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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Lisa Lee Smith, Special Referee

Appellate Case No. 2017-002608

**RECEIVED**  
FEB 20 2018  
SC Court of Appeals

Federal National Mortgage Association ("Fannie Mae"),  
a corporation organized and existing under  
the laws of the United States of America,

Respondent,

v.

D. Randolph Whitt and Pearce W. Fleming,

Defendants,

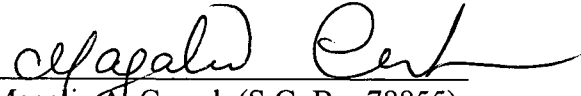
Of whom D. Randolph Whitt is the,

Appellant.

**RESPONDENT'S MOTION TO DISMISS APPEAL**

Respectfully submitted,

FINKEL LAW FIRM LLC



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February 15, 2018

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## MEMORANDUM

Undersigned counsel for Respondent Federal National Mortgage Association (“Fannie Mae”), a corporation organized and existing under the laws of the United States of America, hereby submits the instant Memorandum of Law in Support of its Motion to Dismiss the appeal filed by Appellant D. Randolph Whitt pursuant to Rule 240 of the South Carolina Appellate Court Rules (SCACR). The grounds for a dismissal of this appeal are threefold: First, the order that is the subject of Appellant’s appeal is interlocutory and not immediately appealable. Second, the issues Appellant attempts to raise on appeal were adjudicated in a prior order striking Appellant’s jury demand, which Appellant failed to appeal and thus constitutes the law of the case. As such, this Court lacks jurisdiction to consider whether Appellant was entitled to a jury trial on the legal counterclaims Appellant asserted in response to Respondent’s equitable foreclosure. Third, Appellant consented to the reference by appearing and litigating the action before the Special Referee for over two years before attempting to transfer the case to the Court of Common Pleas prior to trial. Accordingly, an immediate dismissal of the appeal is required.

### **I. PROCEDURAL POSTURE**

Respondent commenced a foreclosure action against Appellant by the filing of a Lis Pendens, Summons, Complaint, and Notice of Foreclosure Intervention on August 1, 2014. Respondent’s Complaint alleges that Appellant and Robin F. Whitt executed a mortgage on June 26, 1998, which constitutes a purchase money mortgage against the subject property (Mortgage). The Complaint further alleges the Mortgage secures a promissory note from Robin F. Whitt (Borrower) in the amount of \$120,275.00 (Note), and that the payments due and owing under the Note and Mortgage are in default since November 1, 2013. A Denial of Foreclosure Intervention pursuant to the 2011-05-02-01 Administrative Order of the Supreme Court was filed on January

26, 2015, based upon the Borrower's default on a trial payment plan. A corresponding Certification of Compliance with the 2011-05-02-01 Administrative Order was filed on March 2, 2015.

In the interim, Appellant served an Answer demanding a jury trial on February 2, 2015, which asserted unclean hands and failure to state a claim as defenses. On March 27, 2015, Appellant served an Amended Answer and Counterclaim demanding a jury trial.<sup>1</sup> Appellant's Amended Answer admits Appellant's execution of the Mortgage, and asserts Counterclaims styled as "breach of contract- duty of good faith and fair dealing" and "dual tracking/CFPB Regs." (See Exhibit A). Respondent filed a Reply on April 6, 2015, and moved to strike Appellant's demand for a jury trial and for mandatory reference to the Master in Equity.<sup>2</sup> The case was called to the non-jury roster for the Lexington County Court of Common Pleas on June 5, 2015, the Honorable William P. Keesley presiding, at which Appellant failed to appear. An Order Striking Appellant's Jury Demand and for Mandatory Order of Reference to Lisa L. Smith as Special Referee (2015 Order to Strike and Refer) was issued by Judge William P. Keesley on June 11, 2015. (See Exhibit B). Appellant was served with the filed 2015 Order to Strike and Refer on August 20, 2015. Appellant did not file a motion under Rule 59, SCRPC or appeal the 2015 Order to Strike and Refer.

Thereafter, a Summary Judgment Motion<sup>3</sup> filed by Respondent was heard by the Special Referee and granted, resulting in a Judgment and Order of Foreclosure and Sale entered on May 6, 2016. After Appellant sought and obtained relief from the Judgment of Foreclosure under

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<sup>1</sup> It appears neither Appellant's Answer nor Appellant's Amended Answer and Counterclaim was filed with the court based upon the public index.

<sup>2</sup> By Order entered April 17, 2015, the Honorable James O. Spence, Master in Equity, recused himself from hearing this matter due to a conflict.

<sup>3</sup> Respondent's Motion was based, in part, upon Appellant's failure to answer Requests for Admission pursuant to Rule 36(a), SCRPC. Appellant did not serve any responses to Respondent's discovery requests.

Rules 59 and 60, SCRCPP, Respondent filed a second Motion for Summary Judgment which was heard by the Special Referee on November 16, 2016. Appellant appeared at the hearing and offered an Affidavit and Memorandum in opposition to the Motion. After the Special Referee held the record open for additional submissions by the parties, an Order Granting Summary Judgment in Part was entered on April 10, 2017 (2017 Order Granting Partial Summary Judgment). (See Exhibit C). The Special Referee granted summary judgment as to liability on the foreclosure and damages in the amount of the unpaid principal balance under the Note and Mortgage and the interest accruing thereon. Summary judgment was denied as to the debt amounts over the unpaid principal balance and interest, and on Appellant's Counterclaims. Appellant did not file a motion under Rule 59, SCRCPP or appeal the 2017 Order Granting Partial Summary Judgment.

On August 8, 2017, the Special Referee set the remaining issues for a merits hearing to be held on September 22, 2017. Appellant then filed a Motion to Transfer the action to the jury roster on September 6, 2017. Respondent filed a Response to the Motion to Transfer on September 14, 2017, to which Appellant filed a Reply on September 15, 2017. The Motion to Transfer was heard by the Special Referee on September 22, 2017, at which all parties were present. By Order entered November 27, 2017, the Motion to Transfer was denied (2017 Order Denying Motion to Transfer or 2017 Order). (See Exhibit D).

Appellant served a Notice of Appeal of the 2017 Order Denying Motion to Transfer on December 21, 2017.

## II. ARGUMENT

### A. The 2017 Order Denying Motion to Transfer is interlocutory.

Section 14-3-330 of the South Carolina Code limits the Court of Appeals' ability to hear appeals. S.C. Code § 14-3-330 (Supp. 2011). Only final judgments and certain interlocutory orders are appealable. *Id.* "It is well settled that an interlocutory order is not immediately appealable unless it involves the merits of the case or affects a substantial right." *Brown v. County of Berkeley*, 366 S.C. 354, 361, 622 S.E.2d 533, 537 (2005) (citing S.C. Code Ann. § 14-3-330 (Supp. 2003)); *Mid-State Distributors, Inc. v. Century Importers*, 310 S.C. 330, 334-35, 426 S.E.2d 777, 780 (1993); *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991). "To involve the merits of a case, the order must "finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Brown*, 366 S.C. at 361, 622 S.E.2d at 537. "To affect a substantial right, the order must determine the action and prevent a judgment from which an appeal might be taken or discontinue the action." *Id.*

The 2017 Order Denying Appellant's Motion to Transfer is not an immediately appealable order because it neither involves the merits of the case nor affects a substantial right. The 2017 Order did not finally determine any matter which forms the basis of any of Appellant's claims or defenses; indeed, it is undisputed that those claims remain before the court for adjudication and were not impacted in any way by the denial of the Motion to Transfer. Instead, the 2017 Order restated Judge Keesley's 2015 ruling that Appellant had waived his right to a jury trial on legal Counterclaims asserted in response to Respondent's equitable foreclosure and concluded that as such, the 2015 Order to Strike and Refer was a final appealable order.

The 2017 Order went on to address language in Judge Keesley's 2015 Order to Strike and Refer which Appellant argued was conditional on further action or review by the Special Referee. The Special Referee expressly rejected this argument, finding that Appellant had not amended his Counterclaims or asserted any additional causes of action subsequent to the reference to which he would be entitled to a jury trial. Therefore, Judge Keesley's 2015 Order to Strike and Refer was not subject to revision and left no additional action to be taken. Appellant appears to misinterpret the Special Referee's power to transfer *subsequent legal compulsory* claims brought before the court to the jury roster as authority to overrule Judge Keelsey's 2015 determination that Appellant was not entitled to a jury trial on his Counterclaims. Neither the plain language of the 2015 Order to Strike and Refer nor the black letter law of this State can be reasonably interpreted to reach such an outcome. For these reasons, the 2017 Motion to Transfer was properly denied.

The 2017 Order Denying Motion to Transfer did not strike Defendant's jury demand, nor determine the mode of trial. As such it is not an order involving a substantial right, or final order. Therefore, the Motion to Transfer and resulting 2017 Order is not subject to appellate review.

**B. The unappealed 2015 Order to Strike and Refer is the law of the case.**

"[A]n unappealed ruling, right or wrong, is the law of the case." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). An order denying a request for a jury trial involves the mode of trial, affects substantial rights under section 14-3-330(2) of the South Carolina Code, and is immediately appealable. *See Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 391 (Ct. App. 2004). "The failure to immediately appeal an order affecting the mode of trial constitutes a waiver of the right to appeal these issues." *Id.*; see,

e.g., *Edwards v. Timmons*, 297 S.C. 314, 316, 377 S.E.2d 97, 97 (1988) (holding that the trial court's unappealed order of reference to a master-in-equity became the law of the case); *Creed v. Stokes*, 285 S.C. 542, 542-43, 331 S.E.2d 351, 351-52 (1985) (finding the appellant waived his objection to the order of reference by not immediately appealing the order).

The 2015 Order to Strike and Refer transferred the case in its entirety pursuant to Rule 53(b), SCRPC, thus leaving no question that the Special Referee has jurisdiction to hear Appellant's Counterclaims and has already, in fact, considered those claims with Appellant's consent as is more fully articulated in section C below. By failing to appeal the 2015 Order to Strike and Refer, this Court lacks jurisdiction to consider whether Appellant was entitled a jury trial on the legal Counterclaims Appellant asserted in response to Respondent's equitable foreclosure. Consequently, Judge Keesley's analysis of whether the Counterclaims were logically related to the foreclosure and ultimate ruling that Appellant waived his right to a jury trial stands as the law of the case.

Appellant's subsequent 2017 Motion to Transfer can be likened to the procedural posture in *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997). In *Lester*, an attorney brought an action to collect attorney's fees from a client. *Id.* at 265, 491 S.E.2d at 240. The circuit court denied at least two pre-trial motions for a jury trial made by the client, and placed the case on the non-jury roster. *Id.* Rather than appealing the denial of the motion for a jury trial, the client renewed his motion that the case be transferred to the jury roster at trial. *Id.* The circuit court found the question moot because the client had not appealed from the previous order. *Id.* The Supreme Court agreed, finding the client waived his right to a jury trial by not immediately appealing the order denying his motion for a jury trial. *Id.* at 266-67, 491 S.E.2d at 240-41. Here, Appellant's failure to appeal the 2015 Order to Strike and Refer constitutes a waiver of the

right to appeal Judge Keelsey's rulings that: (1) the Counterclaims are permissive, (2) that Appellant waived the right to a jury trial by asserting permissive counterclaims in an equitable foreclosure, and (3) that Appellant's jury demand should be stricken. Appellant is therefore barred from appealing those issues.

As a result, the 2015 Order to Strike and Refer stands as the law of the case and bars Appellant's attempt to relitigate these issues in the 2017 Motion to Transfer. Therefore, this Court lacks jurisdiction to consider whether Appellant was entitled a jury trial on the legal Counterclaims Appellant asserted in response to Respondent's equitable foreclosure.

**C. Appellant consented to the Special Referee's disposition of the Counterclaims.**

Notwithstanding the above, by appearing and litigating the merits of the Counterclaims for well over two years following the reference, Appellant consented to having those issues heard and adjudicated by the Special Referee and thus waived any right to a jury trial by implication. "It is settled case law in our State that by agreeing to a reference of the issues, a party thereby waives any right to a trial by jury." *Ervin Co. v. R.R. March, Inc.*, 274 S.C. 532, 544, 265 S.E.2d 520, 521 (1980) (holding appellants effectively waived right to trial by jury by moving for change of venue after case was transferred to nonjury roster instead of appealing); see also *Gilford v. S.C. Nat. Bank*, 257 S.C. 374, 186 S.E.2d 258 (1972) (finding appellants impliedly waived right to jury trial by failing to move for same in trial court prior to hearing before master in equity); *Hodges Concrete Prods., Inc. v. Fletcher*, 284 S.C. 191, 324 S.E.2d 343 (Ct. App. 1984) (holding motion for continuance of hearing before master and agreement to hear matter on certain date constituted waiver of right to jury trial); *Richland Cnty. v. Lowman*, 307 S.C. 422, 415 S.E.2d 433 (Ct. App. 1992) (finding landowners waived right to jury trial by consenting to reference; master's recusal with subsequent reference to special referee did not

withdraw consent where consent order did not indicate waiver was limited or conditional); contra *Sunamerica Fin. Corp. v. Equi-Data, Inc.*, 299 S.C. 175, 383 S.E.2d 8 (1989) (concluding no implied waiver of jury trial occurred where appellant timely demanded jury trial, never withdrew demand, and renewed demand after submission of master's report).

*Ervin* is directly on point. There, the Supreme Court found the appellants reaffirmed their waiver of a jury trial by referring an action at law to the master in equity by general order of reference and subsequently failing to appeal an order assigning the case to the nonjury roster of cases prior to its disposition by the master. See *Ervin*, 274 S.C. at 544, 265 S.E.2d at 521. The *Ervin* appellants then attempted to move for a change of venue to the court of common pleas, which was also denied and no appeal was taken. *Id.* The Supreme Court reasoned that the foregoing constituted a general appearance invoking the court's personal jurisdiction, and thus appellants' motion to restore the matter to the jury trial roster was properly denied. *Id.*

Here, Appellant reaffirmed his previous jury trial waiver (asserting permissive legal claims in an equitable action) by appearing at multiple hearings before the Special Referee and arguing the merits of his Counterclaims. Appellant's general appearance invoked the court's personal jurisdiction. This coupled with Appellant's failure to object to the adjudication of his Counterclaims before the Special Referee at any point in those two plus years, constitutes a waiver of jury trial by implication. Arguing the merits of Appellant's Counterclaims at the summary judgment hearing and seeking relief from the Judgment and Order of Foreclosure which dismissed his Counterclaims are unequivocal acts, inconsistent with an intention to preserve any right to a jury trial Appellant may have had. It is irrelevant that Appellant did not formally withdraw his request for a jury trial, because it was expressly stricken by order of the


court and Appellant had already waived his right to a jury trial by asserting permissive legal Counterclaims in response to the foreclosure.

### III. CONCLUSION

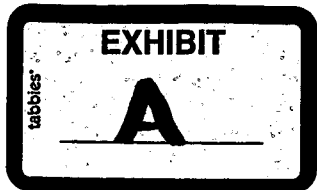
The 2015 Order to Strike and Refer was a final order which determined the mode of trial, and Appellant's failure to appeal same represented a waiver of his jury demand. Further, the unappealed 2015 Order to Strike and Refer constitutes the law of the case. Conversely, the 2017 Order to which Appellant has taken appeal here is interlocutory and cannot involve the mode of trial, as that issue was previously decided and not appealed. Finally, by appearing before the Special Referee and litigating any legal claims he asserted, Appellant assented to the reference and his general appearance constitutes a waiver of jury trial by implication. Under all the foregoing analyses, this Court lacks appellate jurisdiction to consider the appeal and is therefore required to dismiss it.

Respectfully submitted,

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February 15, 2018



STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS  
Case No. 2014-CP-32- 02795

Federal National Mortgage Assn.  
  
Plaintiff,  
  
vs.  
  
D. Randolph Whitt, et al  
  
Defendants.

**Amended Answer and Counterclaims**  
**(Jury Trial Demanded)**

Defendant D. Randolph Whitt ("Defendant") offers this amended answer and asserts the following counterclaims. to the complaint filed in this matter.

- 1) Each allegation not hereafter admitted or qualified is hereby denied and strict proof demanded thereof.
- 2) The execution of the mortgage is admitted, as are the jurisdictional allegations and the allegations confirmed by reference to the public records of Lexington County.

For a Further Defense  
(Unclean Hands)

- 3) The Plaintiff's conduct in this matter provides a basis for barring the relief sought by Plaintiff pursuant to the doctrine of unclean hands.

For A Further Defense  
(Failure to State a Claim)

- 4) The Complaint fails to state a claim upon which relief can be granted.

### Factual Allegations

- 5) The Plaintiff has failed to appropriately handle information provide by the Defendant and failed to give any meaningful review to such material.
- 6) Plaintiff has asserted that Defendant defaulted on a trial payment plan, even though no offer of a trial payment plan was ever made to the Defendant.
- 7) Plaintiff has also asserted that Defendant is not eligible for a modification, after asserting that a modification had been offered and while continuing to solicit information (information that duplicates information previously submitted to Plaintiff) to allow further consideration of a modification
- 8) Plaintiff's inattention and failure to exercise due care in dealing with this matter is evidence by the Plaintiff's request that Defendant execute an IRS Form 4506-T for two completely irrelevant tax years, failing to respond when notified of this error until several months later, after the Defendant had supposedly defaulted on a trial payment plan.

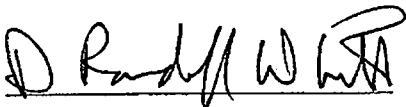
### For A First Counterclaim (Breach of Contract-Duty of Good Faith and Fair Dealing)

- 9) Defendants reincorporate and reallege each of the foregoing allegations as fully as if repeated herein verbatim.
- 10) Plaintiff's conduct as outlined above constitutes a breach of contract in that it violates Plaintiff's duty of good faith and fair dealing under the mortgage contract.
- 11) Defendants have suffered damages as a direct and proximate result of Plaintiff's breach.

For A Second Counterclaim  
(Dual Tracking/CFPB Regs)

- 12) Defendants reincorporate and reallege each of the foregoing allegations as fully as if repeated herein verbatim.
- 13) Plaintiff's conduct as outlined above regarding this consumer loan, which is secured by residential real estate constitute impermissible dual tracking in violation of both the regulations of the Consumer Financial Protection Bureau(CFPB) and the common law of the State of South Carolina.
- 14) Plaintiff's conduct as outlined above also violates the CFPB regulations in failing to provide timely and accurate information to the Defendant and failing to appropriately handle and give meaningful review to information submitted by Defendant.
- 15) Defendants have suffered damages as a direct and proximate result of Plaintiff's conduct and are further entitled to statutory damages as found appropriate by the court.

Therefore, Defendant requests that the Court deny the relief sought by the Plaintiff and grant the relief sought in the conterclaims.



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Dwhitt2001@aol.com

3/27, 2015

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

Case No. 2014-CP-32- 02795

Federal National Mortgage Assn.

Plaintiff,

vs.

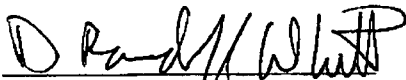
D. Randolph Whitt, et al

Defendants.

**Certificate of Service**

The undersigned hereby certifies that I served the Amended Answer and Counterclaims dated 3/27/2015 by causing a copy of said document to be placed in a sealed envelope with postage thereon fully prepaid, in the United States mail, with a return address clearly shown and addressed to :

Teresa Van Vlake  
4000 Faber Place Dr.  
Suite 450  
North Charleston SC 29405



D. Randolph Whitt  
Fleming & Whitt, P.A.  
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March 27, 2015



STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

FILED

CASE NO.: 2014-CP-32-02795

Federal National Mortgage Association (Mae”), a corporation organized and existing under the laws of the United States of America,

~~ORDER~~ **ORDER FOR MANDATORY REFERENCE TO SPECIAL REFEREE**

BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON

**AND  
STRIKING THE DEMAND FOR A JURY TRIAL ON THE COUNTERCLAIM**

PLAINTIFF,

v.

D. Randolph Whitt; and Pearce W. Fleming,

DEFENDANTS.

This matter was on the roster for this week's term of Common Pleas Non-Jury court. Plaintiff's counsel appeared. No one appeared for the defendants. The court did not hear the motion for an order striking Defendant's jury demand. However, this is an action for foreclosure, and it is subject to a mandatory order of reference. The court was advised that the sitting Master-in-Equity has a conflict and would recuse himself from the case, so the matter is referred to Lisa Lee Smith, as Special Referee for Lexington County, pursuant to Rule 53(b), SCRCF. Having failed to appear and oppose the motion to strike the demand for jury trial, the demand for jury trial is stricken and the court directs that the issues be tried without a jury. Should the Special Referee determine that there is a valid claim that requires a jury trial, she may notify the circuit court, as provided in the South Carolina Rules of Civil Procedure.

WPC  
#1

There is an Amended Answer which seeks to have a jury trial on a counterclaim for violation of the implied covenant of good faith and fair dealing, and violation of the CFPB Dual Tracking Regulations. First, the implied covenant of good faith and fair dealing is not an independent cause of action. See RoTEC v. Encompass, 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004) (holding claim for breach of implied covenant of good faith and fair dealing was subsumed under claim for breach of contract). Second, Section 6(f) of the Real Estate Settlement Procedures Act (RESPA) does not prohibit a lender from initiating or moving forward with a foreclosure, but merely provides statutory damages for violations of this section. 12 U.S.C. 2605(f). Specifically, the alleged conduct which Defendant contends

gives rise to this claim is alleged to have occurred after the Defendant's default under the terms of the note and mortgage.

Affirmative defenses raised in response to an equitable cause of action are inherently equitable in nature, and not triable by a jury. See Farley v. Matthews, 186 S.C. 294, 167 S.E. 502 (1933).

The Plaintiff's foreclosure action is centered entirely on the obligations created by the note and mortgage and the Defendant's default thereunder. There is no opposition to the position taken by the Plaintiff that the Defendant's legal counterclaim does not arise from the same transaction or occurrence as Plaintiff's foreclosure action, thereby making it permissive.

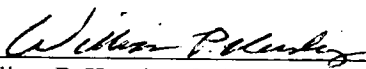
Asserting a permissive claim in a foreclosure action constitutes a waiver of the right to a jury trial. See Wachovia Bank, National Association v. Blackburn, 407 S.C. 321, 755 S.E.2d 437 (2014) (finding that where the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial). This being an action for foreclosure of a mortgage and, as such, an action in equity, it is an appropriate matter to be referred to the Master in Equity. See Collier v. Green, 244 S.C. 346, 137 S.E.2d 277 (1964).

#2

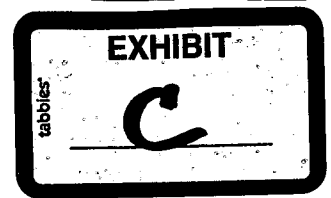
It is, therefore, **ORDERED** that this case is referred to Honorable Lisa Lee Smith, Special Referee for Lexington County, who shall exercise all power and authority which a Circuit Judge sitting without a jury would have, including but not limited to, making findings of fact and conclusions of law; directing entry of final judgment; hearing any issues, including motions, after sale or judgment; issuing any and all orders, supplemental orders, and writs of assistance, and hearing any issues involving possession and/or removal of property and appraisal proceedings under Section 29-3-360, *et seq.* of the South Carolina Code, with any appeal from the final judgment being to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules. Any judicial sale of the property subject of this action may be held on a day other than the regular judicial sale day.

**IT IS SO ORDERED.**

6/11/2015

  
\_\_\_\_\_  
William P. Keesley, Judge

COPY



STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON 2017 APR 10

PM 1:22 C/A NO: 2014-CP-32-02795

Federal National Mortgage Association  
("Fannie Mae"), a corporation organized and  
existing under the laws of the United States  
of America,

COURT  
SC  
**ORDER RE MOTION FOR SUMMARY  
JUDGMENT**

(Granted in Part / Denied in Part)

PLAINTIFF,

(Deficiency Waived)

v.

D. Randolph Whitt; and Pearce W. Fleming,

DEFENDANTS.

This matter was initiated by the filing on August 1, 2014 of a *Lis Pendens* and Summons and Complaint seeking the foreclosure of a residential mortgage. These pleadings were subsequently properly served upon the Defendants. A deficiency judgment is not demanded by the Plaintiff. D. Randolph Whitt, Esquire, Defendant, *Pro Se*, filed and served an Answer and a subsequent Amended Answer and Counterclaim on the Plaintiff. The counterclaims raise the issues of breach of the covenant of good faith and fair dealing and a dual tracking violation of the CFPB regulations; which are denied by the Plaintiff. Pearce W. Fleming, Esquire, who is also a *Pro Se* Defendant, served an Answer on the Plaintiff, which is on file herein, seeking protection of his rights as a separate mortgage lien holder; including rights to any surplus funds in foreclosure.

Pursuant to Rule 53 SCRCP, the above-entitled matter was referred to Lisa Lee Smith as Special Referee for Lexington County. After a previous ruling on summary judgment was vacated by Order of the Special Referee dated August 1, 2016, on file herein, this matter came back before the Special Referee on November 16, 2016, for a hearing of the Plaintiff's refilled Motion for Summary Judgment. Proper notice of the Hearing was served on the parties and/or

their attorneys. At the hearing, Plaintiff was represented by Magalie A. Creech, Esq., of the Finkel Law Firm. The Defendants, both members of the South Carolina Bar, appeared *pro se*.

“Summary judgment is a drastic remedy and should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues.” Hoard v. Roper Hospital, Inc., 694 S.E.2d 1, 4 (S.C. 2010). Summary judgment is appropriate when “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.” Rule 56(c), SCRC.P.

“In ascertaining whether any triable issue of fact exists, the trial court must view all evidence and all inferences that can be reasonably drawn from it in the light most favorable to the non-moving party.” Rawlinson Rd Homeowners Assoc. Inc. v. Jackson, 716 S.E.2d 337, 341 (S.C. Ct. App. 2011) (*citing* Belton v. Cincinnati Ins. Co., 360 S.C. 575, 578, 602 S.E.2d 389, 391 (2004)). “[I]n 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.” *Id.* at 341 (*quoting* Hancock v. Mid-South Mgmt. Co., 673 S.E.2d 801, 803 (S.C. 2009)).

“A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *Id.* At 342 (*quoting* David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006)).

While not solely determinative of all issues before this Court, I find that Defendant Whitt, by his failure to respond, admitted to the Plaintiff's Requests for Admissions dated October 21,

2015 and served upon him, pursuant to Rule 36 of the South Carolina Rules of Civil Procedure. Defendant Whitt admitted at the hearing that he did not respond to the Plaintiff's Requests for Admissions; however, he asserted that the requests should not be deemed admitted, because (1) the Plaintiff's requests were an improper use of Requests to Admit and (2) the legal implications of the conduct of the Plaintiff and/or Plaintiff's representatives after the date of the Requests to Admit should not be determined by any deemed admissions from the failure to respond to the Requests to Admit.

As to Defendant Whitt's first argument that the Requests to Admit were improper to the extent they simply asserted the ultimate issues in the case (i.e. "I win, you loose"), I find that the Plaintiff's Requests to Admit were proper under Rule 36. The applicable South Carolina Rule reads, in part, "(a) party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request." Rule 36(a) SCRPC. Requests to admit may go specifically and directly to issues raised in the pleadings, and "the admission resulting from a party's failure to respond to the request may override the pleadings." Scott v. Greenville Housing Authority, 353 S.C. 639, 650 (Ct. App. 2013). In Scott, the South Carolina Court of Appeals held that requests for admissions were valid which stated that the Defendant was responsible and liable for all damages, and Defendant's conduct was the sole proximate cause of any and all damages; even though the Defendant had denied such allegations in its Answer. An admission under Rule 36 is "akin to the doctrine of judicial estoppel: an admission precludes the admitting party from arguing facts at trial contrary to its responses to a



request to admit....” Commerce Center of Greenville, Inc. v. W. Powers McElveen & Assoc Inc., 347 S.C. 545, 554 (Ct. App. 2001).

In the present case, Plaintiff served 18 statements as Requests for Admission on Defendant Whitt, which is on file in this matter as Exhibit A to Plaintiff’s Affidavit in Support of Motion for Summary Judgment filed herein December 10, 2015. The requests sought the admission of statements of fact or opinion, application of law to fact or the genuineness of documents attached; all of which are an appropriate use of requests for admissions pursuant to Rule 36, SCRPC. Furthermore, the Defendant did not respond to the Plaintiff in discovery by stating his objections to any particular requests, even though such a procedure is set forth in the Rule as the appropriate manner to handle such objections. Accordingly, the requests to admit are deemed admitted by the Defendant Whitt and are therefore appropriate for summary judgment.

At the hearing on the Motion, Defendant Whitt raised a second argument, that the failure to respond to the requests for admission should not be conclusive as to the legal implications of the conduct of the Plaintiff and/or the Plaintiff’s representatives after the date of the Requests to Admit. Such a limitation to the interpretation of the admissions is appropriate considering the ongoing nature of the procedures of foreclosure. Therefore, the finding of summary judgment based on the Defendant’s admissions that Defendant Whitt had not suffered any damages, did not have valid claims against the Plaintiff, did not have valid defenses to the foreclosure of the Mortgage and was not entitled to reimbursement of attorneys’ fees and costs, (See Req. to Adm. 11, 12, 13, 18); is a finding that does not preclude the Defendant from raising defenses or claims at the hearing on the merits, which are based upon facts occurring or arising subsequent to the date of his deemed admissions. In other words, prior admissions are not determinative at summary judgment of the legal implications of subsequently occurring facts. Therefore, the



Defendant Whitt's admissions for purposes of this summary judgment consideration are interpreted at the point in time which the Requests for Admissions were asserted by the Plaintiff.

After consideration of the pleadings, the evidence and the law cited in the Plaintiff's and Defendant's Affidavits and Memoranda, together with supporting exhibits annexed thereto including the Plaintiff's Request for Admissions, and after consideration of the oral arguments of counsel and the parties at the hearing on the motion, along with an examination of the supplemental submissions permitted by order after the hearing, I find that the Plaintiff is entitled to an Order granting Summary Judgment in part and denying Summary Judgment in part.

I find and conclude that there are no genuine issues of material fact, and summary judgment is thus appropriate, as to the following particulars:

1. For value received, Robin F. Whitt made, executed and delivered a Note dated June 26, 1998, promising thereby to pay to the order of Federal Home Mortgage Group, Inc., the sum of \$120,275.00, with interest at the rate of 7.50% per annum. Other terms and conditions are stated in the Note; a correct copy being of record herein. Defendant D. Randolph Whitt did not sign the Note, and has not assumed the loan by becoming an obligor on the Note.
2. Robin F. Whitt and Defendant D. Randolph Whitt made, joint owners of the subject real property at said time, executed and delivered to Federal Home Mortgage Group, Inc., a Mortgage in writing, dated June 26, 1998, covering real property in Lexington County, which is the same as that described in the Complaint. The Mortgage was filed on June 30, 1998, and is of record in the Office of the Register of Deeds for Lexington County in Book 4739 at Page 102. Defendant D. Randolph Whitt signed the referenced Mortgage.
3. This Mortgage constitutes a first mortgage lien on the subject property and is a Purchase Money Mortgage.



4. Thereafter, the subject Note and Mortgage were assigned by instruments recorded in the Office of the Register of Deeds for Lexington, as follows:

a. by Assignment dated June 26, 1998, and recorded June 30, 1998, in Book 4739 at Page 110, Federal Home Mortgage Group, Inc., assigned the subject Note and Mortgage to Chase Manhattan Mortgage Corporation; and

b. by Assignment dated April 2, 2014, and recorded June 17, 2014, in Book 17019 at Page 13, Chase Manhattan Mortgage Corporation assigned the subject Note and Mortgage to Federal National Mortgage Association ("Fannie Mae"), a corporation organized and existing under the laws of the United States of America. Fannie Mae is the present lien holder and Plaintiff herein.

5. Subsequent to the recording of the Plaintiff's mortgage, by Deed recorded June 09, 2010 in Book 14284 at Page 273, Robin F. Whitt conveyed her interest in the property to D. Randolph Whitt, thereby making D. Randolph Whitt the sole title holder of record. Accordingly, it is uncontested that the titleholder of record in and to the subject property as of the filing of the *Lis Pendens* in this action is the Defendant D. Randolph Whitt.<sup>1</sup>

6. All required payments due and owing under the Note have not been made as provided for therein, and Plaintiff, as the holder thereof, elected to require immediate payment of the entire amount due thereon and placed the Note and Mortgage in the hands of an attorney for collection.

7. The balance due and owing under the Note and Mortgage has not been paid in full, the Plaintiff provided notice of default, and the default arising under the Note and Mortgage has not been cured.

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<sup>1</sup> However, this Court and the Plaintiff do not warrant Plaintiff's title search to purchasers at foreclosure sale or other third parties, who should have their own title search performed on the subject property.

8. As of November 1, 2013, the principal amount due and owing under the Note and Mortgage was \$89,776.15; and under the terms of the Note and Mortgage, interest at the rate of 7.50% *per annum* continues to accrue on the unpaid balance from October 1, 2013.

9. The Defendant Pearce W. Fleming holds a lien upon or interest in the subject property by virtue of a Mortgage from D. Randolph Whitt, dated April 9, 2014 and recorded April 10, 2014 in Book 16893 at Page 106, in the amount of \$43,168.14.

10. The lien of the Defendant Pearce W. Flemming, if any remains unsatisfied, is junior and subordinate to Plaintiff's purchase money Mortgage.

11. Under the terms of the Note and Mortgage and finding herein, Plaintiff is entitled to foreclosure of the property, and is entitled to the reimbursement of its costs and expenses, including reasonable attorney's fees.

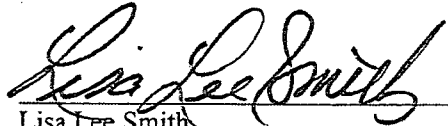
12. Due to a scrivener's error, the legal description in the deed to the Defendant Whitt recorded June 9, 2010 in Book 14284 at Page 273 incorrectly references the plat dated July 11, 1996 as being recorded in Plat Slide 233 at No. 10, rather than the correct reference to Plat Slide 223 at No. 10.

13. As of the Requests for Admissions dated October 15, 2015, Defendant admitted to the application of law to the facts in existence at that time, that he had not suffered any damages, did not have valid claims against the Plaintiff, did not have valid defenses to the foreclosure of the Mortgage and was not entitled to reimbursement of attorneys' fees and costs.

As to all other matters raised by the pleadings in this case, I find that there are genuine issues of material fact and therefore summary judgment is not warranted. This includes, but is not limited to, issues concerning the determination of the amount owed to the Plaintiff reflecting the calculation of portions of the debt over and above the principal and interest calculations.

IT IS THEREFORE ORDERED for the reasons set forth above, Plaintiff's Motion for Summary Judgment is granted in part and denied in part; and a hearing shall be scheduled as soon as possible on merits of the remaining issues in dispute.

IT IS SO ORDERED.

  
\_\_\_\_\_  
Lisa Lee Smith  
Special Referee for Lexington County

Lexington, South Carolina  
April 7, 2017



STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

CASE NO.: 2014-CP-32-02795

Federal National Mortgage Association ("Fannie Mae"), a corporation organized and existing under the laws of the United States of America,

**ORDER DENYING DEFENDANT'S MOTION TO TRANSFER TO THE JURY ROSTER**

PLAINTIFF,

v.

D. Randolph Whitt; and Pearce W. Fleming,

DEFENDANTS.

**THIS MATTER** came before the Court upon Motion by D. Randolph Whitt ("Defendant") seeking an Order transferring this action to the jury roster on Defendant's counterclaims. A motion hearing was held on September 22, 2017, with participation by the Defendants D. Randolph Whitt and Pearce W. Fleming, each members of the South Carolina Bar representing themselves *pro se*; and Magalie A. Creech, attorney for the Plaintiff Federal National Mortgage Association. After consideration of the memoranda submitted by the parties, the oral arguments at the hearing, and the proposed orders of the parties, Defendant's Motion is denied based upon the following findings of fact and conclusions of law:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Plaintiff commenced the instant residential mortgage foreclosure action upon the filing of its Lis Pendens, Summons and Complaint on August 1, 2014.
2. Defendant served an Amended Answer on March 27, 2015, which contained a jury trial demand and asserted counterclaims for violation of the implied covenant of good faith and fair dealing and violation of the CFPB Dual Tracking Regulations. The alleged conduct giving rise to the Defendant's counterclaims is alleged to have occurred after the Defendant's default under the terms of the note and mortgage. Plaintiff filed a timely Reply denying the counterclaims on April 6, 2015.

3. On March 25, 2015, Plaintiff filed a Motion to Strike Defendant's Jury Demand and for a Mandatory Order of Reference.

4. By Order of the Honorable William P. Keesley captioned "Mandatory Order of Reference to Special Referee and Striking the Demand for a Jury Trial on the Counterclaim" ("Order of Reference") entered June 11, 2015, this action was referred in its entirety to Lisa Lee Smith as Special Referee. The Order of Reference specified that as an action for foreclosure, the case is subject to a "mandatory order of reference". Furthermore, because the Defendant failed to appear and oppose the Plaintiff's motion to strike the demand for a jury trial, Judge Keesley ordered that "the demand for jury trial is stricken and the court directs that the issues be tried without a jury."

5. The Order addressed each of the counterclaims in the Answer, found no basis for a jury trial, and also found that that by asserting permissive legal counterclaims in response to Plaintiff's equitable foreclosure action, Defendant had waived any right he may have had to a jury trial. The parties received the filed Order of Reference and neither moved for reconsideration of the Order, nor did either party appeal the Order.

6. The Order of Reference further indicated that "[s]hould the Special Referee determine that there is a valid claim that requires a jury trial, she may notify the circuit court, as provided in the South Carolina Rules of Civil Procedure". This sentence granted to the Special Referee the power during the handling of the case to consider the issue if the Special Referee is made aware of "a valid claim that requires a jury trial".

7. At the hearing on Defendant's present Motion to Transfer to the Jury Trial Roster, considerable focus by the parties was on the issue of whether Judge Keesley's Order was a final order or a conditional order. If conditional, the order would not be a final order for purposes of appeal. This argument focused on whether Judge Keesley's Order was appealable, and whether the fact that the Defendant did not appeal

Judge Keesley's order striking the demand for a jury trial, resulted in the Defendant's present claim being barred by the doctrine of *res judicata* and Judge Keesley's order stands as the law of the case.

8. An order denying a request for a jury trial involves the mode of trial, affects substantial rights under section 14-3-330(2) of the South Carolina Code, and is immediately appealable. *See Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 3991 (Ct. App. 2004). "The failure to immediately appeal an order affecting the mode of trial constitutes a waiver of the right to appeal these issues." *Id.*; *see, e.g., Edwards v. Timmons*, 297 S.C. 314, 316, 377 S.E.2d 97, 97 (1988) (holding that the trial court's un-appealed order of reference to a master-in-equity became the law of the case); *Creed v. Stokes*, 285 S.C. 542, 542-43, 331 S.E.2d 351, 351-52 (1985) (finding the appellant waived his objection to the order of reference by not immediately appealing the order).

9. Judge Keesley's order striking the Defendant's demand for a jury trial was a final appealable order. Judge Keesley's order contained no language that made it conditional on any further action or review by the Special Referee or contingent upon further action of the Circuit Court or Special Referee. Therefore, by the express terms of the Order of Reference, the Plaintiff's initial claim for a jury trial was stricken by Judge Keesley and as such is the law of the case as to the counterclaims plead.

10. However, Defendant has moved anew for the case to be transferred to the jury trial roster, and Judge Keesley's order clearly granted the Special Referee the power to consider such a motion if raised during the pendency of the case.

11. With one exception, the Defendant's counterclaims are the same now as they were in the pleadings considered by Judge Keesley in his June 11, 2015 order. That exception is that Defendant's counterclaims have evolved over the course of the litigation to include complaints about the actions of the Plaintiff during the litigation in submitting alleged inconsistent and confusing Affidavits regarding the debt calculation at prior hearings where the Plaintiff sought Summary Judgement before the Special Referee.

12. By Order dated April 7, 2017 and filed April 10, 2017, the Special Referee partially granted, and partially denied, the Plaintiff's Motion for Summary Judgment, setting forth in detail the matters where there are no issues of material fact, such that summary judgment was appropriate ("Order for Partial Summary Judgment").

13. Among other findings, the Order for Partial Summary Judgment included findings that (a) as of the date of Requests for Admissions dated October 15, 2015, Defendant Whitt is deemed to have admitted that he had not suffered any damages, did not have valid claims against the Plaintiff, and did not have valid defenses to the foreclosure of the Mortgage; and (b) the Plaintiff is entitled to foreclose the mortgage and the amount of the principal and interest calculation on the debt is final as set forth therein.

14. One issue in which Summary Judgment was denied concerned the calculation of amounts that may be owed to the Plaintiff over and above the principal and interest calculation.

15. The finding that the Plaintiff failed to meet the steep burden for Summary Judgment as to the calculation of the debt amount over and above the stated amount of principal and interest formula, did not give rise to a new counterclaim, or any recharacterization of an original counterclaim, which would warrant a jury trial. Defendant argues essentially that the Plaintiff's failure to win on all issues at summary judgment is evidence supporting the original counterclaims, and evidence that the counterclaims are compulsory in nature. A "compulsory counterclaim" is not created just because a non-moving party successfully identifies issues of material fact not appropriate for summary judgment. Rather, it simply means the issues identified by the non-moving party are ripe for cross examination at a hearing on the merits.

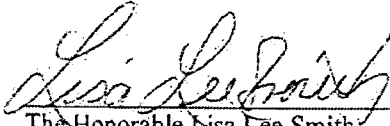
16. Defendant contends that he is entitled to a jury trial because his counterclaims are compulsory, and cites *Plantation Federal Bank v. Gray*, 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013) in support of this argument. However, Defendant's reliance on the *Gray* case is misplaced because *Gray* did not address the question of whether a mortgagee's counterclaims were compulsory. Instead, *Gray* held that a mortgagee's

equitable foreclosure action could not be heard prior to a jury trial of the mortgagor's counterclaims at law. The compulsory nature of the mortgagee's counterclaims in *Gray* was not in disputed, and for that reason the foreclosure and legal counterclaims were bifurcated.

17. Judge Keesley's Order unequivocally determined that the Defendant was not entitled to a jury trial, the counterclaims as plead are permissive and that Defendant waived his right to a jury trial by asserting permissive counterclaims in this foreclosure. Defendant's evolution of his counterclaims before the Special Referee has not convinced the Special Referee that any of his counterclaims are "compulsory counterclaims" as that terms is defined by applicable case law and rules of civil procedure.

18. Upon review of the counterclaims raised by the Defendant, the Special Referee finds that the Defendant's current articulation of the counterclaims does not alter any of the originally plead counterclaims in such a way as to identify any valid claim that requires a jury trial for any part of this case.

NOW THEREFORE, the Defendant Whitt's Motion to transfer to the Jury Trial Roster is **DENIED**. This matter shall be scheduled for a non-jury merits hearing on the remaining issues herein as soon as is practicable.

  
The Honorable Lisa Lee Smith  
Special Referee for Lexington County

Chapin, South Carolina

November 22, 2017

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Lisa Lee Smith, Special Referee

---

Appellate Case No. 2017-002608

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Federal National Mortgage Association ("Fannie Mae"),  
a corporation organized and existing under  
the laws of the United States of America,

Respondent,

v.

D. Randolph Whitt and Pearce W. Fleming,

Defendants,

Of whom D. Randolph Whitt is the,

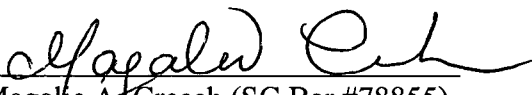
Appellant.

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**PROOF OF SERVICE**

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I certify that I have served the *Respondent's Motion to Dismiss Appellant's Appeal* by depositing a copy of same in the United States Mail, postage prepaid, on February 15, 2018, addressed to Appellant, D. Randolph Whitt, at 344 Blossom View Ct., West Columbia, South Carolina 29170 and to Defendant, Pearce W. Fleming, at 3723 Linwood Rd., Columbia, South Carolina 29205-2545.

  
Magalie A. Creech (SC Bar #78855)  
FINKEL LAW FIRM LLC  
Post Office Box 41489  
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*Attorney for Respondent*

February 15, 2018



MAGALIE A. CREECH  
MCREECH@FINKELLLAW.COM

REPLY TO:  
CHARLESTON LITIGATION

February 15, 2018

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

**RECEIVED**  
FEB 20 2018  
SC Court of Appeals

RE: Federal National Mortgage Association v. D. Randolph Whitt, et al.  
Appellate Case No.: 2017-002608  
Our File No.: 66040.49237

Dear Ms. Kitchings:

Enclosed for filing is the *Respondent's Motion to Dismiss Appeal* and related *Proof of Service*, along with six (6) copies of same. We kindly ask you to file the *Respondent's Motion to Dismiss Appeal* and to return same in the attached, self-addressed, stamped envelope. Enclosed is also check number 66489 in the amount of \$25.00, representing the filing fee for the Motion.

Should you have any questions concerning this matter, please do not hesitate to contact our office at your earliest convenience.

With kind personal regards, we are

Yours very truly,

FINKEL LAW FIRM

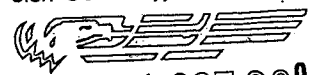
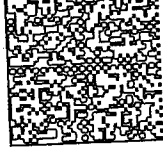
Magalie A. Creech

CC: D. Randolph Whitt, Esquire  
Pearce W, Fleming, Esquire

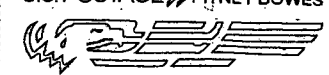
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DFC

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