANY INFORMATION OR RECORD OF ACTUAL
17 DAMAGES OR MONETARY LOSSES ARISING FROM THE CLAIMS
18 SUPPORTING THE RESPA VIOLATION. IN FACT, WHEN YOU GO BACK
19 TO THE DALEN TRANSCRIPT ON PAGE 45 AND PAGE 56, EFFECTIVELY
20 THE ONLY DAMAGES IDENTIFIED WERE FOR SOME FORM OF
21 REPUTATION HARM, REPUTATIONAL HARM, BASED ON THE FACT THAT
22 THE FORECLOSURE WAS FILED. THAT'S SIMPLY INSUFFICIENT.

23 NEXT, I BELIEVE -- THE NEXT COUNTERCLAIM THAT'S
24 BEEN ALLEGED BY THE BORROWERS IS A SLANDER OF TITLE CLAIM.
25 AS A MATTER OF SOUTH CAROLINA LAW THIS CLAIM FAILS. IN

1 POND PLACE PARTNERS, INC V POOLE, WHICH IS A CASE WE CITED
2 IN OUR MEMORANDUM IN SUPPORT OF THE MOTION FOR SUMMARY
3 JUDGMENT, THE COURT HELD THAT "SOUTH CAROLINA HAS LONG
4 RECOGNIZED THAT RELEVANT PLEADINGS, EVEN IF DEFAMATORY, ARE
5 ABSOLUTELY PRIVILEGED". WE WOULD SAY THAT THE FILING OF A
6 FORECLOSURE COMPLAINT IN THIS ACTION CANNOT GIVE RISE TO
7 ANY CLAIM FOR SLANDER OF TITLE.

8 AND QUITE FRANKLY, EVEN DEEPER THAN THAT, THE
9 RECORD INDICATES THAT THERE HAVE BEEN NO FALSE STATEMENTS
10 MADE WITH REGARD TO BANK OF AMERICA'S RIGHT TO PURSUE
11 FORECLOSURE AT THE POINT IN TIME THIS ACTION WAS FILED
12 WHICH WAS AROUND OCTOBER 31, 2011.

13 THE NEXT CLAIM THAT I BELIEVE THAT IS AT ISSUE IS
14 AN UNFAIR TRADE PRACTICES ACT CLAIM. AS DETAILED IN OUR
15 MEMORANDUM IN SUPPORT THIS CLAIM ALSO FAILS.

16 FIRST, THERE IS ABSOLUTELY NO EVIDENCE PRESENTED
17 IN THIS RECORD INDICATING EFFECT ON THE PUBLIC AT LARGE.
18 AS YOU KNOW, THAT'S ONE OF THE REQUIREMENTS FOR A UTPA,
19 THAT THERE MUST BE AN EFFECT ON THE PUBLIC INTEREST. WHAT
20 WE REALLY HAVE HERE IS A PRIVATE DISPUTE OVER RIGHTS
21 BETWEEN TWO PARTIES TO A NOTE AND MORTGAGE SO IT IS
22 EFFECTIVELY SOME FORM OF CONTRACT OF STANDING DISPUTE AND
23 NOTHING MORE.

24 SECONDLY, AGAIN MUCH LIKE THE RESPA CLAIM THAT
25 I'VE DISCUSSED BEFORE, THERE IS JUST NO EVIDENCE OF

1 PECUNIARY LOSS OR DAMAGES IN THIS MATTER. YOU KNOW,
2 THERE'S VAGUE REFERENCES IN THE RECORD TO SOME KIND OF
3 INJURY IN BUSINESS OR PERSONS BUT AGAIN, NO CAUSATION IS
4 DESCRIBED AND THERE'S NO REAL DETAIL AS TO WHAT THE
5 PECUNIARY LOSS WAS. THEREFORE, THIS RECORD IS SIMPLY
6 DEFICIENT IN SUPPORTING A UNFAIR TRADE PRACTICES ACT CLAIM
7 FOR TRIAL.

8 THE NEXT CLAIM THAT WE'VE GOT AT ISSUE HERE, I
9 BELIEVE THE COUNTERCLAIM PLAINTIFFS ALLEGE A CLAIM UNDER
10 SOUTH CAROLINA CODE ANNOTATED 15-75-60. THIS IS A
11 STATUTORY CLAIM THAT REQUIRES ESTABLISHMENT OF A VIOLATION
12 OF SOUTH CAROLINA CODE 16-17-737 WHICH IS A CLAIM THAT IS A
13 CRIMINAL CLAIM THAT SAYS IT IS UNLAWFUL FOR A PERSON
14 FALSELY TO ASSERT AUTHORITY OF STATE LAW IN CONNECTION WITH
15 A SHAM LEGAL PROCESS. THE RECORD SIMPLY DOESN'T SUPPORT
16 THAT. BANK OF AMERICA WAS THE SERVICER AND HOLDER OF THE
17 NOTE AND MORTGAGE. IT WAS ENTITLED TO PURSUE FORECLOSURE
18 IN THIS ACTION WHEN IT FILED THIS CASE AND SO WITHOUT THAT
19 PREDICATE STATUTORY VIOLATION ESTABLISHED THEY CAN'T HAVE A
20 CLAIM UNDER 15-75-60. THERE IS SIMPLY NO EVIDENCE
21 SUPPORTING A CLAIM UNDER THAT STATUTE.

22 ALSO, THERE IS SOME QUESTION AS TO WHETHER OR NOT
23 THEY EVEN HAVE A RIGHT OR ACTION UNDER THAT STATUTE WHICH I
24 DON'T THINK THEY'VE ESTABLISHED.

25 AND THE NEXT CLAIM I THINK WE'VE GOT HERE IS A

1 CLAIM OF NEGLIGENT SUPERVISION. AGAIN, UNDER SOUTH
2 CAROLINA LAW HERE THIS CLAIM IS FATALLY DEFICIENT AS A
3 MATTER OF LAW AND THE EVIDENCE PRESENTED TO DATE IN THIS
4 CASE. NUMBER ONE, PURSUANT TO THE KERR V BRANCH BANKING
5 AND TRUST CASE AND THE REGIONS BANK V SCHMAUCH CASE CITED
6 IN OUR MEMORANDUM, THERE'S NO PARTICULAR SPECIALIZED DUTY
7 OF CARE THAT A LENDER GENERALLY OWES TO A BORROWER SO THE
8 NEGLIGENT CLAIM ON THAT GROUND WOULD FAIL.

9 BUT EVEN THEN, IF WE STEP BACK AND LOOK AT ONE OF
10 THE ELEMENTS OF A NEGLIGENT SUPERVISION CLAIM IS, AS WE
11 DETAILED IN OUR MEMORANDUM, IS THE DEFENDANT HAS TO HAVE
12 NOTICE THAT THEIR EMPLOYEES ARE DOING SOMETHING WRONG AND
13 QUITE FRANKLY, THERE'S NO EVIDENCE THAT'S BEEN PRESENTED IN
14 THIS CASE THAT THERE WERE ANY REASONS FOR BANK OF AMERICA
15 TO THINK THAT ANY OF THE EMPLOYEES WORKING ON THIS LOAN HAD
16 DONE ANYTHING WRONG OR SHOULD HAVE NOTICE OF ANYTHING THAT
17 THEY HAD DONE WRONG AND REQUIRED SUPERVISION. THERE'S
18 ABSOLUTELY NONE THAT'S BEEN PRESENTED IN THE INTERROGATORY
19 RESPONSES FROM THE COUNTERCLAIM PLAINTIFFS, THEIR
20 SUPPLEMENTAL DISCOVERY RESPONSES, NONE OF THEIR DEPOSITION
21 TESTIMONY COVERS THAT AND I THINK MORE TO THE POINT, THE
22 COUNTERCLAIM PLAINTIFFS HAVE NOT IDENTIFIED A SINGLE
23 EMPLOYEE THAT WOULD HAVE RAISED RED FLAGS BECAUSE OF
24 REPEATED IMPROPER CONDUCT. SO UNDER THIS RECORD, THERE'S
25 NO WAY THEY CAN TAKE A NEGLIGENT SUPERVISION CLAIM TO

1 TRIAL.

2 SO FOR THAT REASON, SUMMARY JUDGMENT ON THE
3 NEGLIGENT SUPERVISION CLAIM IS ALSO APPROPRIATE FOR BANK OF
4 AMERICA.

5 FINALLY, THERE'S THE FRAUD CLAIM. THE ISSUE
6 HERE, I THINK THE FRAUD CLAIM IS PREDICATED UPON AN
7 IMPROPER ASSIGNMENT OR SOME CLAIM THAT THE ASSIGNMENTS WERE
8 WRONG. THERE'S SIMPLY NO EVIDENCE OF THAT AS I STATED
9 BEFORE WHEN WE ADDRESSED WHETHER OR NOT BANK OF AMERICA HAD
10 STANDING TO PURSUE THIS FORECLOSURE ACTION WHEN IT WAS
11 INITIALLY FILED. SO THERE'S NO ESTABLISHMENT OF ANY FRAUD
12 THAT'S BEEN REPRESENTED TO THE COUNTERCLAIM PLAINTIFFS.

13 ADDITIONALLY, AGAIN, NO REAL LINK BETWEEN ANY OF
14 THE ALLEGED ACTUAL DAMAGES THAT HAVE BEEN SUFFERED AND SO
15 UNDER THESE CIRCUMSTANCES, AS DETAILED IN THE MEMORANDUM,
16 AMONG OTHER REASONS, BANK OF AMERICA IS ENTITLED TO SUMMARY
17 JUDGMENT ON THIS FRAUD COUNT.

18 THAT'S ALL I'VE GOT.

19 THE COURT: THANK YOU. WHILE WE'RE ON BANK OF
20 AMERICA, MR. GWYNNE, DO YOU HAVE ANYTHING FURTHER TO OFFER
21 ON THIS MATTER?

22 MR. GWYNNE: NO, SIR.

23 THE COURT: ALL RIGHT, MR. SLOAN, ---

24 MR. SLOAN: THANK YOU, YOUR HONOR.

25 THE COURT: --- I'LL BE GLAD TO HEAR FROM YOU.

1 MR. SLOAN: THANK YOU, YOUR HONOR. FIRST,
2 BEFORE I GET INTO THE DEPTHS OF THE -- EXHIBIT 20 -- I
3 APPRECIATE MR. CALUB SENDING THIS ATTACHMENT. EXHIBIT 20
4 IS THE ORDER OF JUDGE MACAULAY DENYING THE PREVIOUS MOTION
5 FOR SUMMARY JUDGMENT ON ALL OF THESE COUNTERCLAIMS FILED BY
6 BANK OF AMERICA WHEN THEY WERE THE PLAINTIFF AND WHEN KORN
7 LAW FIRM WAS REPRESENTING THEM. THIS ORDER WAS SIGNED ON
8 OR NEAR JULY 9TH, 2014. BANK OF AMERICA FILED NO SUCH
9 MOTIONS TO RECONSIDER OR ANYTHING OF THE SORT AND I
10 BELIEVE, BEFORE I DELVE INTO IT, I BELIEVE THEIR MOTION FOR
11 SUMMARY JUDGMENT SHOULD BE DENIED ON THAT REASON ALONE.

12 THE COURT: ALL RIGHT, MR. CALUB, WHAT ABOUT
13 THAT?

14 MR. CALUB: I CAN RESPOND TO THAT. I THINK THE
15 ISSUE THERE IS THAT WHAT MR. SLOAN HAS DONE IS IGNORE THE
16 FACT THAT WE ARE ENTITLED TO FILE A RENEWED MOTION FOR
17 SUMMARY JUDGMENT TO PRESENT NEW ARGUMENTS AND EVIDENCE IN
18 THIS ACTION.

19 IN COMPARING THE PRIOR MOTION FOR SUMMARY
20 JUDGMENT AND THIS ONE, THIS IS A FAR MORE DETAILED ACCOUNT
21 OF THE EVIDENCE TO BE CONSIDERED ON MOTION FOR SUMMARY
22 JUDGMENT AND UNDER SOUTH CAROLINA LAW IT'S OKAY TO REVISIT
23 THE SUMMARY JUDGMENT QUESTION ON THAT POINT. I THINK IF
24 YOU WERE TO COMPARE THIS MEMORANDUM OF SUPPORT WITH THE
25 PRIOR ONE THAT WAS FILED, THERE'S A FAR MORE DETAILED

1 RECORD OF EVIDENCE THAT MAYBE PERHAPS THE JUDGE DENYING OUR
2 PRIOR MOTION FOR SUMMARY JUDGMENT DID NOT CONSIDER.

3 I THINK ALL THESE ARE DETAILED -- I BELIEVE WE
4 FILED A MOTION AND I DON'T HAVE IT WITH ME, BUT WE DID FILE
5 A MOTION TO EXTEND THE DEADLINE SO WE COULD FILE A
6 DISPOSITIVE MOTION IN THIS MATTER.

7 IN THAT MOTION WE EFFECTIVELY ARGUED WE ARE
8 ENTITLED TO FILE A RENEWED MOTION FOR SUMMARY JUDGMENT
9 BECAUSE WE HAD THE EXTENDED DEADLINE.

10 I FIND IT SURPRISING THAT MR. SLOAN NOW RAISES
11 THE FACT THAT THE PRIOR MOTION OF BANK OF AMERICA WAS
12 DENIED AND YET HE CONSENTED TO THE ORDER THAT PERMITTED AN
13 EXTENSION OF TIME TO FILE THE SUBSEQUENT MOTION WHEN ONE OF
14 THE ARGUMENTS THAT WE CLEARLY ARTICULATED IN THAT MOTION
15 FOR EXTENSION OF TIME WAS THAT WE ARE ENTITLED TO RENEW OUR
16 MOTION FOR SUMMARY JUDGMENT.

17 THE COURT: ALL RIGHT. MR. SLOAN, I UNDERSTAND
18 WHAT YOUR MOTION IS. MR. CALUB HAS ARGUED THE OTHER SIDE
19 OF THE QUESTION. NOW WHILE EVERYONE IS HERE I'M GOING TO
20 LET YOU PROCEED, IF YOU WILL, TO PRESENT YOUR CASE AS TO
21 WHY SUMMARY JUDGMENT SHOULD NOT NOW BE GRANTED BASED ON THE
22 ARGUMENTS HERE THIS MORNING.

23 MR. SLOAN: VERY WELL. I'LL BE HAPPY TO DO SO,
24 YOUR HONOR.

25 THE COURT: THANK YOU.

1 MR. SLOAN: FIRST, WITH REGARD TO BANK OF
2 AMERICA V DRAPER. I KNOW MR. CALUB WEIGHS HEAVILY ON THAT
3 CASE THAT WAS FILED IN 2011. BANK OF AMERICA V DRAPER WAS
4 A 2013 DECISION SO BANK OF AMERICA WAS NOT RELYING ON IT'S
5 DRAPER DECISION TO FILE THIS ACTION. I DIRECT THE COURT'S
6 ATTENTION TO MR. CHROMIAK'S DEPOSITION. I'M NOT SURE WHICH
7 NUMBER THAT IS IN THE EXHIBITS.

8 COURT REPORTER: 27.

9 MR. SLOAN: THANK YOU, MA'AM. IT'S EXHIBIT 27.
10 IN HIS DEPOSITION ON PAGE 15 MR. CHROMIAK TESTIFIED THAT
11 THE CURRENT PLAINTIFF, FANNIE MAE, WAS THE OWNER OF THIS
12 NOTE FROM JANUARY OF 2008, SHORTLY AFTER THIS LOAN WAS
13 ORIGINATED. MR. CALUB NOW, ON BEHALF OF BANK OF AMERICA,
14 TO DEFEND THE COUNTERCLAIM, AT THE TIME COUNTERCLAIM AND
15 NOW CROSS-CLAIM, TALKS ABOUT THAT BANK OF AMERICA IS THE
16 HOLDER OF THE NOTE, HOWEVER, THAT'S NOT WHAT THEY WERE
17 BASING THEIR STANDING TO FORECLOSE ON IN THEIR COMPLAINT
18 WHICH WAS ADMITTEDLY NOT FILED BY MR. CALUB BUT BY KORN LAW
19 FIRM IN 2011. THEY WERE SAYING WE HAVE THIS ASSIGNMENT OF
20 MORTGAGE AND MERS ON BEHALF OF QUICKEN, ASSIGNED THIS
21 MORTGAGE TO COUNTRYWIDE AND BANK OF AMERICA TAKING OVER
22 COUNTRYWIDE. THE DALENS DON'T DISPUTE THAT COUNTRYWIDE
23 BECAME BANK OF AMERICA BUT AGAIN, BANK OF AMERICA IS
24 RELYING ON THAT ASSIGNMENT OF MORTGAGE IN THEIR COMPLAINT
25 TO HAVE THE STANDING TO SUE. WE MAINTAIN OPPOSITION TO THE

1 SUMMARY JUDGMENT ON THAT.

2 FURTHER, SINCE BANK OF AMERICA WAS SERVICING THIS
3 MORTGAGE FOR FANNIE MAE FROM 2008 UNTIL 2015, THEY WERE NOT
4 COLLECTING THIS DEBT FOR THEMSELVES, THEY WERE COLLECTING
5 THIS DEBT FOR FANNIE MAE. THEREFORE, UNDER 15-1692E OF THE
6 FAIR DEBT COLLECTION PRACTICES ACT WE CONTEND THAT BANK OF
7 AMERICA MISREPRESENTED THE NATURE OF THE DEBT, NAMELY, TO
8 WHOM THE DEBT WAS OWED.

9 NOW IF BANK OF AMERICA, WHEN THEY FILED THIS
10 COMPLAINT, SAID WE ARE THE SERVICER FOR FANNIE MAE THEN
11 THEY WOULD NOT BE MISREPRESENTING THE NATURE OF THE DEBT
12 BUT THEY WERE CLAIMING THE STANDING TO SUE IN THEIR
13 COMPLAINT, NOT ON HOLDING THE ORIGINAL NOTE, NOT ON BEING
14 THE OWNER, THEY SAID THEY WERE THE OWNER OF THE NOTE. NOT
15 EVEN THAT BUT THAT THEY HAD THIS ASSIGNMENT OF MORTGAGE.
16 SO WE CONTEND THAT THEY VIOLATED THE FDCPA BY
17 MISREPRESENTING THE NATURE OF THE DEBT. WE CONTEND THAT'S
18 A GENUINE ISSUE OF MATERIAL FACTS FOR THE TRIAL.

19 WITH REGARD TO THE UNFAIR TRADE PRACTICES, WE
20 HAVE SUBMITTED THE AFFIDAVIT, THE UNCERTAIN AFFIDAVIT OF
21 MR. DAWSON. THE COURT RESPECTFULLY DENIED OUR MOTION BUT
22 WE WILL CONTINUE TO ATTEMPT TO CONFIRM OR DENY THAT THAT
23 ASSIGNMENT OF MORTGAGE WAS NOTARIZED BY THE PERSON, MS.
24 KOGAK WHO PURPORTEDLY NOTARIZED IT. WE CONTEND THAT THE
25 AFFIDAVIT OF MR. DAWSON PRESENTS A GENUINE ISSUE OF

1 MATERIAL FACTS ON THE UNFAIR TRADE PRACTICES BECAUSE I
2 HIGHLY DOUBT -- THERE VERY WELL MAY BE OTHER ASSIGNMENTS OF
3 MORTGAGE THAT WERE IMPROPERLY NOTARIZED BY BANK OF AMERICA,
4 BY WELLS FARGO. THE REGISTER OF DEEDS OFFICE OF OCONEE
5 COUNTY IS PROBABLY LITTERED WITH THEM AND THAT WOULD AFFECT
6 THE PUBLIC AT LARGE.

7 THE FRAUD CLAIM, THE EXACT SAME. IF THIS
8 ASSIGNMENT OF MORTGAGE WAS FRAUDULENTLY NOTARIZED BY THE
9 SQUIGGLY LINE BY SOMEBODY WHO IS NOT MS. KOGAK, THEN THAT'S
10 CERTAINLY A FRAUD CLAIM AND WE BELIEVE THE AFFIDAVIT OF MR.
11 DAWSON IN AND OF ITSELF PRESENTS A GENUINE ISSUE OF
12 MATERIAL FACT FOR THE FACT FINDER, YOUR HONOR, TO FIND AT
13 TRIAL.

14 SO FOR THOSE REASONS, YOUR HONOR, WE ARE
15 RESPECTFULLY ASKING THE COURT TO DENY SUMMARY JUDGMENT,
16 SUMMARY JUDGMENT TWO OF BANK OF AMERICA.

17 THE COURT: THANK YOU.

18 MR. SLOAN: THANK YOU, YOUR HONOR.

19 THE COURT: AS I SAID, I'VE GONE THROUGH MOST
20 OF THESE EXHIBITS. WE HAVE A COUPLE OF NEW EXHIBITS
21 SUBMITTED TODAY OR COPIES, I BELIEVE. WE HAD A COPY OF THE
22 TRANSCRIPT OF MR. JOHN DALEN'S DEPOSITION. THE ATTORNEYS
23 POINTED OUT SOME OF THE PROVISIONS AND I WAS JUST CURIOUS
24 HOW THIS MORTGAGE BECAME DELINQUENT. I'M NOT SURE WHEN THE
25 LAST PAYMENT WAS MADE. WAS IT 2010?

1 MR. SLOAN: I'M NOT SURE, YOUR HONOR.

2 MR. CALUB: ONE WAS DUE FOR DECEMBER 1ST, 2010,
3 YOUR HONOR.

4 THE COURT: IN MR. DALEN'S AFFIDAVIT (SIC) ON
5 PAGE 8, STARTING AT LINE 5, THE QUESTION WAS:

6 (QUESTIONING OF MR. DALEN IS BY DEAN HAYES,
7 ATTORNEY FOR PLAINTIFF, BANK OF AMERICA)

8 "Q. OKAY. THANK YOU, MR. DALEN. AND WHY

9 DID YOU -- WHAT CAUSED THE DEFAULT IN
10 THIS CASE, THE DEFAULT IN THE PAYMENTS
11 ON THIS NOTE?

12 A. A COLLAPSE OF THE ECONOMY IN 2008. I
13 HAD A BUSINESS. I WAS IN CONSTRUCTION.
14 THE CONSTRUCTION BUSINESS GOT HIT
15 PARTICULARLY HARD IN 2008."

16 THE COURT: I THINK THAT'S EXACTLY RIGHT. SO
17 THAT EXPLAINS PROBABLY IN GREAT DETAIL HOW THIS MORTGAGE
18 GOT -- OKAY, THAT'S SORT OF BESIDE THE POINT.

19 I DON'T BELIEVE THERE IS ANY QUESTION ABOUT THE
20 DEBT THAT'S DUE. I BELIEVE THAT WAS STATED SOMEWHERE IN
21 MR. DALEN'S DEPOSITION.

22 THERE ARE OTHER ISSUES THAT HAVE BEEN RAISED BY
23 MR. SLOAN, ALONG WITH AN EXTENSIVE ARGUMENT AS TO WHY
24 SUMMARY JUDGMENT SHOULD BE GRANTED.

25 IN THIS CASE THERE HAS BEEN EXTENSIVE DISCOVERY.

1 THE CASE WAS FILED IN 2011 AND APPARENTLY OVER A PERIOD OF
2 SOME FOUR YEARS THERE'S BEEN EXTENSIVE DISCOVERY IN THE
3 MATTER. I DON'T KNOW FRANKLY WHAT ELSE EITHER SIDE COULD
4 FIND OUT OTHER THAN MR. SLOAN'S REQUEST TO ALLOW THIS
5 EXPERT TO EXAMINE DOCUMENTS OR MORE TIME TO OBTAIN AN
6 ADDITIONAL 15 SIGNATURES OR EXEMPLARS.

7 ALL RIGHT, AT ANY RATE, AT THIS TIME I'M GOING TO
8 DENY THE MOTION TO EXTEND. I TOOK THAT UNDER ADVISEMENT
9 BEFORE YOU STARTED. I THINK HE WANTS 15 MORE EXEMPLARS.
10 THAT SEEMS TO BE A LITTLE BURDENSOME.

11 NOW AS TO THE SUMMARY JUDGMENT MOTION. I'VE READ
12 THE CONSIDERABLE MEMORANDUMS THAT HAVE BEEN FILED AND, OF
13 COURSE, MR. SLOAN HAS REPRESENTED HIS CLIENTS EQUALLY WELL
14 IN HIS OPPOSING MEMORANDUMS THAT I SAW.

15 HOWEVER, OVERALL, I'M INCLINED TO GRANT THE
16 MOTION TO BANK OF AMERICA'S SUMMARY JUDGMENT. NOW HAVING
17 SAID THAT THIS CASE WILL LATER BE SCHEDULED FOR A HEARING
18 ON THE FORECLOSURE ITSELF.

19 MR. CALUB: IT'S ALREADY BEEN SET, YOUR HONOR.
20 WE HAVE A DATE IN MAY. MAY THE 11TH.

21 THE COURT: ALL RIGHT, THAT WILL BE MY RULING.
22 NOW MR. CALUB AND MR. GWYNNE, IF YOU GENTLEMEN WILL PREPARE
23 A PROPOSED ORDER. I WANT YOU TO SEND A COPY OF THAT ORDER
24 TO MR. SLOAN WHEN YOU PROVIDE IT TO THE COURT. MR. SLOAN,
25 I'M GOING TO ALLOW YOU A FEW DAYS TO LOOK IT OVER. I KNOW

1 YOU'RE GOING TO BE SOMEWHAT AGGRIEVED BUT IF YOU ARE
2 EXTENSIVELY AGGRIEVED BY SOMETHING IN THE ORDER, PLEASE LET
3 ME KNOW.

4 MR. SLOAN: YES, SIR.

5 THE COURT: OKAY. THANK YOU, GENTLEMEN.

6 MR. CALUB: THANK YOU, YOUR HONOR.

7

8 END OF HEARING.

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF ANDERSON)

3
4 C E R T I F I C A T E

5
6 I, KAREN T. SENN, CERTIFIED COURT REPORTER FOR
7 THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE
8 FOREGOING PAGES CONSTITUTE A TRUE, ACCURATE AND COMPLETE
9 TRANSCRIPT OF THE HEARING HELD BEFORE THE HONORABLE ELLIS
10 B. DREW, JR., MASTER IN EQUITY FOR THE TENTH JUDICIAL
11 CIRCUIT ON MARCH 23, 2016 IN CASE 2011-CP-37-01056 ENTITLED
12 FEDERAL NATIONAL MORTGAGE ASSOCIATION, PLAINTIFF VERSUS
13 JOHN D. DALEN, JULIE A. DALEN AND WAWTOCKACE HILLS PROPERTY
14 OWNERS ASSOCIATION, DEFENDANTS AND COUNTERCLAIM PLAINTIFF.
15 VERSUS BANK OF AMERICA, NA SUCCESSOR BY MERGER TO BAC HOME
16 LOANS SERVICING, LP F/K/A COUNTRYWIDE HOME LOANS SERVICING,
17 LP, COUNTERCLAIM DEFENDANT.

18
19 
20

21 ANDERSON, SOUTH CAROLINA

22 JULY 22, 2016
23
24
25



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE) TENTH JUDICIAL CIRCUIT

FEDERAL NATIONAL MORTGAGE) DOCKET NO.: 2011-CP-37-1056
ASSOCIATION,)

PLAINTIFF,)

V.)

JOHN D. DALEN, JULIE A. DALEN)
AND WAWTOCKACE HILLS PROPERTY)
OWNERS ASSOCIATION,)

DEFENDANT AND COUNTERCLAIM)
PLAINTIFFS,)

V.)

BANK OF AMERICA, N.A.,)
SUCCESSOR BY MERGER TO BAC)
HOME LOANS SERVICING, L.P.)
F/K//A COUNTRYWIDE HOME LOANS)
SERVICING, L.P.,)

COUNTERCLAIM DEFENDANT.)



COPY

TRANSCRIPT OF RECORD

SUPPLEMENTAL HEARING ON MOTIONS HELD BEFORE THE
HONORABLE STEVEN C. KIRVEN, MASTER-IN-EQUITY FOR OCONEE
COUNTY, ON THE 8TH DAY OF SEPTEMBER, 2016, BEGINNING AT
11:23 A.M. IN THE OCONEE COUNTY COURTHOUSE, WALHALLA,
SOUTH CAROLINA.

ELLEN A. BOWEN, REPORTER

Bowen Court Reporting Service, LLC

P.O. BOX 2422

ANDERSON, SOUTH CAROLINA 29622

TELEPHONE NO. (864) 226-2644

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1 PRELIMINARY MATTER, LET'S TALK ABOUT THAT A
2 MINUTE.

3 BY MR. DALEN: OKAY.

4 BY THE COURT: AND, YOU KNOW, MY
5 RECOMMENDATION TO YOU IS THAT YOU NOT PROCEED PRO
6 SE, THAT YOU HAVE REPRESENTATION BY ADEQUATE LEGAL
7 COUNSEL. OTHERWISE, YOU ARE ON YOUR OWN, AND
8 UNDER THE RULES IN SOUTH CAROLINA, YOU ARE HELD TO
9 THE SAME STANDARD AS AN ATTORNEY AS FAR AS
10 FOLLOWING THE RIGHT PROCEDURES AND KNOWING THE LAW
11 AND, AND ALL THOSE THINGS. DO YOU UNDERSTAND ALL
12 THAT?

13 BY MR. DALEN: WELL, I, I DO, YOUR HONOR, BUT
14 I ALSO HAVE A JUDICIAL NOTICE HERE THAT SORT OF
15 REFUTES THAT A LITTLE BIT.

16 BY THE COURT: A JUDICIAL NOTICE,
17 JUDICIAL ---

18 BY MR. DALEN: I'M ASKING THE COURT TO TAKE
19 JUDICIAL NOTICE OF CERTAIN FACTS.

20 BY THE COURT: I'VE READ YOUR SUBMISSION AND
21 YOU, YOU'VE CITED SOME CASES IN THERE FROM OTHER
22 JURISDICTIONS WHICH TALK ABOUT LENIENCY TO A PRO
23 SE DEFENDANT, AND I'M, I'M TELLING YOU NOW THAT
24 DOESN'T APPLY IN SOUTH CAROLINA. THE RULE HERE IS
25 THAT YOU'RE HELD TO THE SAME STANDARD AS AN

1 ATTORNEY.

2 BY MR. DALEN: WELL, ---

3 BY THE COURT: YOU HAVE TO FOLLOW THE SAME
4 RULES AND THERE'S NO, NO IFS, ANDS OR BUTS ABOUT
5 THAT; OKAY?

6 BY MR. DALEN: I'LL DO THE BEST I CAN. CAN I
7 EXPLAIN ---

8 BY THE COURT: WELL, THAT'S UP TO YOU. I'M,
9 I'M TELLING YOU THAT'S WHY I SUGGEST YOU MIGHT
10 WANT TO CONSIDER GETTING LEGAL COUNSEL; ---

11 BY MR. DALEN: WELL, ---

12 BY THE COURT: --- BUT, IF YOU DON'T WANT TO,
13 THAT'S YOUR DECISION.

14 BY MR. DALEN: OKAY. WELL, CAN I EXPLAIN TO
15 YOU WHY I HAVE MADE THAT DECISION?

16 BY THE COURT: (NODDING AFFIRMATIVELY)

17 BY MR. DALEN: I ORIGINALLY STARTED THIS CASE
18 AS PRO SE AND I GOT BACKED INTO A CORNER BY JUDGE
19 MACAULAY. BASICALLY HE SAID, WHEN THEY FIRST
20 FILED FOR SUMMARY JUDGMENT, WHEN BANK OF AMERICA
21 FIRST FILED FOR SUMMARY JUDGMENT, MACAULAY SAID,
22 "IF YOU DON'T GET AN ATTORNEY, I'M GOING TO RULE
23 AGAINST YOU ON THE SUMMARY JUDGMENT." AND SO I
24 WAS -- I'M EITHER IN THE POSITION OF WHERE I, I
25 HAVE TO APPEAL OR I GET AN ATTORNEY. AND SO I GOT

1 THE ATTORNEY, AND MACAULAY RULED AGAINST THE
2 SUMMARY JUDGMENT. HE RULED IN MY FAVOR, BECAUSE I
3 GOT THE ATTORNEY. IF I HADN'T OF GOT THE
4 ATTORNEY, HE BASICALLY TOLD ME, "I'M GOING TO RULE
5 AGAINST YOU." SO I GOT THE ATTORNEY AND TEN
6 THOUSAND DOLLARS (\$10,000.00) LATER I'M, I'M
7 COMING INTO COURT WITH AN ATTORNEY THAT'S TELLING
8 ME, "I DON'T THINK WE CAN WIN." AND I'M SAYING,
9 "WELL, YOU'RE NOT ARGUING THE THINGS THAT I'M
10 ASKING YOU TO ARGUE." AND SINCE WE HAD THAT
11 DISAGREEMENT, I JUST SAID, "WELL, I CAN GO TO
12 COURT AND LOSE FOR A LOT LESS. IF I'M GOING TO
13 PAY YOU TEN THOUSAND DOLLARS (\$10,000.00) AND
14 LOSE, I, I'D RATHER LOSE BY MYSELF." I, I FEEL
15 CONFIDENT IN MY ABILITY TO DISCUSS THE ISSUES THAT
16 I'M RAISING AND I'D JUST RATHER RELY ON THE ISSUES
17 IN THE MOTIONS I FILED, AND IF THE COURT RULES
18 AGAINST ME, ---

19 BY THE COURT: ALL RIGHT. WELL, I'M JUST,
20 I'M JUST GIVING YOU FAIR NOTICE ABOUT WHAT, WHAT
21 THE STANDARD IS THAT YOU HAVE TO MEET AS FAR AS
22 REPRESENTING YOURSELF.

23 BY ME. DALEN: RIGHT.

24 BY THE COURT: AND IF YOU CHOOSE TO PROCEED
25 IN THAT FASHION, THAT'S YOUR CHOICE TO MAKE.

1 BY MR. DALEN: OKAY.

2 BY THE COURT: OKAY? ALL RIGHT. ANYTHING
3 ELSE FROM THE PLAINTIFF?

4 BY MR. GWYNNE: NO, YOUR HONOR.

5 BY THE COURT: ALL RIGHT. WELL, WE'RE GOING
6 TO PROCEED NOW TO HEAR YOUR ARGUMENT ON THE
7 MOTIONS THAT YOU FILED. YOU HAVE A MOTION FOR
8 RECONSIDERATION, WHICH IS NOT EXACTLY THE RIGHT
9 TERMINOLOGY, BUT WE'LL CALL IT THAT FOR
10 CONVENIENCE. AND YOU HAVE A MOTION TO DISMISS FOR
11 LACK OF JURIS- -- SUBJECT MATTER JURISDICTION, I
12 THINK IT IS.

13 BY MR. DALEN: CORRECT.

14 BY THE COURT: SO NOW YOU CAN GO AHEAD AND
15 MAKE YOUR ARGUMENT.

16 BY MR. DALEN: OKAY. A SHORT STATEMENT ON
17 THE CASE, IF YOU DON'T -- IF YOUR HONOR DOESN'T
18 MIND.

19 BY THE COURT: WHATEVER YOU WANT TO SAY.

20 BY MR. DALEN: THIS CASE HAS BEEN RUNNING FOR
21 ABOUT FIVE (5) YEARS; AND, AS YOU CAN SEE, THE
22 FILE IS HUGE. FOR AWHILE, I WORKED WITH AN
23 ATTORNEY, BUT MOSTLY I'M A CARPENTER OUT OF MY
24 COMFORT ZONE. IT'S CLEAR TO US THAT WE ARE NOT
25 DEALING WITH A SIMPLE FORECLOSURE EVEN THOUGH THE

1 PREVIOUS COURTS HAVE TREATED THIS FORECLOSURE
2 ATTEMPT AS ROUTINE. THIS CASE IS NOT A CASE OF A
3 BANK OWED MONEY BY A DEADBEAT HOMEOWNER. AFTER
4 THE 2008 ECONOMIC COLLAPSE, THE GOVERNMENT ISSUED
5 A REPORT CALLED THE "FINANCIAL CRISIS INQUIRY
6 REPORT" DATED JANUARY 2011, WHICH PLACED THE BLAME
7 FOR THE NATIONWIDE CRISIS SQUARELY ON THE BANKING
8 AND FINANCIAL INDUSTRIES. A COPY OF THAT REPORT
9 IS ON A CD IN THE RECORD. I ALSO HAVE A PRINTED
10 COPY IF THE COURT WOULD LIKE TO LOOK AT IT.
11 HAVING BEEN WORKING IN MY FIELD STEADILY FOR ABOUT
12 TWENTY (20) YEARS, BY THE TIME I DECIDED TO
13 PURCHASE A HOME I HAD NO REASON TO DOUBT MY
14 ABILITY TO MAKE THE MORTGAGE PAYMENTS. IN 2008,
15 EVERYTHING CHANGED. NO LONGER DID BANKS HOLD
16 MORTGAGES FOR THE LIFE OF A LOAN. BANKS BEGAN
17 BUYING AND SELLING AND SECURITIZING MORTGAGES,
18 SELLING THEM TO INVESTORS WORLDWIDE, CLOUDING
19 TITLES, AND CALLING INTO QUESTION THE TRUE OWNERS
20 OF THE OBLIGATION. THE COURT ACKNOWLEDGES THIS
21 WITH A DISCLAIMER BEFORE EVERY SALE OF EVERY
22 PROPERTY ON THE COURTHOUSE STEPS. AND AFTER THE
23 FINANCIAL COLLAPSE OF 2008, THE BANKS RECEIVED
24 OVER SEVEN HUNDRED BILLION (\$700,000,000,000) IN
25 TAXPAYER BAILOUT MONEY TO COVER BANK LOSSES.

1 SHORTLY THEREAFTER, WE READ IN THE NEWSPAPERS OF
2 RECORD PROFITS FOR THESE BANKING INSTITUTIONS AND
3 THEIR FAILURE TO USE THE BAILOUT MONEY IN
4 ASSISTING HOMEOWNERS AND EXTENDING NEW CREDIT. WE
5 ARE A DEBT-BASED SOCIETY AND THE SYSTEM CANNOT
6 SUSTAIN ITSELF WITHOUT NEW DEBT. QUOTING FROM
7 AUTOMOBILE MAGNET, HENRY FORD, "IF THE PEOPLE
8 UNDERSTOOD THE TRUE NATURE OF THE BANKING SYSTEM,
9 THERE WOULD BE A REVOLUTION TOMORROW." JUDGES ARE
10 PEOPLE TOO AND THEY MAKE MISTAKES AND THEY MAKE
11 ASSUMPTIONS. IN THE PREVIOUS HEARING IN FRONT OF
12 JUDGE DREW, HE ASKED ME WHY WE WEREN'T ABLE TO
13 MAKE PAYMENTS ON OUR MORTGAGE, AND I REPLIED,
14 "I'VE BEEN THROWN OUT OF WORK FOR TWO (2) YEARS AS
15 A RESULT OF THE ECONOMIC COLLAPSE." I DON'T
16 BELIEVE JUDGE DREW UNDERSTOOD THAT THIS IS NOT A
17 TYPICAL FORECLOSURE. I DON'T BELIEVE HE
18 UNDERSTOOD THE SPECIFIC ISSUES OF SECURITIZATION,
19 CREDIT DEFAULT SWAPS, AND THE WAY IN WHICH THE
20 NOTE HAS BEEN PAID AND SATISFIED, SUCH AS PRIVATE
21 MORTGAGE INSURANCE WHICH WAS A PART OF THIS NOTE.
22 DURING THE COURSE OF THESE FORECLOSURE
23 PROCEEDINGS, I HAD TO LEARN ABOUT TOPICS SUCH AS
24 SECURITIZATION, CREDIT DEFAULT SWAPS AND MERS,
25 ALSO KNOWN AS MORTGAGE ELECTRONIC REGISTRATION

1 SYSTEMS. THE FILE IS EXTENSIVE BECAUSE OF THE
2 NECESSITY OF TRYING TO EXPLAIN TO JUDGES THE
3 COMPLEX ISSUES AT STAKE HERE. ONE (1) JUDGE,
4 WHILE I WAS ARGUING A POINT CONCERNING MERS,
5 STOPPED ME AND ASKED OPPOSING COUNSEL, "WHAT IS
6 MERS?" COUNSEL PLAYED DUMB AND SHRUGGED THEIR
7 SHOULDERS, AND THE JUDGE ENDED UP RULING AGAINST
8 ME, NOT EVEN UNDERSTANDING THE ISSUE I WAS
9 ARGUING. MY WIFE AND I EXPECT JUDGES WHO HEAR
10 THIS CASE TO UNDERSTAND THE ISSUES WE ARE RAISING.
11 TO FACILITATE THIS, I HAVE PROVIDED NUMEROUS LAW
12 REVIEW ARTICLES FROM NOTED SCHOLARS. MANY OF
13 THOSE THAT ARE REFERRED TO IN THE "FINANCIAL
14 CRISIS REPORT". MANY OF THE RULINGS IN THIS CASE
15 HAVE BEEN MADE ON PRESUMPTIONS OF TRUTH. MY
16 ARGUMENTS ARE BASED ON WHAT IS TRUE. THERE IS A
17 RECENT CASE WHERE A JUDGE RULED THAT BANKS LOAN
18 DEPOSITS, AND BASED ON THAT PRESUMPTION, WHICH IS
19 NOT TRUE, THEY DISMISSED THE DEFENDANTS' APPEAL.
20 THE DEFENDANTS WERE ARGUING THAT BANKS DO NOT LOAN
21 DEPOSITS BUT LOAN CREDIT IN VIOLATION OF THEIR
22 CHARTER, WHICH IS ONE (1) OF THE ISSUES THAT I
23 RAISED IN THE SUBJECT MATTER JURISDICTION MOTION.
24 BANK OF AMERICA REPEATEDLY BRINGS UP THE DRAPER
25 CASE, WHICH WE CONTEND DOES NOT APPLY TO OUR CASE

1 BECAUSE WE HAVE FROM THE BEGINNING CHALLENGED THE
2 ASSIGNMENT. THE COURT NOTED IN THE DRAPER CASE
3 THAT SINCE THE ASSIGNMENT WAS NOT CHALLENGED, IT
4 WAS ASSUMED TO BE VALID. OKAY. SO, WITH REGARD
5 TO MY MOTION FOR DISMISSAL FOR LACK OF SUBJECT
6 MATTER JURISDICTION, THE FOLLOWING ISSUES ARE
7 ~~RAISED: NO CONTRACT EXISTS OR HAS BEEN PRESENTED~~
8 IN EVIDENCE. THE PROMISSORY NOTE AND THE MORTGAGE
9 ARE NOT A CONTRACT. NUMBER TWO (2), NO
10 CONSIDERATION WAS GIVEN TO JOHN AND JULIE DALEN.
11 A PROMISSORY NOTE WAS USED TO CREDIT AN ACCOUNT
12 FOR JOHN DALEN AND THE LOAN WAS FUNDED BY JOHN
13 DALEN'S SIGNATURE ON THE NOTE WITHOUT MY BEING
14 INFORMED OF THIS. THE MONEY WAS CREATED OUT OF
15 THIN AIR. I HAVE EXHIBITS IN THE MOTION THAT BACK
16 THAT UP. ALSO, EVEN IF A CONTRACT EXISTS, IT'S
17 ULTRA VIRES BECAUSE IT IS NOT WITHIN THE SCOPE OF
18 THE POWERS OF THE CORPORATION TO PERFORM IT UNDER
19 ANY CIRCUMSTANCES FOR ANY PURPOSE. THAT RELATES
20 TO THE PROMISSORY NOTE BEING USED TO FUND THE
21 LOAN. JURISDICTION REQUIRES, NUMBER ONE (1), A
22 COMPETENT WITNESS. NO COMPLAINING WITNESS HAS
23 BEEN PRODUCED. PLEADINGS SUFFICIENT TO WARRANT
24 JURISDICTION: THAT IS, THERE MUST BE AN INJURED
25 PARTY. NO INJURED PARTY HAS BEEN PRODUCED.

7

1 PLEADINGS SUFFICIENT TO EMPOWER THE COURT TO ACT
2 MEANS THAT ONE (1) OF THE PARTIES MUST GIVE THE
3 COURT ITS POWER TO ACT BY WAY OF WRITTEN AND ORAL
4 ARGUMENT. THE PARTIES, NOT THEIR ATTORNEYS, MUST
5 DO THIS. AND "C", ACTUAL FACTS, NOT MERE
6 ALLEGATIONS, ARE REQUIRED FOR SUBJECT MATTER
7 JURISDICTION. STATEMENTS OF ATTORNEYS IN THEIR
8 BRIEFS AND ORAL PLEADINGS ARE NOT FACTS BUT MERE
9 ALLEGATIONS, AND I QUOTE A CASE, TRINSEY VERSUS
10 PAGLIARO. ATTORNEYS CANNOT TESTIFY. THESE
11 PROCEEDINGS ARE SUBSTANTIVE AND PROCEDURALLY NULL.
12 NO JURISDICTION EXISTS, AND JURISDICTION MUST BE
13 PROVEN BY THE PARTY CLAIMING JURISDICTION. AND
14 NOW WE GO ON TO THE MOTION TO RECONSIDER. SUMMARY
15 JUDGMENT IS IMPROPER. THERE ARE GENUINE ISSUES OF
16 MATERIAL FACT AND ALL PLAINTIFF'S ALLEGATIONS ARE
17 DISPUTED. SUMMARY JUDGMENT IS ALSO NOT PROPER FOR
18 ALL THE REASONS STATED IN MY MOTION TO DISMISS,
19 AND I REPEAT THERE'S NO INJURED PARTY. THE
20 PLAINTIFF'S DEPOSITIONS DO NOT PROVE THEIR RIGHT
21 TO ENFORCE. THE PLAINTIFF'S AFFIDAVITS ARE
22 HEARSAY AND HAVE BEEN CHALLENGED FROM THE
23 BEGINNING. I'M NOT SURE IF I MADE AN ERROR HERE,
24 YOUR HONOR, BUT I NEVER FILED A MOTION TO STRIKE.
25 I DON'T KNOW IF THAT'S POSSIBLE TO DO NOW. I DO

1 HAVE A MOTION TO STRIKE, IF THAT IS ACCEPTABLE. I
2 HAVE CONTACTED -- I TALKED WITH MY ATTORNEY ABOUT
3 DOING THIS WHEN I FIRST HIRED HIM AND HE SAID,
4 "WE'LL GET TO THAT LATER," AND I GUESS WE NEVER
5 GOT TO THAT, BUT I HAVE CHALLENGED IT FROM THE
6 BEGINNING. OKAY, AND THEN FINALLY THE PLAINTIFF'S
7 ASSIGNMENT OF THE MORTGAGE IS EVIDENCE OF FRAUD
8 UPON THE COURT. THE BANK COMES TO THIS COURT WITH
9 UNCLEAN HANDS AND UNCONSCIONABLE ACTIONS IN ITS
10 ATTEMPT TO DECEIVE THIS COURT AND THE DEFENDANTS
11 INTO BELIEVING THAT THEY HAVE THE POWER TO
12 ENFORCE. THE CREDIBILITY AND INTEGRITY OF THE
13 COURT IS AT STAKE IN THESE PROCEEDINGS. THEN
14 FINALLY, THE ASSIGNMENT OF THE MORTGAGE, YOUR
15 HONOR, AND THE, THE NOTE ARE THE KEY THINGS IN
16 HERE. THERE'S EVIDENCE IN THE RECORD THAT THIS
17 NOTE WAS SOLD TO A TRUST AND WAS IN FACT
18 SECURITIZED. BANK OF AMERICA HAS ADMITTED THAT.
19 THERE IS NO ASSIGNMENT OF THE MORTGAGE OR TRANSFER
20 OR NEGOTIATION OF THE NOTE TO ANY TRUST, AND THAT
21 IS A KEY PIECE OF THE CHAIN OF TITLE THAT BANK OF
22 AMERICA HAS NOT ONLY NOT PROVIDED BUT HAS PROVIDED
23 A FALSE CHAIN OF TITLE TO CONVINCE THE COURT THAT
24 THIS IS A SIMPLE "WE GOT IT FROM HIM, HE GOT IT
25 FROM US, AND WE'RE, WE'RE FORECLOSING." SOUTH

1 CAROLINA LAW REQUIRES THAT THE BANK PRODUCE THE
2 CHAIN OF TITLE THAT SHOWS FROM THE ORIGINATOR TO
3 THE FORECLOSING PARTY THEIR RIGHT TO FORECLOSE.
4 THE POSSESSION OF THE NOTE BY ITSELF, THEY MAY BE
5 ABLE TO SUE ON THE NOTE, BUT THEY CAN'T LEGALLY
6 FORECLOSE. THAT'S BASICALLY THE SUMMARY OF MY
7 ARGUMENTS. THEY'RE MORE DETAILED IN THE MOTION.
8 AND IF I FORGET TO SAY SOMETHING IN OPEN COURT,
9 I'M RELYING ON MY MOTIONS AND ON FACTS CONTAINED
10 IN THEM. THANK YOU.

11 BY THE COURT: ALL RIGHT, SIR. NOW WHICH ONE
12 OF YOU GENTLEMEN WOULD LIKE TO GO FIRST?

13 BY MR. GWYNNE: I'M HAPPY TO, YOUR HONOR.

14 BY THE COURT: ALL RIGHT, SIR.

15 BY MR. GWYNNE: ONCE AGAIN, FOR THE RECORD,
16 I'M CHARLIE GWYNNE, HERE ON BEHALF OF THE
17 PLAINTIFF FANNIE MAE. I'M HERE TO ARGUE ON THE
18 DALEN'S MOTION TO DISMISS. YOUR HONOR, GENERALLY
19 FOR A MOTION TO DISMISS, THE COURT SHOULD LOOK AT
20 THE PLEADINGS ONLY AND WHAT'S ALLEGED IN THE
21 PLEADINGS, AND THIS IS A MORTGAGE FORECLOSURE
22 CASE, AND SUBJECT MATTER JURISDICTION IS PROPER IN
23 THIS CASE. SUBJECT MATTER JURISDICTION GOES TO
24 THE POWER TO HEAR AND DETERMINE CASES, THE GENERAL
25 CLASS THROUGH WHICH IT IS HEARING THE CASE, AND BY

1 STATUTE AND BY RULE THE MASTER-IN-EQUITY HAS
2 EQUITABLE JURISDICTION OVER MATTERS REFERRED TO IT
3 BY THE CIRCUIT COURT OR BY CONSENT OF THE PARTIES.
4 AND FORECLOSURE CASES SUCH AS THIS ARE TYPICALLY
5 REFERRED TO YOUR HONOR. SO I THINK YOUR HONOR
6 CERTAINLY HAS SUBJECT MATTER JURISDICTION TO HEAR
7 THIS CASE. THE DEFENDANTS' ALLEGATIONS WHICH,
8 AFTER READING THEIR MOTION, I STILL DON'T QUITE
9 UNDERSTAND, BUT I THINK THEY'RE ESSENTIALLY
10 ALLEGING THAT THE PLAINTIFF HAS PRODUCED NO
11 EVIDENCE THAT IT EVEN LENT MONEY TO THE DEFENDANTS
12 OR THAT THEY AGREED TO BORROW MONEY. MR. DALEN'S
13 ARGUMENT THAT THE PROMISSORY NOTE IS NOT A
14 CONTRACT IS JUST NOT A VALID ARGUMENT, YOUR HONOR.
15 IT'S A PROMISSORY NOTE ON WHICH THE DALENS
16 ATTENDED A CLOSING AND MONEY WAS GIVEN TO THEM
17 EITHER TO REFINANCE OR TO PURCHASE THE PROPERTY.
18 THAT IS THE CONSIDERATION IN A CONTRACT, YOUR
19 HONOR, AND ALL OF THAT IS ALLEGED IN THE
20 COMPLAINT. THE FACT THE -- THE ARGUMENT THAT
21 THERE'S NO INJURED PARTY ALSO MAKES NO SENSE TO
22 ME, YOUR HONOR. IF MR. DALEN LENT MONEY TO
23 SOMEBODY AND THEY DIDN'T PAY IT BACK, I'M SURE
24 HE'D ARGUE HE'S THE INJURED PARTY. HIS ARGUMENT
25 ABOUT ASSIGNING THE MORTGAGE BEING IRRELEVANT, I

1 THINK THAT, THAT UNDER SOUTH CAROLINA LAW IT'S --
2 YOU HONOR, UNDER SOUTH CAROLINA LAW, I THINK THE
3 ASSIGNMENT OF MORTGAGE QUESTION IS IRRELEVANT.
4 ASSIGNMENT OF MORTGAGE DON'T GO TO STANDING.
5 STANDING HAS TO DO WITH, WITH THE UCC AND THE
6 ABILITY OF THE PARTY TO ENFORCE -- HAVE STANDING
7 TO ENFORCE THE PROMISSORY NOTE. THERE'S BEEN AN
8 ORDER FROM JUDGE MCINTOSH IN WHICH HE FOUND THAT
9 BANK OF AMERICA DID HAVE STANDING AT THE TIME, AND
10 NOW FANNIE MAE HAS BEEN SUBSTITUTED INTO THE CASE
11 BY ORDER OF JUDGE DREW. STANDING IN THIS CASE HAS
12 TO DO WITH THE ABILITY OF THE PLAINTIFF TO PROVE
13 THAT THEY HAVE POSSESSION OF THE PROMISSORY NOTE
14 AND THEY CAN ENFORCE IT. AND, IN GENERAL, YOUR
15 HONOR, ALL THESE ARGUMENTS ARE PROPER FOR THE
16 TRIAL, WHICH WE ARE EAGER TO GET TO AS, AS SOON AS
17 POSSIBLE. THANK YOU, YOUR HONOR.

18 BY THE COURT: ALL RIGHT.

19 BY MR. CALUB: YOUR HONOR, ATTORNEY BRIAN
20 CALUB FOR COUNTERCLAIM DEFENDANT BANK OF AMERICA,
21 N.A. WITH RESPECT TO THE MOTION TO RECONSIDER AND
22 WHAT MR. DALEN HAS FILED WITH THE COURT, MY
23 UNDERSTANDING IS THAT HIS ARGUMENTS -- OR HIS
24 MOTION TO RECONSIDER ONLY ADDRESSED TWO (2) ISSUES
25 THAT ARE PART OF THE SUM TOTAL MATTERS DETERMINED

1 BY THE SUMMARY JUDGMENT ORDER. THE TWO (2) ISSUES
2 THAT IT APPEARS HE'S ARGUING IN HIS PAPERS AND
3 WHAT HE SAID TODAY ARE, NUMBER ONE (1),
4 EFFECTIVELY, THE STANDING OF BANK OF AMERICA TO
5 EVEN FILE THIS CASE. RATHER THAN RECREATE THE
6 RECORD, FOR THE RECORD, I WILL JUST REFER TO THE
7 TRANSCRIPT AND EVIDENCE PRESENTED DURING THE
8 HEARING FOR THE BANK OF AMERICA'S MOTION FOR
9 SUMMARY JUDGMENT WHICH WAS HEARD ON MARCH 23,
10 2006 [SIC]. I THINK A CURSORY REVIEW OF THAT
11 RECORD AND ALL THE PRESENTATION OF DOCUMENTARY
12 EVIDENCE IN THE RECORD, INCLUDING DEPOSITION
13 TRANSCRIPTS AND AN AFFIDAVIT, INDICATE THAT ONCE
14 -- WHEN THIS FORECLOSURE ACTION WAS FIRST FILED,
15 BANA WAS THE CORRECT PLAINTIFF WITH AUTHORITY TO
16 PURSUE FORECLOSURE. AND ON THAT RECORD, BANK OF
17 AMERICA STANDS ON THAT. AND QUITE FRANKLY, ALL
18 THE SUBMISSIONS PROVIDED BY MR. DALEN DO NOT
19 REFUTE THAT. SECONDLY, IT APPEARS, BASED ON HIS
20 PAPERS, MR. DALEN'S CONTINUALLY TRYING TO ASSERT A
21 FDCPA CLAIM. QUITE FRANKLY, THE LAW, FEDERAL LAW
22 PRECLUDES THAT CLAIM BEING ALLEGED AGAINST BANK OF
23 AMERICA BECAUSE IT WAS A DIRECT CREDITOR OF MR.
24 DALEN; AND, THEREFORE, THE FDCPA DOES NOT APPLY.
25 THOSE LEGAL ARGUMENTS AND EVIDENCE PRESENTED WERE

1 ALSO MADE DURING THE HEARING ON THE MOTION FOR
2 SUMMARY JUDGMENT BACK ON MARCH 23, 2016, AND BANK
3 OF AMERICA STANDS ON THAT RECORD. A LOT OF WHAT
4 WAS PRESENTED WITH REGARDS TO THE FDCPA CLAIM,
5 YOUR HONOR, THE FAIR DEBT COLLECTION PRACTICE ACT
6 CLAIM, DID NOT PRESENT ANY EVIDENCE IN HIS
7 PAPERWORK, AND A LOT OF IT WAS --, I -- WHAT
8 APPEARED TO ME, WERE LEGAL ARTICLES AND SIMPLY
9 BRIEFING IN LEGAL ARGUMENT FROM ACADEMIA AND NOT
10 HARD EVIDENCE. AND SO THE CRITICAL FACTOR HERE,
11 WITH REGARD TO THE MOTION FOR RECONSIDERATION, IS
12 I'VE NOT HEARD ANY NEW EVIDENCE THAT'S BEEN
13 PRESENTED INTO THIS RECORD THAT WOULD REQUIRE A
14 DIFFERENT RESULT FROM THE SUMMARY JUDGMENT HEARING
15 AND THE ORDER THAT'S ENTERED BY THE COURT,
16 ESPECIALLY WITH REGARD TO THIS QUESTION OF -- I
17 THINK THE THEORY THAT SOUNDS LIKE, ON THE
18 RECONSIDERATION, IS A REITERATION OF THE "SHOW ME
19 THE NOTE" KIND OF CASE. ON THAT ISSUE, THAT'S
20 BEEN ESTABLISHED. BANK OF AMERICA, AT THE TIME
21 THEY FILED THIS ACTION, WAS THE NOTE HOLDER.
22 THERE'S AN AFFIDAVIT IN THE RECORD FROM A BANK OF
23 AMERICA EMPLOYEE STATING THAT IT'S HOLDER OF THE
24 NOTE AT THE POINT IN TIME THIS -- BANK OF AMERICA
25 WAS SERVICING THE NOTE. AND, IN FACT, IN THE

1 RECORD -- THE CRITICAL THING FOR DRAPER, WE
2 BELIEVE DRAPER DOES APPLY, THERE ARE A COUPLE OF
3 CONCESSIONS THAT MR. DALEN MAKES THAT ESTABLISHES
4 BANK OF AMERICA IS THE PROPER PARTY TO INITIAL --
5 INITIALLY FILE THIS FORECLOSURE, AND LET ME RUN
6 THROUGH THAT. FIRST OF ALL, IF YOU LOOK AT PAGE
7 SIX (6) OF THE MOTION TO RECONSIDER, HE'S GOT A
8 NUMBERED PARAGRAPH NUMBER THREE (3) THERE. IT
9 SAYS BANK OF AMERICA IS ONLY A SERVICER. THE LAW
10 OF SOUTH CAROLINA IS, UNDER DRAPER, A SERVICER IS
11 ENTITLED TO PURSUE FORECLOSURE AND HAS STANDING
12 PROCEDURE TO REMEDY. SO, THEREFORE, RIGHT IN THAT
13 CONCESSION, HE'S GIVEN UP HIS ARGUMENT ON THE
14 "SHOW ME THE NOTE" AND PROPER STANDING THEORY. HE
15 CONCEDES THAT POINT ON PAGE SIX (6) OF HIS BRIEF.
16 ANOTHER THING I WANTED TO POINT OUT IS, ON PAGE
17 SIX (6) AT THE TOP OF THE BRIEF, HE ADMITS
18 EXECUTION OF THE NOTE. SO THIS ISSUE ABOUT NEVER
19 EXECUTING AN OBLIGATION IS SOMEWHAT INCORRECT, IT
20 SEEMS, BASED ON THE RECORD THAT HE PRESENTS.
21 FINALLY, WITH REGARDS TO STANDING, I THINK ALSO
22 THE STANDING ISSUE HAS BEEN ESTABLISHED THIS WAY
23 AND I THINK IT'S LAW OF THE CASE WITH RESPECT TO
24 THE ORDER THAT JUDGE DREW ENTERED SUBSTITUTING
25 FANNIE MAE INTO THIS ACTION AS A PROPER

1 FORECLOSING PLAINTIFF. IF WE LOOK AT THIS RECORD
2 AND WE LOOK AT JUDGE DREW'S ORDER FOR
3 SUBSTITUTION, I THINK IT'S LAW OF THE CASE THAT
4 BANK OF AMERICA WAS A PROPER ASSIGNEE WHO THEN
5 PASSED THE LAW -- THE, THE LOAN OVER TO FANNIE
6 MAE, IN THAT JUDGE DREW CONCLUSIVELY HOLDS THAT
7 FEDERAL NATIONAL MORTGAGE ASSOCIATION IS THE REAL
8 PARTY IN INTEREST TO ENFORCE THE NOTE AND MORTGAGE
9 AND IS THE PROPER PLAINTIFF, AND THAT'S BA- --
10 PREDICATED UPON AN ASSIGNMENT OF THE MORTGAGE FROM
11 THE BANK OF AMERICA TO FANNIE MAE. SO I THINK
12 PART OF THAT -- ANY DEFECTS IN THE CHAIN OF TITLE,
13 THAT, THAT CAN'T BE ADDRESSED ANYMORE. THE LAW OF
14 THE CASE IS THAT FANNIE MAE HAS RECEIVED PROPER
15 ASSIGNMENT OF THE NOTE AND MORTGAGE AND IS NOW THE
16 PROPER PARTY TO PURSUE FORECLOSURE AND BANK OF
17 AMERICA WAS A PROPER ASSIGNEE TO SEND THE MORTGAGE
18 THAT WAY. PART OF IT, TOO, GENERALLY, WHEN
19 PARTIES ARE SUBSTITUTED IN A CASE, THAT'S AN
20 IMMEDIATE APPEALABLE ISSUE. THERE'S BEEN NO
21 APPEAL OF THIS ORDER SUBSTITUTING FANNIE MAE AS A
22 PLAINTIFF AND AS AN ASSIGNEE OF BANK OF AMERICA;
23 AND, THEREFORE, THAT RECORD STANDS. THERE'S
24 NOTHING ANYMORE THAT MR. DALEN CAN DO TO CHALLENGE
25 THAT RECORD, AND WE'RE LEFT WITH A PROPER FILED

1 FORECLOSURE BY BANK OF AMERICA, A PROPERLY ENTERED
2 SUMMARY JUDGMENT ORDER ON THE STANDING ISSUE AND
3 FDCPA ISSUE, AND NOW FANNIE MAE'S JUST SET FOR
4 FORECLOSURE THROUGH THE COURT. THANK YOU, YOUR
5 HONOR.

6 BY THE COURT: ALL RIGHT, SIR. THANK YOU.
7 MR. DALEN, I'LL GIVE YOU AN OPPORTUNITY TO, TO
8 RESPOND.

9 BY MR. DALEN: OKAY. BESIDES THE OBVIOUS
10 THING THAT'S ALREADY IN MY MOTION THAT BASICALLY
11 REFUTES EVERYTHING HE SAID, I EXECUTED A NOTE FOR
12 QUICKEN LOANS. I DIDN'T EXECUTE A NOTE TO BANK OF
13 AMERICA. AND I HAVE A RIGHT UNDER THE LAW TO KNOW
14 HOW THE LOAN GOT FROM QUICKEN LOANS TO BANK OF
15 AMERICA AND WHETHER THEY HAVE THE RIGHT TO ENFORCE
16 BECAUSE YOU CAN HAVE A NOTE IN YOUR POSSESSION AND
17 NOT HAVE THE RIGHT TO ENFORCE IT. IF I FOUND A
18 NOTE ON THE STREET AND IT WAS A BEARER NOTE, I
19 COULD TECHNICALLY COME INTO COURT AND, AND SUE ON
20 THAT NOTE, BUT I DON'T THINK I COULD FORECLOSE ON,
21 ON YOUR HOUSE IF I DIDN'T HAVE PROOF OF HOW I GOT
22 THAT NOTE AND WHETHER I HAVE THE AUTHORITY TO
23 ENFORCE IT. IF YOU'LL LOOK AT THE COMPLAINT,
24 THERE'S NOTHING IN THIS COMPLAINT THAT MENTIONS
25 ANYTHING ABOUT BEING AN AGENT FOR FANNIE MAE.

1 THERE'S PLENTY OF EVIDENCE ALREADY ON THE RECORD
2 THAT FANNIE MAE HAS BEEN THE OWNER OF THIS NOTE
3 FROM THE TIME I SIGNED IT WITH QUICKEN, PROBABLY
4 BEFORE I EVEN SIGNED THE PAPERS WITH QUICKEN. SO
5 BANK OF AMERICA COMES IN WITH A COMPLAINT THAT
6 BASICALLY TRIES TO MISLEAD THE DEFENDANTS AND THE
7 COURT INTO BELIEVING THAT THEY ARE THE ONES THAT
8 OWN THE NOTE AND THE MORTGAGE AND HAVE THE RIGHT
9 TO ENFORCE WHEN IN FACT THEY'RE ACTUALLY
10 REPRESENTING FANNIE MAE. AND IF ALL THAT'S TRUE,
11 THEN WHY ARE THEY ASSIGNING THE MORTGAGE TO FANNIE
12 MAE IF FANNIE MAE IS ALREADY THE OWNER? AND A
13 PROPER CHAIN OF TITLE WILL SHOW THAT THE NOTE WAS
14 SOLD TO A TRUST, AND THERE ARE LAWS THAT ARE
15 REQUIRED TO BE FOLLOWED WHEN YOU ENTER INTO A
16 TRUST. AND THERE ARE ALSO LAWS THAT ARE REQUIRED
17 TO BE FOLLOWED WHEN YOU SECURITIZE A NOTE. AND
18 THEY HAVE VIOLATED THOSE LAWS. I, I GUESS THAT'S
19 ABOUT IT THAT I HAVE TO SAY, BUT EVERYTHING, IF I
20 HAVEN'T SAID IT, IT'S ALREADY IN THE MOTIONS, AND
21 I'M RELYING ON MY WRITTEN MOTIONS.

22 BY THE COURT: ALL RIGHT, SIR. WELL, I HAVE
23 REVIEWED YOUR MOTION AND I HAVE REVIEWED THE FILE
24 MATERIAL, I REVIEWED THE PRIOR TRANSCRIPTS AND SO
25 ON, AND I'M GOING TO DENY YOUR MOTIONS. THE

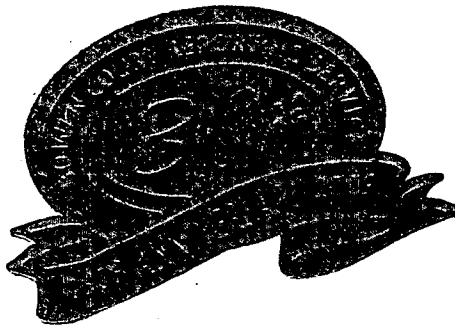
1 MOTION TO DISMISS FOR LACK OF SUBJECT MATTER
2 JURISDICTION, THIS COURT CLEARLY HAS JURISDICTION
3 TO DEAL WITH THIS CASE, AND I DON'T THINK THAT'S
4 -- ANY REAL QUESTION ABOUT THAT. AS FAR AS THE
5 MOTION FOR RECONSIDERATION, THE PURPOSE OF THAT
6 MOTION IS TO BRING TO THE COURT'S ATTENTION AN
7 ISSUE THAT WAS PROPERLY RAISED AT THE INITIAL
8 HEARING BUT WAS, WAS INADVERTENTLY OMITTED BY THE
9 COURT IN ITS ORDER. I BELIEVE THAT THE COURT'S
10 ORDER HAS ADEQUATELY DEALT WITH ALL OF THE ISSUES
11 THAT WERE RAISED AT THE HEARING, AND, ACCORDINGLY,
12 THERE'S NO, NO BASIS TO RECONSIDER THAT PRIOR
13 ORDER AT ALL. SO YOUR MOTIONS FOR DISMISSAL AND
14 YOUR MOTION FOR RECONSIDERATION ARE DENIED. I'M
15 GOING TO REQUEST THAT ONE (1) OF YOU GENTLEMEN
16 PREPARE -- DRAFT AN ORDER FOR ME, PROVIDE A COPY
17 TO MR. DALEN AND, FOR HIS REVIEW, AND THEN WE'LL
18 TAKE A LOOK AT IT. OKAY? YOU GOT HIS -- DO YOU
19 HAVE A WAY TO GET IN TOUCH WITH MR. DALEN? SINCE
20 HE'S NOW PRO SE, YOU NEED TO, YOU NEED TO, ---

21 BY MR. DALEN: THEY HAVE MY ---

22 BY THE COURT: --- YOU NEED TO PROVIDE HIM
23 WITH YOUR CONTACT INFORMATION.

24 BY MR. DALEN: YEAH. I BELIEVE YOU HAVE IT?

25 BY MR. CALUB: I THINK WE'VE GOT AN E-MAIL --



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE) TENTH JUDICIAL CIRCUIT

FEDERAL NATIONAL MORTGAGE
ASSOCIATION,

PLAINTIFF,

V.

JOHN D. DALEN, JULIE A. DALEN
AND WAWTOCKACE HILLS PROPERTY
OWNERS ASSOCIATION,

DEFENDANT AND COUNTERCLAIM
PLAINTIFFS,

V.

BANK OF AMERICA, N.A.,
SUCCESSOR BY MERGER TO BAC
HOME LOANS SERVICING, L.P.
F/K//A COUNTRYWIDE HOME LOANS
SERVICING, L.P.,

COUNTERCLAIM DEFENDANT.

DOCKET NO.: 2011-CP-37-1056



COPY

TRANSCRIPT OF RECORD

FORECLOSURE HEARING HELD BEFORE THE HONORABLE
STEVEN C. KIRVEN, MASTER-IN-EQUITY FOR OCONEE COUNTY, ON
THE 2ND DAY OF MARCH, 2017, BEGINNING AT 1:07 P.M. IN THE
OCONEE COUNTY COURTHOUSE, WALHALLA, SOUTH CAROLINA.

ELLEN A. BOWEN, REPORTER

Bowen Court Reporting Service, LLC

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PLAINTIFF'S EXHIBITS:

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>PAGE NO.</u>
"1" -	COPY OF NOTE.	14
"2" -	MORTGAGE.	14
"3" -	ASSIGNMENT OF MORTGAGE.	15
"4" -	COPY OF PAYMENT HISTORY	17
"5" -	ACCELERATION LETTER DATED 12/17/2010. .	18
"6" -	SUMMARY OF AMOUNT DUE; BUSINESS RECORDS SUPPORTING SUMMARY.	21
"7" -	AFFIDAVIT OF ATTORNEY'S FEES AND COSTS.	21

****ALL EXHIBITS MARKED AND ENTERED HEREIN WERE**

RETAINED BY THE CLERK OF COURT FOR OCONEE COUNTY**

APPEARANCES:

CHARLES S. GWYNNE, JR., ESQUIRE
ROGERS, TOWNSEND & THOMAS, P.C.
1221 MAIN STREET
14TH FLOOR
COLUMBIA, SOUTH CAROLINA 29201

REPRESENTING THE PLAINTIFF
FEDERAL NATIONAL MORTGAGE ASSOCIATION

JOHN D. DALEN
109 WOOD VALLEY DRIVE
WESTMINSTER, SOUTH CAROLINA 29693
DEFENDANTS AND COUNTERCLAIM PLAINTIFFS
APPEARING PRO SE

ALSO IN ATTENDANCE: WILLIAM RANKIN
LITIGATION OFFICER
SETERUS, INCORPORATED

P R O C E E D I N G S :

1
2 BY THE COURT: THIS IS CIVIL ACTION NUMBER
3 2011-CP-37-01056, FEDERAL NATIONAL MORTGAGE
4 ASSOCIATION, PLAINTIFF VERSUS JOHN D. DALEN, JULIE
5 A. DALEN AND WAWTOCKACE HILLS PROPERTY OWNERS
6 ASSOCIATION, DEFENDANTS, ET AL. THIS MATTER WAS
7 PREVIOUSLY REFERRED TO THE MASTER-IN-EQUITY BY AN
8 ORDER OF REFERENCE. AND PRESENT HERE TODAY WE
9 HAVE MR. GWYNNE; IS THAT RIGHT?

10 BY MR. GWYNNE: YES, SIR.

11 BY THE COURT: AND YOU REPRESENT?

12 BY MR. GWYNNE: THE PLAINTIFF, FEDERAL
13 NATIONAL MORTGAGE ASSOCIATION.

14 BY THE COURT: ALL RIGHT. WE ALSO HAVE
15 PRESENT MR. JOHN DALEN ---

16 BY MR. DALEN: YES, SIR.

17 BY THE COURT: --- AND JULIE A. DALEN?

18 BY MR. DALEN: (NODDING AFFIRMATIVELY)

19 BY THE COURT: ALL RIGHT. AND APPARENTLY
20 THERE'S NO ONE HERE FROM THE PROPERTY OWNERS'
21 ASSOCIATION?

22 BY MR. GWYNNE: THEY WERE ACTUALLY RELEASED
23 FROM THIS A LONG TIME AGO, YOUR HONOR.

24 BY THE COURT: OKAY. ALL RIGHT.

25 BY MR. DALEN: YOUR HONOR, I WOULD LIKE TO

1 OBJECT TO THESE PROCEEDINGS.

2 BY THE COURT: OKAY.

3 BY MR. DALEN: I HAVE A MOTION WITH THIS
4 COURT CHALLENGING YOUR SUBJECT MATTER
5 JURISDICTION, AND ALSO VIOLATIONS OF MY RIGHT TO
6 DUE PROCESS.

7 BY THE COURT: MR. DALEN, YOU HAD, YOU HAD
8 RAISED THAT ISSUE EARLIER AND IT WAS RULED UPON.

9 BY MR. DALEN: EXACTLY.

10 BY THE COURT: AND I BELIEVE YOU ATTEMPTED TO
11 APPEAL THAT AND THE APPELLATE COURT BASICALLY SAID
12 THAT THAT'S NOT APPEALABLE AT THIS TIME.

13 BY MR. DALEN: RIGHT. I ---

14 BY THE COURT: YOU CAN RAISE THAT ISSUE ON AN
15 APPEAL AFTER THE CASE IS FINAL.

16 BY MR. DALEN: WELL, THAT WAS A TECHNICAL
17 ERROR, THAT'S ALL, BUT THE COURT IN THE -- IN YOUR
18 RULING ON THAT, YOU NEVER ESTABLISHED
19 JURISDICTION.

20 BY THE COURT: JUST ---

21 BY MR. DALEN: IN ORDER FOR YOU TO ESTABLISH
22 SUBJECT MATTER ---

23 BY THE COURT: HOLD ON.

24 BY MR. DALEN: --- JURISDICTION, IT HAS TO BE
25 PROVEN ON THE RECORD.

1 BY THE COURT: HOLD ON. WE'VE RULED ON THAT
2 ISSUE, AND IT'S -- IF YOU HAVE A PROBLEM WITH THAT
3 RULING, YOU CAN TAKE -- YOU CAN UTILIZE YOUR
4 APPEAL RIGHTS AT THE PROPER TIME. NOW, YOU FILED
5 A MOTION. I BELIEVE IT WAS A MOTION TO DISMISS
6 FOR LACK OF JURISDICTION AND VIOLATION OF DUE
7 PROCESS; HOWEVER, ---

8 BY MR. DALEN: RIGHT.

9 BY THE COURT: --- THAT MOTION WAS FILED
10 APPARENTLY ON THE 21ST OF FEBRUARY AND IT WAS
11 SERVED ON THE OPPOSING PARTIES ON, BY MAIL, ON
12 FEBRUARY 21.

13 BY MR. DALEN: CORRECT.

14 BY THE COURT: UNDER OUR RULES, IT'S REQUIRED
15 TO GIVE THEM TEN (10) DAYS' NOTICE PRIOR TO A
16 HEARING ON THAT MOTION, ---

17 BY MR. DALEN: WELL, ---

18 BY THE COURT: --- AND I DON'T KNOW THAT MR.
19 GWYNNE -- I DON'T KNOW WHAT HIS POSITION ON IT IS,
20 BUT ---

21 BY MR. GWYNNE: WELL, WE WOULD OBJECT TO
22 HAVING IT HEARD AT THIS LATE DATE, YOUR HONOR.

23 BY THE COURT: ALL RIGHT, SIR. THE SCHEDULED
24 -- THE HEARING SCHEDULED TODAY WAS FOR A FINAL
25 HEARING ON THE MERITS OF THE FORECLOSURE AND ---

1 BY MR. DALEN: YOUR HONOR, SUBJECT MATTER
2 JURISDICTION CAN BE CHALLENGED AT ANY TIME,
3 INCLUDING RIGHT NOW.

4 BY THE COURT: WELL, THEN YOUR, YOUR
5 OBJECTION IS OVERRULED.

6 BY MR. DALEN: WELL, YOU CAN DO THAT, BUT I
7 JUST WANT IT ON THE RECORD THAT I OBJECT AND I
8 OBJECT TO THESE PROCEEDINGS ---

9 BY THE COURT: IT'S ON THE RECORD. YOU'VE
10 GOT A COURT REPORTER RIGHT HERE.

11 BY MR. DALEN: OKAY. I DO OBJECT TO THE
12 PROCEEDING ---

13 BY THE COURT: MR., MR. DALEN, I'M GOING TO,
14 I'M GOING TO TELL YOU RIGHT NOW THAT YOU NEED TO
15 READ RULE, RULE 11 OF THE CIRCUIT COURT RULES.
16 AND I BELIEVE WE HAD A CONVERSATION EARLIER, WHEN
17 YOU LET YOUR ATTORNEY BE RELIEVED AS COUNSEL AND
18 DECIDED TO PROCEED ON YOUR OWN AS A PRO SE
19 DEFENDANT. AND YOU NEED TO READ RULE 11 AND THE
20 SANCTIONS THAT ARE THERE FOR ACTIONS THAT ARE
21 DEEMED FRIVOLOUS OR REDUNDANT. SO, I TOLD YOU AT
22 THAT TIME AND I'LL TELL YOU AGAIN, EVEN THOUGH
23 YOU'RE REPRESENTING YOURSELF, YOU'RE HELD TO THE
24 SAME STANDARDS AS AN ATTORNEY IS AS FAR AS KNOWING
25 THE RULES AND THE PROCEDURES.

1 BY MR. DALEN: THAT'S TRUE, BUT THERE CAN BE
2 NO RULE MAKING THAT VIOLATES THE CONSTITUTION.
3 THAT'S MIRANDA VERSUS ARIZONA. WHAT I'M CLAIMING
4 HERE IS THAT I HAVE A RIGHT TO A JURY TRIAL.
5 UNDER THE CONSTITUTION, THERE CANNOT BE ANY RULES
6 THAT VIOLATE THAT AND DENY ME A JURY TRIAL. THAT
7 IS WHAT I'M CLAIMING, AND I'M STANDING ON THE
8 CONSTITUTION AND I'M STANDING ON MY PLEADINGS AND
9 I'M -- ALL THIS IS INCLUDED IN MY PLEADINGS. I
10 HAVE ALSO FILED A CLAIM AGAINST YOU AND AGAINST
11 THE ATTORNEYS AND THE BANKS. SO ANYTHING YOU DO
12 TODAY IS OUTSIDE YOUR AUTHORITY. I'VE GIVEN YOU
13 NOTICE THAT YOU'RE VIOLATING MY RIGHTS, THAT
14 YOU'RE ACTING WITHOUT JURISDICTION. WHAT YOU DO
15 IS YOUR BUSINESS, THOUGH. I OBJECT TO THIS TRIAL.
16 I OBJECT TO THESE PROCEEDINGS BASED ON MY RIGHTS
17 UNDER THE UNITED STATES CONSTITUTION, AND I WOULD
18 HOPE THAT YOU WILL HONOR THAT. YOU'VE TAKEN AN
19 OATH TO DO SUCH.

20 BY THE COURT: MR. DALEN, YOUR OBJECTION IS
21 DULY NOTED. IT'S IN THE RECORD MULTIPLE TIMES.

22 BY MR. DALEN: OKAY.

23 BY THE COURT: IT'S OVERRULED, AND I'M NOT
24 GOING TO DO IT -- DO THAT AGAIN.

25 BY MR. DALEN: THAT'S FINE.

1 BY THE COURT: NOW YOU MAY SIT DOWN AND WE'LL
2 PROCEED.

3 BY MR. DALEN: JUST KNOW THAT I OBJECT TO
4 THESE PROCEEDINGS.

5 BY THE COURT: I THINK YOU'VE MADE THAT VERY
6 CLEAR.

7 BY MR. DALEN: OKAY.

8 BY THE COURT: ALL RIGHT, MR. GWYNNE.

9 BY MR. GWYNNE: YES, YOUR HONOR. JUST FOR
10 THE RECORD TO REMIND THE COURT THAT THE
11 COUNTERCLAIMS HAVE BEEN DISMISSED. SO WE'RE JUST
12 HERE ON THE FORECLOSURE.

13 BY THE COURT: THAT'S RIGHT.

14 BY MR. GWYNNE: AND THE PLAINTIFF CALLS
15 WILLIAM RANKIN TO THE STAND. HE'S AN EMPLOYEE
16 WITH SETERUS, THE LOAN SERVICER OF THIS LOAN.

17 BY THE COURT: ALL RIGHT. MR. RANKIN, IF YOU
18 WILL COME FORWARD TO THE WITNESS STAND AND BE
19 SWORN IN.

20
21 _____
21 (WILLIAM RANKIN TAKES THE STAND)

22
23 _____
23 BY THE COURT REPORTER: PLACE YOUR LEFT HAND
24 ON THE BIBLE AND RAISE YOUR RIGHT HAND, PLEASE.

25 BY MR. RANKIN: (COMPLIES)

1 BY THE COURT REPORTER: DO YOU SWEAR OR
2 AFFIRM THAT THE TESTIMONY YOU'RE ABOUT TO GIVE IN
3 THIS CASE WILL BE THE TRUTH, THE WHOLE TRUTH AND
4 NOTHING BUT THE TRUTH, SO HELP YOU GOD?

5 BY MR. RANKIN: YES, MA'AM, I DO.

6 BY THE COURT REPORTER: OKAY. PLEASE STATE
7 YOUR NAME IN FULL.

8 BY MR. RANKIN: MY NAME IS WILLIAM, LAST NAME
9 RANKIN, SPELLED R-A-N-K-I-N.

10 BY THE COURT REPORTER: THANK YOU.

11 BY THE COURT: ALL RIGHT, HAVE A SEAT, SIR.
12 PLEASE SPEAK INTO THE MICROPHONE. SPEAK UP LOUD
13 SO EVERYONE CAN HEAR.

14 BY MR. RANKIN: YES, SIR.

15 DIRECT EXAMINATION BY MR. GWYNNE:

16 Q. MR. RANKIN, WHAT COMPANY DO YOU WORK FOR?

17 A. SETERUS, INCORPORATED.

18 Q. AND WHAT'S THE PHYSICAL LOCATION OF YOUR OFFICE?

19 A. RALEIGH, NORTH CAROLINA.

20 Q. AND WHAT'S YOUR JOB TITLE AT SETERUS?

21 A. I'M A LITIGATION OFFICER.

22 Q. WHAT ARE SOME OF YOUR JOB DUTIES AT SETERUS?

23 A. TO REVIEW LOANS THAT ARE IN DEFAULT, INCLUDING ALL
24 DOCUMENTS PERTAINING TO THE LOANS, AND ALSO ATTEND
25 TRIALS AND DEPOSITIONS.

1 Q. ARE YOU AUTHORIZED TO TESTIFY IN BEHALF OF YOUR
2 COMPANY IN TODAY'S HEARING?

3 A. YES, I AM.

4 Q. IS SETERUS THE LOAN SERVICER FOR THIS LOAN?

5 A. THAT IS CORRECT.

6 Q. AND IN THE ORDINARY COURSE OF ITS BUSINESS, DOES
7 SETERUS MAINTAIN RECORDS FOR THE MORTGAGE LOANS
8 THAT IT SERVICES, INCLUDING THIS ONE?

9 A. YES, SIR.

10 Q. AS A PART OF YOUR JOB DUTIES, ARE YOU FAMILIAR
11 WITH THE RECORDS MAINTAINED BY THE COMPANY IN
12 CONNECTION WITH THIS LOAN?

13 A. YES.

14 Q. DO YOU HAVE PERSONAL KNOWLEDGE OF THIS MORTGAGE
15 LOAN BASED ON YOUR REVIEW OF SUCH RECORDS?

16 A. YES, SIR.

17 Q. I'LL SHOW YOU SEVERAL EXHIBITS. I'D MARK THESE AS
18 EXHIBIT ONE (1) AND TWO (2), PLAINTIFF'S EXHIBIT
19 ONE (1) AND TWO (2). (DOCUMENTS HANDED TO
20 WITNESS) IS, IS EXHIBIT ONE (1) A COPY OF A NOTE
21 IN THIS CASE?

22 A. (UPON REVIEW) YES, SIR, IT IS.

23 Q. AND WHO'S THE BORROWER?

24 A. THE BORROWER IS LISTED AS JOHN DALEN.

25 Q. AND WHAT DATE WAS THE NOTE SIGNED?

1 A. ON DECEMBER 20TH, 2007.

2 Q. AND WAS QUICKEN LOANS, INCORPORATED THE ORIGINAL
3 LENDER?

4 A. YES, SIR.

5 Q. DOES THE NOTE COVER THE SUBJECT PROPERTY ADDRESS
6 OF 109 WOOD VALLEY DRIVE IN WESTMINSTER, SOUTH
7 CAROLINA?

8 A. YES, SIR, IT DOES.

9 Q. AND AT THE TIME THE NOTE WAS SIGNED, WAS THE
10 ORIGINAL PRINCIPAL AMOUNT ONE HUNDRED EIGHTEEN
11 THOUSAND DOLLARS, SEVEN HUNDRED, FIFTY DOLLARS
12 (\$118,750.00)?

13 A. YES.

14 Q. IS THE NOTE ENDORSEMENT BLANK?

15 A. YES, SIR, IT IS.

16 Q. AND IS THE ORIGINAL NOTE IN THE COURTROOM HERE
17 TODAY?

18 A. YES, SIR, IT IS.

19 Q. AND SO SETERUS IS IN PHYSICAL POSSESSION OF THE
20 NOTE THROUGH MY OFFICE?

21 A. THAT IS CORRECT.

22 Q. NOW, ON THE SAME DATE THAT THE NOTE WAS SIGNED,
23 DID THE BORROWER ALSO SIGN EXHIBIT TWO (2)?

24 A. YES.

25 Q. AND WHAT IS EXHIBIT TWO (2)?

1 A. IT'S A COPY OF THE MORTGAGE.

2 Q. AND SO THE MORTGAGE IS DATED DECEMBER 20TH, 2007?

3 A. YES, SIR, IT IS.

4 Q. AND IT COVERS THE SAME PROPERTY ADDRESS; IS THAT
5 CORRECT?

6 A. YES, SIR, IT DOES.

7 Q. DOES THE MORTGAGE CONSTITUTE A FIRST MORTGAGE LIEN
8 ON THE PROPERTY?

9 A. IT DOES.

10 Q. AND ACCORDING TO THE MORTGAGE, ARE THE MORTGAGORS
11 JOHN DALEN AND JULIE A. DALEN?

12 A. YES, SIR, IT IS.

13 BY MR. GWYNNE: YOUR HONOR, PLAINTIFF MOVES
14 EXHIBIT ONE (1) AND TWO (2) INTO EVIDENCE.

15 BY THE COURT: IF YOU'LL PROVIDE MR. DALEN
16 WITH A COPY OF THOSE.

17 BY MR. GWYNNE: I HAVE, YOUR HONOR.

18 BY THE COURT: IS THERE ANY OBJECTION TO
19 THOSE BEING ADMITTED AS EVIDENCE?

20 BY MR. DALEN: YES, YOUR HONOR. I OBJECT TO
21 THE WHOLE PROCEEDING. I OBJECT TO THE -- THIS MAN
22 DOES NOT WORK FOR FANNIE MAE. THIS MAN IS UNDER
23 SETERUS. THERE'S NO COMPETENT FACT WITNESS HERE
24 THAT I CAN CROSS EXAMINE THAT WORKS FOR FANNIE
25 MAE.

1 BY THE COURT: OKAY. YOUR OBJECTION'S
2 OVERRULED. THE DOCUMENTS WILL BE ADMITTED. THE
3 NOTE WILL BE PLAINTIFF'S EXHIBIT NUMBER ONE (1).
4 THE MORTGAGE WILL BE PLAINTIFF'S EXHIBIT NUMBER
5 TWO (2).

6 BY MR. GWYNNE: (DOCUMENTS TENDERED TO
7 REPORTER)

8 **(PLAINTIFF'S EXHIBITS "1" AND "2" MARKED AND ENTERED)**

9 Q. MR. RANKIN, HAS THE NOTE AND MORTGAGE BEEN
10 ASSIGNED IN THIS CASE?

11 A. YES, SIR, THEY HAVE.

12 Q. I'LL SHOW YOU WHAT'S BEEN MARKED AS PLAINTIFF'S
13 EXHIBIT THREE (3). (DOCUMENT HANDED TO WITNESS)
14 IS THIS A COPY OF TWO (2) ASSIGNMENTS AND MORTGAGE
15 THAT HAVE BEEN FILED IN OCONEE COUNTY, SOUTH
16 CAROLINA?

17 A. (UPON REVIEW) YES, SIR.

18 Q. AND IS THE, IS THE SECOND ASSIGNMENT OF MORTGAGE
19 AN ASSIGNMENT OF MORTGAGE IN TO THE CURRENT
20 PLAINTIFF IN THIS CASE?

21 A. YES, SIR, IT IS.

22 BY MR. GWYNNE: YOUR HONOR, PLAINTIFF MOVES
23 EXHIBIT THREE (3) INTO EVIDENCE.

24 BY THE COURT: ANY OBJECTION?

25 BY MR. DALEN: I'LL JUST SAY, YOUR HONOR, I

1 OBJECT.

2 BY THE COURT: OKAY. OBJECTION'S OVERRULED.

3 THIS ASSIGNMENT WILL BE ADMITTED AS PLAINTIFF'S
4 EXHIBIT NUMBER THREE (3).

5 BY MR. GWYNNE: (DOCUMENT TENDERED TO
6 REPORTER)

7 (PLAINTIFF'S EXHIBIT "3" MARKED AND ENTERED)

8 Q. MR. RANKIN, DID THE BORROWER EVENTUALLY FAIL TO
9 MAKE HIS PAYMENTS AND GO INTO DEFAULT ON THE TERMS
10 OF THE NOTE AND MORTGAGE?

11 A. YES, SIR.

12 Q. IN THE ORDINARY COURSE OF ITS BUSINESS, DOES
13 SETERUS MAINTAIN AN ELECTRONIC PAYMENT HISTORY FOR
14 THE LOANS THAT IT SERVICES, INCLUDING THIS LOAN?

15 A. YES, SIR, WE DO.

16 Q. DO YOU HAVE PERSONAL KNOWLEDGE OF THE COMPUTER
17 SYSTEM USED TO GENERATE PAYMENT HISTORIES OF THE
18 LOANS THAT YOU SER- -- THE COMPANY SERVICES,
19 INCLUDING THIS ONE?

20 A. YES, SIR, I DO.

21 Q. ARE THE PAYMENT HISTORIES MAINTAINED BY PERSONS
22 WITH ACTUAL KNOWLEDGE OF THE INFORMATION BEING
23 RECORDED?

24 A. THAT'S CORRECT.

25 Q. DOES THE ELECTRONIC PAYMENT HISTORY RECORD CREDITS

1 OR CHARGES TO THE LOAN AT OR NEAR THE TIME THOSE
2 CREDITS OR CHARGES OCCUR?

3 A. YES, SIR, IT DOES.

4 Q. LET ME SHOW YOU WHAT'S BEEN MARKED AS PLAINTIFF'S
5 EXHIBIT FOUR (4). (DOCUMENT HANDED TO WITNESS)
6 IS THIS A COPY OF THE PAYMENT HISTORY IN THIS
7 CASE?

8 A. (UPON REVIEW) YES, SIR.

9 Q. NOW, SETERUS HAS NOT ALWAYS BEEN THE LOAN SERVICER
10 FOR THIS LOAN; IS THAT CORRECT?

11 A. THAT IS CORRECT.

12 Q. THE PRIOR SERVICER WAS BANK OF AMERICA; IS THAT
13 CORRECT?

14 A. THAT IS CORRECT; YES, SIR.

15 Q. SO PART OF EXHIBIT FOUR (4) INCLUDES THE, THE
16 PAYMENT HISTORY FOR BANK OF AMERICA; CORRECT?

17 A. YES, SIR.

18 Q. AND WHEN SETERUS BEGAN SERVICING THIS LOAN, DID
19 YOU INCORPORATE BANK OF AMERICA'S RECORDS INTO
20 YOUR RECORDS?

21 A. YES, WE DID.

22 Q. SO THEY BECAME YOUR COMPANY'S BUSINESS RECORDS AT
23 THAT TIME?

24 A. YES, SIR.

25 Q. AND ACCORDING TO THE PAYMENT HISTORY, DID THE

1 BORROWER FAIL TO MAKE HIS DECEMBER 1ST, 2010
2 PAYMENT?

3 A. YES, SIR.

4 BY MR. GWYNNE: YOUR HONOR, PLAINTIFF MOVES
5 EXHIBIT FOUR (4), THE PAYMENT HISTORY, INTO
6 EVIDENCE.

7 BY THE COURT: ANY OBJECTION?

8 BY MR. DALEN: YES, YOUR HONOR, I OBJECT. I
9 OBJECT TO THESE PROCEEDINGS ON THE BASIS THAT YOU
10 DO NOT HAVE SUBJECT MATTER JURISDICTION TO HAVE
11 THIS TRIAL, ---

12 BY THE COURT: ALL RIGHT.

13 BY MR. DALEN: --- VIOLATING MY
14 CONSTITUTIONAL RIGHTS.

15 BY THE COURT: OBJECTION IS OVERRULED. THE
16 PAYMENT HISTORY WILL BE ADMITTED AS PLAINTIFF'S
17 EXHIBIT FOUR (4).

18 BY MR. GWYNNE: (DOCUMENT TENDERED TO
19 REPORTER)

20 (PLAINTIFF'S EXHIBIT "4" MARKED AND ENTERED)

21 Q. MR. RANKIN, I'M GOING TO SHOW YOU WHAT HAS BEEN
22 MARKED AS PLAINTIFF'S EXHIBIT FIVE (5). (DOCUMENT
23 HANDED TO WITNESS) IS THAT A COPY OF A DEMAND OR
24 ACCELERATION LETTER THAT WAS SENT TO THE BORROWER
25 DATED DECEMBER 17, 2010?

1 A. (UPON REVIEW) YES, SIR.

2 Q. AND THAT WAS SENT TO BANK OF AMERICA BECAUSE THEY
3 WERE THE SERVICER AT THE TIME; IS THAT CORRECT?

4 A. THAT IS CORRECT.

5 BY MR. GWYNNE: YOUR HONOR, PLAINTIFF MOVES
6 EXHIBIT FIVE (5) INTO EVIDENCE, THE DEMAND
7 ACCELERATION LETTER.

8 BY THE COURT: ANY OBJECTION?

9 BY MR. DALEN: OBJECTION, YOUR HONOR. THIS
10 TRIAL IS AN UNLAWFUL FORECLOSURE.

11 BY THE COURT: ALL RIGHT. OBJECTION'S
12 OVERRULED. THAT WILL BE ADMITTED AS PLAINTIFF'S
13 EXHIBIT NUMBER FIVE (5).

14 BY MR. GWYNNE: (DOCUMENT TENDERED TO
15 REPORTER)

16 (PLAINTIFF'S EXHIBIT "5" MARKED AND ENTERED)

17 Q. MR. RANKIN, DOES THE BORROWER OWE A CERTAIN SUM OF
18 MONEY TO THE PLAINTIFF BASED ON THE DEFAULT?

19 A. YES, SIR.

20 Q. I'M GOING TO SHOW YOU SOMETHING MARKED AS
21 PLAINTIFF'S EXHIBIT SIX (6). (DOCUMENT HANDED TO
22 WITNESS) ARE THE FIRST FOUR (4) PAGES OF
23 PLAINTIFF'S EXHIBIT SIX (6) A SUMMARY OF THE
24 AMOUNT DUE?

25 A. (UPON REVIEW) YES, SIR, IT IS.

1 Q. AND THE REMAINING PAGES OF EXHIBIT SIX (6), ARE
2 THOSE, ARE THOSE THE BUSINESS RECORDS OF YOUR
3 COMPANY THAT SUPPORT THAT SUMMARY?

4 A. YES, SIR.

5 Q. AND HAVE YOU REVIEWED THE RECORDS OF THE PLAINTIFF
6 TO DETERMINE WHAT THE AMOUNT DUE IS ON THE LOAN?

7 A. I HAVE.

8 Q. CAN YOU TELL THE COURT WHAT THE AMOUNT DUE IS,
9 BREAKING IT DOWN FIRST BY PRINCIPAL?

0 A. THE TOTAL AMOUNT IN PRINCIPAL DUE ON THIS LOAN IS
1 ONE HUNDRED FOURTEEN THOUSAND EIGHT HUNDRED
2 SEVENTY-FIVE DOLLARS AND SEVENTY-TWO CENTS
3 (\$114,875.72).

4 Q. WHAT ABOUT INTEREST?

5 A. INTEREST IS FORTY-NINE THOUSAND ONE HUNDRED THIRTY
6 DOLLARS AND NINETY-TWO CENTS (\$49,130.92).

7 Q. WHAT ABOUT ESCROW ADVANCES?

8 A. ESCROW ADVANCES IS A TOTAL OF FOURTEEN THOUSAND
9 THREE HUNDRED FIFTY-NINE DOLLARS AND FORTY-NINE
0 CENTS (\$14,359.49).

1 Q. WHAT ABOUT PRO-RATED MORTGAGE INSURANCE PAYMENTS?

2 A. ONE HUNDRED FIFTY-FOUR DOLLARS AND THIRTY-EIGHT
3 CENTS (\$154.38).

4 Q. WHAT ABOUT CORPORATE ADVANCES?

5 A. EIGHT HUNDRED FIVE DOLLARS AND TWENTY-FIVE CENTS

1 (\$805.25).

2 Q. AND WHAT ABOUT PRIOR -- ATTORNEYS FEES PAID TO,
3 PAID TO A PRIOR LAW FIRM IN THIS CASE?

4 A. ONE THOUSAND FIVE HUNDRED AND FIFTEEN DOLLARS
5 (\$1,515.00) EVEN.

6 Q. WHAT'S THAT TOTAL?

7 A. A TOTAL OF ONE HUNDRED EIGHTY THOUSAND EIGHT
8 HUNDRED AND FOUR -- EIGHT HUNDRED AND FORTY
9 DOLLARS AND SEVENTY-SIX CENTS (\$180,840.76).

10 Q. AND DOES THE PLAINTIFF ASK FOR A REASONABLE
11 ATTORNEYS FEES AND COSTS TO BE ADDED TO THAT
12 AMOUNT?

13 A. YES, SIR.

14 BY MR. GWYNNE: YOUR HONOR, JUST FOR THE
15 RECORD, I'VE MARKED AS PLAINTIFF'S EXHIBIT SEVEN
16 (7) AN AFFIDAVIT OF ATTORNEYS FEES AND COSTS THAT
17 HAVE ALREADY BEEN E-FILED WITH THE, WITH THE
18 CLERK'S OFFICE ON MARCH 1ST.

19 BY THE COURT: DID YOU OFFER EXHIBIT SIX (6)?

20 BY MR. GWYNNE: I DID NOT, YOUR HONOR. THE
21 PLAINTIFF MOVES TO ADMIT EXHIBIT SIX (6) INTO
22 EVIDENCE, THE JUDGMENT FIGURES IN THIS CASE.

23 BY THE COURT: ANY OBJECTION?

24 BY MR. DALEN: YES, I OBJECT, YOUR HONOR.
25 THIS IS AN UNLAWFUL FORECLOSURE, VIOLATION OF MY

1 CONSTITUTIONAL RIGHTS.

2 BY THE COURT: ALL RIGHT. OBJECTION'S
3 OVERRULED. THE SUMMARY OF PAYMENT AMOUNT DUE WILL
4 BE PLAINTIFF'S EXHIBIT SIX (6).

5 BY MR. GWYNNE: YES, SIR. (DOCUMENT TENDERED
6 TO REPORTER) AND FOR IDENTIFICATION PURPOSES,
7 I'VE MARKED EXHIBIT SEVEN (7), WHICH IS AN
8 AFFIDAVIT OF ATTORNEYS FEES AND COSTS, WHICH TOTAL
9 SIXTEEN THOUSAND DOLLARS -- SIXTEEN THOUSAND NINE
10 HUNDRED AND ONE DOLLARS AND NINETY-FIVE CENTS
11 (\$16,901.95). (DOCUMENT TENDERED TO REPORTER)

12 BY THE COURT: ALL RIGHT, SIR.
13 **(PLAINTIFF'S EXHIBITS "6" AND "7" MARKED AND ENTERED)**

14 BY MR. GWYNNE: YOUR HONOR, THE PLAINTIFF HAS
15 NO FURTHER QUESTIONS FOR THIS WITNESS.

16 BY THE COURT: ALL RIGHT. DOES THE DEFENDANT
17 HAVE ANY QUESTIONS OF THIS WITNESS?

18 BY MR. DALEN: YOUR HONOR, I HAVE A
19 DECLARATION OF CLAIMS ON FILE UNDER A COURT OF
20 RECORD, AND THE ONLY QUESTIONS I WOULD HAVE
21 PERTAIN TO THAT PROCEEDING, AS A COURT OF RECORD
22 UNDER THE COMMON LAW. SO I WOULD JUST LIKE TO ASK
23 THE -- WHAT WAS YOUR NAME, AGAIN?

24 BY THE WITNESS: WILLIAM.

25 BY MR. DALEN: WILLIAM.

1 CROSS EXAMINATION BY MR. DALEN:

2 Q. HAVE YOU READ AND ARE YOU FAMILIAR WITH THE MASTER
3 SERVICING AND POOLING AGREEMENT RELATING TO THIS
4 MORTGAGE THAT WAS FILED -- WELL, I'M NOT SURE IF
5 IT WAS FILED WITH THE SEC, BUT YOU ARE AWARE OF --
6 THERE'S A POOLING AND SERVICING AGREEMENT
7 ASSOCIATED WITH THIS LOAN?

8 A. YES, SIR.

9 Q. YOU ARE AWARE OF THAT? AND YOU ARE AWARE THAT
10 FANNIE MAE CLAIMS THAT THEY SECURITIZED THE NOTE
11 ON JANUARY OF 2008? ARE YOU AWARE OF THAT?

12 A. I'M NOT EXACTLY SURE ON WHAT YOU'RE ---

13 Q. YOU DON'T KNOW WHAT SECURITIZATION IS, DO YOU?

14 A. UH, (PAUSE) ---

15 Q. DO YOU KNOW WHAT IT IS, TO SECURITIZE A LOAN?

16 A. THE MORTGAGE SECURITIZES THE LOANS.

17 Q. THE MORTGAGE DOES NOT SECURITIZE THE LOAN. WHEN
18 BANKS SECURITIZE A LOAN, THEY CONVERT IT INTO A
19 STOCK, THEY PUT IT INTO A TRUST, THEY RECEIVE TAX
20 BENEFITS FOR THAT, AND THEY SELL IT TO WHO KNOWS
21 HOW MANY INVESTORS, SEPARATING THE NOTE FROM THE
22 MORTGAGE. ARE YOU AWARE OF THAT?

23 A. I'M NOT FAMILIAR WITH WHAT YOU'RE DISCUSSING.

24 Q. OKAY. SO YOU DON'T KNOW ANYTHING. THEREFORE, I
25 CAN'T REALLY CROSS EXAMINE YOU BECAUSE YOU DON'T

1 KNOW WHAT WE'RE TALKING ABOUT; DO YOU? YOU DON'T
2 KNOW WHAT SECURITIZATION IS; DO YOU?

3 A. IS, IS THAT A QUESTION OR WAS THAT A STATEMENT?

4 Q. I'M ASKING YOU, DO YOU KNOW WHAT SECURITIZATION
5 IS? I ASKED YOU ALREADY AND YOU BASICALLY --
6 STATE, STATE FOR THE RECORD THAT YOU DO OR YOU DO
7 NOT UNDERSTAND SECURITIZATION. "YES" OR "NO"?

8 A. (PAUSE)

9 Q. YOU DO NOT UNDERSTAND WHAT SECURITIZA-
10 SECURITIZATION OF A NOTE MEANS?

11 A. I'M NOT GETTING YOUR QUESTION.

12 Q. OKAY.

13 BY MR. DALEN: YOUR HONOR, I'M ASKING FOR A
14 "YES" OR "NO" ANSWER HERE.

15 BY THE COURT: WELL, THE WITNESS CAN ANSWER
16 THE QUESTION AS HE DEEMS APPROPRIATE. YOU NEED TO
17 CLEARLY STATE YOUR QUESTION ---

18 BY MR. DALEN: OKAY.

19 BY THE COURT: --- AND THEN LET HIM ANSWER.

20 Q. FANNIE MAE HAS STATED IN, IN A REQUEST FOR
21 ADMISSIONS THAT THEY SECURITIZED THE NOTE IN
22 JANUARY OF 2008. DO YOU KNOW WHAT THAT MEANS, TO
23 SECURITIZE A NOTE?

24 A. (PAUSE)

25 Q. YOU DON'T KNOW WHAT IT MEANS, OKAY.

1 BY THE COURT: LET, LET THE WITNESS ANSWER.

2 MR. RANKIN, DO YOU UNDERSTAND THE QUESTION?

3 BY THE WITNESS: I'M, I'M NOT UNDERSTANDING
4 THE QUESTION; NO, SIR.

5 BY THE COURT: MR. DALEN, WOULD YOU REPEAT
6 THE QUESTION.

7 BY MR. DALEN: I DON'T KNOW HOW TO MAKE IT
8 ANY MORE CLEAR.

9 Q. FANNIE MAE ADMITTED THAT THEY SECURITIZED THE
10 NOTE. I'M ASKING DO YOU KNOW WHAT SECURITIZATION
11 IS. DO YOU KNOW WHAT TRANSFERRING A NOTE IS?

12 BY THE COURT: ALL RIGHT, YOU'RE ASKING TOO
13 MANY -- YOU'RE ASKING HIM MORE THAN ONE (1)
14 QUESTION AT A TIME.

15 BY MR. DALEN: OH, I -- OKAY.

16 BY THE COURT: THE QUESTION IS: DO YOU KNOW
17 WHAT SECURITIZATION OF A NOTE IS, MR. RANKIN? AND
18 PLEASE ANSWER THE QUESTION IF YOU DO OR YOU DO NOT
19 AND GIVE ANY EXPLANATION YOU NEED TO GIVE.

20 A. I, I BELIEVE I'VE ALREADY STATED MY UNDERSTANDING
21 OF THE SECURITIZE.

22 BY THE COURT: OKAY.

23 Q. YOU HAVE? I DIDN'T GET IT.

24 A. WELL, YOU REPEATED IT.

25 Q. (CHUCKLE) OKAY. AND DID YOU ANSWER THIS

1 QUESTION? HAVE YOU READ OR ARE YOU FAMILIAR WITH
2 THE MASTER SERVICING AND POOLING AGREEMENT THAT'S
3 ASSOCIATED WITH ---

4 BY MR. GWYNNE: YOUR HONOR, I'M GOING TO
5 OBJECT TO THIS LINE OF QUESTIONING ON RELEVANCE.
6 I THINK MR. DALEN IS TRYING TO ARGUE THAT SOMEHOW
7 THE POOLING AND SERVICING AGREEMENT SECURITIZATION
8 AFFECTS THE STANDING OF MY CLIENT TO BRING A
9 LAWSUIT IN THIS CASE, YOUR HONOR. I THINK SOUTH
10 CAROLINA LAW'S VERY CLEAR THAT A NOTE IN THIS TYPE
11 SITUATION IS GOVERNED BY ARTICLE III OF THE SEC,
12 WHICH IS CODIFIED BY STATUTE AND, THEREFORE, THIS
13 IDEA OF GOING DOWN THIS PATH OF SECURITIZATION OR
14 POOLING SERVICES AGREEMENT IS IRRELEVANT. MY
15 CLIENT'S ALREADY TESTIFIED THAT HE HAS THE
16 ORIGINAL NOTE IN THE COURTROOM HERE TODAY,
17 ENDORSED IN BLANK, WHICH MEANS IT'S BEARER PAPER
18 AND CAN BE ENDORSED OR CAN BE TRANSFERRED.
19 ENFORCE-, ENFORCEABILITY OF THE NOTE IS SIMPLY
20 DONE BY TRANSFERRING THE NOTE.

21 BY THE COURT: WELL, I TEND TO AGREE WITH
22 YOU, BUT I'M GOING TO ALLOW MR. DALEN TO ASK A FEW
23 MORE QUESTIONS ALONG THOSE LINES JUST FOR HIS OWN
24 SATISFACTION IF NOTHING ELSE.

25 BY MR. GWYNNE: YES, SIR.

1 BY MR. DALEN: YOUR HONOR, WHEN A NOTE IS
2 SECURITIZED, IT'S NO LONGER ---

3 BY THE COURT: WELL, NO, YOU'RE NOT -- WELL,
4 ASK HIM QUESTIONS.

5 BY MR. DALEN: WELL, I'M EXPLAINING IT TO THE
6 COURT. I'M EXPLAINING IT TO ---

7 BY THE COURT: WELL, I -- WE DON'T NEED AN
8 EXPLANATION. YOU'RE HERE TO ASK QUESTIONS OF THIS
9 WITNESS.

10 BY MR. DALEN: WELL, I'M ANSWERING HIS
11 STATEMENT THAT ARTICLES ---

12 BY THE COURT: WELL, I'VE ALREADY RULED IN
13 YOUR FAVOR.

14 BY MR. DALEN: OKAY.

15 BY THE COURT: I'VE ADVISED YOU TO GO, GO
16 AHEAD.

17 BY MR. DALEN: WELL, I THINK YOU SHOULD KNOW
18 THAT ONCE A STOCK HAS CONVERTED TO A STOCK, A NOTE
19 IS STILL ---

20 BY THE COURT: MR. DALEN, DO YOU HAVE ANY
21 MORE QUESTIONS?

22 BY MR. DALEN: OKAY. YES, I DO.

23 Q. THE SUBSERVICE -- "THE SERVICER OR SUBSERVER [SIC]
24 OR SOME OTHER PARTY LIKELY MADE A PAYMENT TO THE
25 PARTY WHO ALLEGEDLY OWNS THE PURPORTED DEBT

1 OBLIGATION. THIS PAYMENT, IF MADE, WAS INTENDED
2 TO COVER SUMS THAT ARE ALLEGED TO BE IN DEFAULT.
3 THEREFORE, THE PARTY WHO ALLEGEDLY OWNS THE
4 PURPORTED DEBT OBLIGATION HAS BY VIRTUE OF THAT
5 PAYMENT NOT BEEN DAMAGED IN ANY WAY." THEREFORE,
6 IF ANY SUMS HAVE THUSLY BEEN PAID, HOW IS IT BEING
7 TRUTHFULLY ---

8 BY THE COURT: MR. DALEN, MR. -- I'M GOING TO
9 STOP YOU ---

10 BY MR. DALEN: THIS IS THE QUESTION ---

11 BY THE COURT: NO. YOU'RE READING SOMETHING
12 TO HIM, ---

13 BY MR. DALEN: WELL, I'M ASKING A QUESTION.

14 BY THE COURT: --- AND THAT'S NOT AN
15 APPROPRIATE WAY TO ASK QUESTIONS. ASK HIM A
16 QUESTION. DON'T READ SOMETHING OUT OF A ---

17 BY MR. DALEN: OKAY.

18 BY THE COURT: --- PIECE OF LITERATURE YOU
19 FOUND SOMEWHERE AND TRY TO TURN IT INTO A
20 QUESTION.

21 BY MR. DALEN: NO, THIS IS A QUESTION ABOUT
22 SECURITIZATION.

23 BY THE COURT: WELL, ASK A QUESTION. DON'T
24 READ OFF A BIG PARAGRAPH OF INFORMATION.

25 Q. IF, IF THERE WAS A PAYMENT MADE, HOW IS IT BEING

1 TRUTHFULLY STATED THAT A DEFAULT HAS OCCURRED? IF
2 SOMEONE GOT PAID FOR THE NOTE, HOW CAN THERE BE A
3 DEFAULT? WHAT -- THAT'S WHAT SECURITIZATION IS.
4 IF YOU UNDERSTAND SECURITIZATION, YOU UNDERSTAND
5 THAT FANNIE MAE SOLD THE NOTE AND GOT PAID. NOW,
6 IF THEY GOT PAID, HOW CAN YOU COME BACK IN COURT
7 AND CLAIM THAT A DEFAULT HAS OCCURRED?

8 BY THE COURT: WELL, DO YOU HAVE ANY EVIDENCE
9 THAT THERE WAS ANY PAYMENT MADE? WHERE IS THAT
10 EVIDENCE?

11 BY MR. DALEN: WHEN FANNIE MAE SECURITIZED
12 THE LOAN, ---

13 BY THE COURT: WHERE IS THE EVIDENCE OF THAT?

14 BY MR. DALEN: WELL, WHERE IS THE EVIDENCE OF
15 THE CHAIN OF TITLE? THAT'S WHAT WE'RE TRYING TO
16 GET AT HERE.

17 BY THE COURT: THAT'S BEEN PRESENTED. IT'S
18 ALREADY BEEN PRESENTED.

19 BY MR. DALEN: AND THAT'S A FRAUD, AND I CAN
20 PROVE A FRAUD BY ---

21 BY THE COURT: WELL, THAT'S YOUR OPINION AND
22 YOU CAN, ---

23 BY MR. DALEN: THEY -- NO, IT'S NOT MY ---

24 BY THE COURT: --- YOU CAN RAISE THAT ISSUE.

25 BY MR. DALEN: --- OPINION, YOUR HONOR. IT'S

1 BASED ON THE EVIDENCE THAT I'VE COLLECTED, WHICH
2 IS ALSO IN THE RECORD.

3 BY THE COURT: THE EVIDENCE YOU'VE COLLECTED
4 IS SITTING ON THAT TABLE, APPARENTLY, BUT IT'S NOT
5 IN THE RECORD OF THIS COURT.

6 BY MR. DALEN: IT'S IN THE RECORD.

7 BY THE COURT: IT'S IN, IN WHATEVER ---

8 BY MR. DALEN: REQUEST FOR ADMISSIONS, ---

9 BY THE COURT: --- YOU FILED, PERHAPS; I
10 DON'T KNOW.

11 BY MR. DALEN: REQUEST FOR ADMISSIONS. THOSE
12 ARE IN THE RECORD.

13 BY THE COURT: OKAY, FINE. THEN, THEN
14 THEY'RE IN THE RECORD.

15 BY MR. DALEN: FANNIE MAE SAYS THEY
16 SECURITIZED THE NOTE IN 2008. WE HAVE A
17 TRANSCRIPT FROM ZACHERY ---

18 BY THE COURT: THEN YOU NEED TO SUBMIT THAT
19 INFORMATION AND QUESTION ABOUT THAT SPECIFICALLY.

20 BY MR. DALEN: I SUBMITTED IT IN MY FILING
21 FOR A COURT OF RECORD, YOUR HONOR.

22 BY THE COURT: WELL, YOU FILED A LOT OF
23 THINGS.

24 BY MR. DALEN: IT'S ON THE RECORD.

25 BY THE COURT: WELL, THERE'S A LOT OF THINGS

1 IN THE RECORD, BUT YOU -- THIS MAN HERE IS HERE TO
2 ANSWER YOUR QUESTIONS. ASK HIM A QUESTION.

3 BY MR. DALEN: I'VE ASKED HIM IF FANNIE MAE
4 SECURITIZED THE NOTE IN 2008, HOW CAN BANK OF
5 AMERICA ASSIGN THE NOTE IN 2011, MAY 9TH OF 2011,
6 WHICH IS THE ASSIGNMENT DATE THAT ---

7 Q. IS THIS THE DOCUMENTS (REFERRING TO EXHIBITS) THAT
8 HE JUST PRESENTED TO YOU?

9 A. YES, SIR.

10 Q. OKAY. THERE'S AN ASSIGNMENT OF MORTGAGE IN HERE
11 THAT'S DATED MAY 11TH. HERE IT IS. (DOCUMENT
12 HANDED TO WITNESS) WANT TO LOOK AT THAT? WHAT'S
13 THE DATE ON THAT? WHEN WAS THAT ASSIGNED?

14 A. (UPON REVIEW) MAY OF 2011.

15 Q. MAY OF 2011. HOW CAN BANK OF AMERICA ASSIGN
16 SOMETHING THAT FANNIE MAE SECURITIZED IN JANUARY
17 OF 2008? HOW CAN THEY DO THAT?

18 A. I'M REALLY NOT UNDERSTANDING YOUR QUESTION, SIR.

19 Q. ARE YOU AWARE THAT ALL FIFTY (50) STATES' ATTORNEY
20 GENERALS SUED BANK OF AMERICA, AS WELL AS SOME
21 OTHER BANKS?

22 A. NO, I'M NOT.

23 Q. YOU'RE NOT AWARE OF THAT?

24 A. (SHAKING HEAD NEGATIVELY)

25 Q. OKAY. I HAVE THAT CASE. DO YOU WANT TO LOOK AT

1 IT?

2 BY THE COURT: HE SAID HE'S NOT AWARE OF IT.
3 LET'S MOVE ON.

4 BY MR. DALEN: OKAY.

5 Q. WELL, I'M MAKING YOU AWARE OF IT RIGHT NOW. THAT
6 HAPPENED. THE BANK SETTLED WITH ALL FIFTY (50)
7 STATES' ATTORNEY GENERALS AND PAID HUGE FINES.

8 A. OKAY.

9 Q. IN THAT CASE, THE BANKS WERE ACCUSED OF
10 MANUFACTURING ASSIGNMENTS IN ORDER TO FORECLOSE
11 WHERE THEY ACTUALLY HAD NO CLEAR AUTHORITY TO DO
12 THAT. THE COURT CALLED IT UNLAWFUL FORECLOSURE
13 ACTIVITIES. THAT IS WHAT THAT IS. THAT IS
14 UNLAWFUL FORECLOSURE ACTIVITIES.

15 BY THE COURT: MR. DALEN, YOU'RE, YOU'RE
16 MAKING AN ARGUMENT. YOU'RE NOT ASKING QUESTIONS.
17 THIS WITNESS SAYS HE DOESN'T HAVE ANY KNOWLEDGE
18 ABOUT THAT. SO, IF YOU HAVE ANOTHER QUESTION,
19 LET'S ASK IT.

20 BY THE COURT: YOUR HONOR, I OBJECT. I DO
21 NOT HAVE A WITNESS, A COMPETENT FACT WITNESS HERE
22 THAT I CAN GET ANSWERS FROM.

23 BY THE COURT: WELL, YOU HAVE, YOU HAVE THE
24 RIGHT ---

25 BY MR. DALEN: THAT IS NOT ---

1 BY THE COURT: --- TO BRING WHATEVER
2 WITNESSES YOU WANT TO BRING IN HERE.

3 BY MR. DALEN: THEY ARE PRESENTING THE
4 WITNESS.

5 BY THE COURT: DID YOU SUBPOENA, SUBPOENA
6 ANYBODY TO BE HERE?

7 BY MR. DALEN: YOUR HONOR, I, I'M NOT
8 PARTICIPATING IN THIS FORECLOSURE TRIAL, ANYWAY.
9 I'M JUST TRYING TO -- YOU WILL BE ADDED TO MY
10 LAWSUIT, ---

11 BY THE COURT: MR., MR. DALEN, ---

12 BY MR. DALEN: --- BECAUSE YOU ARE
13 PARTICIPATING IN ---

14 BY THE COURT: --- YOU'RE NOT GOING TO
15 INTIMIDATE THE WITNESS IN ANY FASHION. IF YOU
16 DON'T HAVE ANY MORE QUESTIONS, SIT DOWN.

17 BY MR. DALEN: I'M GOING TO SIT DOWN.

18 BY THE COURT: GOOD.

19 BY MR. DALEN: I WOULD LIKE TO PROVIDE THE
20 COURT WITH SOME DOCUMENTS.

21 BY THE COURT: OKAY. YOU CAN FILE THOSE WITH
22 THE CLERK.

23 BY MR. DALEN: I WOULD LIKE TO GIVE ONE TO
24 THE WITNESS. ---

25 BY THE COURT: NO, SIR.

1 BY MR. DALEN: --- SO HE CAN READ ABOUT
2 SECURITIZATION.

3 BY THE COURT: NO, SIR. THAT'S NOT PROPER.

4 BY MR. DALEN: I CAN'T SUBMIT THESE AS
5 EVIDENCE IN THE COURT?

6 BY THE COURT: WELL, DO YOU HAVE ANY WAY TO
7 VERIFY WHAT THEY ARE?

8 BY MR. DALEN: IT'S AN EXPLANATION OF
9 SECURITIZATION.

10 BY THE COURT: WHO WROTE THE EXPLANATION?

11 BY MR. DALEN: I DON'T KNOW.

12 BY THE COURT: WELL, THEN, NO; YOU CAN'T PUT
13 THAT IN THE RECORD, THEN. IT'S NOT AUTHENTICATED.

14 BY MR. DALEN: OKAY, YOUR HONOR.

15 BY THE COURT: ANY FURTHER QUESTIONS?

16 (PAUSE) I THINK HE'S THROUGH. HAVE YOU GOT
17 ANYTHING ELSE?

18 BY MR. GWYNNE: NO REDIRECT, YOUR HONOR.

19 BY THE COURT: ALL RIGHT. MR. RANKIN, YOU
20 CAN STEP DOWN.

21 BY THE WITNESS: THANK YOU.

22 (MR. RANKIN STEPS DOWN)

23 BY MR. GWYNNE: YOUR HONOR, THE PLAINTIFF HAS
24 NO FURTHER WITNESSES IN THIS CASE. SO, JUST FOR
25 THE RECORD, BRIEFLY, YOUR HONOR, DEFICIENCY IS

1 DEMANDED. WE'RE ASKING FOR THE APRIL 3RD, 2016
2 [SIC] SALE DATE. THE TOTAL JUDGMENT WE'RE SEEKING
3 IS TWO HUNDRED AND SIX THOUSAND TWO HUNDRED AND
4 NINETY-FIVE DOLLARS AND NINETY-ONE CENTS
5 (\$206,295.91), WHICH INCLUDES THE AFFIDAVIT OF
6 ATTORNEY'S FEES AMOUNT TO THE JUDGMENT. I
7 ATTEMPTED TO E-FILE A PROPOSED JUDGMENT, YOUR
8 HONOR, BUT THERE WAS A MIXUP. SO I WILL, I WILL
9 -- WHATEVER YOUR HONOR WANTS ME TO DO, I CAN
10 RESUBMIT THE PROPOSED JUDGMENT THAT WAY ---

11 BY THE COURT: ALL RIGHT, SIR.

12 BY MR. GWYNNE: --- FROM THE COURT FILING
13 FROM THE PLAINTIFF. PLAINTIFF RESTS, YOUR HONOR.

14 BY THE COURT: ALL RIGHT. THAT'S THE
15 PLAINTIFF'S CASE. MR. -- DEFENDANT, DO YOU HAVE
16 ANY, ANY WITNESSES?

17 BY MR. DALEN: NO, YOUR HONOR. I JUST --
18 I'M, I'M OBJECTING TO THESE PROCEEDINGS. THEY
19 VIOLATE MY CONSTITUTIONAL RIGHTS ---

20 BY THE COURT: YES, SIR; I UNDERSTAND, MR.
21 DALEN. YOU'VE SAID THAT NUMEROUS TIMES. IT'S ON
22 THE RECORD. IT'S FULLY COVERED.

23 BY MR. DALEN: IT'S ON THE RECORD, YOUR
24 HONOR, THAT THEY HAVE BROUGHT FRAUD ON THIS COURT,
25 AND THE EVIDENCE IS CONCLUSIVE ON THAT. I DON'T

1 KNOW HOW YOU CAN'T SEE THAT, I DON'T KNOW HOW THEY
2 CAN'T SEE IT, BUT THAT'S THE CASE AND IT'S
3 ACTIONABLE.

4 BY THE COURT: OKAY.

5 BY MR. DALEN: I WILL PURSUE WITH MY
6 CONSTITUTIONAL RIGHTS IN THIS MATTER.

7 BY THE COURT: ALL RIGHT, SIR, BY ALL MEANS,
8 I, I HOPE YOU DO.

9 BY MR. DALEN: OKAY.

10 BY THE COURT: SO YOU HAVE NOTHING FURTHER?

11 BY MR. DALEN: NO, SIR. THIS IS A FRAUD UPON
12 THE COURT, FRAUD UPON THE PLAINTIFFS.

13 BY THE COURT: ALL RIGHT. I'M GOING TO
14 REVIEW THE PROPOSED ORDER WHEN THAT GETS FILED AND
15 THEN WE'LL PROCEED ACCORDINGLY.

16 BY MR. GWYNNE: YES, SIR. THANK YOU, YOUR
17 HONOR.

18 BY THE COURT: ALL RIGHT. ALL RIGHT, THIS
19 COURT'S ADJOURNED.

20 THE HEARING WAS THEN CONCLUDED - 1:34 P.M.

1 STATE OF SOUTH CAROLINA)

2) CERTIFICATE OF REPORTER

3 COUNTY OF ANDERSON)

4 THIS IS TO CERTIFY THAT THE FOREGOING

5 THIRTY-FIVE (35) PAGES REPRESENT A TRUE AND ACCURATE

6 TRANSCRIPTION OF THE FORECLOSURE HEARING HELD BEFORE

7 THE HONORABLE STEVEN C. KIRVEN, MASTER-IN-EQUITY FOR

8 ANDERSON AND OCONEE COUNTY, WHICH WAS TAKEN BEFORE ME,

9 ELLEN A. BOWEN, VERBATIM COURT REPORTER AND NOTARY

10 PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, ON THE

11 2ND DAY OF MARCH, 2017.

12 THIS WILL FURTHER CERTIFY THAT I AM NOT

13 INTERESTED IN, NOR AM I COUNSEL OR ATTORNEY TO EITHER

14 OF THE PARTIES INTERESTED IN THE EVENT OF THE CAUSE.

15 (L.S.)

16 ELLEN A. BOWEN, COURT REPORTER AND

17 NOTARY PUBLIC IN AND FOR THE STATE

18 OF SOUTH CAROLINA.

19 MY COMMISSION EXPIRES: 03-12-2023

20 MARCH 27, 2017