Volume 1

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN SOUTH CAROLINA COURT OF APPEALS

APPEAL FROM LEE COUNTY

The Honorable Clifton Newman
Circuit Court Judge

CASE NUMBER: 2013-CP-31-0321

APPELLATE CASE NO: 2016-001989

Laura Toney.....**Appellant,**

Vs.

LaSalle Bank National Association
As Trustee for the Registered Holders
Of Structured Asset Securities
Corporation, Structured Asset Investment
Loan Trust, Mortgaged Pass-Through
Certificates, Series 2004-11, AltiSource
Homes, Wayne Capell, Lee County
Treasure and Lee County Planning and
Zoning.....**Respondents.**

RECORD ON APPEAL

Finkel Law Firm
PO Box 41489
Charleston, SC 29405

Laura Toney
PO Box 722
Bishopville, SC 29010

Stuckey, Fata & Segars
PO Box 568
Bishopville, SC 29010

Volume 1

STATE OF SOUTH CAROLINA)
)
COUNTY OF)

IN THE COURT OF COMMON PLEAS

Laura Toney
Plaintiff(s)

vs.

LaSalle Bank National Association
As Trustee for the Registered Holders
Of Structured Asset Securities
Corporation, Structured Asset Investment
Loan Trust, Mortgaged Pass-Through
Certificates, Series 2004-11, AltiSource
Homes, Pro Capital Investors, Wayne
Capell, Lee County Treasure and
Lee County Planning and Zoning
Defendant(s)

CIVIL ACTION COVERSHEET

2013-CP - 31- 321

(Please Print)
Submitted By: Laura Toney, Pro Se
Address: P. O. Box 722 Bishopville, SC 29010
(803) 459-6006

SC Bar #:
Finkel Law Firm, LLC
P. O. Box 41489
4000 Faber Place
Suite 450
Charleston, SC 29405

Stuckey, Fata, & Segars, LLC
P. O. Box 568
Bishopville, SC 29010

Pro Capital Investors
50 South 16th Street, Suite 1950
Philadelphia, PA 19102
C/O Haynsworth Sinkler and boyd
P. O. Box 11889
Columbia, SC 2211-1899
Telephone #:
Fax #:
Other:
E-mail:

Certified to be a True Copy
By Clerk of Common Pleas
Lee County, South Carolina

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply)*

**If Action is Judgment/Settlement do not complete*

☒ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION *(Check One Box Below)*

Contracts	Torts - Professional Malpractice	Torts – Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Libel (300)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	Previous Notice of Intent Case #	☐ Premises Liability (330)	☐ Mechanic's

☐ Breach of Contract (140)
☐ Other (199)

20___-CP-____-_____
☐ Notice/ File Med Mal (230)
☐ Other (299)

☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399)

☐ Partition (440)
☒ Possession (450)
☐ Building Code Violation (460)
☒ Other (499) Quiet Title and Conversion

Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Other (799)

Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture—Consent Order (850)
☐ Other (899)

Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)

☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Sexual Predator (510)

Submitting Party Signature: Laura Tonry **Date:** 12-8-14

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

INDEX

MOTIONS

Motion To Strike----------4

416

Defendants Motion to Strike----------819

Notice of Removal----------19

Complaint filed by the Appellant in State Court----------24

Respondent's First Motion To Dismiss in Federal Court----------45

Amended Answer and Counterclaim of Lee County----------57

Report And Recommendation by Federal Court----------64

175

188

214

376

447

530

556

583

609

642

661

687

714

767

773

Second Motion To Recuse----------847

Defendants 12B(6)----------427

Defendants Motion To Dismiss----------372

527

701

711

Motion For Reconsideration----------860

Defendant's Memorandum of Law----------487

Memorandum In support of the Plantiff Motion to Dismiss.....833

Order and Opinion by Federal Court----------75

473

402

Plaintiff's Motion For Remand----------90

Defendants Memorandum of Law.....130

Notice of Motion and Motion for Reconsideration----------265

Defendants Amended Motion to Dismiss----------444

623

636

651

558

754

ORDERS

Order Denying Amended Motion For Reconsideration------84

900

Order Denying Motion To Disqualify Attorney Paul Fata----86

Order Granting The Motion To Dismiss----------105

Bankruptcy Order----------144

168

Masters Order and Judgement for Foreclosure----------145

Order Dissolving Temporary Restraining Order----------155

Order As To Pending Motions----------160

Opinion Of SC Court Of Appeals.....--.....173

United States Court of Appeals----------231

Complaint----------253

429

501

783

Answer----------259

Order dissolving Temporary Restraining Order----------873

Respondent's Brief ----------269

Complaint----------297

316

Answer----------323

Plaintiff's First Amended Reply----------326

Defendants' Answers To Interrogatories----------313

Appellants Affidavit For Default----------511

Respondent's Response to Motion For Default----------520

Transcript (LaSalle Bank)----------876

881

939

Corrected Appellant's Initial Brief----------909

Carolina Pines Excuse----------1057

Letter From The Commission On Lawyer Conduct----------1058

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

Cases are exempt from ADR only upon the following grounds:

Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

Requests for temporary relief;

Appeals;

Post Conviction relief matters;

Contempt of Court proceedings;

Forfeiture proceedings brought by governmental entities;

Mortgage foreclosures; and

Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: • You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.• •

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

COUNTY OF LEE

CASE NUMBER: 2013-CP-31-0321

Laura Toney,
Plaintiff,

Vs.

LaSalle Bank National Association
As Trustee for the Registered Holders
Of Structured Asset Securities
Corporation, Structured Asset Investment
Loan Trust, Mortgaged Pass-Through
Certificates, Series 2004-11, AltiSource
Homes, Pro Capital Investors, Wayne
Capell, Lee County Treasure and
Lee County Planning and Zoning

Defendants.

MOTION TO STRIKE THE DEFENDANTS LASALLE BANK A/K/A ALTISOURCE HOMES AND SANCTIONS ARE IMPOSED ON THE DEFENDANTS FOR FRAUD ON THE COURT AND MOTION TO STRIKE ALL DOCUMENTS FROM FEDERAL COURT

Pursuant to Rule 12(f) of the SCRCP, the Plaintiff respectfully requests that the Defendants Motion to Dismiss is denied with prejudice and an Order to Strike the Defendant's Motion to Dismiss with prejudice and the Plaintiff's Default are granted. Also, the Plaintiff is requesting that all documents from Federal Court are declared null and void because State Court has total

jurisdiction in all matters in this case. The Plaintiff also request that sanctions are imposed upon the Defendants for fraud on the Court for the following:

1. **In State v. Columbia Ry., Gas & Elec.,** 112 S.C. 528, 537, 100 S.E. 355, 357 (1919) (stating that upon remand it is the duty of the state court to proceed as if no removal had been attempted). Since this case was remanded back to State Court, all documents filed in Federal Court should be null and void. State Court has total jurisdiction in all matters pertaining to this case. The Plaintiff filed a Motion For Default and requested the Court to rule on the Motion to Strike on September 25, 2014, in State Court. The Motion to Strike was a document filed in Federal Court and should be null and void.
2. Pro Capital never filed an answer in State court until December 2, 2014, was is **(277)** days late without the consent of Court. Also, LaSalle Bank A/K/A AltisourceHomes never filed an answer in State Court and is **(277)** days late.
3. Now the Defendants, LaSalle Bank A/K/A AltiSourceHomes are filing an **Amended** Answer in State Court when no first answer was filed in State Court. The Defendants' attempt to file an Amended Answer when a first answer was never filed in State Court constitutes fraud on this Court.

STATEMENT OF CASE

1. The Plaintiff filed a complaint with State Court November 13, 2013, for the following:

2. That pursuant to South Carolina Code 15-67-210, this is an action for the recovery of real property. The Plaintiff believes that she still possesses legal title to the premises located at 729 Chatmon Street, Bishopville, South Carolina. The Plaintiff's deceased husband deeded one (1) lot, which is lot 14. The estate consists of four (4) lots. This type of co-ownership constitutes "Tenancy-In-Common" and cannot be destroyed absent the consent of the other co-tenant. The Plaintiff's husband never signed any documents giving up his interests in the property. The foreclosure of the Plaintiff's property was an illegal action that is now being decided by the United States Supreme Court for violation of the Truth-In-Lending Act, Noncompliance to a letter of rescission, forgery of federal disclosure documents and other serious violations. The plaintiff is awaiting a ruling from the courts hopefully very soon. As aforementioned, the Plaintiff still maintains ownership in the property. Clear title to the property cannot be obtained because the South Carolina Supreme Court ruled in Davis v. Davis, 233, S.C. 182, 191-92, 75 S.E. 2d 46, 50 (1953), that a Tenancy in Common cannot be defeated by the act of one tenant absent the agreement of the other

tenant. Also, under Davis, the survivorship rights between tenants in common create future interests in the entire estate that cannot be destroyed by the unilateral act of one tenant through an act such as partition. The plat that was drawn by the Defendant, Lee County Planning and Zoning Office clearly violates this ruling and the zoning ordinance of the county in which the property is located.

3. The Plaintiff will amend this complaint to allege any other Defendants.
4. The Plaintiff is informed and believes and thereon alleges that at all times herein mentioned, each of the Defendants sued herein was the agent and employee of each of the remaining Defendants and was at all times acting within the purpose and scope of such agency and employment.
5. Plaintiff is and at all times herein mentioned and/or entitled to possession of the property located at 729 Chatmon Street, Bishopville, South Carolina.
6. The Plaintiff is informed and believes and thereupon allege that each of them, claim an interest in the property adverse to Plaintiff herein. However, the claim of said Defendants is without any right whatsoever, and said Defendants have no legal or equitable right, claim, or interest in said property.
7. The Plaintiff therefore seek a declaration that the title to the subject property is vested in the Plaintiff alone and that the Defendant herein,

and each of them, be declared to have no estate, right, title or interest in the subject property adverse to Plaintiff herein.

8. South Carolina Code 18-9-130(2) also clearly states, "A Plaintiff may not enforce a sale of property after a notice of appeal is filed without undertaking a bond to the Defendant, with two good sureties, in double the appraised value of the property or double the amount of the judgment, conditioned to pay all damages the Defendant may sustain by reason the judgment is reversed." As aforementioned, the United States Supreme Court is in the process of ruling in this case. The Defendants have violated the Truth-In-Lending Act, committed forgery of Federal Disclosure documents, and noncompliance to a letter of rescission.
9. The Defendants have illegally taken all four (4) lots according to the records in the Lee County Clerk of Court's Office. The Plaintiff believes this constitutes Conversion being that only one (1) lot was mortgaged. The Lee County Treasurer's Office illegally partitioned this property in 2012 to allow a tax sale. The Treasurer, Mr. Wayne Capell, prevented the sale of the property for delinquent taxes in 2012 and prevented the Plaintiff from bidding on the property. In the 2013 delinquent tax sale, the treasurer's allowed the property to be sold to an investor, Pro Capital Investors knowing that the sale violates the Zoning Ordinance of Lee County. The Plaintiff feels that the conduct of the Lee County Treasurer's Office was bias and unfair being that the Plaintiff was denied the opportunity to purchase this property in 2012. The Lee

County Planning Zoning illegally drew a plat partitioning the property in 2004. The Defendants failed to exercise good faith in its dealing and conduct with the Plaintiff; preventing its agents and servants and employees from engaging in illegal and unconscionable conduct; failing to properly train and supervise its employees, agents and servants in the performance of their duties; and hiring honest, competent, and knowledgeable employees, servants and agents. The Plaintiff believes the Defendant's actions were willful and wanton. By virtue of the Defendants' conduct, the Plaintiff has been damaged and because the Defendants' conduct was willful, wanton, intentional, with malice and reckless disregard of the rights of the Plaintiff, she seeks treble damages, actual damages and punitive damages.

10. The Plaintiff has made numerous and expensive improvements in protecting her interest in the above property during her Possession. The Plaintiff also prevented continued vandalism and burglary that were being directed toward the premises. The Plaintiff feels that it is her duty to protect her interest in the property.

11. To deny the Plaintiff access to this property will be illegal and cause her irreparable harm because the Plaintiff still has interest in this property through "Tenancy In Common."

12. The Plaintiff filed a complaint with State Court November 13, 2013. The Defendants filed a Notice of Removal to Federal Court on December 13, 2013, which was on the 30th day. The Defendants never filed an answer in State Court. The Federal Answer was also untimely filed (17) days late in Federal Court. Federal Court remanded the case back to State Court for Lack of Subject Matter Jurisdiction on August 8, 2014.

13. The Defendants filed a Motion to Dismiss on December 20, 2013 in Federal Court which was also untimely filed. The Defendants never requested an enlargement of time to file any answer.

14. The Case was removed to Federal Court on December 12, 2013, which was on the 30th day. The Defendant failed to file an answer in State Court. The case was remanded back to State Court on August 8, 2014, for lack of subject matter jurisdiction.

Rule 81 of the SCRCP states:

(c) REMOVED ACTIONS.

(1) *Applicability.* These rules apply to a civil action after it is removed from a state court.

(2) *Further Pleading.* After removal, repleading is unnccessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:

(A) 21 days after receiving—through service or otherwise—a copy of the initial pleading stating the claim for relief;

(B) 21 days after being served with the summons for an initial pleading on file at the time of service; or

(C) 7 days after the notice of removal is filed.

In Lawton Limehouse, Sr., Respondent, v.Paul H. Hulsey and The Hulsey Litigation Group, LLC, Appellants the South Carolina Court of Appeals states:

"In order to find the August 29 answer was timely Husley urges this court to adopt a rule that the thirty-day time period in which to answer starts over upon remand. We are not inclined to adopt such a rule.

Rule 12(a), SCRCP, provides: "A defendant shall serve his answer within 30 days after the service of the complaint upon him[] . . . ." However, federal rules provide "[a] defendant who did not answer [in state court] before removal must answer . . . within the longest of . . . :" (A) twenty days after being served or otherwise receiving the initial pleading or (B) within five days after notice of removal is filed. Rule 81(c)(2), FRCP.

In this case, Hulsey removed fourteen days after being served. Thus, although under Rule 12(a), SCRCP, he was entitled to another sixteen days to answer, by choosing to remove the case to federal court, he willfully subjected himself to the shortened time period of Rule 81(c)(2), FRCP – providing he must answer

within six days (twenty days after being served). However, in the seventy-six days between removal and the entry of remand, Husley neglected to answer.

Initially, we find no authority in this state to support the position that a removing party is entitled to a fresh thirty days to answer a complaint upon remand. Neither did the trial court. Rather, looking at both the federal rules and state rules, in the exceptionally rare circumstance in which a case would be remanded to the state court before an answer was due pursuant to Federal Rule 81(c)(2), a plain reading of South Carolina Rule 12(a) would require an answer within thirty days of service. However, seemingly giving Hulsey the benefit of the doubt, the trial court determined that because the state court is to proceed as if no removal had been attempted, removal to federal court tolls the thirty day time period and therefore, upon remand Hulsey should be allowed the remainder of any unexpired time See State v. Columbia Ry., Gas & Elec., 112 S.C. 528, 537, 100 S.E. 355, 357 (1919) (stating that upon remand it is the duty of the state court to proceed as if no removal had been attempted).

In this case, because Hulsey failed to answer under the plain reading of either Rule 12(a), SCRCP, or Rule 81(c)(2), FRCP; or under the more liberal approach provided by the trial court, it is of no consequence which approach we would adopt. Therefore, we are not occasioned to opine on the more acceptable method It suffices that we find no indication that a party is entitled to a fresh thirty-day period upon remand. Accordingly, we are disinclined to adopt a rule allowing the same. Such action is not the province of this court, but that of our legislature or supreme court.

The Defendants were served on November 18, 2013, but failed to consent to the removal filed by Mr. Finkel on December 13, 2013. Pro Capital Investors filed a Notice of Removal on December 31, 2013, which was **(43)** days since the date of service of complaint. Mr. Finkel has committed fraud on the court in his Notice of Removal. Deadlines for removal cannot be extended by agreement of the parties or even by order of court. The deadlines are jurisdictional. That is, if they are not satisfied, the court does not have jurisdiction to hear the case.

15. The Defendants' Notice of Removal was defective because it did not include the consent of all of the codefendants in a timely manner. Pro Capital was served on November 18, 2013, but failed to answer until December 31, 2013. The Defendants failure to obtain the consent before removal of its co-defendants as required by the federal removal statute 28 U.S.C. § 1441(a). constitutes a defect in the Defendants removal.

Pursuant to Rule(b) Enlargement. When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the time may be extended by written agreement of counsel for an additional period not exceeding the original time provided in these rules, or the court for cause shown may at any time in its discretion (1) with or without written motion or notice order the period enlarged if request therefor is made before the expiration of the period as originally prescribed or extended or (2) upon motion made after the expiration of the

specified period, for good cause shown, permit the act to be done. The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them.

16. In South Carolina, negligence on the part of an attorney is imputable to the client and will not be the basis of finding good cause to set aside entry of default. See Vanvolkenburg, 312 S.C. at 375, 440 S.E.2d at 410 (indicating, prior to Sundown, that the imputed negligence of an attorney to a defaulting litigant is not good cause). Similarly, our supreme court has recognized subsequent to Sundown that the good cause standard of Rule 55(c), encompasses a degree of reasonableness. See Richardson v. P.V., Inc., 383 S.C. 610, 618-19, 682 S.E.2d 263, 267 (2009) (finding, after Sundown, that negligence on the part of an insurance company or attorney will be imputed to a defaulting litigant and negligence does not constitute good cause to relieve an appellant from entry of default); see also Black's Law Dictionary 1133 (9th ed. 2009) (defining negligence as the failure to act reasonably under a specific set of circumstances). It stands, therefore, that because unreasonable conduct does not amount to good cause, an unreasonable explanation for defaulting is not a satisfactory explanation that serves a sufficient interest of justice.

17. The issue before this court is not whether good cause, but whether the decision to deny the motion to set aside default is supportable by the evidence and not controlled by an error of

law. Williams v. Vanvolkenburg, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994). A motion to set aside entry of default under Rule 55(c) is addressed to the sound discretion of the trial court. Id.

18. Under Rule 55(c), the entry of default may be set aside for "good cause shown," which is a less stringent standard than the excusable neglect standard of Rule 60(b). Sundown Operating Co. v. Intedge Indus. Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). The good cause standard of Rule 55(c) requires, as a threshold burden, a party to put forth "an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Id. "Once a party has put forth a satisfactory explanation . . . the trial court must also consider [the Wham factors]: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." Id. at 607-08, 681 S.E.2d at 888. However, a trial court need not make specific findings of fact for each factor if sufficient evidence supports a trial court's determination that no reasonable explanation exists for vacation of default. Id.

In this case, the trial court held that because "there appears . . . to be no reasonable basis for [Hulsey's] assumption that the [thirty] day time to file an answer starts completely anew upon remand[,] . . . no good cause has been demonstrated . . . ." While we appreciate the trial court did not have the benefit of the Sundown opinion, we find Sundown did nothing to abate the discretion to which a trial court is entitled in ruling on a

Rule 55(c) motion. Nor did it change the standard this court applies when reviewing such a decision. What constitutes a satisfactory explanation that serves the interests of justice remains within the sound discretion of the trial court.

In this case at bar, although the Supreme Court had not yet issued the Sundown opinion, the trial court nonetheless addressed Hulsey's explanation of default and specifically found it unreasonable. They found that the record supports the finding that Husley's explanation for default is unreasonable. Vanvolkenburg, 312 S.C. at 375, 440 S.E.2d at 409 (stating the "issue before this [c]ourt . . . is not whether we believe good cause existed . . . [but] whether the trial court's determination is supported by the evidence"). Further, we are aware of no authority either prior to or after Sundown that compels this court to find it is not within the trial court's discretion to deny a Rule 55(c) motion for an unreasonable failure to answer. Accordingly, we find the trial court did not abuse its discretion."

For the above reasons, the Plaintiff respectfully requests that her Default is granted and the Defendants motions are denied with prejudice.

December 8, 2014

Laura Toney
P.O. Box 722
Bishopville, SC 29010
(803) 459-6006

Finkel Law Firm, LLC
P.O. Box 41489
4000 Faber Place
Suite 450
Charleston, SC 29405

Stuckey, Fata,& Segars, LLC
P.O. Box 568
Bishopville, SC 29010

Pro Capital Investors
50 South 16th Street, Suite 1950
Philadelphia, PA 19102
C/O Haynsworth Sinkler and boyd
P.O. Box 11889
Columbia, SC 2211-1899

CERTIFICATE OF SERVICE

The Plaintiff certifies that she served a copy of the **MOTION TO STRIKE DEFENDANT'S PRO CAPITAL INVESTOR'S ANSWER TO COMPLAINT to the Defendants below via United States Postal Service on December 8, 2014.**

Laura Toney
P.O. Box 722
Bishopville, SC 29010
(803) 459-6006

Finkel Law Firm, LLC
P.O. Box 41489
4000 Faber Place
Suite 450
Charleston, SC 29405

Stuckey, Fata,& Segars, LLC
P.O. Box 568
Bishopville, SC 29010

Pro Capital Investors
50 South 16th Street, Suite 1950
Philadelphia, PA 19102
C/O Haynsworth Sinkler and boyd
P.O. Box 11889
Columbia, SC 2211-1899

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, Plaintiff, vs. LaSalle Bank National Association as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, Defendants.	Civil Action No. _____ **NOTICE OF REMOVAL** Removed from Lee County, S.C. Case No. 2013-CP-31-321

FILED
DEC 20
Lee County, SC
C.C.C.P.

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1332, 28 U.S.C. § 1367; 28 U.S.C. § 1441, and 28 U.S.C. § 1446, Defendants LaSalle Bank National Association as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 and Altisource Homes files this Notice of Removal and show the following:

TIMELINESS OF REMOVAL

1. On November 13, 2013, Laure Toney filed a complaint against the Defendants in the Court of Common Pleas, Lee County, South Carolina, Cause Number 13-CP-31-321. This Notice of Removal is being filed within 30 days of each Defendant's receipt of service of process. 28 U.S.C. § 1446(b)(2)(B).

BASIS FOR REMOVAL

2. This is a civil action over which this Court has original jurisdiction pursuant to both 28 U.S.C. § 1331 and 28 U.S.C. § 1332 as the Complaint raises a federal question and because the requirements for diversity jurisdiction are satisfied.

A. Federal Question.

3. Plaintiff alleges Defendants violated the Truth-in-Lending Act, 15 U.S.C. §§ 1601 *et seq.* Compl. ¶¶ 3, 9. Thus, this Court has original jurisdiction over this claim as it arises under federal law. 28 U.S.C. § 1331.

4. The Court also has supplemental jurisdiction over Plaintiff's state law claims as they arise out of the same case or controversy as Plaintiff's federal claim. 28 U.S.C. § 1367; *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 387 (1998).

5. Therefore, Plaintiff's entire case is removable pursuant to 28 U.S.C. § 1441(a).

B. Diversity of Citizenship.

6. This Court also has original jurisdiction pursuant to 28 U.S.C. § 1332, and is one which may be removed to this Court pursuant to 28 U.S.C. § 1441, because the case is a civil action between citizens of different states wherein the matter in controversy exceeds the sum of $75,000, exclusive of interest and costs.

7. There is complete diversity of the parties. Defendant or Defendants "Wayne Capell, Lee County Treasurer Lee County Zoning and Planning" should be disregarded for the purpose of determining diversity, as explained herein below.

8. The judicially-created "fraudulent joinder doctrine" is an exception to the complete diversity rule that "effectively permits a district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants at the time the case is removed."

Bessinger v. Food Lion, Inc., 305 F. Supp. 2d 574, 578 (D.S.C. 2003) aff'd sub nom. *Bessinger v. Food Lion, LLC*, 115 F. App'x 636 (4th Cir. 2004)

9. To be successful, the removing party must show "either that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiff's pleading of jurisdictional facts." *Bessinger, supra.*

10. Once the defendants raise a colorable claim of fraudulent joinder, the court may look beyond the pleadings to determine whether the nondiverse party has indeed been fraudulently joined. *Id.*; *Auto Ins. Agency, Inc. v. Interstate Agency, Inc.*, 525 F.Supp. 1104, 1106 (D.S.C.1981).

11. There is no possibility that Plaintiff would be able to establish a cause of action against Defendant or Defendants "Wayne Capell, Lee County Treasurer Lee County Zoning and Planning," which Defendant or Defendants have nothing whatsoever to do with the facts and circumstances giving rise to the subject action. Therefore, complete diversity exists among the parties.

12. Plaintiff seeks damages in the amount of $10,000,000 (Ten Million Dollars). Therefore the $75,000.00 amount in controversy for diversity jurisdiction is clearly satisfied.

COMPLIANCE WITH PROCEDURES OF REMOVAL

13. All defendants who have been properly joined and served consent to this removal. 28 U.S.C. § 1446(b)(2)(A).

14. In accordance with 28 U.S.C. § 1446(a), copies of all processes, pleadings, and orders filed in the state court action as of this date, and a copy of the court's docket sheet, are being filed contemporaneously with this Notice.

15. Promptly after the filing of this Notice of Removal, Defendants shall give written notice of the removal to Plaintiff and to the clerk of the State Court as required by 28 U.S.C. § 1446(d).

WHEREFORE, Defendants request that this action now pending against it Court of Common Pleas, Lee County, South Carolina be removed to the United States District Court for the District of South Carolina, Columbia Division, as it is an action properly removable thereto.

FINKEL LAW FIRM LLC

s/Sean A. O'Connor
Sean A. O'Connor (Dist. Id. No. 7601)
Post Office Box 41489
Charleston, South Carolina 29423
Telephone: (843) 577-5460
Facsimile: (843) 577-5135
soconnor@finkellaw.com

Attorneys for Defendants
LaSalle Bank National Association and
Altisource Homes

December 13, 2013

November 13, 2013

P.O. Box 722 -
Bishopville, SC 29010

Dear Sir or Madam:

Please find a copy of the Complaint, Lis Pendens, and Summons. I will be retaining an attorney in this matter and the Complaint could be amended or additional Defendants added.

I will be contacting State and Federal Agencies to request an investigation into this incident. I will also be contacting the Office of Disciplinary Counsel.

Thank you for your attention in this matter.

Sincerely,

Laura Toney

Laura Toney

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF Lee)

Laura Toney)
Plaintiff(s))
) CIVIL ACTION COVERSHEET
vs.)
) 13-CP-31-321
LaSalle Bank National Association)
As Trustee for the Registered
Holders of Structured Asset
Securities Corporation, Structured
Asset Investment Loan Trust, Mortgage
Pass-Through Certificates, Series 2004-11
A/K/A Dewen Loan Servicing
AllSource Homes
Address: P.O. Box 24237
West Palm Beach, Florida 33416-4737
And
12650 Ingenuity Drive
Orlando, Florida 32826
C/O Hunoval Law Firm
501 Minuet Lane
Suite 104A
Charlotte, North Carolina 28217

Pro Capital Investors
50 South 16th Street
Suite 1950
Philadelphia, Pa 19102

Wayne Capell, Lee County Treasurer
Lee County Planning and Zoning
Defendant(s))

(Please Print)
Submitted By: Laura Toney, Pro So
Address: P. O. Box 722 Bishopville, SC 29010
(803) 459-6006

SC Bar #:
Telephone #:
Fax #:
Other:
E-mail:

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION *(Check all that apply)*

**If Action is Judgment/Settlement do not complete*

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION *(Check One Box Below)*

Contracts	Torts - Professional Malpractice	Torts – Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Libel (300)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	Previous Notice of Intent Case #	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☐ Breach of Contract (140)	20___-CP-_____-_____	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)	☐ Notice/ File Med Mal (230)	☐ Personal Injury (350)	☒ Possession (450)

☐ Other (399)

☒ Other (899) Lis pendens, Summons and Complaint Recovery of Real Property and Conversion

Inmate Petitions

- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Judgments/Settlements

- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☒ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Other (799)

Administrative Law/Relief

- ☐ Reinstate Driver's License (850)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Appeals

- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other

- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of-State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: [signature] **Date:** November 13, 2013

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

   a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

   b. Requests for temporary relief;

   c. Appeals

   d. Post Conviction relief matters;

   e. Contempt of Court proceedings;

   f. Forfeiture proceedings brought by governmental entities;

   g. Mortgage foreclosures; and

   h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

LaSalle Bank National Association
As Trustee for the Registered
Holders of Structured Asset
Securities Corporation, Structured
Asset Investment Loan Trust, Mortgage
Pass-Through Certificates, Series 2004-11,

)

A/K/A
AltiSource Homes
Address: P.O. Box 24237
West Palm Beach, Florida 33416-4737
And
12650 Ingenuity Drive
Orlando, Florida 32826
C/O Hunoval Law Firm
501 Minuet Lane
Suite 104A
Charlotte, North Carolina 28217

Pro Capital Investors
50 South 16th Street
Suite 1950
Philadelphia, Pa 19102

Wayne Capell, Lee County Treasurer
Lee County Planning and Zoning.

NOTICE

TO THE DEFENDANTS ABOVE NAMED:

TAKE NOTICE that the Amended Lis Pendens, Summons and in the above action, of which the foregoing is a copy, together with the Complaint therein was filed in the Office of the Clerk of Court for Lee County on the 13th day of November 2013.

Bishopville, SC

November 13, 2013

Laura A. Toney

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF LEE)

Laura A. Toney,)
)
PLAINTIFF,) SUMMONS
)
VS.) JURY TRIAL DEMANDED
)
CASE NUMBER:

LaSalle Bank National Association
As Trustee for the Registered
Holders of Structured Asset
Securities Corporation, Structured
Asset Investment Loan Trust, Mortgage
Pass-Through Certificates, Series 2004-11,

SUMMONS

A/K/A
AltiSource Homes
Address: P.O. Box 24237
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And
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C/O Hunoval Law Firm
501 Minuet Lane
Suite 104A
Charlotte, North Carolina 28217

Pro Capital Investors
50 South 16th Street
Suite 1950
Philadelphia, Pa 19102

Wayne Capell, Lee County Treasurer
Lee County Planning and Zoning.

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the said Complaint on the Plaintiff, Laura A. Toney, P.O. Box 722, Bishopville, South Carolina 29010, within thirty (30) days after the service hereof, exclusive of the day of such services; and, if you fail to answer the Complaint within the time aforesaid, a judgment by Default will by rendered against you for the relief demanded in the Complaint. Your answer must be in writing and signed by you or your attorney and must state your address or the address of your attorney, if signed by your attorney.

Laura A. Toney
P.O. Box 722
Bishopville, SC 29010
(803) 459-6040

Bishopville, South Carolina
November 13, 2013

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF LEE CASE NUMBER:

Laura A. Toney,

PLAINTIFF,

LIS PENDENS

VS.

LaSalle Bank National Association
As Trustee for the Registered
Holders of Structured Asset
Securities Corporation, Structured
Asset Investment Loan Trust, Mortgage
Pass-Through Certificates, Series 2004-11,

)

A/K/A
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Suite 104A
Charlotte, North Carolina 28217

Pro Capital Investors
50 South 16th Street
Suite 1950
Philadelphia, Pa 19102

Wayne Capell, Lee County Treasurer
Lee County Planning and Zoning.
DEFENDANTS.

NOTICE IS HEREBY GIVEN that an action has been commenced by the Plaintiff above named against the Defendants above named for the recovery of real property LOCATED AT 729 CHATMON STREET, BISHOPVILLE, SC

The description of the premises as contained is as follows:

All that certain lot or parcel of land situate just North of he Town of Bishopville, County of Lee and State of South Carolina and being bounded as follows: on the North by Chatmon Street; on the East by lot of West Wilson; on the South by lots Nos. 9, 10, 11, 12, and 13 and on the West by Bay Street represented on a plat of North Mohawk as lot 14, said plat being at record in plat Book E Page 46 in the office of the Clerk of Court for Lee County, South Carolina.

This being the lot conveyed to the Grantee herein by George Toney dated November 3, 1951 and recorded in Deed Book N-1 at page 582 in the office of the Clerk of Court for Lee County, South Carolina.

Grantee Address: P.O. Box 722, Bishopville, South Carolina 29010
TMS # 030-02-00-024

All that certain lot of land situate, lying and being in that subdivision known as Mohawk, Town of Bishopville, County and State aforesaid and being delineated upon a plat made by John K. Davis, C.E. as lot 10, Block C, and being bounded and described as follows: On the North by lands said to belong to John Mingo, on the East by Lot No. 9 on said Plat; on the South by Wilson Street and on the West by lot No. 9 on said plat; and on the South by Wilson Street and the West by lot No. 11 on said plat. Said plat being of record in plat book E at page 46 in the office of Clerk of Court for Lee County.

All those two certain lots situate near the City limits of the Town of Bishopville, County of Lee, State of South Carolina and being delineated upon a plat of North Mohawk, John K. Davis, C.E., as lots Nos. 11 and 12, Block C, and being bounded as follows: On the Northeast by lot14, on the Southeast by lot No. 10, on the Southwest by Wilson Street of fifty (50) feet each and running back a distance of one hundred fifty (150) feet deep. Said plat being of record in Plat Book E, page 46 in the office of the Clerk of Court for Lee County, S.C.

Laura A. Toney
P.O. Box 722
Bishopville, SC 29010
(803) 459-6040
(803) 692-4343

THE STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

COUNTY OF LEE

Laura Toney
Plaintiff,

v.

CASE NUMBER:

LaSalle Bank National Association
As Trustee for the Registered
Holders of Structured Asset
Securities Corporation, Structured
Asset Investment Loan Trust, Mortgage
Pass-Through Certificates, Series 2004-11,

COMPLAINT
FOR RECOVERY OF REAL
PROPERTY

(JURY TRIAL DEMANDED)

A/K/A
AltiSource Homes
Address: P.O. Box 24237
West Palm Beach, Florida 33416-4737
And
12650 Ingenuity Drive
Orlando, Florida 32826
C/O Hunoval Law Firm
501 Minuet Lane
Suite 104A
Charlotte, North Carolina 28217

Pro Capital Investors
50 South 16th Street
Suite 1950
Philadelphia, Pa 19102

Wayne Capell, Lee County Treasurer
Lee County Planning and Zoning.

DEFENDANTS.

Now comes the Plaintiff, Laura A. Toney, who will show unto the courts as follows:

1. That the plaintiff, Laura A. Toney, is a citizen and resident of Lee County, South Carolina and has been for more than one (1) year prior to the commencement of this action.
2. That, Defendant, Ocwen Loan Servicing and LaSalle Bank are corporations organizing and existing by virtue of the laws of a State other than South Carolina and the United States of America. That the Defendant Pro Capital Investment is an investment firm operating and existing by virtue of the laws of a State other than South Carolina. The Defendants, Lee County Treasurer and Lee County Planning and Zoning are citizens of Lee County and are employed by the County of Lee.
3. That pursuant to South Carolina Code 15-67-210, this is an action for the recovery of real property. The Plaintiff believes that she still possesses legal title to the premises located at 729 Chatmon Street, Bishopville, South Carolina. The Plaintiff's deceased husband deeded one (1) lot, which is lot 14. The estate consists of four (4) lots. This type of co-ownership constitutes "Tenancy-In-Common" and cannot be destroyed absent the consent of the other co-tenant. The Plaintiff's husband never signed any documents giving up his interests in the property. The foreclosure of the Plaintiff's property was an illegal action that is now being decided by the United States Supreme Court for violation of the Truth-In-Lending Act, Noncompliance to a letter of rescission, forgery of federal disclosure documents and other serious violations. The plaintiff is awaiting a ruling from the courts hopefully very soon. As aforementioned, the Plaintiff still maintains ownership in the property. Clear title to the property cannot be obtained because the

South Carolina Supreme Court ruled in Davis v. Davis, 233, S.C. 182, 191-92, 75 S.E. 2d 46, 50 (1953), that a Tenancy in Common cannot be defeated by the act of one tenant absent the agreement of the other tenant. Also, under Davis, the survivorship rights between tenants in common create future interests in the entire estate that cannot be destroyed by the unilateral act of one tenant through an act such as partition. The plat that was drawn by the Defendant, Lee County Planning and Zoning Office clearly violates this ruling and the zoning ordinance of the county in which the property is located.

4. The Plaintiff will amend this complaint to allege any other Defendants.
5. The Plaintiff is informed and believes and thereon alleges that at all times herein mentioned, each of the Defendants sued herein was the agent and employee of each of the remaining Defendants and was at all times acting within the purpose and scope of such agency and employment.
6. Plaintiff is and at all times herein mentioned and/or entitled to possession of the property located at 729 Chatmon Street, Bishopville, South Carolina.
7. The Plaintiff is informed and believes and thereupon allege that each of them, claim an interest in the property adverse to Plaintiff herein. However, the claim of said Defendants is without any right whatsoever, and said Defendants have no legal or equitable right, claim, or interest in said property.
8. The Plaintiff therefore seek a declaration that the title to the subject property is vested in the Plaintiff alone and that the Defendant herein, and each of them, be declared to have no estate, right, title or interest in the subject property adverse to Plaintiff herein.

9. South Carolina Code 18-9-130(2) also clearly states, "A Plaintiff may not enforce a sale of property after a notice of appeal is filed without undertaking a bond to the Defendant, with two good sureties, in double the appraised value of the property or double the amount of the judgment, conditioned to pay all damages the Defendant may sustain by reason the judgment is reversed." As aforementioned, the United States Supreme Court is in the process of ruling in this case. The Defendants have violated the Truth-In-Lending Act, committed forgery of Federal Disclosure documents, and noncompliance to a letter of rescission.

10. The Defendants have illegally taken all four (4) lots according to the records in the Lee County Clerk of Court's Office. The Plaintiff believes this constitutes Conversion being that only one (1) lot was mortgaged. The Lee County Treasurer's Office illegally partitioned this property in 2012 to allow a tax sale. The Treasurer, Mr. Wayne Capell, prevented the sale of the property for delinquent taxes in 2012 and prevented the Plaintiff from bidding on the property. In the 2013 delinquent tax sale, the treasurer's allowed the property to be sold to an investor, Pro Capital Investors knowing that the sale violates the Zoning Ordinance of Lee County. The Plaintiff feels that the conduct of the Lee County Treasurer's Office was bias and unfair being that the Plaintiff was denied the opportunity to purchase this property in 2012. The Lee County Planning Zoning illegally drew a plat partitioning the property in 2004. The Defendants failed to exercise good faith in its dealing and conduct with the Plaintiff; preventing its agents and servants and employees from engaging in illegal and unconscionable conduct; failing to properly train and supervise its employees, agents and servants in the performance of their duties; and

hiring honest, competent, and knowledgeable employees, servants and agents. The Plaintiff believes the Defendant's actions were willful and wanton. By virtue of the Defendants' conduct, the Plaintiff has been damaged and because the Defendants' conduct was willful; wanton, intentional, with malice and reckless disregard of the rights of the Plaintiff, she seeks treble damages, actual damages and punitive damages.

11. The Plaintiff has made numerous and expensive improvements in protecting her interest in the above property during her Possession. The Plaintiff also prevented continued vandalism and burglary that were being directed toward the premises. The Plaintiff feels that it is her duty to protect her interest in the property.

12. To deny the Plaintiff access to this property will be illegal and cause her irreparable harm because the Plaintiff still has interest in this property through "Tenancy In Common."

WHEREFORE, the Plaintiff prays as follows:

1. That this court will quiet the title to the above property in favor of the Plaintiff;
2. That the court will issue an order compelling said Defendants and each of them, to transfer legal title and possession of the subject property to Plaintiff herein;
3. That the court will issue a declaration and determination that Plaintiff is the rightful holder of title to the property and that Defendant herein, and each of them, be declared to have no estate, right, title or interest in said property;
4. That the court will issue a judgment forever enjoining said Defendants, and each of them, from claiming any estate, right, title or interest in the subject property;

5. That this court will grant the Plaintiff the recovery of the above property;
6. That this court will grant the Plaintiff attorney fees and cost of suit herein incurred;
7. That this court will award treble damages, actual damages, and punitive damages in the amount of $10,000,000.00.
8. That this court will enjoin the Defendants from seeking the sale of the property until the United States Supreme Court has issue a decision for the numerous violations by the Defendants.

AND FOR SUCH AND FURTHER RELIEF AS THIS COURT DEEMS JUST AND PROPER.

Laura A. Toney
P.O. Box 722
Bishopville, South Carolina 29010
(803) 459-6040

Bishopville, South Carolina

November 13, 2013

CC: Ocwen Federal Bank/LaSalle Bank C/O
12650 Ingenuity Drive
Orlando, Florida 32826
C/O Hunoval Law Firm
501 Minuet Lane
Suite 104A
Charlotte, North Carolina 28217

ProCapital Investors Via Certified Returned Receipt

Mr. Wayne Capell, Lee County Treasurer Via Hand Delivered

Lee County Planning and Zoning Via Hand Delivered

CERTIFICATE OF SERVICE

The Plaintiff, Laura Toney, certifies that she served a copy of the Complaint, Lis Pendens, Summon on the Defendants below addressed and delivered as stated below on November 13, 2013.

LaSalle Bank National Association
As Trustee for the Registered
Holders of Structured Asset
Securities Corporation, Structured
Asset Investment Loan Trust, Mortgage
Pass-Through Certificates, Series 2004-11,

A/K/A

AltiSource Homes
Address: P.O. Box 24737
West Palm Beach, Florida 33416-4737
And
12650 Ingenuity Drive
Orlando, Florida 32826
C/O Hunoval Law Firm
501 Minuet Lane
Suite 104A
Charlotte, North Carolina 28217

Pro Capital Investors
50 South 16th Street
Suite 1950
Philadelphia, Pa 19102

Wayne Capell, Lee County Treasurer
Lee County Planning and Zoning,

Laura Toney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, Plaintiff, vs. LaSalle Bank National Association as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, Defendants.	Civil Action No. _____ **NOTICE OF REMOVAL** Removed from Lee County, S.C. Case No. 2013-CP-31-321

FILED
DEC
Lee County, SC
C.C.P. & G.

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1332, 28 U.S.C. § 1367, 28 U.S.C. § 1441, and 28 U.S.C. § 1446, Defendants LaSalle Bank National Association as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 and Altisource Homes files this Notice of Removal and show the following:

TIMELINESS OF REMOVAL

1. On November 13, 2013, Laure Toney filed a complaint against the Defendants in the Court of Common Pleas, Lee County, South Carolina, Cause Number 13-CP-31-321. This Notice of Removal is being filed within 30 days of each Defendant's receipt of service of process. 28 U.S.C. § 1446(b)(2)(B).

BASIS FOR REMOVAL

2. This is a civil action over which this Court has original jurisdiction pursuant to both 28 U.S.C. § 1331 and 28 U.S.C. § 1332 as the Complaint raises a federal question and because the requirements for diversity jurisdiction are satisfied.

A. Federal Question.

3. Plaintiff alleges Defendants violated the Truth-in-Lending Act, 15 U.S.C. §§ 1601 *et seq*. Compl. ¶¶ 3, 9. Thus, this Court has original jurisdiction over this claim as it arises under federal law. 28 U.S.C. § 1331.

4. The Court also has supplemental jurisdiction over Plaintiff's state law claims as they arise out of the same case or controversy as Plaintiff's federal claim. 28 U.S.C. § 1367; *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 387 (1998).

5. Therefore, Plaintiff's entire case is removable pursuant to 28 U.S.C. § 1441(a).

B. Diversity of Citizenship.

6. This Court also has original jurisdiction pursuant to 28 U.S.C. § 1332, and is one which may be removed to this Court pursuant to 28 U.S.C. § 1441, because the case is a civil action between citizens of different states wherein the matter in controversy exceeds the sum of $75,000, exclusive of interest and costs.

7. There is complete diversity of the parties. Defendant or Defendants "Wayne Capell, Lee County Treasurer Lee County Zoning and Planning" should be disregarded for the purpose of determining diversity, as explained herein below.

8. The judicially-created "fraudulent joinder doctrine" is an exception to the complete diversity rule that "effectively permits a district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants at the time the case is removed."

Bessinger v. Food Lion, Inc., 305 F. Supp. 2d 574, 578 (D.S.C. 2003) aff'd sub nom. *Bessinger v. Food Lion, LLC*, 115 F. App'x 636 (4th Cir. 2004)

9. To be successful, the removing party must show "either that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiff's pleading of jurisdictional facts." *Bessinger, supra.*

10. Once the defendants raise a colorable claim of fraudulent joinder, the court may look beyond the pleadings to determine whether the nondiverse party has indeed been fraudulently joined. *Id.*; *Auto Ins. Agency, Inc. v. Interstate Agency, Inc.*, 525 F.Supp. 1104, 1106 (D.S.C.1981).

11. There is no possibility that Plaintiff would be able to establish a cause of action against Defendant or Defendants "Wayne Capell, Lee County Treasurer Lee County Zoning and Planning," which Defendant or Defendants have nothing whatsoever to do with the facts and circumstances giving rise to the subject action. Therefore, complete diversity exists among the parties.

12. Plaintiff seeks damages in the amount of $10,000,000 (Ten Million Dollars). Therefore the $75,000.00 amount in controversy for diversity jurisdiction is clearly satisfied.

COMPLIANCE WITH PROCEDURES OF REMOVAL

13. All defendants who have been properly joined and served consent to this removal. 28 U.S.C. § 1446(b)(2)(A).

14. In accordance with 28 U.S.C. § 1446(a), copies of all processes, pleadings, and orders filed in the state court action as of this date, and a copy of the court's docket sheet, are being filed contemporaneously with this Notice.

15. Promptly after the filing of this Notice of Removal, Defendants shall give written notice of the removal to Plaintiff and to the clerk of the State Court as required by 28 U.S.C. § 1446(d).

WHEREFORE, Defendants request that this action now pending against it Court of Common Pleas, Lee County, South Carolina be removed to the United States District Court for the District of South Carolina, Columbia Division, as it is an action properly removable thereto.

FINKEL LAW FIRM LLC

s/Sean A. O'Connor
Sean A. O'Connor (Dist. Id. No. 7601)
Post Office Box 41489
Charleston, South Carolina 29423
Telephone: (843) 577-5460
Facsimile: (843) 577-5135
soconnor@finkellaw.com

Attorneys for Defendants
LaSalle Bank National Association and
Altisource Homes

December 13, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, Plaintiff, vs. LaSalle Bank National Association as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, Defendants.	Civil Action No. 3:13-cv-03481-MBS-SVH

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND MOTION FOR SANCTIONS

COMES NOW, Defendants LaSalle Bank National Association and AltiSource Homes (respectively "LaSalle Bank" and "AltiSource Homes" or collectively "Defendants"), by and through undersigned counsel, and hereby file this Memorandum of Law in Support of their Motion to Dismiss and Motion for Sanctions and would show unto the Court as follows:

INTRODUCTION

The underlying facts of this case are simple; muddled only by the relentless filings of Plaintiff. In short, Plaintiff defaulted on her mortgage and LaSalle Bank rightfully foreclosed on the property in May 2007. Plaintiff has contested the foreclosure sale in South Carolina's state and federal courts on more than ten separate occasions. Both courts have entered final judgments against Plaintiff. Plaintiff is now beating a dead horse. This Court should dismiss

this case with prejudice because it is barred by the doctrine of *res judicata* and otherwise fails to state a claim upon which relief can be granted. This Court should also sanction Plaintiff for her behavior.

STATEMENT OF FACTS

On October 6, 2004, Plaintiff refinanced her house located at 729 Chatman Street in Bishopville, South Carolina.[1] On June 14, 2005, Plaintiff sent a letter attempting to rescind the loan due to an alleged failure to make certain disclosures required by the Truth-in-Lending Act. On or around July 21, 2005, LaSalle Bank filed a *lis pendens* and complaint seeking permission to foreclose on Plaintiff's property. *LaSalle Bank v. Laura Toney*, Case No. 2005-CP-31-169, in the Court of Common Pleas of Lee County, South Carolina. LaSalle Bank filed a motion for summary judgment which was granted on March 15, 2007. The court entered an order declaring that LaSalle Bank "should have judgment of foreclosure of the mortgage and the mortgage property should be ordered sold at public auction." After repeated attempts by Plaintiff to prevent foreclosure, the property was sold on May 7, 2007.

Plaintiff appealed to the South Carolina Court of Appeals. The court affirmed the foreclosure sale.

Undeterred, Plaintiff then filed a motion for a temporary injunction and a "Complaint to Set Aside Fraudulent Transfer, and Fraud; Declaratory Judgment for Entry of Default, Gross Negligence, Emotional Distress, Deceptive and Unfair Trade Practices" on July 13, 2011 in the United States District Court for the District of South Carolina.

[1] Some of the facts in this section are not stated in Plaintiff's most recent complaint. They are, however, set forth in the record of a case previously before this Court (C.A. No. 3:11-1686-MBS). It is proper for the Court to take judicial notice of these facts. *See Weber v. Jones*, 8:13-CV-01040-GRA, 2013 WL 3328673, *5 (D.S.C. July 2, 2013) (citing *Aloe Creme Lab., Inc. v. Francine Co.*, 425 F.2d 1295, 1296 (5th Cir. 1970) (noting the district court had the right to take notice of its own files and records).

In March 2011, this Court denied Plaintiff's motion for injunction relief. Plaintiff then appealed to the Fourth Circuit, who affirmed the denial. Appeal No. 12-1452 (August 24, 2012).

With the injunction issue resolved, LaSalle Bank moved to dismiss Plaintiff's complaint. On August 9, 2012, United States Magistrate Judge Joseph R. McCrorey entered a detailed Report and Recommendation recommending that Plaintiff's case be dismissed because: (1) it was barred by the doctrine of *res judicata*; and (2) it failed to state any claim upon which relief could be granted.[2] Chief United States District Judge Margaret B. Seymour agreed and dismissed Plaintiff's case on *res judicata* grounds.[3]

Plaintiff appealed this decision to the United States Court of Appeals for the Fourth Circuit. On February 28, 2013, the court affirmed "for the reasons stated by the district court." Appeal No. 12-2364 (February 28, 2013). Belligerently, Plaintiff filed a writ of certiorari to the United States Supreme Court, which has since been denied.[4]

Before the Supreme Court decided whether to accept Plaintiff's case, she filed the instant action. This Complaint is nothing more than an attempt to re-litigate a case which the South Carolina state and federal courts have already ruled meritless.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of an action when the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of [her] entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action

[2] A copy of the Report and Recommendation is attached as Exhibit A.
[3] A copy of the Order and Opinion is attached as Exhibit B.
[4] The United States Supreme Court denied writ of certiorari on December 2, 2013. *Laura Toney v. LaSalle Bank National Association, Trustee*, No. 13-404.

will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal marks and citations omitted). *Res judicata* is an affirmative defense and is treated as a basis for dismissal under Rule 12(b)(6). *See Davani v. Va. Dep't of Transp.*, 434 F.3d 712, 720 (4th Cir. 2006) (*res judicata* or claim preclusion challenge is to be considered pursuant to Rule 12(b)(6)); *Andrews v. Daw*, 201 F.3d 521, 524 n.1 (4th Cir. 2000) (an affirmative defense such as *res judicata* may be raised under Rule 12(b)(6) "if it clearly appears on the face of the complaint.").

ARGUMENT

This Court should grant Defendants' Motion to Dismiss because Plaintiff's claims are barred by the doctrine of *res judicata*. Alternatively, Plaintiff's allegations fail to state a claim upon which relief can be granted. This Court should also grant Defendants' Motion for Sanctions because Plaintiff has already been given fair warning that she would be sanctioned for filing additional pleadings.

I. Plaintiff's Claims Should Be Dismissed.

A. Plaintiff's claims are barred by the doctrine of *res judicata*.

"Res judicata is applied to prevent the re-litigation of claims, and thus prevent the unsettling of a prior judgment, whether by increasing or decreasing the award of by reversing the result." *Heckert v. Dotson*, 272 F.3d 253, 258 (4th Cir. 2001). "'For the doctrine of res judicata to be applicable, there must be: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or their privies in the two suits.'" *Martin v. Am. Bancorp. Ret. Plan*, 407 F.3d 643, 650 (4th Cir. 2005) (quoting *Pueschel v. United States*, 369 F.3d 345, 354-55 (4th Cir. 2004)). Furthermore, *res judicata* not only "bar[s] claims that were raised and fully litigated," but also "'prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties,

regardless of whether they were asserted or determined in the prior proceedings.'". *Peugeot Motors v. E. Auto Distrib.*, 892 F.2d 355, 359 (4th Cir. 1989) (quoting *Brown v. Felsen*, 442 U.S. 127, 131 (1979)).

Plaintiff's claims are barred by the doctrine of *res judicata* because all three elements are satisfied. First, this Court has already dismissed Plaintiff's claims on *res judicata* grounds. Exhibit B at p. 13 (noting that "final judgment has been entered on the merits against Plaintiff in at least two prior civil actions, *LaSalle Bank v. Laura Toney*, Case No. 2005-CP-31-169 and *Laura A. Toney v. Ocwen Federal Bank*, Case No. 2010-CP-31-180.").

Second, the allegations contained in the instant complaint stem from the same set of facts that gave rise to Plaintiff's claim for relief in the prior cases. As this Court noted, at the heart of the prior cases was a dispute regarding "Defendants' entitlement to foreclosure of the Property versus Plaintiff's attempt to prevent the foreclosure of the property." *Id.* Likewise, in this case the Complaint is premised on the belief that "[t]he foreclosure of the Plaintiff's property was an illegal action." Compl. ¶ 3. Clearly, the underlying dispute is identical.

Finally, the parties in this case are the same as in the prior cases: Laura Toney, LaSalle Bank, and AltiSource.

For these reasons, the Court should dismiss Plaintiff's claims on *res judicata* grounds as it has already done previously. To the extent, if any, Plaintiff alleges claims not expressly mentioned in her prior suits, they are also barred by the doctrine of *res judicata* because Plaintiff had an opportunity to raise them. *Peugeot Motors*, 892 F.2d at 359 (*res judicata* "'prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceedings'") (quoting *Brown*, 442 U.S. at 131).

B. While not necessary for the Court to consider, Plaintiff's claims also fail to state a claim upon which relief can be granted.

Because Plaintiff's claims are barred by *res judicata*, the Court need not consider whether Plaintiff's claims have been adequately pleaded under Rule 12(b)(6). Should the Court wish to consider these arguments, the Court should adopt the Magistrate Judge's Report and Recommendation which explains why Plaintiff's claims would also be barred under the Rule 12(b)(6) standard.

II. Plaintiff Should Be Sanctioned For Continuing To File Meritless Claims.

Plaintiff should be sanctioned for filing the instant suit because she has already received fair warning that she would be sanctioned if she brought another claim. The last time this case was before the Court, Defendants moved for sanctions because of Plaintiff's frivolous filings. Indeed, as the Court has noted previously, the pattern of Plaintiff's egregious behavior cannot be overemphasized: (1) Plaintiff has a long history of abusing the state and federal judicial systems with her meritless and vexatious filings, (2) Plaintiff has attempted to prevent or otherwise dispute the lawful foreclosure sale of the subject property more than ten times, (3) Plaintiff has filed a total of seven bankruptcy actions in the United States Bankruptcy Court for the District of South Carolina admittedly as an attempt to save her property, (4) said Bankruptcy Court banned Plaintiff from filing any actions for a period of one year, (5) Plaintiff has filed additional state court actions as to other pieces of property, and (6) Plaintiff includes baseless allegations in her current litigation.[5]

The only reason sanctions were not imposed in the prior case was because it was unclear whether Plaintiff, a *pro se* litigant, had "been warned of the consequences of filing such actions

[5] Exhibit B at pp. 10-11.

in this Court."[6] While Plaintiff was shown leniency, the order also made clear the consequences of filing another suit: "Plaintiff, however, ***is warned*** that filing future frivolous actions may result in appropriate sanctions against Plaintiff including any sanctions available under Fed. R. Civ. P. 11."[7]

A clearer case for sanctions could not be made. In imposing sanctions against a *pro se* litigant, the South Carolina district court explained:

> The court warned Plaintiffs three years ago that their litigation tactics "would long ago have resulted in serious sanctions against members of the bar" and that the court was being "extremely patient" with them only because of their pro se status. *Potter v. Crestwood Golf Club, Inc., et al.*, C.A. No. 5:94–2047–22, Order filed 4/17/96 at 43 (*Potter II*).
>
> Despite this admonition, Plaintiffs persist in staging baseless collateral attacks on rulings related to claims against these Defendants.

Potter v. Mosteller, 199 F.R.D. 181, 188 (D.S.C. 2000) *aff'd.* 238 F.3d 414 (4th Cir. 2000). *See also McMahon v. F & M Bank-Winchester*, 45 F.3d 426 (4th Cir. 1994) (affirming district court's imposition of pre-filing injunction and monetary sanctions against *pro se* litigant).

In sum, Plaintiff has a history of abusive filings. This Court warned Plaintiff that sanctions would be imposed if she filed suit again. Nevertheless, Plaintiff filed the instant suit. Sanctions are now in order.

CONCLUSION

WHEREFORE, Defendants, respectfully request that this Honorable Court:

A. Grant the Motion to Dismiss;

B. Dismiss the Complaint with prejudice;

C. Award Defendants reasonable attorney's fees and costs incurred in having to appear and defend against Plaintiff's allegations asserted in the Complaint;

[6] Exhibit A at p. 24.

[7] *Id.* (emphasis added).

D. Sanction Plaintiff for her long history of frivolous and abusive filings;

E. Grant such other and further relief as this Court deems just and proper.

FINKEL LAW FIRM LLC

s/Sean A. O'Connor
Sean A. O'Connor (Dist. Id. No. 7601)
Post Office Box 41489
Charleston, South Carolina 29423
Telephone: (843) 577-5460
Facsimile: (843) 577-5135
soconnor@finkellaw.com

Attorneys for Defendants
LaSalle Bank National Association and
Altisource Homes

December 20, 2013

IN THE UNITED DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, PLAINTIFF -vs- LaSalle Bank National Association, as Trustee For Registered Holders of Structured Assets Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning. DEFENDANTS	Civil Action No.: 3:13-cv-03481-MBS-SVH **ANSWER AND COUNTERCLAIM OF DEFENDANTS, WAYNE CAPELL, LEE COUNTY TREASURER AND LEE COUNTY PLANNING AND ZONING**

The above named Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning by way of Answer and Counterclaim to the Complaint of the Plaintiff alleges as follows:

FIRST DEFENSE

1. The Defendants deny each and every allegation of the Plaintiff's Complaint except those which are specifically admitted reserving all rights under their 12(b) (6) Motion to Dismiss previously filed in Lee County Court of Common Pleas.

2. That the Defendant do not have sufficient information to admit or deny allegations One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8),Nine (9), Eleven (11) and Twelve (12) of the Plaintiff's Complaint and therefore deny same and request strict proof thereof.

3. That by way of answer to allegation Ten (10) of the Plaintiff's Complaint, the Defendants deny that they took any action to partition the subject property herein nor took any actions to prevent the sale of said property at the 2012 tax sale. Further that the 2012 and 2013 tax sales were held in accordance with the laws of the State of South Carolina and therefore denies any illegal conduct.

SECOND DEFENSE
(Failure to state a claim upon which relief can be granted)

4. That the Defendants restate, reiterate and reallege each and every allegation of their First Defense as if fully setout herein verbatim.

5. That the Plaintiff has failed to state a cause of action against the Defendants, Wayne Capell and Lee County Planning and Zoning for which relief can be granted.

6. That the Plaintiff's Complaint should be dismissed pursuant to Federal Rules of Civil Procedure 12 (b)(6).

THIRD DEFENSE
(Stature of Limitations)

7. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning restate, reiterate and reallege each and every allegation of their First and Second Defenses as if fully setout herein verbatim.

8. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning pleads the applicable statute of limitations as an affirmative defenses.

FOURTH DEFENSE
(Res Judicata)

9. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning restate, reiterate and reallege each and every allegation of their First, Second and Third Defenses as if fully setout herein verbatim.

10. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning are informed and believe that this is the latest in a series of lawsuits brought by the Plaintiff that have been heard and dismissed.

11. That the Plaintiff failed to join the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning in the prior causes of action and therefore any claims against these defendants are barred by *res judicata*.

FIFTH DEFENSE
(Defenses Asserted by Other Parties)

12. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning restate, reiterate and reallege each and every allegation of their First, Second, Third and Fourth Defenses as if fully setout herein verbatim.

13. To the extent applicable, the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning asserts and incorporate herein by reference pursuant to Fed R. Civ. P. 10(c), all affirmative defenses asserted by the other Defendants in response to Plaintiff's Complaint as well as all affirmative defenses asserted by the other Defendants in any further amended or supplemental pleadings.

SIXTH DEFENSE
(Equitable Defenses)

14. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning restate, reiterate and reallege each and every allegation of their First, Second, Third and Fourth Defenses as if fully setout herein verbatim.

15. That the Plaintiff's claims are barred by all equitable doctrines available to the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning including but not limited to laches, ratification, unclean hands, waiver, consent, estoppel, and unjust enrichment.

SEVENTH DEFENSE AND BY WAY OF COUNTERCLAIM
(Attorney Fees and Costs)

16. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning restate, reiterate and reallege each and every allegation of their First, Second, Third, Fourth, Fifth, and Sixth Defenses as if fully setout herein verbatim.

17. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning are informed and believe that this is a frivolous cause of action for which the Defendants, have incurred the cost and expenses of defending.

18. That Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning are informed and believe that they are entitled to attorney fees and costs for defending this cause of

action.

WHEREFORE, having fully answered the Complaint of the Plaintiff the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning request that this Court inquire into this matter and issue its Order,

1. Dismissing the Complaint of the Plaintiff;
2. Awarding attorney fees and costs;
3. For such other and further relief as this Court deems just and proper.

STUCKEY, FATA AND SEGARS, LLC

Bishopville, S.C.

January 6, 2014

BY: s/ Paul M. Fata

PAUL M. FATA
ATTORNEY FOR DEFENDANT CAPELL AND LEE COUNTY PLANNING & ZONING
115 E. CHURCH STREET
POST OFFICE DRAWER 568
BISHOPVILLE, S.C.29010
(803) 484-5409 FAX: (803) 484-9239
Email: paulmfata@sfslawfirm.com

IN THE UNITED DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, PLAINTIFF -vs- LaSalle Bank National Association, as Trustee For Registered Holders of Structured Assets Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning. DEFENDANTS	Civil Action No.: 3:13-cv-03481-MBS-SVH **AMENDED** **ANSWER AND COUNTERCLAIM OF DEFENDANTS, WAYNE CAPELL, LEE COUNTY TREASURER AND LEE COUNTY PLANNING AND ZONING**

The above named Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning by way of Amended Answer and Counterclaim to the Complaint of the Plaintiff alleges as follows:

FIRST DEFENSE

1. The Defendants deny each and every allegation of the Plaintiff's Complaint except those which are specifically admitted reserving all rights under their 12(b) (6) Motion to Dismiss previously filed in Lee County Court of Common Pleas and refiled in the Federal District Court.

2. That the Defendant do not have sufficient information to admit or deny allegations One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8),Nine (9), Eleven (11) and Twelve (12) of the Plaintiff's Complaint and therefore deny same and request strict proof thereof.

3. That by way of answer to allegation Ten (10) of the Plaintiff's Complaint, the Defendants deny that they took any action to partition the subject property herein nor took any actions to prevent the sale of said property at the 2012 tax sale. Further that the 2012 and 2013 tax sales were held in accordance with the laws of the State of South Carolina and therefore denies any illegal conduct.

SECOND DEFENSE
(Failure to state a claim upon which relief can be granted)

4. That the Defendants restate, reiterate and reallege each and every allegation of their First Defense as if fully setout herein verbatim.

5. That the Plaintiff has failed to state a cause of action against the Defendants, Wayne Capell and Lee County Planning and Zoning for which relief can be granted.

6. That the Plaintiff's Complaint should be dismissed pursuant to Federal Rules of Civil Procedure 12 (b)(6).

THIRD DEFENSE
(Stature of Limitations)

7. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning restate, reiterate and reallege each and every allegation of their First and Second Defenses as if fully setout herein verbatim.

8. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning pleads the applicable statute of limitations as an affirmative defenses.

FOURTH DEFENSE
(Res Judicata)

9. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning restate, reiterate and reallege each and every allegation of their First, Second and Third Defenses as if fully setout herein verbatim.

10. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning are informed and believe that this is the latest in a series of lawsuits brought by the Plaintiff that have been heard and dismissed.

11. That the Plaintiff failed to join the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning in the prior causes of action and therefore any claims against these defendants are barred by *res judicata*.

FIFTH DEFENSE
(Defenses Asserted by Other Parties)

12. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning restate, reiterate and reallege each and every allegation of their First, Second, Third and Fourth Defenses as if fully setout herein verbatim.

13. To the extent applicable, the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning asserts and incorporate herein by reference pursuant to Fed R. Civ. P. 10(c), all affirmative defenses asserted by the other Defendants in response to Plaintiff's Complaint as well as all affirmative defenses asserted by the other Defendants in any further amended or supplemental pleadings.

SIXTH DEFENSE
(Equitable Defenses)

14. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning restate, reiterate and reallege each and every allegation of their First, Second, Third, Fourth and Fifth Defenses as if fully setout herein verbatim.

15. That the Plaintiff's claims are barred by all equitable doctrines available to the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning including but not limited to laches, ratification, unclean hands, waiver, consent, estoppel, and unjust enrichment.

SEVENTH DEFENSE
(Sovereign Immunity)

16. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning restate, reiterate and reallege each and every allegation of their First, Second, Third, Fourth, Fifth and Sixth Defenses as if fully setout herein verbatim.

17. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning plead the defense of sovereign immunity as a complete bar to this cause of action.

EIGHTY DEFENSE
(South Carolina Tort Claims Act)

18. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning restate, reiterate and reallege each and every allegation of their First, Second, Third, Fourth, Fifth, Sixth and Seventh Defenses as if fully setout herein verbatim.

19. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning plead all defenses and immunities available under the South Carolina Tort Claims Act §15-78-10 et. seq. of the Code of Laws of the State of South Carolina, 1976 as amended.

NINTH DEFENSE
(Insufficient Service of Process)

20. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning restate, reiterate and reallege each and every allegation of their First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Defenses as if fully setout herein verbatim.

21. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning have not been properly served pursuant to Fed. R. Civ. P. 12(b)(5) and Rule 4(6) S.C.R.P. and the Complaint should be dismissed for insufficient service of process.

TENTH DEFENSE AND BY WAY OF COUNTERCLAIM
(Attorney Fees and Costs)

22. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning restate, reiterate and reallege each and every allegation of their First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Defenses as if fully setout herein verbatim.

23. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning are informed and believe that this is a frivolous cause of action for which the Defendants, have incurred the cost and expenses of defending.

24. That Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning are informed and believe that they are entitled to attorney fees and costs for defending this cause of action.

WHEREFORE, having fully answered the Complaint of the Plaintiff the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning request that this Court inquire into this matter and issue its Order,

1. Dismissing the Complaint of the Plaintiff;
2. Awarding attorney fees and costs;
3. For such other and further relief as this Court deems just and proper.

STUCKEY, FATA AND SEGARS, LLC

Bishopville, S.C.

January 8, 2014

BY: s/ Paul M. Fata

PAUL M. FATA
ATTORNEY FOR DEFENDANT CAPELL AND LEE COUNTY PLANNING & ZONING
115 E. CHURCH STREET
POST OFFICE DRAWER 568
BISHOPVILLE, S.C.29010
(803) 484-5409 FAX: (803) 484-9239
Email: paulmfata@sfslawfirm.com

IN THE UNITED DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, PLAINTIFF -vs- LaSalle Bank National Association, as Trustee For Registered Holders of Structured Assets Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning DEFENDANTS	Civil Action No.: 3:13-cv-03481-MBS-SVH

DEFENDANT'S WAYNE CAPELL, LEE COUNTY TREASURER AND LEE COUNTY PLANNING AND ZONING 12(b)(6) MOTION TO DISMISS

COMES NOW, Defendant Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, by and through undersigned counsel, and hereby files their Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and preserving all rights under their previously filed 12(b)(6) Motion pursuant to the South Carolina Rules of Civil Procedure.

1. It appears from the Plaintiff's Complaint, that Plaintiff is seeking to overturn the foreclosure action instituted by Defendant, LaSalle Bank National Association.

2. That the Defendants were never parties to the foreclosure action.

3. That any actions taken by the Defendants were as the result of their ministerial duties in response to filings in the Office of the Clerk of Court for Lee County and/or the Lee County Tax Assessor's Office.

4. That the Defendants are informed and believe that all prior causes of actions instituted by the Plaintiff have been dismissed and the Plaintiff's claim against these Defendants should be barred on *res judicata* grounds.

5. That the Plaintiff's cause of action is barred by the doctrine of sovereign immunity and the South Carolina Tort Claims Act §15-78-10 et seq.

6. That the Defendants join the Defendants, LaSalle Bank National Association and Altisource Homes in their Motion for Dismissal pursuant to Rule 12(b)(6).

STUCKEY, FATA AND SEGARS, LLC

Bishopville, S.C.

January 8, 2014

BY:s/A Paul M. Fata

PAUL M. FATA
ATTORNEY FOR DEFENDANT CAPELL AND LEE COUNTY PLANNING & ZONING
115 E. CHURCH STREET
POST OFFICE DRAWER 568
BISHOPVILLE, S.C.29010
(803) 484-5409 FAX: (803) 484-9239
Email: paulmfata@sfslawfirm.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
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Laura Toney, Plaintiff, vs. LaSalle Bank National Association, As Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates Series 2004-11; AltiSource Homes; Pro Capital Investors; Wayne Capell, Lee County Treasurer; and Lee County Planning and Zoning, Defendants.	)	C/A No.: 3:13-3481-MBS-SVH REPORT AND RECOMMENDATION

Plaintiff Laura Toney filed her complaint in the Court of Common Pleas for Lee County, South Carolina, against LaSalle Bank National Association, As Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates Series 2004-11 ("LaSalle"); AltiSource Homes ("AltiSource");[1] US Bank Custodian for Pro Capital III LLC ("Pro Capital");[2] Wayne Capell, Lee County Treasurer ("Capell"); and Lee County Planning

[1] LaSalle and AltiSource represented in their answers to Local Civil Rule 26.01 interrogatories that they were correctly identified [Entry #2], but have asserted in their response to Plaintiff's motion to remand that they are incorrectly identified [Entry #43].

[2] Pro Capital asserts that it was incorrectly identified as Pro Capital Investors, but counsel has indicated that it is authorized to accept service of an amended summons and complaint with the correct identification. [Entry #16].

and Zoning ("LCPZ"). [Entry #1-1 at 11–17]. LaSalle and AltiSource ("Removing Defendants") removed the action to this court on December 13, 2013. [Entry #1]. This matter comes before the court on Plaintiff's motion to remand [Entry #20]. This matter having been fully briefed [Entry #43], it is ripe for disposition. After a review of the pleadings, the undersigned finds that this case should be remanded because the court lacks subject matter jurisdiction.

I. Factual Background

In her complaint, Plaintiff alleges that she has legal title to property located at 729 Chapman Street, in Bishopville, South Carolina ("Property"). [Entry #1-1 at ¶ 3]. Plaintiff alleges that the Property consists of four lots, one of which her husband deeded. *Id.* According to the complaint, because Plaintiff's husband owned the Property as a tenancy in common, the ownership could not be destroyed without consent of the co-tenant.[3] *Id.* Plaintiff notes that "[t]he foreclosure of the Plaintiff's property was an illegal action that is now being decided by the United States Supreme Court for violation of the Truth-In-Lending Act, [n]oncompliance to a letter of rescission, forgery of federal disclosure documents and other serious violations." *Id.* Plaintiff alleges that because she still owns title to the Property, the plat that was drawn by LCPZ violates South Carolina state law. *Id.* Plaintiff further alleges that Capell's office illegally partitioned the Property in 2012 to allow a tax sale. *Id.* at ¶ 10. Plaintiff seeks a declaration that she still owns title to the Property. *Id.* at ¶ 8.

[3] Plaintiff's complaint is silent as to the identity of the co-tenant or what legal title the alleged co-tenant possesses.

Removing Defendants removed this action on the basis of federal question jurisdiction, pursuant to 28 U.S.C. § 1331, based on Plaintiff's allegations that Defendants violated the Truth in Lending Act ("TILA"). [Entry #1 at 2]. Additionally, Removing Defendants asserted that the court could exercise its diversity jurisdiction pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds $75,000 and all properly-joined defendants are diverse from Plaintiff. *Id.* Specifically, Defendants asserted that Capell and LCPZ ("Lee County Defendants") are fraudulently joined and should not be considered for purposes of determining whether diversity jurisdiction exists. *Id.* In her motion to remand, Plaintiff argues that this court does not have federal question or diversity jurisdiction over this matter and that the removal was defective because all defendants did not join in the removal. [Entry #20]

II. Discussion

A. Magistrate Judge's Authority to Remand

The motion to remand has been referred to the undersigned for disposition pursuant to 28 U.S.C. § 636. A motion to remand does not explicitly fall within any of the dispositive motions set forth in 28 U.S.C. § 636. This omission has led to a split of authority as to whether a United States Magistrate Judge has the authority to remand a matter to state court. While some courts have held that remand motions are nondispositive and orders of remand can be issued by a Magistrate Judge in a non-consent case, the law in the Fourth Circuit remains unclear whether an order or a report and recommendation should be entered. *See, e.g., Jonas v. Unisun Ins. Co.*, No.

00-1217, 2000 WL 1350648, *1 (4th Cir. Sept. 20, 2000) (noting that the Fourth Circuit "has not addressed whether a magistrate judge may issue an order of remand (as opposed to issuing a report and recommendation for the district court's review)"). At least one district court in this district has addressed this issue in a published opinion and held that a Magistrate Judge did not have such authority. *See Long v. Lockheed Missiles & Space Co., Inc.*, 783 F. Supp. 249, 250 (D.S.C. 1992) ("[A] remand order is the equivalent of a dismissal. The Magistrate's Order thus sought to effect an 'involuntary dismissal' of the action.") (quoting *Giangola v. Walt Disney World Co.*, 753 F. Supp. 148, 152 (D.N.J. 1990)); *see also Mortg. Elec. Registration Sys., Inc. v. Hunt*, 6:07-1763-HMH (D.S.C. July 30, 2007) (unpublished opinion collecting cases and finding report and recommendation appropriate when considering motion to remand).

Although the United States Supreme Court has not addressed the issue directly, it has suggested that a remand motion is functionally indistinguishable from a dispositive motion listed in 28 U.S.C. § 636(b)(1)(A). *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714 (1996) ("No less than an order staying a federal court action pending adjudication of the dispute in state court, [an order of remand] puts the litigants in this case effectively out of court, and its effect is precisely to surrender jurisdiction of a federal suit to a state court.") (internal quotation and citation omitted). The federal circuit courts addressing this matter have determined in published opinions that remand motions are dispositive. *See Williams v. Beemiller, Inc.*, 527 F.3d 259, 264–66 (2d Cir. 2008); *Vogel v. U.S. Office Prods. Co.*, 258 F.3d 509, 514–17 (6th Cir. 2001); *First Union*

Mortg. Corp. v. Smith, 229 F.3d 992, 994–97 (10th Cir. 2000); and *In re U.S. Healthcare*, 159 F.3d 142, 145–46 (3d Cir. 1998).

The practical impact on the parties of this seemingly-academic dispute is the applicable standard of review in an appeal of the Magistrate Judge's decision on the motion to remand. If the motion to remand is considered nondispositive, the more deferential standard of "clearly erroneous or contrary to law" found in 28 U.S.C. § 636(b)(1)(A) applies to an appeal of the Magistrate Judge's order of remand. If the motion to remand is considered dispositive, the Magistrate Judge should enter a report and recommendation under 28 U.S.C. § 636(b)(1)(B), pursuant to which objections are considered on a *de novo* standard of review under Fed. R. Civ. P. 72.

In light of the unsettled state of the law within this district as to whether motions to remand are considered dispositive, out of an abundance of caution, a report and recommendation, instead of an order, is being entered. This route preserves the prerogative of the District Judge to whom this case is assigned, as well as any potentially aggrieved party to secure a *de novo* review upon timely objection, prior to final action on the remand motion.

B. Analysis

Federal courts are courts of limited jurisdiction, *see Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994), and a district court is charged with ensuring that all cases before it are properly subject to such jurisdiction. *In re Bulldog Trucking, Inc.*, 147 F.3d 347, 352 (4th Cir. 1998). Generally, a case may be filed in

federal district court if there is federal question jurisdiction under 28 U.S.C. § 1331 or diversity of citizenship under 28 U.S.C. § 1332. The removal statute, 28 U.S.C. § 1441, allows a state court defendant to remove a case to a federal district court if the state court action could have originally been filed there. *See Darcangelo v. Verizon Commc'ns, Inc.*, 292 F.3d 181, 186 (4th Cir. 2002). However, the removing defendant has the burden of establishing subject matter jurisdiction, *Mulcahey v. Columbia Organic Chems. Co., Inc.*, 29 F.3d 148, 151 (4th Cir. 1994), and a district court may remand a case *sua sponte* or pursuant to a motion if federal jurisdiction is lacking. *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 196 (4th Cir. 2008).

1. Federal Question Jurisdiction

It is well-settled that a federal question must be presented on the face of a plaintiff's complaint to satisfy federal question jurisdiction. *Harless v. CSX Hotels, Inc.*, 389 F.3d 444, 450 (4th Cir. 2004) (discussing the well-pleaded complaint rule). Further, a plaintiff may avoid federal jurisdiction by exclusively relying on state law. *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987). Plaintiff states that she has petitioned the Supreme Court of the United States regarding allegations that the foreclosure of the Property was illegal under the TILA. [Entry #1-1 at ¶¶ 3, 9]. However, when read in context, it does not appear that Plaintiff is requesting this court to determine whether the foreclosure of the Property violated the TILA, as she was awaiting a ruling from the Supreme Court.[4] Plaintiff's motion to remand confirms such an interpretation, as she states that this

lawsuit "has nothing to do with a federal question." [Entry #20 at 1]. Therefore, Removing Defendants have not met their burden of establishing federal question jurisdiction.

2. Diversity Jurisdiction

Diversity jurisdiction requires complete diversity of parties and an amount in controversy in excess of $75,000. Complete diversity of parties in a case means that no party on one side may be a citizen of the same state as any party on the other side. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372–74 nn.13–16 (1978). Here, the parties do not dispute that the amount in controversy exceeds $75,000. It is also undisputed that Lee County Defendants are citizens of South Carolina, as is Plaintiff. [Entry #1-1 at ¶¶ 1–2]. However, Removing Defendants argue that the citizenship of the Lee County Defendants should be disregarded for the purposes of determining diversity jurisdiction under the fraudulent joinder doctrine.

"To show fraudulent joinder, the removing party must demonstrate either 'outright fraud in the plaintiff's pleading of jurisdictional facts' or that 'there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court.'" *Hartley v. CSX Transp., Inc.* 187 F.3d 422, 424 (4th Cir. 1999) (internal citations omitted). The Fourth Circuit has described this standard as "even more favorable to the plaintiff than the standard for ruling on a motion to dismiss under Fed. R.

[4] The United States Supreme Court denied writ of certiorari on December 2, 2013. *Laura Toney v. LaSalle Bank Nat'l Association, Trustee*, 571 U.S. __, No. 13-404 (Dec. 2, 2013).

Civ. P. 12(b)(6)." *Id.* (citations omitted). All the plaintiff needs to show is that there is a "glimmer of hope," *Mayes v. Rapoport*, 198 F.3d 457, 466 (4th Cir. 1999), or a "slight possibility of a right to relief" in state court. *Hartley*, 187 F.3d at 426.

Defendants argue that Plaintiff has no possibility of recovering against Lee County Defendants because: (1) the issue of whether Plaintiff can regain title to the Property has already been decided by the courts; (2) Plaintiff cannot establish a cause of action against Lee County Defendants based solely on alleged bias or unfairness; (3) any claim against Lee County Defendants relating to the tax sale is not ripe because title will only be affected if LaSalle timely redeems the Property; and (4) Plaintiff's claims against Lee County Defendants related to recording land records, drawing plats, and conducting tax sales are barred by the doctrines of sovereign immunity and the South Carolina Tort Claims Act ("SCTCA").

In her complaint and her motion to remand, Plaintiff alleges that Lee County Defendants drew an illegal plat and/or illegally partitioned the Property. [Entry #1-1 at ¶¶ 3, 10]. Therefore, Plaintiff's claims against Lee County Defendants appear to be based on negligence in recording land records, drawing plats, and partitioning the Property. Although Removing Defendants assert that claims related to these actions are barred by the doctrine of sovereign immunity, they provide no argument in support and only generally cite the SCTCA as authority. Removing Defendants also cite to Lee County Defendants' motion to dismiss. However, a review of that motion, and the memorandum

in support they filed two weeks later, reveals a failure to provide any substantive argument or authority for a sovereign immunity or SCTCA defense. [Entry #26, #47].

Removing Defendants have failed to meet their burden of establishing that Plaintiff does have the slightest possibility of recovering against Lee County Defendants, such that the court should apply the fraudulent joinder doctrine. The Supreme Court has commanded that when considering removal jurisdiction, federal courts must "scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941) (internal citations omitted). In addition, "[r]emoval statutes must be strictly construed against removal," *Scott v. Greiner*, 858 F. Supp. 607, 610 (S.D.W. Va. 1994), and a federal court must "resolve all doubts about the propriety of removal in favor of retained state court jurisdiction." *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993); *see also Palisades Collections LLC v. Shorts*, 552 F.3d 327, 333–34 (4th Cir. 2008). The undersigned recommends that the district judge find that Removing Defendants have failed to establish diversity jurisdiction in this matter. In so recommending, the undersigned expresses no opinion on the merits of the claims against any defendant, but finds that Removing Defendants have not carried the heavy burden required to establish fraudulent joinder.

Therefore, the undersigned recommends that the district judge grant Plaintiff's motion to remand [Entry #20] because Removing Defendants have failed to establish

federal subject matter jurisdiction over Plaintiff's claims. [5]

III. Conclusion and Recommendation

For the foregoing reasons, it is recommended that the district judge grant Plaintiff's motion to remand [Entry #20] and remand this matter to the Court of Common Pleas for Lee County, South Carolina. If the district judge accepts this recommendation, all other motions pending in this action will be included in the remand for state court disposition.

IT IS SO RECOMMENDED.

Shiva V. Hodges

March 10, 2014
Columbia, South Carolina

Shiva V. Hodges
United States Magistrate Judge

The parties are directed to note the important information in the attached "Notice of Right to File Objections to Report and Recommendation."

[5] The undersigned has not addressed the issue of whether all Defendants timely and properly consented to removal in light of the recommendation of remand based on a lack of subject matter jurisdiction.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, Plaintiff, vs. LaSalle Bank National Association As Trustee for the Registered Holders Of Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates Series 2004-11; AltiSource Homes; Pro Capital Investors; Wayne Capell, Lee County Treasurer; and Lee County Planning and Zoning, Defendants.	)	C/A No. 3:13-3481-MBS **ORDER AND OPINION**

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Laura Toney, proceeding pro se, previously has appeared before this court seeking relief with respect to a foreclosure of certain property located at 729 Chatmon Street, Bishopville, South Carolina ("the Property"). It appears that Plaintiff took possession of the Property after her husband's death, and on October 6, 2004 refinanced a mortgage on the Property. The Property went into foreclosure and was sold on May 7, 2007 to LaSalle Bank National Association, As Trustee for Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 ("LaSalle Bank"). Plaintiff filed a notice of appeal to the South Carolina Court of Appeals. The foreclosure and rulings appertaining thereto were affirmed by the South Carolina Court of Appeals. LaSalle Bank Nat'l Ass'n v. Toney, 2011 WL 11734978 (S.C. Ct. App. June 27, 2011).

On July 13, 2011, Plaintiff filed a complaint in this court, alleging that she was not provided at the time of refinance with disclosures mandated by the Truth-in-Lending Act, 15, U.S.C. §§ 1601-1667f. Plaintiff further contended that she issued a notice of rescission on June 14, 2005, to which LaSalle did not respond until October 19, 2005. According to Plaintiff, she had been relieved of her obligations under the mortgage and the foreclosure should be set aside. The court found that Plaintiff's action was barred by res judicata based on the rulings adverse to Plaintiff in state court. Accordingly, Plaintiff's complaint was dismissed. See Toney v. LaSalle Bank Nat'l Ass'n, C/A No. 3:11-1686-MBS. Plaintiff appealed the court's ruling to the Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed on August 24, 2012. Toney v. LaSalle Bank Nat'l Ass'n, 512 F. App'x 363 (4th Cir. 2013).

On November 13, 2013, Plaintiff commenced the within action in the Court of Common Pleas for Lee County, South Carolina, against Defendants; AltiSource Homes; Pro Capital Investors; Wayne Capell, Lee County Treasurer; and Lee County Planning and Zoning. Although it is not clear, it appears that the Property consisted of four lots, and that Plaintiff's husband, now deceased, deeded one of the lots to an unnamed grantee. Plaintiff alleges that, as a result, her husband owned the Property as a tenant-in-common with the grantee. Plaintiff alleges that in 2004 Lee County Planning and Zoning illegally drew a plat and partitioned the Property. In addition, Plaintiff alleges that in 2012, Wayne Capell, Lee County Treasurer, partitioned the Property in order to allow a portion of the Property to be sold for delinquent taxes. In 2013, the Property, or at least a portion of it, was purchased by Pro Capital Investors. Plaintiff contends that ownership of the Property could not be destroyed without the consent of the unnamed individual who purportedly was a tenant-in-common with Plaintiff's husband. Accordingly, Plaintiff asserts that the foreclosure and partition

were illegal acts, and that she retains title to the Property. Id. at ¶¶ 3-8. Plaintiff seeks to quiet title to the Property in her favor; transfer legal title and possession to her; issue a declaration that each Defendant has no estate, right, title, or interest in the Property; and enjoin each Defendant from any claim in estate, right, title, or interest in the Property. Plaintiff also seeks attorney's fees and costs, as well as treble, actual, and punitive damages in the amount of $10,000,000.00.

On December 13, 2013, LaSalle Bank and AltiSource Homes filed a notice of removal asserting jurisdiction based on federal question and diversity of citizenship. LaSalle Bank and AltiSource Homes contend federal jurisdiction is proper because (1) Plaintiff alleges claims arising under the Truth-in-Lending Act; and (2) Lee County Treasurer Wayne Capell and Lee County Planning and Zoning ("Lee County Defendants") are sham Defendants who may be disregarded for purposes of establishing complete diversity of citizenship. On December 31, 2013, U.S. Bank Custodian for Pro Capital III LLC ("Pro Capital"), incorrectly identified as in the complaint as "Pro Capital Investors," consented to removal.

On January 3, 2014, Plaintiff filed a motion to remand. Plaintiff asserts that her complaint does not implicate the Truth-In-Lending Act. Plaintiff also states that the Lee County Defendants are not sham Defendants in that they partitioned the Property without a court order. Thus, Plaintiff argues that the court lacks both federal question and diversity jurisdiction. Plaintiff also contends that Pro Capital's consent to removal was untimely. On January 20, 2014, LaSalle Bank and AltiSource Homes filed a response in opposition to motion to remand.[1] LaSalle Bank and AltiSource Homes state that Plaintiff specifically references the Truth-In-Lending Act in paragraphs 3 and 9 of the complaint. LaSalle Bank and AltiSource Homes also state that there is no possibility Plaintiff

[1] These Defendants state that U.S. Bank is LaSalle Bank's successor-in-interest to the Property.

can recover against the Lee County Defendants because (1) the court previously dismissed a complaint by Plaintiff disputing title to the Property; (2) the complaint fails to state a cause of action against the Lee County Defendants; (3) claims regarding the tax sale are not ripe; and (4) the action against the Lee County Defendants is barred by sovereign immunity and the South Carolina tort Claims Act ("SCTCA"), S.C. Code Ann. §§ 15-78-10, et seq. LaSalle Bank and AltiSource Homes further argue that removal is proper because Pro Capital had not been "properly joined and served" at the time of removal, and thus its consent was not required. See 28 U.S.C. § 1446(b)(2)(A).

In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02, D.S.C., this matter was referred to United States Magistrate Judge Shiva V. Hodges for pretrial handling. On March 11, 2014, the Magistrate Judge filed a Report and Recommendation in which she determined that Plaintiff's allegations in her complaint regarding the Truth-in-Lending Act, read in context, refer to her appeals of the court's prior ruling. The Magistrate Judge further found that Plaintiff's complaint alleges negligence on the part of the Lee County Defendants, and that LaSalle Bank and AltiSource Homes had failed to demonstrate Plaintiff had no possibility of relief again the Lee County Defendants. Based on these findings, the Magistrate Judge concluded that LaSalle Bank and AltiSource Homes had not met their burden of establishing subject matter jurisdiction. Accordingly, the Magistrate Judge recommended that Plaintiff's motion to remand be granted.

On March 27, 2014, LaSalle Bank and AltiSource Homes filed objections to the Report and Recommendation. Plaintiff filed a response to the objections on April 11, 2014, to which LaSalle Bank and AltiSource Homes filed a reply on April 18, 2014.

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight. The responsibility for making a final determination remains with this court.

Mathews v. Weber, 423 U.S. 261, 270 (1976). This court is charged with making a de novo determination of any portions of the Magistrate Judge's Report to which a specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or may recommit the matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b)(1) (2012).

II. DISCUSSION

LaSalle Bank and AltiSource Homes contend that the Magistrate Judge erred in finding that the court lacks subject matter jurisdiction, such that removal was not proper. The court disagrees.

If removal is challenged, the defendant bears the burden of establishing that federal jurisdiction is proper. Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 151 (4th Cir. 1994). The thumb is on the scale in favor of remand. Id. Because federal courts are courts of limited jurisdiction and removal implicates serious federalism concerns, removal restriction is strictly construed in favor of state court jurisdiction—i.e., "[i]f federal jurisdiction is doubtful, a remand is necessary." Id.

A. Federal Question Jurisdiction

LaSalle Bank and AltiSource Homes first contend the Magistrate Judge erred in concluding that federal question jurisdiction does not exist. These Defendants contend that Plaintiff disclaimed reliance on federal law subsequent to the filing of the notice of removal. LaSalle Bank and AltiSource Homes assert that federal question jurisdiction appeared on the face of the complaint and removal was therefore proper. See Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987). In support of their argument, LaSalle Bank and AltiSource Homes point to paragraph 3 and 9 of the complaint, which read in full:

3. That pursuant to South Carolina Code 15-67-210, this is an action for the recovery of real property. The Plaintiff believes that she still possesses legal title to the premises located at 729 Chatmon Street, Bishopville, South Carolina. The Plaintiff's deceased husband deeded one (1) lot, which is lot 14. The estate consists of four (4) lots. This type of co-ownership constitutes "Tenancy-In-Common" and cannot be destroyed absent the consent of the other co-tenant. The Plaintiff's husband never signed any documents giving up his interests in the property. The foreclosure of the Plaintiff's property was an illegal action that is now being decided by the United States Supreme Court for violation of the Truth-In-Lending Act, Noncompliance to a letter of rescission, forgery of federal disclosure documents and other serious violations. The plaintiff is awaiting a ruling from the courts hopefully very soon. As aforementioned, the Plaintiff still maintains ownership in the property. Clear title to the property cannot be obtained because the South Carolina Supreme Court ruled in Davis v. Davis, 233, S.C. 182, 191-91, 75 S.E. 2d 46, 60 (1953), that a Tenancy in Common cannot be defeated by the act of one tenant absent the agreement of the other tenant. Also, under Davis, the survivorship rights between tenants in common create future interests in the entire estate that cannot be destroyed by the unilateral act of one tenant through an act such as partition. The plant that was drawn by the Defendant, Lee County Planning and Zoning Office clearly violates this ruling and the zoning ordinance of the county in which the property is located.

. . . .

9. South Carolina Code 18-9-130(2) also clearly states, "A Plaintiff may not enforce a sale of property after a notice of appeal is filed without undertaking a bond to the Defendant, with two good sureties, in double the appraised value of the property or double the amount of the judgment, conditioned to pay all damages the Defendant may sustain by reason the judgment is reversed." As aforementioned, the United States Supreme Court is in the process of ruling in this case. The Defendants have violated the Truth-In-Lending Act, committed forgery of Federal Disclosure documents, and noncompliance to a letter of rescission.

ECF No. 1-1, 13-14.

The court agrees with the Magistrate Judge that, read in context, Plaintiff is not asserting a claim under the Truth-in-Lending Act, inasmuch as she was awaiting a ruling from the Supreme

Court.[2] Rather, as she explicitly alleges, the complaint is an action for recovery of real property. LaSalle Bank and AltiSource Homes' objection is without merit.

B. Diversity Jurisdiction

LaSalle Bank and AltiSource Homes next argue that the Magistrate Judge erred in finding that the Lee County Defendants are not fraudulently joined or "sham" defendants whose citizenship can be disregarded for the purpose of establishing diversity jurisdiction.[3] The court disagrees.

The fraudulent joinder doctrine will permit a defendant to remove a case to federal court despite the presence of another non-diverse defendant. Mayes v. Rapoport, 198 F.3d 457, 461 (4th Cir. 1999). To establish fraudulent joinder, the removing party must show either: (1) outright fraud in the plaintiff's pleading of jurisdictional facts, or (2) that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court. Benjamin v. Wal-Mart Stores, Inc., 413 F. Supp. 2d 652, 654 (D.S.C. 2006) (quoting Hartley v. CSX Transp. Inc., 187 F.3d 422, 424 (4th Cir. 1999)). The second means for establishing fraudulent joinder is even more favorable to a plaintiff than the standard for ruling on a motion to dismiss under Fed R. Civ. P. 12(b)(6). Hartley, 187 F.3d at 424. A plaintiff does not have to show he will prevail against the defendant. He must only show that he has a slight possibility of succeeding. Id. at 426. If the plaintiff can show this glimmer of hope, the defendant is properly joined. Id.

LaSalle Bank and AltiSource Homes contend that the Magistrate Judge erred in not considering the various theories under which they argue Plaintiff cannot establish a cause of action

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[2] The United States Supreme Court denied a petition for writ of certiorari on December 2, 2013. Toney v. LaSalle Bank Nat'l Ass'n, 134 S. Ct. 696 (2013).

[3] Parties do no dispute that the amount in controversy exceeds $75,000. ECF No. 59, 7.

against the Lee County Defendants, i.e., (1) Plaintiff's claims are barred by res judicata and collateral estoppel; (2) Plaintiff has failed to state a claim upon which relief can be granted; (3) Plaintiff's claims, if any, are not ripe; and (4) Plaintiff's claims are barred by the doctrines of sovereign immunity and the SCTCA.

As noted hereinabove, the Magistrate Judge relied upon the fourth argument in finding that Plaintiff has a possibility of recovering against the Lee County Defendants. In the court's view, the Magistrate Judge was not required to address the remaining three arguments once she determined there exists a possibility Plaintiff can establish a cause of action against the Lee County Defendants. Thus, the court turns to LaSalle Bank and AltiSource Homes' objection to the Magistrate Judge's conclusion.

These Defendants argue that Capell is individually immune from suit under the SCTCA because he was acting in the course and scope of his employment. See S.C. Code Ann. § 15-78-70(a) (providing that the SCTCA is the exclusive remedy for torts committed by an employee of the government while acting within the scope of the employee's official duty). The SCTCA does not provide immunity, however, when the employee's conduct (1) was not within the scope of his official duties or (2) it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. Id. § 15-78-70(b)

LaSalle Bank and AltiSource Homes contend that Plaintiff alleges that Capell was acting in his official capacity as Treasurer, and therefore the first exception to immunity does not apply. These Defendants further assert that Plaintiff's claims against Capell sound in negligence, such that the second exception does not apply. The court disagrees as to the second contention. Plaintiff alleges in her complaint that the Lee County Defendants' conduct "conduct was willful, wanton,

intentional, with malice, and reckless disregard of the rights of the Plaintiff[.]"

A district court cannot predict with certainty how a state court or state jury would resolve a legal issue and weigh the factual evidence in a case. Hartley, 187 F.3d at 425. Plaintiff's claim may not succeed ultimately, but there need be only a slight possibility of a right to relief. Once a district court identifies a possibility of relief for the plaintiff, the jurisdictional inquiry ends. Id.

LaSalle Bank and AltiSource Homes also contend that Plaintiff's claims against the Lee County Defendants are barred by the two-year statute of limitations set forth in the SCTCA. See S.C. Code Ann. § 15-78-110 (providing that "any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered"). To the extent Plaintiff alleges conduct that occurred in 2012 and 2013, Plaintiff is not barred from recovery. LaSalle Bank and AltiSource Homes' objection is without merit.

III. CONCLUSION

The court adopts the Magistrate Judge's Report and Recommendation incorporates it hereby reference. For the reasons stated therein and in this order, Plaintiff's motion to remand (ECF No. 20) is **granted.**

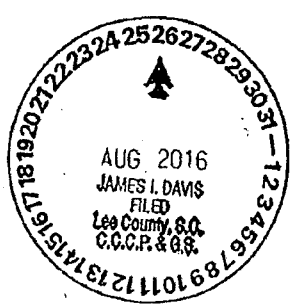
IT IS SO ORDERED.

/s/ Margaret B. Seymour
Senior United States District Judge

Columbia, South Carolina

August 4, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRD JUDICIAL CIRCUIT
COUNTY OF LEE	)	Civil Action No. 2013-CP-31-00321
Laura Toney,	)	
	)	
Plaintiff,	)	
	)	**ORDER DENYING AMENDED**
v.	)	**MOTION FOR RECONSIDERATION**
	)	
LaSalle Bank National Association as Trustee for the Registered Holder of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, A/K/A Altisource Homes, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning,	)	
	)	
Defendants.	)	



THIS MATTER comes before the Court upon the Amended Motion for Reconsideration of Plaintiff Laura Toney seeking reconsideration of the Order issued by this Court on July 6, 2016, and filed on July 11, 2016.

Plaintiff submitted by U.S. mail a written copy of the motion along with attachments. Defendant submitted to the Court by U.S. mail a memorandum in opposition to the motion.

Having carefully considered submissions of the parties and applicable law, the Motion for Reconsideration is hereby DENIED.

AND IT IS SO ORDERED.

August 12, 2016
Date

Clinton Newman
Presiding Judge

Clerk Court of Common Pleas and General Sessions, Lee County, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF LEE LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, PLAINTIFF, vs. Laura Toney, DEFENDANT(S).	IN THE COURT OF COMMON PLEAS SUMMONS 05-CP-31-169 (NON-JURY MORTGAGE FORECLOSURE) C/A NO: DEFICIENCY REQUESTED

JUL 2005
JAMES I. DAVIS
FILED
LEE COUNTY, S.C.
C.C.P. & G.S.

F25-02718

TO THE DEFENDANTS ABOVE NAMED:

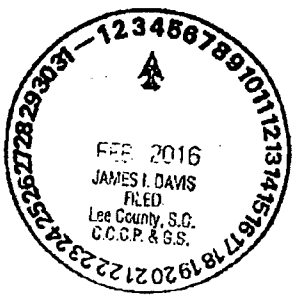
YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, or otherwise appear and defend, and to serve a copy of your Answer to said Complaint upon the subscriber at his office, 1300 Pickens Street, P.O. Box 11264, Columbia, South Carolina, 29211-1264, 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.

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
ALAN M. STEWART / LAURA B. BRENT
JOHN B. KELCHNER / J. SCOTT WALLS
GUYTON MURRELL
Attorneys for Plaintiff

Columbia, South Carolina
July 13, 2005

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRD JUDICIAL CIRCUIT
COUNTY OF LEE	)	Civil Action No.: 2013-CP-31-00321
	)	
Laura Toney,	)	
	)	
Plaintiff,	)	
	)	**ORDER DENYING**
v.	)	**MOTION TO DISQUALIFY**
	)	**ATTORNEYS FATA AND O'CONNOR**
LaSalle Bank National Association as Trustee for the Registered Holder of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning,	)	
	)	
Defendants.	)	



THIS MATTER came before the Court on November 30, 2015, for a hearing on all pending motions. At the outset of the hearing, Plaintiff Laura Toney, appearing pro se, presented to the Court for the first time a Motion to Disqualify Attorneys Paul M. Fata, counsel for Defendant Lee County, and Sean A. O'Connor, counsel for Defendants LaSalle Bank National Association and Altisource Homes.

The stated basis for Plaintiff's motion regarding Mr. Fata was an alleged conflict of interest. Plaintiff alleged that Mr. Fata and/or his law firm represented her in several previous matters, and also acted as the bidding agent at the foreclosure sale of the real property at issue in the instant action.

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The stated basis for Plaintiff's motion regarding Mr. O'Connor was the alleged unauthorized practice of law. Plaintiff read into the record an email to Mr. O'Connor apparently written by Attorney Jake Adams of Jackson, Mississippi, which referenced the handling of the instant action. Plaintiff also alleged that Mr. O'Connor engaged in impermissible *ex parte* communication with various judges in connection with this case.

The Court notes the following statements of the general rules regarding the issues raised in this motion:

> Attorney conduct is governed by ethical standards of the court before which an attorney appears. The court should disqualify an attorney only when it determines, on a particular case's facts, that disqualification is an appropriate means of enforcing an applicable disciplinary rule. Disqualification of an attorney is never automatic. The court has a wide discretion in framing sanctions to be just and fair to all parties involved.

Boston Scientific Corp. v. Johnson & Johnson Inc., 647 F. Supp. 2d 369 (D. Del. 2009).

> Motions to disqualify counsel are generally disfavored... A party seeking disqualification of counsel must clearly show that continued representation would be impermissible. Vague and unsupported allegations are not sufficient to meet that standard. In determining whether a "substantial relationship" exists within meaning of the professional conduct rule that prohibits counsel's representation of client on a matter substantially related to his representation of a former client where the current client's interests are materially adverse to the interests of the former client, the court need not, nor should it, inquire into whether an attorney actually acquired confidential information during the prior representation related to the current representation. Rather, the court's primary concern is whether confidential information that might have been gained in the first representation may be used to the detriment of the former client in the subsequent action.

Conley v. Chaffinch, 431 F. Supp. 2d 494 (D. Del. 2006).

> Disqualification of counsel based on a law firm member's prior representation of the opposing party is a severe penalty, and is inappropriate where an ethics screen can adequately protect the affected party's interests. In determining whether to disqualify a law firm due to one attorney's prior representation of an adverse party, the court must balance: (1) the former clients' interest in attorney loyalty, (2) the current client's interest in retaining his chosen counsel, (3) the risk of prejudice to current client, and (4) the court's interest in protecting the integrity of the proceedings and maintaining public confidence in the judicial system.

Holcombe v. Quest Diagnostics, Inc., 675 F. Supp. 2d 515 (E.D. Pa. 2009).

Upon hearing from both Plaintiff and Attorney Fata, this Court finds that the governing rule in this instance is Rule 1.9 of the South Carolina Rules of Professional Conduct (SCRPC), and not Rule 1.7, SCRPC, as Plaintiff asserted. The Court finds that Plaintiff is not a current client of Attorney Fata or his law firm. Instead, Plaintiff is, at most, a former client. The Court finds that under the applicable Rule 1.9, Mr. Fata has no duty to Plaintiff to refrain from representing Lee County in the instant case, was not required to obtain Plaintiff's consent to represent Lee County, and is not in violation of the SCRPC by representing Lee County. The Court finds that the previous matters in which Mr. Fata or his firm represented Plaintiff are not substantially related to the instant matter. Further, Mr. Fata or his firm serving as the bidding agent for the foreclosure sale of the subject real property does not disqualify him from representing Lee County under Rule 1.9, SCRPC. Accordingly, Plaintiff's motion is denied as to Attorney Fata.

Upon hearing from both Plaintiff and Attorney O'Connor, this Court finds that Plaintiff made no showing that Mr. O'Connor engaged in the unauthorized practice of law. The

referenced Attorney Adams, while acknowledged by Mr. O'Connor as not being licensed to practice in South Carolina, has been involved in this action only to the extent that his firm manages or supervises the work of its local South Carolina Attorney O'Connor. Attorney Adams has not made any appearance or filing in this action. The firms of Attorneys O'Connor and Adams each represent the same mutual client, which the Court notes is a routine arrangement. This Court finds no unlawful or impermissible conduct. As for the allegations of *ex parte* communication, Mr. O'Connor stated credibly and presented documentary evidence reflecting that he has copied Plaintiff on his correspondence and emails to the Court, as well as to the various judges and their law clerks in connection with this case. Accordingly, Plaintiff's motion is denied as to Mr. O'Connor.

THEREFORE, this Court finds that the Motion to Disqualify Attorneys made by Plaintiff should be DENIED.

AND IT IS SO ORDERED.

Clifton Newman
Presiding Judge

January 25, 2016
Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DICTRICT OF SOUTH CAROLINA
COLUMBIA

Laura Toney,

Plaintiff,

Case: 3:13-cv-03481

Vs.

LaSalle Bank National Association
As Trustee for the Registered Holders
Of Structured Asset Securities
Corporation, Structured Asset Investment
Loan Trust, Mortgaged Pass-Through
Certificates, Series 2004-11, AltiSource
Homes, Pro Capital Investors, Wayne
Capell, Lee County Treasure and
Lee County Planning and Zoining

Defendants.

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PLAINTIFF'S MOTION FOR REMAND AND

INCORPORATED MEMORANDUM OF LAW

AND MOTION FOR SANCTIONS AGAINST THE FINKEL LAW FIRM

COMES NOW, the Plaintiff, Laura Toney, for Motion for Remand and Incorporated Memorandum of Law and sanctions against the Finkel Law Firm and as grounds therefore states as follows:

1. The Plaintiff's lawsuit that was filed in Lee County on November 13, 2013, is based on property situated in Lee County. The Finkel Law Firm has attempted to mislead the court in incorporating Federal Question Jurisdiction on the **"Truth In Lending Act."** This lawsuit has nothing to do with a Federal Question. Title 28, Section 1331 of the United States Code confers upon federal district courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Section 1331, which grants what is commonly referred to as federal question jurisdiction, is an all-purpose jurisdictional statute, available regardless of the defendant's identity and, since 1980, is not limited by any requirement that a minimum dollar amount be in controversy. Section 1331 also confers jurisdiction in actions authorized by 42 U.S.C. § 1983 against defendants acting under color of state law. It is generally available in suits against the federal government and its agencies and in actions against federal officers and employees.

2. The Finkel Law Firm has also attempted to mislead the Court under Diversity Jurisdiction. Mr.Wayne Capell, Treasurer of Lee County and The Lee County Land and Zoning Board are all citizens of Lee County. An illegal Plat was drawn in Lee County that consists of erroneous information. Also, the

Treasurer of Lee County and the Land and Zoning Board partitioned property in Lee County without a Court Order.

The District Court does not have diversity in this manner. According to 28 U.S.C. § 1332 : US Code - Section 1332: Diversity of citizenship; amount in controversy; costs:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603 (a) of this title, as plaintiff and citizens of a State or of different States.

Also, 1441 states:

(c) For the purposes of this section and section 1441 of this title:

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent. Both Mr. Wayne Capell, Lee County Treasurer, and The Lee County Planning and Zoning are citizens of Lee County and were instrumental in drawing this illegal Plat and partitioning land without a Court Order.

3. The Finkel Law Firm filed a Timely Notice of Removal for his clients LaSalle Bank and AltiSourceHomes on December 13, 2013, but also unethically represented Mr. Wayne Capell, Lee County Treasurer and Lee County Planning

Zoning who are both being represented by Stuckey, Fata & Segars Law Firm. The Law Firm of Stuckey, Fata & Segars has filed an answer with the Lee County Courts on December 20, 2013.

As mentioned, the Defendant, Pro Capital Investors failed to file a Notice of Removal in a timely manner. The Defendant was served on November 18, 2013, but filed a Notice of Removal on December 31, 2013. Mr. Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning which were both served on November 13, 2013, has not of yet filed a Notice of Removal. The Law Firm of Stuckey, Fata, & Segars filed an answer in Lee County on December 20, 2013 on behalf of Mr. Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning.

It is now settled in the Fourth Circuit that the time for removal runs 30 days from the date the last-served defendant is served with the complaint. The last served in this action was Pro Capital Investors which was November 18, 2013. Pro Capital seemingly missed its 30-day window for removal. Second, neither a defendant nor her counsel may consent to removal by any means other than a document filed in court signed by the attorney for the party or, if the party is unrepresented, the party itself. **Representations by one defendant or their counsel that another defendant consents to or does not oppose removal do not satisfy Rule 11 of the Federal Rules of Civil Procedure, which applies to filings during the removal process.**

The Timing of Removal in Multi-Defendant Litigation.

On Feb. 4, 2010, the Fourth Circuit in **Barbour v. International Union**, 594 F.3d 315 (4th Cir. 2010), adopted the "last-served defendant rule," which permits earlier-served defendants to join a notice of removal filed by the last-served defendant even if the earlier-served defendants failed to remove within 30 days of their service. The court, in a 2-1 hotly-contested opinion, clarified a removal issue that has stumped federal courts and practitioners in the circuit for almost twenty years and solidified a split between federal circuits that will require intervention by the Supreme Court. The last served Defendant was Pro Capital Investors which was served on November 18, 2013.

Statutory Background. Tile 28, Chapter 89 of the United States Code provides the statutory framework for removal to federal court. See 28 U.S.C. §§ 1441-1453. Section 1441 identifies the general categories of actions removable, including the two most common categories: federal question jurisdiction (§ 1441(a)) and diversity jurisdiction (§ 1441(b)). Sections 1442 to 1445 and 1452 to 1453 provide special examples of and exceptions to the general removal rules. Section 1451 provides definitions applicable to the entire Chapter and, important here, Sections 1446 to 1450 govern the procedure during and after removal.

Timing of removal is found in 28 U.S.C. § 1446(b), which provides in pertinent part:

The notice of removal of a civil action or proceeding shall be filed within **thirty days** after the receipt *by the defendant*, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

The difficulty with § 1446(b) arises from the fact that its express language contemplates only one defendant. It is unlike all other pertinent sections of the removal statute (Title 28, Chapter 89), which contemplate cases with more than one defendant. Compare § 1446(b) with § 1441 (referring to removal by "defendant or defendants"), § 1446(a), (d), and (e) (same), § 1448 (same), § 1453 (referring to "any defendant"). The omission of "defendants" from § 1446(b) created statutory construction issues that have led to considerable judicial and academic debate.

"Official and Unambiguous" Consent to Removal."

As referenced briefly above, courts have "uniformly ruled" that the phrase "a defendant or defendants" in § 1446(a) requires that all defendants join in or otherwise consent to a notice of removal. **Brodar v. McKinney**, 378 F. Supp. 2d 634, 636 (M.D.N.C. 2005). Known as the "rule of unanimity," this mandate does not require all of the defendants to sign a single notice of removal. **Parker v. Johnny Tart Enters. Inc.**, 104 F. Supp. 2d 581, 583 (M.D.N.C. 1999). "Rather, section 1446 requires that each defendant file a notice of removal,

either independently or by unambiguously joining in or consenting to another defendant's notice," within the 30-day period following service. **Creekmore v. Food Lion, Inc.**, 797 F. Supp. 505, 508 (E.D. Va. 1992) (emphasis added). As the Fourth Circuit has noted, there is no federal jurisdiction when one of the defendants fails to join in, file his own, or officially and unambiguously consent to, a removal petition within 30 days of service. **Wilkins v. Correctional Med. Sys.**, No. 90-7155, 1991 WL 68791, at *2 n.2 (4th Cir. 1991).But what does this really mean for removal in multi-defendant litigation? According to a recent recommendation of Magistrate Judge Trevor P. Sharp in the Middle District of North Carolina in **Habitat for Humanity of the N.C. Sandhills, Inc. v. Unsworth**, it means that every defendant must convey to the court, either personally (if pro se) or through that defendant's counsel, his consent to removal. Case No. 1:09-CV-456 (M.D.N.C.) (10/21/09 docket text order). It is not sufficient for one defendant or her counsel to represent to the court that another defendant consents to removal. *Id.* The foundation for the court's decision in **Habitat for Humanity**, is Rule 11 of the Federal Rules of Civil Procedure. The United States Supreme Court has interpreted Rule 11 as imposing a non-assignable duty of certification. **Pavelic v. LeFlore v. Marvel Entm't Group**, 493 U.S. 120, 125-26 (1989). It has recognized that the purpose of Rule 11 "is to bring home to the individual signer his personal nondelegable responsibility." *Id.* Section 1446(a) requires "a notice of removal signed pursuant to Rule 11." 28 U.S.C. § 1446(a). Thus, as the Eastern District of Virginia instructed in **Creekmore**, interpreting § 1446(a) and Rule 11

together "requires all defendants, individually, or through their counsel, to voice their consent before the court, not through another party's attorney." **Creekmore**, 797 F. Supp. at 509.In holding that the assertion of consent of some defendants by counsel for other defendants does not meet the requirements of § 1446(a) and Rule 11, the court in Habitat for Humanity adopted the rationale of the Eastern District of Virginia in **Creekmore**, finding it the "majority view." As one court has noted, "[d]istrict courts within the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuit" have endorsed this majority position. Henderson v. Holmes, 920 F. Supp. 1184, 1187 n.2 (D. Kan. 1996). As the **Creekmore** court had explained in ordering remand:

Rule 11 does not authorize one party to make representations or file pleadings on behalf of another. Rather, Rule 11 requires that each pleading, motion, or other paper submitted to the court be signed by the party or its attorney of record, if represented. [Certain defendants who failed to sign personally the removal papers] are represented by counsel and clearly are "movants" subject to the requirements of Rule 11. They must file their own signed pleadings. However, the record contains no document, pleading, or motion reflecting their consent to removal and their signatures.

. . . To allow one party, through counsel, to bind or represent the position of other parties without their express consent to be so bound would have serious

adverse repercussions, not only in removal situations but in any incident of litigation.

The court in **Habitat for Humanity** went further than **Creekmore**, however, reaching the issue of whether the failure to consent "officially and unambiguously" to removal could be cured after the 30-day removal period had run. The court held that it could not be cured, finding it to be a "substantial defect" in the removal proceeding. **Habitat for Humanity**, Case No. 1:09-CV-459 (M.D.N.C.) (10/21/09 docket text order). Thus, when removing a matter to the Middle District of North Carolina in a multi-defendant litigation, it is essential that each defendant evidence his consent to removal by signature complying with Rule 11, or such consent may be deemed ineffective and the matter remanded to state court. While §1446(a)'s "defendant or defendants" language was easily understood as requiring the consent of all defendants to removal (deemed the "rule of unanimity"), a three-way split arose between the federal circuits about the timing of that consent.The Fifth Circuit, the first circuit to address the issue, held that, in cases involving multiple defendants, the thirty-day period in § 1446(b) begins to run as soon as the first defendant is served. **Brown v. Demco, Inc.**, 792 F.2d 478, 481 (5th Cir. 1986). Thus, "if the first served defendant abstains from seeking removal or does not effect a timely removal, subsequently served defendants cannot remove." *Id.* This became known as the "first-served defendant" rule. *See* **Getty Oil Corp. v. Ins. Co. of N.A.**, 841 F.2d 1254 (5th Cir. 1988).Subsequent to the Fifth Circuit's decision, the Sixth, Eighth, and Eleventh Circuits rejected the "first-served

defendant" rule in favor of what generally became known as the "last-served defendant" rule. The "last-served defendant" rule "permits each defendant, upon formal service of process, thirty days to file a notice of removal pursuant to § 1446(b)." **Bailey v. Janssen Pharmaceutica, Inc.**, 536 F.3d 1202, 1209 (11th Cir. 2008); *see also* **Marano Enters. of Kan. v. Z-Teca Rests., L.P.**, 254 F.3d 753 (8th Cir. 2001); **Brierly v. Alusuisse Flexible Packaging, Inc.**, 184 F.3d 527, 532 (6th Cir. 1999). Thus, "[e]arlier-served defendants may choose to join in a later-served defendant's motion or not, therefore preserving the rule that a notice of removal must have the unanimous consent of the defendants." **Bailey**, 536 F.3d at 1207. After the Fifth Circuit adopted, but before other circuit courts rejected, the "first-served defendant" rule, the Fourth Circuit touched upon the issue in a footnote in **McKinney v. Board of Trustees of Mayland Community College**, 955 F.2d 924 (4th Cir. 1992). Although not critical to the outcome of the matter, the Fourth Circuit explained in a footnote that:

[W]here B is served *more than* 30 days after A is served, two timing issues can arise, and the law is settled as to each. First, if A petitions for removal within 30 days, the case may be removed, and B can either join in the petition or move for remand. See 28 U.S.C. § 1448. Second, if A does *not* petition for removal within 30 days, the case may not be removed.

[T]he Fourth Circuit has adopted a position somewhere in between the first-served and last-served-defendant rules. In **McKinney**, the court held that each defendant has thirty days from the date on which it is served to join in "an

otherwise valid removal petition." Thus, if the original notice of removal filed by an earlier-served defendant is defective in some way, the later-served defendant may not remove, even if it attempts to do so within thirty days of being served. **Fitzgerald v. Bestway Servs., Inc.** 284 F. Supp. 2d 1311, 1315 -1316 (N.D. Ala. 2003) (internal citations omitted).District courts within the Fourth Circuit, including those within North Carolina, themselves became split on whether and how to apply the **McKinney** rule. Some courts applied **McKinney** without question. *See, e.g.*, **Parker v. Johnny Tart Enters.**, 104 F. Supp. 2d 581, 584 (M.D.N.C. 1999). Many, if not most, however, considered the **McKinney** "middle ground" approach dicta. *See, e.g.*, **Gyon v. Basso**, 403 F. Supp. 2d 502, 508 (E.D. Va. 2005) (acknowledging that defendants "urge the court to . . . disregard **McKinney**'s dictum that a first-served defendant must file a removal notice within thirty days from the date of service"); **Branch v. Coca-Cola Bottling Co.**, 83 F. Supp. 2d 631, 634 (D.S.C. 2000) (holding that the relevant language in **McKinney** was not "controlling precedent" and dictum). Nevertheless, many found themselves obliged to follow the Fourth Circuit's dicta. *See, e.g.*, **Superior Painting & Contracting Co. v. Walton Tech., Inc.**, 207, F. Supp. 2d 391, 393 n.4 (D. Md. 2002) (finding the dicta "presumptively correct"); **Adams v. Emeritus Corp.**, No. 1:99CV20-C, 1999 WL 33321100 (W.D.N.C. Apr. 16, 1999) (finding it "highly persuasive dicta"). A small minority of courts in the Fourth Circuit, boldly adopted the "last-served defendant" rule despite **McKinney**'s language. *See, e.g.*, **Ratliff v. Workman**, 274 F. Supp. 2d 783, 791 (S.D.W. Va. 2003) (finding statement in Footnote 3 "unnecessary to

the Fourth Circuit's actual decision" and, therefore, dictum); **Freeman v. Bechtel**, 936 F. Supp. 320, 326 (M.D.N.C. 1996) (distinguishing the facts of **McKinney** and adopting the "last-filed defendant" rule).

Barbour: The Split Resolved in the Fourth Circuit.

Accepting the invitation of the District of Maryland to address the split between circuits and rectify the confusion within the Fourth Circuit, the Fourth Circuit resolved the issue in Barbour by adopting the "last-served" defendant rule. In doing so, the **Barbour** majority, over a strong dissent, found that the **McKinney** footnote "constitutes nonbinding dicta." 594 F.3d at 321-22. As dicta, the court was free to reject the **McKinney** rule without violating the Fourth Circuit's rules of precedent. *See* **Mentavlos v. Anderson**, 249 F.3d 301, 312 n.4 (4th Cir. 2001) (explaining that only the Supreme Court or the Fourth Circuit sitting en banc can overrule, explicitly or implicitly, prior precedent). The court was also guided by the Supreme Court's analysis in **Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.** , 526 U.S. 344 (1999). There, the court held that the triggering event for removal was not the mere receipt of the complaint unattended by any formal service, but the simultaneous services of the summons and complaint, or receipt of the complaint, "through service or otherwise," after and apart from service of the summons. *Id.* at 347-48. The **Barbour** court found that **Murphy Brothers** lent "credible and persuasive" support for the "last-served defendant" rule because it sought to protect a defendant's opportunity to remove until after the defendant received proper

service of process. **Barbour**, 594 F.3d at 323-24. According to the Barbour court, both the "first-served defendant" rule and the **McKinney** rule condition the right to removal for subsequently served defendants upon actions taken by previously served defendants, and therefore work an inequity in the removal process that Congress never intended. *Id.* at 324.The Fourth Circuit in Barbour thus joined the Sixth, Eighth, and Eleventh Circuits in adopting the last-served defendant rule in holding "that in cases involving multiple defendants, each defendant, once served with formal process, has thirty days to file a notice of removal pursuant to 28 U.S.C. § 1446(b) in which earlier-served defendants may join regardless of whether they have previously filed a notice of removal." *Id.* at 326. By doing so, it resolved confusion within the Fourth Circuit regarding the timing for removal in multi-defendant litigation and, hopefully, helped posture the circuit split for future resolution by the Supreme Court.

For the aforementioned reasons, the Plaintiff is respectfully requesting that the Defendants' Notice of Removal is denied for the following:

1. Lack of response or consent by the Defendants Lee County Treasurer, Mr. Wayne Capell and Lee County Planning and Zoning who are both represented by the law firm of Stuckey, Fata & Segars.
2. That sanctions are imposed against the Finkel Law Firm for fraud on the Court and misrepresentations.

3. That the case is remanded back to State Court for untimely Notice of Removal by Pro Capital Investors.

4. That the **"Rule of Unanimity"** has not been met for a removal.

January 2, 2014

Laura Toney
P.O. Box 722
Bishopville, SC
29010
(803) 459-6006

Finkel Law Firm, LLC
P.O. Box 41489
4000 Faber Place
Suite 450
Charleston, SC 29405

Stuckey, Fata,& Segars, LLC
P.O. Box 568
Bishopville, SC 29010

Pro Capital Investors
50 South 16th Street, Suite 1950
Philadelphia, PA 19102

IN THE UNITED STATES DISTRICT COURT
FOR THE DICTRICT OF SOUTH CAROLINA
COLUMBIA

Laura Toney,

Plaintiff,

Case: 3:13-cv-03481

Vs.

LaSalle Bank National Association
As Trustee for the Registered Holders
Of Structured Asset Securities
Corporation, Structured Asset Investment
Loan Trust, Mortgaged Pass-Through
Certificates, Series 2004-11, AltiSource
Homes, Pro Capital Investors, Wayne
Capell, Lee County Treasure and
Lee County Planning and Zoining

Defendants.

CERTIFICATE OF MAILING

The Plaintiff, Laura Toney, certifies that she mailed a copy of the Plaintiff's Motion for Remand and Incorporated Memorandum of Law and Motion for Sanctions against the Finkel Law Firm to the names and addresses below on January 2, 2014 via United States Postal Service.

Finkel Law Firm, LLC
P.O. Box 41489
4000 Faber Place
Suite 450
Charleston, SC 29405

Stuckey, Fata,& Segars, LLC
P.O. Box 568
Bishopville, SC 29010

Pro Capital Investors
50 South 16th Street, Suite 1950
Philadelphia, PA 19102

Laura Toney

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEE) FOR THE THIRD JUDICIAL CIRCUIT
)
Laura Toney,) C.A. No. 2013-CP-31-00321
)
Plaintiff,)
)
v.)
)
LaSalle Bank National Association as)
Trustee for the Registered Holder of)
Structured Asset Securities Corporation,)
Structured Asset Investment Loan Trust,)
Mortgage Pass-Through Certificates,)
Series 2004-11, A/K/A Altisource Homes,)
Wayne Capell, Lee County Treasurer)
and Lee County Planning and Zoning,)
)
Defendants.)

ORDER GRANTING THE MOTION TO DISMISS OF DEFENDANT U.S. BANK, GRANTING THE MOTION FOR SUMMARY JUDGMENT OF DEFENDANT LEE COUNTY, AND DENYING ALL MOTIONS OF PLAINTIFF LAURA TONEY

THIS MATTER came before the Court on March 30, 2016, for the resumption of a previously suspended hearing on all pending motions. Present before the Court were Attorneys Sean A. O'Connor, counsel for Defendant U.S. Bank, National Association, as Trustee for Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 and Altisource Homes ("U.S. Bank"),[1] and Paul M. Fata, counsel for Defendant Lee County.[2] As explained further herein below, Plaintiff Laura Toney ("Plaintiff" or "Toney"), *Pro Se*, failed to appear at the hearing that had been duly noticed. Her absence was not excused by the Court.

[1] According to its filings, this Defendant is incorrectly named on page 1 of the Complaint as "LaSalle Bank National Association as Trustee for Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, A/K/A AltiSource Homes."

[2] According to its filings and the statements of Attorney Fata, Lee County Defendants were incorrectly identified by Plaintiff in the Complaint and therefore were never properly served.

For the reasons set forth below in detail herein:

1. The Motion to Dismiss by Defendant U.S. Bank, including the related or predecessor entities identified in the caption, is GRANTED, and all claims by Toney against Defendant U.S. Bank and its related or predecessor entities are dismissed with prejudice;

2. The Motion for Summary Judgment by Defendant Lee County and any and all individual Lee County Defendants identified in the caption is GRANTED, and all claims by Toney against Defendant Lee County, including any and all individual Lee County Defendants, are dismissed with prejudice; and

3. All motions by Plaintiff Toney are DENIED with prejudice.

INTRODUCTION

The basis of this dispute is a parcel of real property situated in Lee County and known as 729 Chatman Street, Bishopville, South Carolina 29010 (the "subject property"). The entire procedural history of the various litigation involving Toney and the subject property as stated herein below is relevant and directly related to the motions disposed of in this Order, as it illustrates the extraordinarily lengthy period of time that Toney has been repeatedly asserting the same arguments and how many times those arguments have been rejected by state and federal courts over a period of more than nine years since the initial judgment of foreclosure and sale of the subject property that was filed on March 9, 2007. As reflected in court records, Toney has asserted the same claims and allegations that the subject foreclosure was somehow improper, apparently undeterred by the fact that those claims were previously rejected by the Special Referee in Lee County, the South Carolina Court of Appeals and the South Carolina Supreme Court, and later by the U.S. District Court

for the District of South Carolina and the U.S. Court of Appeals for the Fourth Circuit, after which the U.S. Supreme Court denied certiorari.

The statements contained in the detailed Procedural History herein are reflected in the public records of Lee County, South Carolina, the Court of Common Pleas for the Third Judicial Circuit, the Court of Appeals of South Carolina, the Supreme Court of South Carolina, the U.S. District Court for the District of South Carolina, the U.S. Court of Appeals for the Fourth Circuit, and the United States Supreme Court.

PROCEDURAL HISTORY

This litigated dispute between U.S. Bank and Toney regarding the subject property and the mortgage loan that encumbered it has been ongoing since July 2005. Toney refinanced the subject property on October 6, 2004. During the closing, Toney entered into and received a mortgage that was secured by the subject property. On July 21, 2005, Defendant LaSalle Bank National Association as Trustee ("LaSalle"), which had been assigned the subject mortgage, filed a mortgage foreclosure action against Toney in Common Pleas Court in Lee County designated Case No. 2005-CP-31-00169. Toney filed, through counsel, an answer and counterclaim (alleging a TILA violation) on August 17, 2005. Thereafter, LaSalle filed a motion for summary judgment. On February 16, 2007, a dispositive hearing was held on the foreclosure action and motion for summary judgment by LaSalle as to the counterclaim. A judgment of foreclosure was entered and the summary judgment motion by LaSalle was granted as to the counterclaim, per the Order and Judgment of Foreclosure and Sale dated March 9, 2007. On or about March 22, 2007, Toney filed an application for a temporary restraining order, preliminary injunction and permanent injunction in state court, both in Case No. 2005-CP-31-00169 and in a separately-

filed action designated Case No. 2007-CP-31-00066. On April 2, 2007, the court dissolved the temporary restraining order. On April 25, 2007, Toney filed a motion for reconsideration of the foreclosure judgment, which was eventually denied. On April 27, 2007, LaSalle filed a notice of eviction against Toney. On May 7, 2007, a foreclosure sale at public auction was held, and LaSalle was the successful bidder. On April 14, 2008 Toney filed a Rule 60(b), SCRCP, motion for relief from the foreclosure order, which was eventually denied. At some point after the sale, after the Rule 60(b) motion and other motions of Toney were denied, Toney filed an appeal with the South Carolina Court of Appeals. The matter was designated Appellate Case No. 2011-201266. The South Carolina Court of Appeals affirmed the decision of the trial court in Op. No. 2011-UP-334 dated June 27, 2011. Toney appealed to the South Carolina Supreme Court. The South Carolina Supreme Court denied Certiorari on December 20, 2012.

While her ultimately unsuccessful petition for certiorari to the South Carolina Supreme Court was pending, Toney filed an action in U.S. District Court, Case No. 3:11-cv-01686-MBS-JRM (D.S.C.), addressing the same subject property and mortgage loan dispute and attacking the state court result. On September 25, 2012, U.S. District Judge Margaret B. Seymour granted motions to dismiss by LaSalle and Ocwen, denied Toney's motion for entry of default, and adopted the Report and Recommendation of the U.S. Magistrate, which recommended that outcome. [ECF No. 90]. Toney appealed to the U.S. Court of Appeals for the Fourth Circuit, and the case was designated as Appeal No. 12-2364. The Fourth Circuit affirmed the trial court in an unpublished opinion dated February 28, 2013. Toney petitioned for hearing *en banc*, which was denied on April 4, 2013. Toney appealed to the United States Supreme Court, where the matter was designated as No. 13-404. The U.S. Supreme Court denied certiorari on December 2, 2013.

While her ultimately unsuccessful petition for certiorari to the U.S. Supreme Court was pending, Toney filed the instant action, Case No. 2013-CP-31-00321, on November 13, 2013, in Common Pleas Court in Lee County, once again addressing the same foreclosed subject property, same circumstances, and attacking the results of the prior litigation. The Defendants removed the action to U.S. District Court, asserting that the Lee County Defendants were fraudulently joined, which destroyed diversity. The action was designated as Case. No. 3:13-cv-03481-MBS-SVH in federal court. Toney filed a motion to remand, which was granted on August 4, 2014. [ECF No. 20].

In the instant state court action, known after remand as Case No. 2013-CP-31-00321, eight (8) motions were pending for lengthy periods of time by late 2015, some of them for nearly two years, including motions to dismiss filed by Defendants that dated back to the early days of the action. Part of the delay was due to the infrequency of court terms in Lee County; another reason was a recusal by Circuit Judge George C. James, Jr., who determined he had a conflict after having been adverse to Toney in an insurance coverage matter some years ago when he was in private practice.

All of the pending motions were set to be heard by this Court in Bishopville on November 30, 2015. Once the hearing began, the Court allowed Toney to argue first. She started by presenting to this Court, for the first time, a new motion requesting that Attorneys O'Connor and Fata be disqualified "for ethical reasons"; the motion was not on the public index, and Defendants have been given no prior notice of the motion. Toney orally argued this motion at length, after which Attorneys O'Connor and Fata argued in opposition. This Court denied the

motion from the bench for disqualification of Attorney Fata and Attorney O'Connor. A written order denying the motion was issued by this Court and filed on February 4, 2016.

Toney consented to the dismissal of Defendant US Bank Cust for Pro Cap III LLC ("Pro Cap"), which had purchased the subject property at a tax sale. By the time of the hearing on November 30, 2015, the tax sale had been vacated by Lee County upon the request of Pro Cap. At this point, Pro Cap no longer had any interest in the subject property, and Plaintiff had no basis for any claim against Pro Cap. The stipulation of dismissal of Defendant Pro Cap was filed on November 30, 2015.[3]

Toney then argued in support of her other motions, starting with a motion for default against Defendant U.S. Bank (named in the pleadings as LaSalle and Altisource). This Court took the motion for default by Toney under advisement. The Court instructed Attorney O'Connor to submit additional authority corroborating the position of U.S. Bank, which he did the next day on December 1, 2015, and copied Toney. The memorandum was file-stamped December 7, 2015.

At approximately 2:00 p.m. on November 30, 2015, after the motion hearing had been ongoing for about an hour, the Court took a break and instructed everyone to return by 2:30 p.m. At 2:30 p.m., Attorneys Fata and O'Connor had returned to the courtroom, but Toney was not present. I asked Attorneys Fata and O'Connor whether they had seen or talked to Toney, but they had not. This Court took up other matters not involving this action until 3:45 p.m., at which point Toney still had not returned. Attorneys Fata and O'Connor were instructed to submit proposed orders on all the pending motions, and they were excused. The next morning, on

[3] This made moot Plaintiff Toney's "Motion to Strike Defendant's Pro Capital Investor's Answer to Complaint and Motion to Strike all Documents and Filings from Federal Court," filed December 8, 2014.

December 1, 2015, this Court learned of a doctor's excuse regarding Toney. The Court notes that a similar circumstance occurred once before in this action. After these motions were scheduled for a hearing on February 13, 2015, Toney contacted the Lee County Clerk's Office by letter dated February 11, 2015, and requested a continuance on the basis that she was under the care of a doctor for an illness. The hearing was continued.

Following the alleged health incident on November 30, 2015, I called into court the person who signed the note from the health care facility that Toney checked into the day of the hearing. The individual stated that she did not know Toney was using the note for the purpose of explaining or excusing an absence from a court appearance. She also said that she would not have signed the note, had she known the purpose, because she was unable to diagnose Toney's condition or detect an illness on the part of Toney on November 30, 2015. The individual said that she would not sign a note under such circumstances in the future.

On January 6, 2016, Toney filed a motion seeking to have me recuse myself as presiding judge in this case. This was the posture of the action when the hearing on all pending motions resumed on March 30, 2016, at 12:00 p.m.

The morning of March 30, 2016, hours before the hearing was set to resume, Toney contacted this Court via email and requested cancellation or postponement of the hearing, claiming that she was ill and stating that she was at a health care facility.

RULING AND DECREE

This Court has carefully reviewed and considered the arguments of the parties, pleadings, briefs and memoranda on file, in addition to the arguments advanced on behalf of the parties at the hearing on March 30, 2016. Based upon this review, this Court rules and decrees as follows:

1. **Plaintiff's request for postponement or rescheduling of the hearing on March 30, 2016, requested via email on March 30, 2016, is denied.**

Upon careful consideration, this Court denies the last-minute email request by Toney on the morning of March 30, 2016, to postpone the hearing scheduled for 12:00 p.m. that day. Toney did not file a motion in connection with this request. After the hearing was scheduled for March 30, 2016, Toney sought by filing and by sending emails to the Court on or about March 22, 2016, to have it rescheduled based upon an assertion that she had "personal obligations for March 26-30, 2016." However, Toney failed to specify to the Court or provide any detail regarding those personal obligations. Accordingly, this Court finds the claim of unavailability by Toney on the date of the hearing lacks good and sufficient cause shown. The Court takes into account the previous instances during the pendency of this action in which it appeared that Toney sought to delay the progress of adjudicating this case by repeatedly seeking continuances and postponements of hearings based upon tenuous and uncorroborated assertions regarding her personal circumstances, including but not limited to the above-referenced credible statements of the individual who signed the note that Toney presented when she failed to return to court on November 30, 2015, after a brief break. This Court finds that the overall conduct of Toney in this regard demonstrates a propensity and pattern of abuse of the court system, and that her statements in this regard have not been credible. This Court will not reward such conduct by

granting another continuance that would prejudice the other parties whose attorneys appeared at the hearing as scheduled.

This Court further notes Order No. 2015-09-10-01 of the Supreme Court of South Carolina, outlining the Civil Motions Pilot Program,[4] which provides, in pertinent part: "[a]fter the submission of all timely filed briefs, the trial court may grant oral argument in its discretion or may rule without further notice on the written filings without scheduling oral argument." Here, the Court notes that Toney made a number of written filings setting forth her positions and arguments on all issues, including the pending motions, all of which have been duly considered. This Court therefore exercised its discretion to proceed with the hearing.

2. **Plaintiff's Motions for Recusal are denied.**

This Court denies the motions that this Court recuse itself from presiding over this action. Pursuant to Canon 3(E)(1) of the Judicial Code of Conduct, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned...." Canon 3(E)(1), Rule 501, SCACR.

The judicial canons provide direction as to when disqualification may be necessary, including but not limited to, instances where:

> (1) the judge holds personal bias or prejudice towards a litigant or counsel or has personal knowledge of evidentiary facts in dispute in the proceeding; (2) the judge either worked on the case as a lawyer, a lawyer with whom the judge previously practiced law worked on the case while the judge was associated with the lawyer's firm, or the judge has been a material witness concerning the case; (3) the judge "knows" that he or a member of his

[4] *Available at* http://www.judicial.state.sc.us/whatsnew/displaywhatsnew.cfm?indexID=1042.

family (spouse, parent, or child) has more than a de minimus [sic] economic interest in the litigation and the litigation will "substantially affect[ ]" that interest; or (4) the judge or his spouse or a person within the third degree of relationship to them (or the spouse of such a person) is either a party or the officer, director, or trustee of a party, is a lawyer in the case, known to have more than a de minimus [sic] interest that could be substantially affected by the litigation, or, to the judge's knowledge, is likely to be a material witness in the proceeding. Canon 3(E)(1)(a)-(d).910; *Davis v. Parkview Apartments*, 409 S.C. 266, 284–85, 762 S.E.2d 535, 545 (2014), reh'g denied (Sept. 11, 2014).

"Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." *Davis, supra,* citing *Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004) (citation omitted); *Simpson v. Simpson*, 377 S.C. 519, 522, 660 S.E.2d 274, 276 (Ct. App. 2008); see also *Ellis v. Procter & Gamble Distrib. Co.*, 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993). In cases involving an alleged violation of Canon 3, an appellate court will affirm a trial judge's failure to disqualify himself only if there is no evidence of judicial prejudice. Appellate courts "accord great weight to the trial judge's assurance of his own impartiality." *Id.* It is the movant's responsibility to provide some evidence of the existence of the judge's impartiality. *Lyvers v. Lyvers*, 280 S.C. 361, 367, 312 S.E.2d 590, 594 (Ct. App. 1984) (citation omitted).

Applying the above standard, this Court finds no credible basis to any claim by Toney questioning the impartiality of this Court. Therefore, the motions for recusal are denied.

3. Defendant U.S. Bank's Motion to Dismiss against Plaintiff, filed December 1, 2014, is granted,[5] and the Motion for Sanctions is held in abeyance.

A. The Motion to Dismiss by U.S. Bank is granted on *res judicata* grounds.

As a threshold matter, it is appropriate for the Court to address *res judicata* at the Rule 12(b)(6) stage. *Res judicata* is an affirmative defense and is treated as a basis for dismissal under Rule 12(b)(6). *See Davani v. Va. Dep't of Transp.*, 434 F.3d 712, 720 (4th Cir. 2006) (*res judicata* or claim preclusion challenge is to be considered pursuant to Rule 12(b)(6)); *Andrews v. Daw*, 201 F.3d 521, 524 n.1 (4th Cir. 2000) (an affirmative defense such as *res judicata* may be raised under Rule 12(b)(6) "if it clearly appears on the face of the complaint.").

The foreclosure of the subject property was adjudicated with finality, with the judgment of foreclosure and sale of the subject property filed on March 9, 2007. The South Carolina Court of Appeals and the South Carolina Supreme Court affirmed that judgment. The same issues were re-litigated in the U.S. District Court for the District of South Carolina, where the lienholder and loan servicer of the same mortgage loan on the same subject property prevailed over Toney on those claims. The U.S. Court of Appeals for the Fourth Circuit affirmed and the U.S. Supreme Court denied certiorari.

Res judicata requires: "(1) identical parties or their privies; (2) identity of subject matter; and (3) adjudication of the issue in the former suit." *Ford v. Watson*, 282 S.C. 66, 316 S.E.2d 429 (Ct. App. 1987). An unsuccessful litigant is precluded from relitigating all claims that were actually litigated and any claims that could have been litigated. *Wold v. Funderburg*, 250 S.C.

[5] Seven days after removal to the U.S. District Court for the District of S.C., Defendant U.S. Bank timely filed in the court, pursuant to Rule 81(c)(2)(C) FRCP, a Motion to Dismiss for Failure to State a Claim [ECF No. 5, filed December 20, 2013.] Defendant U.S. Bank later filed in the same court an Amended Motion to Dismiss and Motion for Sanctions. [ECF No. 44, filed January 20, 2014.]

205, 157 S.E.2d 180 (1975). The doctrine of res judicata bears little, if any, relation to equitable estoppel, although it does bear some of the marks of estoppel by record, with the judgment of the court on the pleadings preventing those things found to be true from being relitigated between the same parties or their privies. 7 S.C. Jur. *Estoppel and Waiver* § 27.

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. ***RIM Associates v. Blackwell***, 359 S.C. 170, 597 S.E.2d 152 (Ct. App. 2004). *Res judicata* bars not only the claims that were actually raised in a prior action, but also those issues which might have been raised in the former suit. *Id.*

In the instant case, the claims by Plaintiff Toney are barred by the doctrine of *res judicata* because all three elements are satisfied. First, the U.S. District Court for the District of South Carolina previously dismissed Plaintiff's claims on *res judicata* grounds, noting that "final judgment has been entered on the merits against Plaintiff in at least two prior civil actions, *LaSalle Bank v. Laura Toney*, Case No. 2005-CP-31-169 and *Laura A. Toney v. Ocwen Federal Bank*, Case No. 2010-CP-31-180." Case No. 3:11-cv-01686-MBS, ECF No. 90, Order and Opinion of Chief United States District Judge Margaret B. Seymour, filed September 25, 2012, at pp. 12–14.

Second, the allegations contained in the instant complaint stem from the same set of facts that gave rise to Plaintiff's claim for relief in the prior cases. As Judge Seymour noted in her 2012 Order and Opinion, at the heart of the prior cases was a dispute regarding "Defendants' entitlement to foreclosure of the Property versus Plaintiff's attempt to prevent the foreclosure of

the property." *Id.* Likewise, in this case, the Complaint is premised on the belief that "[t]he foreclosure of the Plaintiff's property was an illegal action." Compl. ¶ 3. The true nature of this case is further demonstrated by Plaintiff's numerous assertions that "she still possesses legal title to the premises." *Id.*; *see also id.* at ¶¶ 6-8, 12, and Compl. Prayer for Relief ¶¶ 1-5. The underlying dispute is identical.

Finally, the parties in this case are the same as in the prior cases: Laura Toney and U.S. Bank, successor in interest to LaSalle Bank.[6]

To the extent, if any, Plaintiff alleges claims not expressly mentioned in her prior suits, these claims are also barred by the doctrine of *res judicata* because Plaintiff had an opportunity to raise them. *RIM Associates v. Blackwell, supra*; *Peugeot Motors*, 892 F.2d at 359 (*res judicata* "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceedings.") (quoting *Brown v. Felsen*, 442 U.S. 127, 131 (1979)).

For these reasons, it is appropriate for this Court to dismiss claims by Plaintiff on *res judicata* grounds as was done by the U.S. District Court for the District of South Carolina in 2012, which decision was affirmed on appeal and is now final. Thus, this Court so decrees.

B. The Motion by Defendant U.S. Bank pursuant to Rule 12(b)(6) is moot.

This Court has dismissed all claims by Toney against U.S Bank with prejudice on *res judicata* grounds. This motion is therefore moot.

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[6] LaSalle Bank held the mortgage at the time of the 2007 foreclosure. LaSalle Bank has since transferred its interest to U.S. Bank. Because U.S. Bank is a successor in interest to LaSalle Bank, *res judicata* is equally applicable. Furthermore, collateral estoppel would bar Plaintiff's claims even if this suit involved different parties. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 329 (1979) ("Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely 'switching adversaries.'").

C. This Court makes no ruling on the assertion by Defendant U.S. Bank that it and its predecessors should be dismissed pursuant to Rules 12(b)(4) and 12(b)(5), SCRCP.

In light of Section 3.A of this Order, this Court finds it unnecessary to rule on the assertion of U.S. Bank that U.S. Bank and its predecessors should be dismissed pursuant to Rules 12(b)(4) and 12(b)(5), SCRCP. Accordingly, this Court declines to address that portion of the motion by U.S. Bank, finding it unnecessary and immaterial to the outcome.

D. This Court holds in abeyance the Motion for Sanctions by Defendant U.S. Bank against Plaintiff.

As part of its Motion to Dismiss, Defendant U.S. Bank moved and requested that Plaintiff be sanctioned for filing the instant suit on the grounds that:

> (1) Plaintiff has a long history of abusing the state and federal judicial systems with meritless and vexatious filings; (2) Plaintiff has attempted to prevent, dispute or otherwise thwart the lawful foreclosure and sale of the subject property more than ten times; (3) Plaintiff has filed a total of seven bankruptcy actions in the United States Bankruptcy Court for the District of South Carolina admittedly as an attempt to save her property; (4) said Bankruptcy Court banned Plaintiff from filing any actions for a period of one year; (5) Plaintiff has filed additional state court actions as to other pieces of property; and (6) Plaintiff includes baseless allegations in the instant litigation.[7]

Defendant U.S. Bank further asserts that the U.S. District Court for the District of South Carolina warned Toney in 2012 of the potential consequences of filing further legal actions regarding the foreclosure of the subject property stating that: "Plaintiff, however, ***is warned*** that

[7] Civil Action No. 3:11-cv-01686-MBS, Order and Opinion of Chief United States District Judge Margaret B. Seymour, ECF No. 90, filed September 25, 2012, at pp. 10-11.

filing future frivolous actions may result in appropriate sanctions against Plaintiff including any sanctions available under Fed. R. Civ. P. 11"[8] (emphasis added).

Although this Court seriously considers the facts and circumstances presented by U.S. Bank in its motion for sanctions, this Court finds that in the interest of justice, Toney should be allowed to address the motion in person. Although this Court does not condone or excuse Toney's absence, the Court holds this portion of U.S. Bank's motion in abeyance, with leave to revisit it. This Court therefore decrees that U.S. Bank is free to revisit this issue upon the scheduling of a separate hearing in Lee County. Such a hearing shall be scheduled through the Clerk of Court of Lee County upon the request of U.S. Bank. Once a hearing is scheduled, Toney shall be required to appear upon due notice of the date and time.

4. The Motion for Summary Judgment of Defendant Lee County filed on December 19, 2014, is granted, including its Motion for Sanctions against Toney.

A. The Motion for Summary Judgment of Defendant Lee County is granted.

Defendant Lee County, identified in the Complaint as "Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning," moved before the Court for summary judgment under Rule 56, SCRCP, on the following grounds:

[8] Civil Action No. 3:11-cv-01686-MBS, Report and Recommendation of U.S. Magistrate Judge Joseph R. McCrorey, ECF No. 79, filed August 9, 2012, at p. 24.

Service was never completed upon Defendants "Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning," and therefore they are not properly before this Court. Defendants "Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning" were, at all times relevant to Plaintiff's claims, exercising their administrative duties and took no action that injured Plaintiff.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Lanham v. Blue Cross & Blue Shield of S. Carolina, Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002), citing *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545. With respect to an issue upon which the nonmoving party has the burden of proof, this initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case. *Id.* In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997). 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). 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).

Applying this standard and viewing all facts in the light most favorable to the non-moving party, i.e., Plaintiff, this Court finds that there is no genuine issue of material fact and the moving party, Defendant Lee County, is entitled to judgment as a matter of law. This Court finds that there is no dispute as to any material evidentiary facts or any legitimate disagreement concerning the conclusion to be drawn from those facts. For these reasons, this Court grants Defendant Lee County's motion for summary judgment pursuant to Rule 56, SCRCP.

B. The Motion for Sanctions by Defendant Lee County against Plaintiff is granted.

Defendant Lee County moved for sanctions against Toney pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 *et seq.* (2005).

This Court finds it obvious that Plaintiff had no viable theories of recovery at any relevant time against Lee County or any individual Lee County Defendant. Plaintiff nonetheless named Lee County and the individual Lee County Defendants, causing the County to have to defend patently frivolous claims for over two years at the expense of the taxpayers. For these reasons, this Court sanctions Plaintiff Toney in the full amount of the reasonable attorneys' fees and costs incurred by Lee County in defending this action.

Attorney Fata is directed to submit to this Court an affidavit of said attorneys fees and costs incurred. After review, this Court will file a supplemental order stating the amount of the award against Toney in favor of Lee County. The order shall be filed in the public records as a money judgment.

5. "Motions for Rulings on Motions to Strike and Motion for Default" filed by Toney on September 25, 2014, are denied.

Having found and determined that Defendant U.S. Bank was not in default under applicable law, this Court denies the motion for default by Plaintiff Toney against Defendant U.S. Bank with prejudice.

A. Factual and procedural background as to this motion

Plaintiff filed the Summons and Complaint in this action on November 13, 2013. (See Lee County Public Index at sccourts.org.) Defendant removed the case to the United States District Court for the District of South Carolina, Columbia Division, on December 13, 2013. Case No. 3:13-cv-03481-MBS-SVH [ECF No. 1]. Defendant then timely filed in U.S. District Court a *Motion to Dismiss for Failure to State a Claim* on December 20, 2013. [ECF No. 5]. Defendant filed in U.S. District Court an *Amended Motion to Dismiss and Motion for Sanctions* (hereinafter "the Motion") on January 20, 2014. [ECF No. 44].

B. Ruling and decree as to this motion

i. Removal was timely.

The motion to dismiss filed in U.S. District Court by Defendant U.S. Bank is recognized as a valid responsive pleading and a defense within the meaning of the South Carolina Rules of Civil Procedure and the Federal Rules of Civil Procedure. Rule 12(a), SCRCP, states in part:

> A defendant shall serve his answer within 30 days after the service of the complaint upon him.... The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the Court: (1) if the Court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 15 days after notice of the Court's action[.]

Moreover, Rule 12(b), SCRCP, requires that 12(b)(4), 12(b)(5) and 12(b)(6) defenses, as were

asserted here, must be raised by motion before further pleading.[9]

Defendant U.S. Bank's Motion to Dismiss was not heard or ruled upon and remained pending when the U.S. District Court remanded the case on August 5, 2014. [ECF No. 64]. Defendant U.S. Bank's Motion to Dismiss therefore remains pending and is now properly before this Court. Defendant's original motion to dismiss was timely filed more than ten months before Plaintiff filed her Motion for Default on September 25, 2014. The amended motion was filed some nine months before Plaintiff's Motion for Default.

At the hearing on Plaintiff's Motion for Default on November 30, 2015, Plaintiff first argued that Defendant U.S. Bank did not timely remove this action to federal court. This is inconsistent with the record, which reflects that the Complaint was filed on November 13, 2013, and was removed on December 13, 2013. Based upon these dates, even if the Complaint was served on the same day it was filed, removal was timely. Although removal to federal court is required to be filed within 21 days, based on the fact that an answer in federal court is due 21 days after service, the Defendants here had 30 days to remove. See 28 U.S.C. § 1446(b). It is clear that removal was timely and this Court therefore rejects the argument of Plaintiff as to this issue.

ii. Defendant U.S. Bank was not required to re-file its Motion to Dismiss in state court following remand.

Plaintiff argued that Defendant U.S. Bank (identified in the Complaint as LaSalle Bank

[9] "Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state facts sufficient to constitute a cause of action, (7) failure to join a party under Rule 19, (8) another action is pending between the same parties for the same claim. **A motion making any of these defenses shall be made before pleading if a further pleading is permitted.**" Rule 12(b), SCRCP (emphasis added).

and Altisource) defaulted by failing to re-file its motion to dismiss in state court following remand.

Although no state or federal South Carolina authority exists addressing this specific issue, the authority in other jurisdictions that has addressed this issue appears to be consistent in holding that a motion to dismiss pending in federal court is not required to be re-filed in state court upon remand.

"[T]he state court ordinarily receives the case in the posture it is in when remanded and, thus, a pleading filed in federal court need not be refiled in state court." 77 C.J.S. Removal of Cases § 180. Several jurisdictions across the country have followed this black letter rule, as reflected in the decisions excerpted below. Currently, and going back as far as 1948, no jurisdictions require a motion to dismiss pending in federal court to be refiled in state court upon remand in order for such motion to dismiss to remain valid and in effect. More pertinently, for purposes of Plaintiff's motion, the pendency of a motion to dismiss in federal court at the time of remand renders a motion for default by the plaintiff upon remand ineffective, even where the motion to dismiss is not re-filed in state court.

> Whether the cases cited by Aetna and Hansen are distinguishable or whether they do in fact stand for the proposition that federal pleadings should be disregarded after remand, this court is of the opinion that the better rule favors giving continued effect to those pleadings. Adoption of the federal pleadings filed in this case would avoid the needless waste of time, effort and expense which would result from requiring counsel to duplicate in this court their actions of the past six years in the federal court. Such an unnecessary duplication of effort alone indicates the preferability of adopting the federal pleadings.
>
> Additionally, the adoption of the pleadings would result in the post-remand procedure in this court mirroring as nearly as possible the post-removal procedure in the federal court. Upon removal, the entire

> record is delivered to the clerk of the federal court and that court assumes its jurisdiction with the case in exactly the same position as when it was removed from the state court. Adoption of the federal pleadings would result in this court's renewing its jurisdiction with the case in exactly the same posture as when it was remanded from the federal court. Counsel has not suggested nor has the court discovered any convincing reason why this continuity in the proceedings is not preferable to the procedure urged by Hansen and Aetna.

Edward Hansen, Inc. v. Kearny Post Office Associates, 166 N.J. Super. 161, 170, 399 A.2d 319, 323 (Ch. Div. 1979).

> We believe the irregularity in the case before us, if it be an irregularity at all, in failing to refile the Motions to Dismiss in the state court following remand from the federal court is likewise inconsequential. We therefore hold that when filed the Motions to Dismiss were properly before the Federal District Court but that when the federal court ordered remand without having ruled upon such motions, they were properly ruled on by the state court without 'refiling' in the state court. Viles v. Sharp, 248 F. Supp. 271 (W.D. Mo. 1965). See Ayres v. Wiswall 112 U.S. 187, 5 S.Ct. 90, 28 L.Ed. 693 (1884); Ransom v. Sipple Truck Lines, Inc., 52 F. Supp. 521 (N.D. Iowa 1943); Olds v. Brown Shoe Co., 25 F. Supp. 880. (W.D. Mo. 1938). (Cases decided under predecessor statute to 28 U.S.C. § 1446 et seq.)

Citizens Nat. Bank of Grant Cty. v. First Nat. Bank in Marion, 165 Ind. App. 116, 124–25, 331 N.E.2d 471, 476–77 (1975).

> The time has past when technical rules were applied to those who sought unsuccessfully to remove cases to the federal courts. We therefore hold that a timely answer filed in district court following timely removal of the action is sufficient to prevent a default in a state court if the case is subsequently remanded from district court. Cotton v. Federal Land Bank of Columbia, supra. See Shelton v. Bowman Transportation Co., 140 Ga. App. 248(2), 230 S.E.2d 762 (1976). Accord Edward Hansen, Inc. v. Kearney Post Office Assoc., 166 N.J. Super. 161, 399 A.2d 319 (1979). Cf. Citizens Nat'l Bank v. First Nat'l Bank, 165 Ind. App. 116, 331 N.E.2d 471, 476–77 (1975); Bolden v. Brazile, 172 So.2d 304, 310 (La. App. 1965). The superior court erred in ruling that the defendants were in default on the claim for damages.

Teamsters Local 515 v. Roadbuilders, Inc. of Tennessee, 249 Ga. 418, 421, 291 S.E.2d 698, 701 (1982) overruled on other grounds by Shields v. Gish, 280 Ga. 556, 629 S.E.2d 244 (2006).

> State courts in New Mexico and Utah rendered opinions in the 1920s and 1930s that pleadings filed in federal court prior to remand to state court for want of jurisdiction were, essentially, a nullity because the federal court had lacked jurisdiction... However, "[t]here have been no cases since 1948 in which Tracy Loan & Trust Co. v. Mut. Life Ins. Co. [7 P.2d 279 (Utah 1932)] or Citizens' Light, Power & Tel. Co. v. Usnik [194 P. 862 (N.M. 1921)] have been followed." Laguna Village, Inc. v. Laborers' Int'l. Union of N. Am., Local Union No. 652, AFL CIO, 35 Cal. 3d 174, 180, 197 Cal. Rptr. 99, 103, 672 P.2d 882, 885 (1983).
>
> More recently, state courts have given effect to pleadings filed in federal court prior to a remand to state court. See, e.g., Laguna Village, Inc., 35 Cal. 3d at 180-182, 197 Cal. Rptr. at 102-104, 672 P.2d at 885–887; Williams v. St. Joe Minerals Corp., 639 S.W.2d 192, 194–195 (Mo. App. 1982); Teamsters Local 515 v. Roadbuilders, Inc., 249 Ga. 418, 421, 291 S.E.2d 698, 700-701 (1982); Citizens Nat'l. Bank v. First Nat'l. Bank, 165 Ind. App. 116, 125, 331 N.E.2d 471, 476–477 (1975).
>
> ...
>
> [R]equiring parties to file documents multiple times does not comport with considerations of judicial economy, especially where the document at issue is an answer that is directed at another party, rather than a request for action by the trial court. Accordingly, we hold that a party need not refile documents in the court of common pleas after a case is remanded from federal court so long as that party makes the trial court aware of the filing's existence and, if challenged, shows proof of service on the other party at the time the document was filed in federal court.

Banks v. Allstate Indemn. Co., 143 Ohio App. 3d 97, 99–101, 757 N.E.2d 776, 778–79 (2001). Accord: Mosby v. W. Anderson, 363 S.W.3d 397 (Mo. Ct. App. 2012), and JurisDictionUSA, Inc. v. Loislaw.com, Inc., 183 S.W.3d 560, 564 (Ark. 2004).

Based on this consistent ruling, as illustrated by the several authorities cited herein, Plaintiff's argument that Defendant U.S. Bank should be held in default for not re-filing its motion to dismiss in state court, which was timely and properly filed in federal court, necessarily fails. Based on the facts and procedural history of this case, as well as the weight of persuasive case law, the motion for default of Plaintiff against U.S. Bank is denied with prejudice.

6. **The "Motion to Strike the Defendants LaSalle Bank A/K/A Altisource Homes and Sanctions are Imposed on the Defendants for Fraud on the Court and Motion to Strike all Documents from Federal Court" filed by Plaintiff on December 8, 2014, is denied.**

After careful consideration, this Court finds that the motion by Plaintiff fails to identify relief which can be properly granted based upon the prevailing facts, circumstances, and the applicable substantive and procedural law. This Court notes that the motion contains several misstatements and mischaracterizations that do not warrant detailed analysis or discussion. Instead, this Court directs reference to Section 3.A of this order herein above. Accordingly, this motion by Plaintiff is denied with prejudice.

7. **The "Motion to Strike Defendants Mr. Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning for Insufficiency of Service of Process" filed by Plaintiff on December 23, 2014, is denied.**

Upon review of this motion, this Court finds that it fails to identify relief which can be properly granted based upon all the prevailing facts, circumstances, and the applicable substantive and procedural law. The Court finds that the motion contains several misstatements and mischaracterizations which do not warrant detailed analysis or discussion. Instead, the Court directs reference to Section 4.A of this order herein above. This motion by Plaintiff is therefore denied with prejudice.

CONCLUSION

For the foregoing reasons and in accordance with this Order, this Court:

1. GRANTS the Motion to Dismiss by Defendant U.S. Bank, including the related or predecessor entities identified in the caption; therefore, all claims by Plaintiff Toney against Defendant U.S. Bank are dismissed with prejudice;

2. GRANTS the Motion to Dismiss by Defendant Lee County, including any and all individual Lee County Defendants identified in the caption; therefore, all claims by Plaintiff Toney against Defendant Lee County and any and all individual Lee County Defendants are dismissed with prejudice; and

3. DENIES all motions by Plaintiff Toney with prejudice.

Laura Toney v. LaSalle Bank National Association, etc., et al.
2013-CP-31-00321

ORDER GRANTING DEFENDANT
U.S. BANK'S MOTION TO DISMISS,
GRANTING DEFENDANT LEE COUNTY'S
MOTION FOR SUMMARY JUDGMENT,
AND DENYING ALL MOTIONS
BY PLAINTIFF LAURA TONEY

AND IT IS SO ORDERED.

Clifton Newman
Presiding Judge

July 6, 2016
Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, Plaintiff, vs. LaSalle Bank National Association as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, Defendants.	Civil Action No. 3:13-cv-03481-MBS-SVH

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND MOTION FOR SANCTIONS

COMES NOW, Defendants LaSalle Bank National Association and AltiSource Homes (respectively "LaSalle Bank" and "AltiSource Homes" or collectively "Defendants"), by and through undersigned counsel, and hereby file this Memorandum of Law in Support of their Motion to Dismiss and Motion for Sanctions and would show unto the Court as follows:

INTRODUCTION

The underlying facts of this case are simple; muddled only by the relentless filings of Plaintiff. In short, Plaintiff defaulted on her mortgage and LaSalle Bank rightfully foreclosed on the property in May 2007. Plaintiff has contested the foreclosure sale in South Carolina's state and federal courts on more than ten separate occasions. Both courts have entered final judgments against Plaintiff. Plaintiff is now beating a dead horse. This Court should dismiss

this case with prejudice because it is barred by the doctrine of *res judicata* and otherwise fails to state a claim upon which relief can be granted. This Court should also sanction Plaintiff for her behavior.

STATEMENT OF FACTS

On October 6, 2004, Plaintiff refinanced her house located at 729 Chatman Street in Bishopville, South Carolina.[1] On June 14, 2005, Plaintiff sent a letter attempting to rescind the loan due to an alleged failure to make certain disclosures required by the Truth-in-Lending Act. On or around July 21, 2005, LaSalle Bank filed a *lis pendens* and complaint seeking permission to foreclose on Plaintiff's property. *LaSalle Bank v. Laura Toney*, Case No. 2005-CP-31-169, in the Court of Common Pleas of Lee County, South Carolina. LaSalle Bank filed a motion for summary judgment which was granted on March 15, 2007. The court entered an order declaring that LaSalle Bank "should have judgment of foreclosure of the mortgage and the mortgage property should be ordered sold at public auction." After repeated attempts by Plaintiff to prevent foreclosure, the property was sold on May 7, 2007.

Plaintiff appealed to the South Carolina Court of Appeals. The court affirmed the foreclosure sale.

Undeterred, Plaintiff then filed a motion for a temporary injunction and a "Complaint to Set Aside Fraudulent Transfer, and Fraud; Declaratory Judgment for Entry of Default, Gross Negligence, Emotional Distress, Deceptive and Unfair Trade Practices" on July 13, 2011 in the United States District Court for the District of South Carolina.

[1] Some of the facts in this section are not stated in Plaintiff's most recent complaint. They are, however, set forth in the record of a case previously before this Court (C.A. No. 3:11-1686-MBS). It is proper for the Court to take judicial notice of these facts. *See Weber v. Jones*, 8:13-CV-01040-GRA, 2013 WL 3328673, *5 (D.S.C. July 2, 2013) (citing *Aloe Creme Lab., Inc. v. Francine Co.*, 425 F.2d 1295, 1296 (5th Cir. 1970) (noting the district court had the right to take notice of its own files and records).

In March 2011, this Court denied Plaintiff's motion for injunction relief. Plaintiff then appealed to the Fourth Circuit, who affirmed the denial. Appeal No. 12-1452 (August 24, 2012).

With the injunction issue resolved, LaSalle Bank moved to dismiss Plaintiff's complaint. On August 9, 2012, United States Magistrate Judge Joseph R. McCrorey entered a detailed Report and Recommendation recommending that Plaintiff's case be dismissed because: (1) it was barred by the doctrine of *res judicata*; and (2) it failed to state any claim upon which relief could be granted.[2] Chief United States District Judge Margaret B. Seymour agreed and dismissed Plaintiff's case on *res judicata* grounds.[3]

Plaintiff appealed this decision to the United States Court of Appeals for the Fourth Circuit. On February 28, 2013, the court affirmed "for the reasons stated by the district court." Appeal No. 12-2364 (February 28, 2013). Belligerently, Plaintiff filed a writ of certiorari to the United States Supreme Court, which has since been denied.[4]

Before the Supreme Court decided whether to accept Plaintiff's case, she filed the instant action. This Complaint is nothing more than an attempt to re-litigate a case which the South Carolina state and federal courts have already ruled meritless.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of an action when the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of [her] entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action

[2] A copy of the Report and Recommendation is attached as Exhibit A.
[3] A copy of the Order and Opinion is attached as Exhibit B.
[4] The United States Supreme Court denied writ of certiorari on December 2, 2013. *Laura Toney v. LaSalle Bank National Association, Trustee*, No. 13-404.

will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal marks and citations omitted). *Res judicata* is an affirmative defense and is treated as a basis for dismissal under Rule 12(b)(6). *See Davani v. Va. Dep't of Transp.*, 434 F.3d 712, 720 (4th Cir. 2006) (*res judicata* or claim preclusion challenge is to be considered pursuant to Rule 12(b)(6)); *Andrews v. Daw*, 201 F.3d 521, 524 n.1 (4th Cir. 2000) (an affirmative defense such as *res judicata* may be raised under Rule 12(b)(6) "if it clearly appears on the face of the complaint.").

ARGUMENT

This Court should grant Defendants' Motion to Dismiss because Plaintiff's claims are barred by the doctrine of *res judicata*. Alternatively, Plaintiff's allegations fail to state a claim upon which relief can be granted. This Court should also grant Defendants' Motion for Sanctions because Plaintiff has already been given fair warning that she would be sanctioned for filing additional pleadings.

I. Plaintiff's Claims Should Be Dismissed.

A. Plaintiff's claims are barred by the doctrine of *res judicata*.

"Res judicata is applied to prevent the re-litigation of claims, and thus prevent the unsettling of a prior judgment, whether by increasing or decreasing the award of by reversing the result." *Heckert v. Dotson*, 272 F.3d 253, 258 (4th Cir. 2001). "'For the doctrine of res judicata to be applicable, there must be: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or their privies in the two suits.'" *Martin v. Am. Bancorp. Ret. Plan*, 407 F.3d 643, 650 (4th Cir. 2005) (quoting *Pueschel v. United States*, 369 F.3d 345, 354-55 (4th Cir. 2004)). Furthermore, *res judicata* not only "bar[s] claims that were raised and fully litigated," but also "'prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties,

regardless of whether they were asserted or determined in the prior proceedings.'" *Peugeot Motors v. E. Auto Distrib.*, 892 F.2d 355, 359 (4th Cir. 1989) (quoting *Brown v. Felsen*, 442 U.S. 127, 131 (1979)).

Plaintiff's claims are barred by the doctrine of *res judicata* because all three elements are satisfied. First, this Court has already dismissed Plaintiff's claims on *res judicata* grounds. Exhibit B at p. 13 (noting that "final judgment has been entered on the merits against Plaintiff in at least two prior civil actions, *LaSalle Bank v. Laura Toney*, Case No. 2005-CP-31-169 and *Laura A. Toney v. Ocwen Federal Bank*, Case No. 2010-CP-31-180.").

Second, the allegations contained in the instant complaint stem from the same set of facts that gave rise to Plaintiff's claim for relief in the prior cases. As this Court noted, at the heart of the prior cases was a dispute regarding "Defendants' entitlement to foreclosure of the Property versus Plaintiff's attempt to prevent the foreclosure of the property." *Id.* Likewise, in this case the Complaint is premised on the belief that "[t]he foreclosure of the Plaintiff's property was an illegal action." Compl. ¶ 3. Clearly, the underlying dispute is identical.

Finally, the parties in this case are the same as in the prior cases: Laura Toney, LaSalle Bank, and AltiSource.

For these reasons, the Court should dismiss Plaintiff's claims on *res judicata* grounds as it has already done previously. To the extent, if any, Plaintiff alleges claims not expressly mentioned in her prior suits, they are also barred by the doctrine of *res judicata* because Plaintiff had an opportunity to raise them. *Peugeot Motors*, 892 F.2d at 359 (*res judicata* '"prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceedings'") (quoting *Brown*, 442 U.S. at 131).

B. While not necessary for the Court to consider, Plaintiff's claims also fail to state a claim upon which relief can be granted.

Because Plaintiff's claims are barred by *res judicata*, the Court need not consider whether Plaintiff's claims have been adequately pleaded under Rule 12(b)(6). Should the Court wish to consider these arguments, the Court should adopt the Magistrate Judge's Report and Recommendation which explains why Plaintiff's claims would also be barred under the Rule 12(b)(6) standard.

II. Plaintiff Should Be Sanctioned For Continuing To File Meritless Claims.

Plaintiff should be sanctioned for filing the instant suit because she has already received fair warning that she would be sanctioned if she brought another claim. The last time this case was before the Court, Defendants moved for sanctions because of Plaintiff's frivolous filings. Indeed, as the Court has noted previously, the pattern of Plaintiff's egregious behavior cannot be overemphasized: (1) Plaintiff has a long history of abusing the state and federal judicial systems with her meritless and vexatious filings, (2) Plaintiff has attempted to prevent or otherwise dispute the lawful foreclosure sale of the subject property more than ten times, (3) Plaintiff has filed a total of seven bankruptcy actions in the United States Bankruptcy Court for the District of South Carolina admittedly as an attempt to save her property, (4) said Bankruptcy Court banned Plaintiff from filing any actions for a period of one year, (5) Plaintiff has filed additional state court actions as to other pieces of property, and (6) Plaintiff includes baseless allegations in her current litigation.[5]

The only reason sanctions were not imposed in the prior case was because it was unclear whether Plaintiff, a *pro se* litigant, had "been warned of the consequences of filing such actions

[5] Exhibit B at pp. 10-11.

in this Court."[6] While Plaintiff was shown leniency, the order also made clear the consequences of filing another suit: "Plaintiff, however, ***is warned*** that filing future frivolous actions may result in appropriate sanctions against Plaintiff including any sanctions available under Fed. R. Civ. P. 11."[7]

A clearer case for sanctions could not be made. In imposing sanctions against a *pro se* litigant, the South Carolina district court explained:

> The court warned Plaintiffs three years ago that their litigation tactics "would long ago have resulted in serious sanctions against members of the bar" and that the court was being "extremely patient" with them only because of their pro se status. *Potter v. Crestwood Golf Club, Inc., et al.*, C.A. No. 5:94 2047–22, Order filed 4/17/96 at 43 (*Potter II*).
>
> Despite this admonition, Plaintiffs persist in staging baseless collateral attacks on rulings related to claims against these Defendants.

Potter v. Mosteller, 199 F.R.D. 181, 188 (D.S.C. 2000) *aff'd.* 238 F.3d 414 (4th Cir. 2000). *See also McMahon v. F & M Bank-Winchester*, 45 F.3d 426 (4th Cir. 1994) (affirming district court's imposition of pre-filing injunction and monetary sanctions against *pro se* litigant).

In sum, Plaintiff has a history of abusive filings. This Court warned Plaintiff that sanctions would be imposed if she filed suit again. Nevertheless, Plaintiff filed the instant suit. Sanctions are now in order.

CONCLUSION

WHEREFORE, Defendants, respectfully request that this Honorable Court:

A. Grant the Motion to Dismiss;

B. Dismiss the Complaint with prejudice;

C. Award Defendants reasonable attorney's fees and costs incurred in having to appear and defend against Plaintiff's allegations asserted in the Complaint;

[6] Exhibit A at p. 24.

[7] *Id.* (emphasis added).

D. Sanction Plaintiff for her long history of frivolous and abusive filings;

E. Grant such other and further relief as this Court deems just and proper.

FINKEL LAW FIRM LLC

s/Sean A. O'Connor
Sean A. O'Connor (Dist. Id. No. 7601)
Post Office Box 41489
Charleston, South Carolina 29423
Telephone: (843) 577-5460
Facsimile: (843) 577-5135
soconnor@finkellaw.com

Attorneys for Defendants
LaSalle Bank National Association and
Altisource Homes

December 20, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, Plaintiff, vs. LaSalle Bank National Association as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, Defendants.	Civil Action No. 3:13-cv-03481-MBS-SVH **CERTIFICATE OF SERVICE**

The undersigned states that on **December 20, 2013**, he caused a true and correct copy of *Defendants' Motion to Dismiss and Motion for Sanctions*, with attached Exhibits, and *Defendants' Memorandum of Law in Support of Motion to Dismiss and Motion for Sanctions* to be served upon the parties identified below by United States mail, proper postage affixed and addressed as follows:

Laura Toney
Post Office Box 722
Bishopville, South Carolina 29010
Plaintiff, Pro Se

Pro Capital Investors
50 South 16th Street, Suite 1950
Philadelphia, PA 19102
Defendant

Wayne Capell
Lee County Treasurer
Post Office Box 428
Bishopville, South Carolina 29010
Defendant

Lee County Planning and Zoning
3rd Floor of Courthouse, Room 302
Bishopville, South Carolina 29010
Defendant

s/Sean A. O'Connor
Sean A. O'Connor (Dist. Id. No. 7601)
FINKEL LAW FIRM LLC
Post Office Box 41489
Charleston, South Carolina 29423
Telephone: (843) 577-5460
Facsimile: (843) 577-5135
soconnor@finkellaw.com

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney,

Plaintiffs,

vs.

LaSalle Bank National Association as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning,

Defendants.

C/A No. 3:13-cv-03481-MBS-SVH

ANSWER OF US BANK CUSTODIAN FOR PRO CAPITAL III LLC

Defendant US Bank Custodian for Pro Capital III LLC ("Pro Capital"), incorrectly identified in the Complaint as "Pro Capital Investors," answers the Complaint as follows:

FIRST DEFENSE

1. Pro Capital denies each and every allegation of the Complaint except as expressly admitted herein.

Claim for a Declaratory Judgment

2. Pro Capital admits, upon information and belief, the allegations of paragraph 1.

3. Answering paragraph 2, Pro Capital admits only that it is a limited liability company organized and existing pursuant to the laws of a state other than the State of South Carolina.

4. Pro Capital lacks knowledge and information sufficient to form a belief about the truth of the allegations of paragraphs 3 and 4, and therefore, Pro Capital denies these allegations.

5. Pro Capital denies the allegations of paragraph 5 and denies that any other defendant ever acted as its agent or employee.

6. Pro Capital lacks knowledge and information sufficient to form a belief about the truth of the allegations of paragraph 6, and therefore, Pro Capital denies these allegations. Answering further, Pro Capital states that if the subject real property, which is known as 729 Chatmon Street, Bishopville, SC (the "Property"), is not redeemed before the statutory one-year redemption period expires on November 8, 2014, Pro Capital will have the sole right to possession of the Property.

7. Answering paragraph 7, Pro Capital admits that it purchased the Property with a successful bid of $20,000 at the Lee County tax sale conducted on November 7, 2013. Pro Capital denies all remaining allegations of paragraph 7.

8. Pro Capital denies that Plaintiff is entitled to the declaratory judgment requested in paragraph 8.

9. Pro Capital admits the allegations of the first sentence of paragraph 9 only to the extent that they are consistent with the content of S.C. Code § 18-9-130(2). Pro Capital lacks knowledge and information sufficient to form a belief about the truth of the allegations of the second sentence of paragraph 9, and therefore, Pro Capital denies these allegations. Pro Capital denies all remaining allegations of paragraph 9.

10. Answering paragraph 10, Pro Capital admits that it purchased the Property with a successful bid of $20,000 at the Lee County tax sale conducted on November 7, 2013. Pro Capital denies all remaining allegations of paragraph 10.

11. Pro Capital lacks knowledge and information sufficient to form a belief about the truth of the allegations of paragraphs 11 and 12, and therefore, Pro Capital denies these allegations.

Prayer for Relief

12. Pro Capital denies that Plaintiff is entitled to the relief requested in her Prayer for Relief.

SECOND DEFENSE
(Insufficient Service of Process)

13. Plaintiff has not properly named or served Pro Capital, and pursuant to Fed. R. Civ. P. 12(b)(5), the Complaint should be dismissed as to Pro Capital for insufficient service of process.

THIRD DEFENSE
(Failure to State a Claim upon which Relief Can be Granted)

14. Pro Capital only purchased the Property at the Lee County tax sale conducted on November 7, 2013, and Pro Capital is informed and believes that the statutory one-year redemption period following the tax sale does not expire until November 8, 2014.

15. For these and other reasons, the Complaint fails to state a claim upon which relief can be granted against Pro Capital and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

FOURTH DEFENSE
(Lack of Standing)

16. Plaintiff lacks standing to assert any claim against Pro Capital.

FIFTH DEFENSE
(Ripeness)

17. Because the record owner of the Property still has the right to redeem the Property, Plaintiff's claims against Pro Capital are unripe.

SIXTH DEFENSE
(Statutes of Limitation)

18. Plaintiff's claims against Pro Capital are barred by all applicable statutes of limitation, including, but not limited to, the one-year limitations period of 15 U.S.C. § 1640(e).

SEVENTH DEFENSE
(Acts of Third Parties)

19. Plaintiff's claims for damages, if any, result from the acts or omissions of third parties over which Pro Capital had no control and is not responsible.

EIGHTH DEFENSE
(Punitive Damages Prohibited)

20. An award of punitive damages to Plaintiff under the circumstances of this case would violate the due process and equal protection clauses of the constitutions of South Carolina and of the United States Constitutions.

NINTH DEFENSE
(Equitable Defenses)

21. Plaintiff's claims are barred by all equitable doctrines available to Pro Capital, including, but not limited to, laches, ratification, unclean hands, waiver, consent, estoppel, and unjust enrichment.

TENTH DEFENSE
(Defenses Asserted by Other Parties)

22. To the extent applicable, Pro Capital asserts and incorporates herein by reference, pursuant to Fed. R. Civ. P. 10(c), all affirmative defenses asserted by the other defendants in response to Plaintiff's Complaint, as well as all affirmative defenses asserted by the other defendants in any future, amended, or supplemented pleading.

WHEREFORE, having fully answered the Complaint, Pro Capital prays that Plaintiff's claims against it be dismissed with prejudice and that the Court award Pro Capital the costs of this action and such other and further relief as this Court may deem just and proper.

HAYNSWORTH SINKLER BOYD, P.A.

By: s/A. Parker Barnes III
A. Parker Barnes III, ID # 7628
James Y. Becker, ID #5733

1201 Main Street, Suite 2200
Post Office Drawer 11889 (29211-1889)
Columbia, South Carolina 29201
(803) 779.3080 Tel
(803) 765.1243 Fax
Email Address: pbarnes@hsblawfirm.com
jbecker@hsblawfirm.com

December 31, 2013

Attorneys for Defendant US Bank Custodian for Pro Capital III LLC

Form 200BNC (Revised 02/03/2009)

United States Bankruptcy Court – District of South Carolina
J. Bratton Davis United States
Bankruptcy Courthouse
1100 Laurel Street
Columbia, SC 29201-2423

Case Number: 08-08382-dd Chapter: 13

In re: *(Debtor(s) name(s) used by the debtor(s) in the last 8 years, including married, maiden, trade, and address)*

Laura Ann Toney
aka Laura Thomas Toney
PO Box 722
Bishopville, SC 29010

SSN: xxx-xx-6990

Entered By The Court
4/21/09

ORDER

Filed By The Court
4/21/09
Tammi M. Hellwig
Clerk of Court
US Bankruptcy Court

This matter comes before the Court for a confirmation hearing to consider the plan filed with this Court on 01/15/2009 pursuant to Chapter 13 of the Bankruptcy Code (11 U.S.C. Sec. 1301 *et seq*). Notice for this hearing was given to all parties in interest as required by 11 U.S.C. Sec. 1324. Following a hearing, the Court finds and concludes as marked below:

_ C-I. The plan as presently filed will be confirmed if the trustee recommends confirmation.

_ C-II. The plan does not currently comply with the requirements of Chapter 13. Therefore, confirmation of the plan as presently filed is denied. The debtor(s) is/are given ten (10) days from the date of this Order within which to propose and file an amended plan, along with an affidavit which certifies that a copy of such amended plan was mailed to the holder of any claim whose rights may have been adversely affected by any amendment to the plan as previously filed. If no such amended plan and/or certificate of mailing is filed, this case may be dismissed without further notice or hearing. If filed, the amended plan may be confirmed without further notice or hearing upon the trustee's recommendation.

X C-IIIA. The plan does not comply with the requirements of Chapter 13. Therefore, confirmation is denied and the case is hereby dismissed.

_ C-IIIB. The plan does not comply with the requirements of Chapter 13. Therefore, confirmation is denied and the case is hereby dismissed with prejudice based upon a previous Order directing that any dismissal of this case would be with prejudice. The debtor(s) is/are hereby directed not to file a Petition under **Chapter 13** for a period of **one-hundred eighty (180) days** from the entry of this Order.

_ C-IV. Confirmation of the plan is denied. The case will be dismissed unless a motion to convert to another chapter is filed within ten (10) days.

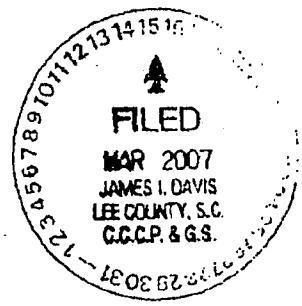
Any other conditions incident to confirmation which may have been made orally by the Court during the hearing are hereby made a part of this order.

AND IT IS SO ORDERED.

Document 34 - 16

United States Bankruptcy Judge

STATE OF SOUTH CAROLINA COUNTY OF LEE LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 PLAINTIFF, vs. Laura Toney, DEFENDANT(S).	IN THE COURT OF COMMON PLEAS MASTER'S ORDER AND JUDGMENT OF FORECLOSURE AND SALE (NON-JURY MORTGAGE FORECLOSURE) C/A NO:2005-CP-31-169 DEFICIENCY REQUESTED



F25-02718

TO:
Korn Law Firm, P.A.
Attorney for Plaintiff

Pursuant to Rule 53 SCRCP, the above-entitled matter was referred to the undersigned to make appropriate findings of fact and conclusions of law with authority to enter a final judgment in the cause.

Pursuant to the said Order of Reference a hearing was held, attended by the attorneys of record, the testimony was taken, which is reported herewith, and from the testimony and evidence, I find conclude and order as follows:

FINDINGS OF FACT:

1. The Lis Pendens was filed on July 21, 2005.

2. The Summons and Complaint were filed on July 21, 2005. The Defendant Laura Toney filed an Answer and Counterclaim on August 18, 2005. Plaintiff filed a Reply to the Answer and Counterclaims on September 19, 2005 and an Amended Reply on October 20, 2005.

Plaintiff filed a Motion for Summary Judgment on March 29, 2006. Plaintiff filed a Memorandum of Law in Support of the Motion for Summary Judgment on September 22, 2006.

The Defendant filed a Chapter 13 Bankruptcy on July 20, 2006 as Case No. 06-03028-jw. That case was dismissed on August 30, 2006. The Defendant filed a second Chapter 13 Bankruptcy on September 29, 2006 as Case No.06-4333-dd. That Bankruptcy case was dismissed on November 15, 2006. The Defendant filed a third Chapter Bankruptcy as Case no.

06-05381-dd on November 27, 2006. That Bankruptcy Case was dismissed on January 2, 2007. The Defendant filed fourth Chapter 13 Bankruptcy on January 17, 2007 as Case No.07-00234-jw. Pursuant to provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the stay provided by Section 362(a) of the Bankruptcy Code did not go into effect when the Defendant filed her current Chapter 13 Bankruptcy.

A hearing on the Motion was held on February 6, 2007. The Defendant and her attorney of record were not in attendance and the Court confirmed that opposing counsel was provided notice of the hearing. A copy of the Notice of Hearing was submitted into evidence by Plaintiff's counsel as Exhibit No. One.

The Defendant's Answer and Counterclaim admits the existence of the debt and that the payments are in default. The Defendant denies that the loan documents provide for acceleration of the debt in the event of default. The Defendant further denies that she was provided Notice of Right to Cure. By way of Counterclaim, the Defendant alleges she was not provided a good faith estimate. Defendant further alleges she was not provided an opportunity to select the attorney of her preference for closing the loan. Lastly, Defendant alleges that she rescinded the loan by letter dated June 12, 2005.

Plaintiff's Motion for Summary Judgment is based upon several grounds. First, the Defendant has repeatedly filed Bankruptcy during the pendency of this foreclosure action. As part of the required declaration of assets in the Bankruptcy cases, the Defendant has affirmatively stated under oath that she possesses no "contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims". Plaintiff submitted into evidence Schedule B of the Chapter 13 Plan from the Defendant's third Bankruptcy filing. (Plaintiff's Exhibit Two).

Judicial Estoppel precludes a party from adopting a position in conflict with one taken in the same or related litigation. See Colleton Reg. Hosp. V. MRS Med. Rev. Syst., 866 F. Supp 896 (D.S.C. 1994). The purpose or function of the doctrine is to protect the integrity of the judicial process or the integrity of the courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries. 31 C.J.S. *Estoppel & Waiver* Section 139, at 593 (1996). See also Zimmerman v. Central Union Bank, 194 S.C. 518, 532, 8 S.E.2d 359, 365 (1940)("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interest have changed, assume a contrary position."). The Court finds that the statements under oath in the Defendant's Bankruptcy cases maintaining that no setoffs or counterclaims existed to declare as assets should act as a bar to her now assuming a contrary position in this litigation.

Summary Judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on filed, 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. Auto. 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 a motion for summary judgment, the trial judge must consider all of the documents and evidence within the record, including pleadings, depositions, answers to interrogatories, admissions on file, and affidavits).

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). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 1997). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall, 359 S.C. at 376, 597 S.E.2d at 183. Once the party moving for summary judgment meets the initial burden of showing an 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 v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004); Peterson v. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999); Rule 56(c), SCRCP.

The Plaintiff has further established its right to Summary Judgment based upon the evidence of record. In her Answer, the Defendant Laura Toney admits signing the Promissory Note for Seventy Six Thousand Five Hundred and 00/100ths ($76,500.00) Dollars. She further admits signing the Mortgage and the Court has taken judicial notice of the Mortgage as a matter of public record. The Defendant denies that the mortgage provides for acceleration of the debt upon default or for a deficiency judgment despite the plain language of the document. A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it. Sims v. Tyler, 276 S.C. 640, 643, 281 S.E.2d 76, 77 (1977). In this case, the Defendant does not deny reading the loan documents, she merely claims that the documents do not state what they plainly state.

Additionally, the loan documents provide that Plaintiff is required to send a notice of breach to subject property address. The Affidavit submitted on behalf of Plaintiff (Plaintiff's Exhibit No. Four) establishes that two (2) breach letters were sent to the subject property address as required. The Affidavit shifts the burden of proof to the Defendant to establish that either of the two (2) letters were not sent and Defendant cannot rely upon a bare denial to avoid Summary Judgment.

An affidavit of the closing attorney was filed on March 29, 2006 in support of the motion. The affidavit confirms that the Defendant Laura Toney received a Good Faith Estimate at closing and the copy of the Good Faith Estimate attached to the affidavit bears the signature of the Defendant confirming that she received a copy. (Affidavit of Michael May filed March 29, 2006). Again, the Defendant's allegations are not only unsupported by the evidence, her denials are conclusively discredited and disproved by the evidence.

The Affidavit of Letia Benjamin, the mortgage broker, confirms that the Defendant Laura Toney selected the closing attorney at the time of loan application. (Plaintiff's Exhibit No. Three). The contemporaneous Customer Notes kept by the mortgage broker confirm that the Defendant made her own selection as to the attorney for the loan closing. The Attorney/Insurance Preference Checklist attached to the Affidavit is signed by the Defendant Laura Toney and contains a confirmation by her that she has been notified of her right to select her own legal counsel as well as her selection. The Affidavit of the closing attorney also contains a form whereby the Defendant Laura Toney confirmed she had been advised by the lender prior to closing of her right to seek counsel to close the loan. (Affidavit of Michael May filed March 29, 2006). The form also confirmed that she was again advised of her right to the attorney of her preference at closing. Therefore, the evidence conclusively proves that the Defendant Laura Toney was provided the opportunity to select the attorney of her preference and she selected the attorney who performed the closing.

The Defendant Laura Toney alleges that she rescinded the loan by letter dated June 12, 2005. Pursuant to Title 15 Section 1635 of the U.S. Code, the obligor in a real estate secured consumer credit transaction shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms. The loan closing occurred on October 6, 2004, at which time the Defendant was provided the information and rescission forms. (Affidavit of Michael May filed March 29, 2006; Affidavit of Letia Benjamin). The information and rescission forms are signed by the Defendant Laura Toney to acknowledge that she was provided a copy of each at

closing. Therefore, the Defendant's counterclaim that she rescinded the loan is without merit on its face since it is well outside the time to rescind permitted by law.

When taken as a whole, the Pleadings, together with supporting documents and Affidavits, show that there is no genuine issue as to any material fact and that the Plaintiff is entitled to judgment as a matter of law. When no issues of material fact exist, the appropriate action is Summary Judgment. *Spencer v. Miller*, 192 S.E.2d 863 (1972). Therefore, the Court finds that the Plaintiff is entitled to Summary Judgment as a matter of law.

3. Service was made upon the Defendant(s) named in this Report as is shown by the Proof(s) of Service filed herein.

4. The Defendants and/or all attorneys of record were notified of the time, date, and place of the hearing in this matter.

5. According to the Affidavit filed herein, no Defendant in default is in the Military Service of the United States of America, as contemplated under the Soldiers' and Sailors' Civil Relief Act of 1940, and any amendments thereto.

6. For value received, Laura Toney made, executed and delivered a Note dated October 6, 2004, promising thereby to pay to the order of Mortgage Electronic Registration Systems, Inc. solely as nominee for Finance America, LLC the sum of Seventy-Six Thousand Five Hundred And 00/100 Dollars ($76,500.00), with interest at an adjustable rate per terms as set out in said Note percent per annum. Other terms and conditions are stated in the Note, which is of record herein.

7. To better secure the payment of the Note described above, the said Laura Toney made, executed and delivered to Mortgage Electronic Registration Systems, Inc. solely as nominee for Finance America, LLC a Mortgage in writing, dated October 6, 2004, covering real property in Lee County, which is the same as that described in the Complaint. The mortgage was filed on October 19, 2004, and is of record in the Office of the Clerk of Court for Lee County in Mortgage Book 361 at page 79.

8. Thereafter, by virtue of an assignment dated August 15, 2005, recorded December 22, 2005, in Mortgage Book 386 at page 211, Mortgage Electronic Registration Systems, Inc. solely as nominee for Finance America, LLC assigned said mortgage unto LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11. LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 is present lien holder and Plaintiff herein.

9. The above referenced instrument constitutes a first lien priority mortgage.

10. Payment due on the Note has not been made as provided for therein, and the Plaintiff, as the holder thereof, has elected to require immediate payment of the entire amount due thereon and has placed the Note and Mortgage in the hands of the attorney herein for collection.

11. I find that since the inception of this action, plaintiff's attorney has assumed responsibility for the institution of this action and has searched and updated the title on the subject property from the date the current owner received the property or the date the mortgage was executed to the date of the filing of the Lis Pendens. He has been responsible for the preparation of the following pleadings:

1. Lis Pendens
2. Summons and Complaint
3. Affidavit of Default
4. Order of Reference
5. Notice of Hearing
6. Proposed Final Decree
7. Notice of Sale
8. Transcript of Testimony
9. Other documents as applicable pertaining to service and finalization of this action.

Additionally, he has arranged for service of process on the defendant(s), has scheduled and attended the hearing in this matter, has provided reinstatement figures to the primary defendant, if requested, and has had telephone conversations with the defendant(s), if requested. Future duties include forwarding copies of the Decree to the defendant(s), advising the defendant(s) of the date that the property will be sold, arranging and coordinating the amount to be bid by plaintiff, representation of plaintiff at sale and preparation of after sale documentation as required. Eighteen hours have been spent on this file to date. Plaintiff's counsel anticipates spending approximately Six hours on the file after the hearing. In light of the potential liabilities inherent in a property matter, the attendant responsibilities and the size of the mortgage debt, I find that the attorney fees requested by the plaintiff in the amount of $7,500.00 are reasonable.

12. The amount due and owing on the Note, with interest at the rate provided in the Note, and other costs and expenses of collection, including an attorney's fee, secured by the Note and Mortgage, is as follows:

(a)	Principal due as of	$76,356.05
(b)	Interest from 3/1/05 through 2/6/07 at 8.3650 %	$13,382.91
(c)	Escrow Advances (Insurance, Taxes)	$ 955.06

(d)	Property Inspections	$ 363.00
(e)	Corporate Advance	$ 509.14
(k)	Costs of Collections Prior to Hearing	$ 401.00
(m)	Title Search Fee	$ 400.00
(o)	Attorney Fees	$ 7,500.00
	TOTAL DEBT secured by Note and Mortgage, including interest to date shown	$99,867.16

Interest for the period from the date shown in (b) above, through the date of this Judgment at the above stated rate to be added to the above stated "Total Debt" to comprise the amount of the judgment debt entered herein and interest after the date of judgment at the rate of an adjustable rate per terms as set out in said Note percent per annum (pursuant to the terms of the Note and Mortgage) on the judgment debt should be added to such judgment debt to comprise the amount of Plaintiff's debt secured by the mortgage through the date to which such interest is computed.

13. That the Plaintiff does not waive but specifically demands judgment against the Defendant(s), Laura Toney, 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(s) for any deficiency in this action remaining after sale of the mortgaged premises.

14. As a personal or deficiency judgment is demanded, the bidding will remain open for a period of thirty (30) days pursuant to S.C. CODE Ann. Section 15-39-720 (1976).

CONCLUSION OF LAW

I, therefore, conclude as follows:

1. There is no genuine issue as to any material fact in this case, therefore Plaintiff's Motion for Summary Judgment is granted.

2. Plaintiff should have judgment of foreclosure of the mortgage and the mortgaged property should be ordered sold at public auction after due advertisement.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. There is due to the Plaintiff on the obligation and mortgage set forth in the Complaint the sum of Ninety Nine Thousand Eight Hundred Sixty Seven and 16/100 ($99,867.16) Dollars representing the "Total Debt" due Plaintiff as set forth supra, together with interest at the rate provided therein on the balance of principal from the date aforesaid to the date hereof.

2. The amount due in the preceding paragraph (the "Total Debt" as set forth supra and later accrued interest on the principal) shall constitute the total judgment debt due the

Plaintiff and shall bear interest hereafter at the rate of an adjustable rate per terms as set out in said Note percent per annum.

3. That the Defendants liable for the aforesaid mortgage debt shall, on or before the date of sale of the property hereinafter described, pay to the Plaintiff, or Plaintiff's attorney the amount of Plaintiff's debt as aforesaid, together with the costs and disbursements of this action.

4. That on default of payment at or before the time herein indicated, the mortgaged premises described in the Complaint, as hereinafter set forth, be sold by the Lee County Clerk of Court at public auction at the Lee County Courthouse in Bishopville, South Carolina, on some convenient sales day hereafter (and should the regular day of judicial sales fall on a legal holiday, then and in the such event, the sales day shall be on Tuesday next succeeding such holiday), on the following terms, that is to say:

A. FOR CASH: The Clerk of Court will require a deposit of Five percent (5%) on the amount of the bid (in cash or equivalent) at the time of the sale, same to be applied on the purchase price only upon compliance with the bid, but in case of non-compliance within Thirty (30) days same to be forfeited and applied to the costs and Plaintiff's debt.

B. Interest on the balance of the bid shall be paid to the day of compliance at the rate of an adjustable rate per terms as set out in said Note percent.

C. The sale shall be subject to taxes and assessments, existing easements and easements and restrictions of record.

D. The above referenced instrument constitutes a first lien priority mortgage.

E. Purchaser to pay for Deed Stamps and costs of recording the Deed.

5. If Plaintiff be the successful bidder at the said sale, for a sum not exceeding the amount of costs, expenses and the indebtedness of the 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.

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

8. That the Clerk of Court will, by advertisement according to law, give notice of the time, and place of sale, and the terms thereof; and will execute to the Purchaser, or Purchasers, a deed to the premises sold. The Plaintiff, or any other party to this action, may

become a purchaser at such sale, and that if, upon such sale being made, the Purchaser, or Purchasers, should fail to comply with the terms thereof within Thirty (30) 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.

9. That the Clerk of Court will apply the proceeds of the sale as follows:

FIRST: To payment of the amount of the costs and expenses of this action, including any Guardian Ad Litem fee or fees of attorneys appointed under Order of Court.

NEXT: To the payment to the Plaintiff or Plaintiff's attorney, of the amount of Plaintiff's debt and interest, so much thereof as the purchase money will pay on the same.

NEXT: Any surplus will be held pending further order of the court.

10. It is further ORDERED, ADJUDGED AND DECREED that in the event the successful bidder to whom the deed of conveyance has been issued subsequent to the sale is other than the Defendants in possession herein, the Sheriff of Lee County is ordered and directed to eject and remove from the premises the occupants of the property sold, together with all personal property located thereon, and put the successful bidder to whom the deed of conveyance has been issued or his assigns in full, quiet and peaceable possession of said premises without delay, and to keep said successful bidder or his assigns in such peaceable possession.

11. And it is further ORDERED, ADJUDGED AND DECREED that each Defendant and all persons whomsoever claiming under him, her or them, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said mortgaged premises so sold, or any part thereof.

12. And it is further ORDERED, ADJUDGED AND DECREED that any prior lien that has been paid in full is hereby satisfied and cancelled of record.

13. IT IS FURTHER ORDERED that the Deed of conveyance made pursuant to said sale shall contain the names of only the first named Plaintiff and the first named Defendant and the Defendant who was the titleholder of the mortgaged property at the time of filing of the Notice of Pendency of the within action, and the name of the Grantee, and the Clerk of Court is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said Deed.

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

15. Upon issuance of a Report on Sale and Disbursements, the Register of Deeds is directed to release of record the mortgage lien being foreclosed, which mortgage lien is described as follows:

That Mortgage originally given to Mortgage Electronic Registration Systems, Inc. solely as nominee for Finance America, LLC by Laura Toney, dated 10/06/2004 and recorded 10/19/2004, in Mortgage Book 361 at page 79.

16. The following is a description of the premises herein ordered to be sold:

LEGAL DESCRIPTION AND PROPERTY ADDRESS:

All that certain lot or parcel of land situate just North of the Town of Bishopville, County of Lee and State of South Carolina and being bounded as follows: On the North by Chapman Street; On the East by lot of West Wilson; on the South by Lots Nos., 9, 10, 11, 12 and 13 and on the West by Bay Street represented on a plat being of North Mohawk as Lot No. 14, said plat being of record in Plat Book E at page 46, in the Office of the Clerk of Court for Lee County, South Carolina Records.

This conveyance is made subject to any and all existing reservations, easements, right-of-way, zoning ordinances, and restrictive or protective covenants that may appear of record or on the premises.

This being the same property most recently to Laura Toney by deed from Milton Toney dated December 4, 1992 and recorded December 4, 1992 in Book V-5 at page 205 in the Lee County, South Carolina Records.

729 Chatman Street, Bishopville, SC 29010

TMS 030-02-00-024

17. IT IS FURTHER ORDERED that if the Plaintiff or the Plaintiff's representative does not appear at the scheduled sale of the above-described property, then the sale of the property will be null, void and of no force and effect. In such event, the sale will be rescheduled for the next available sales day.

W. C. Coffey, Jr.
Master-in-Equity

Manning, South Carolina
_____, 2007.

STATE OF SOUTH CAROLINA

COUNTY OF LEE

Laura Toney,

PLAINTIFF,

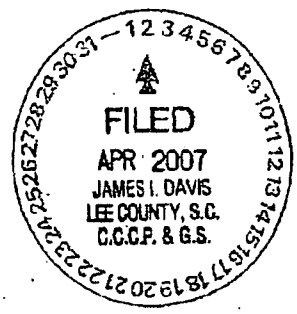
vs.

LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A NO:2007-CP-31-66

ORDER DISSOLVING TEMPORARY RESTRAINING ORDER



This is an action seeking to stay a foreclosure sale scheduled for April 2, 2007 in a separate action, LaSalle Bank v. Laura Toney, Case No. 2005-CP-31-168. This present action was commenced upon an Application for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction filed March 22, 2007. A Summons, verified Complaint and affidavit were also filed on March 22, 2007. Based upon the representations set forth in the application and complaint, this Court issued an Order Granting Temporary Restraining Order filed March 23, 2007 that provided for the foreclosure sale to be stayed pending a hearing to be held March 27, 2007.

Appearing at the hearing were the Plaintiff herein Laura Toney and her attorneys in the present action Joseph Henry and Nathaniel Roberson. Appearing on behalf of the Defendant LaSalle Bank was its counsel of record in the pending foreclosure action, H. Guyton Murrell. At the hearing, attorney Murrell submitted a Return to the Application for Injunction and Restraining Order and the Court received evidence and heard arguments from both parties.

At the commencement of the proceedings, the Court took judicial notice of the pleadings, evidence and orders filed of public record in the pending foreclosure action, LaSalle Bank v. Laura Toney, Case No. 2005-CP-31-168. The Court took judicial notice of the four (4) Chapter 13 Bankruptcy filings by the Plaintiff Laura Toney and the Orders and filings therein.

The record in the pending foreclosure action reflects that Laura Toney is represented by attorney David Weeks. There is a letter dated January 11, 2006 to the Lee County Clerk of Court

and to opposing counsel confirming his representation of the mortgagor and requesting that any future correspondence be addressed to his law office. Pursuant to Rule 11(c) S.C.R.C.P., an attorney may be changed by consent, or upon cause shown, and upon such terms as shall be just, upon application, by order of the court, and not otherwise. The Rule further provides that written notice of change of attorney must be served as provided by Rule 5. The Court finds that this rule has not been complied with in this matter.

As to the issue of the continuing jurisdiction of the hearing officer over any matters related to the foreclosure action, Rule 53(c) S.C.R.C.P. provides that once a matter has been referred, the master of special referee shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter. In the foreclosure action, the case was initially referred to the Lee County Master-in-Equity. The Lee County Master-in-Equity notified the moving party and the Clerk of Court in writing that he had a conflict that precluded his hearing the matter. The foreclosure action was subsequently referred to the Clarendon County Master-in-Equity, the Honorable W.C. Coffey, Jr., by Order of Reference executed the Honorable Thomas Cooper filed June 16, 2006. Although the hearing was held outside of Lee County, the Order of Reference was without any language limiting the authority of Judge Coffey or requiring Judge Coffey to hear the case within Lee County. Therefore, Judge Coffey sat with the same authority to adjudicate the foreclosure action as a circuit judge.

As to the contention in this action that the foreclosure is a separate matter, Rule 12(b) S.C.R.C.P. provides that every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto. A review of the pending foreclosure action shows that the pending case involves the same claims between the same parties. The foreclosure action has been referred to Judge Coffey and he has jurisdiction over the case.

The Court further notes that a Notice of Motion pursuant to Rule 59(e) S.C.R.C.P. was filed on March 23, 2007 in the foreclosure action. The Temporary Restraining Order was signed by this Court on the same day. The findings in the Temporary Restraining Order are based on the representation that in the application and Complaint of a Bankruptcy proceeding that imposed an automatic stay on the foreclosure action. The Court has taken judicial notice of the Order filed February 15, 2007 wherein the Honorable John Waites, U.S. Bankruptcy Judge for the District of South Carolina, ruled that no automatic stay existed under the last Chapter 13 Bankruptcy filed by the debtor Laura Toney. Those issues are part and parcel of the foreclosure proceeding and must be heard by the judge with the requisite jurisdiction under the Order of Reference.

THEREFORE, IT IS ORDERED that the Temporary Restraining Order issued by this Court on March 22, 2007 and filed on March 23, 2007 is hereby rescinded and the stay imposed thereby is dissolved,

IT IS FURTHER ORDERED that this case is dismissed with prejudice due to the pending foreclosure action on the identical issues.

IT IS SO ORDERED.

s/ Clifton Newman
The Honorable Clifton Newman
Presiding Judge 3rd Judicial Circuit

Williamsburg, South Carolina
April 2, 2007

FILED
___ O'clock & ___ min
MAY 15 2007
United States Bankruptcy Court
Columbia, South Carolina

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

In re:

Laura Ann Toney,

Debtor.

Case No. 07-01978-DD
Chapter 7

ENTERED
MAY 15 2007
K.R.W.

ORDER DISMISSING CASE WITH PREJUDICE

This proceeding is before the Court on the motion of the debtor to dismiss this case. The United States Trustee (UST) objected to the debtor's motion. The debtor failed to appear at the hearing on the motion. The UST and the attorney for LaSalle Bank National Association appeared at the hearing and recommended that any dismissal be with prejudice for one year.

The debtor, acting *pro se*, has now filed five bankruptcy cases in only nine months. In the debtor's most recent previous case, Case No. 07-00234-JW, this Court found that the debtor had filed her case in bad faith and dismissed the case with prejudice, prohibiting her from refiling under chapters 11, 12 or 13 for a period of one year.[1] The debtor filed her pending case under chapter 7 on April 13, 2007, and by letter dated April 16, 2007, asked the court to dismiss the case. The Court concludes that this case was also filed in bad faith. The debtor has failed to file schedules and statements or to attend and submit to questions under oath at the meeting of creditors as required by the Bankruptcy Code. The debtor also failed to attend the hearing on her motion. It is, therefore

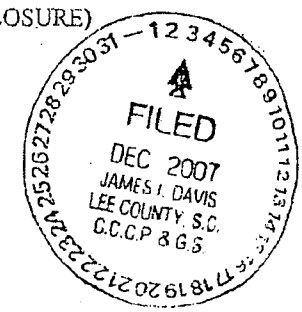
[1] The Court's order finding bad faith and dismissing Case No. 07-00234-JW was entered on February 26, 2007. The order was amended by a subsequent order entered on March 27, 2007, prohibiting the debtor from refiling under chapters 11, 12, or 13 for one year.

ORDERED that the debtor's case is dismissed with prejudice to bar a refiling under any chapter of the Bankruptcy Code in any district for a period of one (1) year from the entry of this order.

John E. Waites
U.S. Bankruptcy Court Judge
District of South Carolina

5/15/07
Date

STATE OF SOUTH CAROLINA COUNTY OF LEE LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 PLAINTIFF, vs. Laura Toney, DEFENDANT(S).	IN THE COURT OF COMMON PLEAS ORDER AS TO PENDING MOTIONS (NON-JURY MORTGAGE FORECLOSURE) C/A NO:2005-CP-31-169 DEFICIENCY REQUESTED



This is a foreclosure action as to certain real property located in Lee County. The action was commenced by a Summons and Complaint filed July 21, 2005. The Defendant Laura Toney filed an Answer and Counterclaim on August 18, 2005. Plaintiff filed a Reply to the Answer and Counterclaims on September 19, 2005 and an Amended Reply on October 20, 2005.

Plaintiff filed a Motion for Summary Judgment on March 29, 2006. Plaintiff filed a Memorandum of Law in Support of the Motion for Summary Judgment on September 22, 2006.

The Defendant filed a Chapter 13 Bankruptcy on July 20, 2006 as Case No. 06-03028-jw. That case was dismissed on August 30, 2006. The Defendant filed a second Chapter 13 Bankruptcy on September 29, 2006 as Case No.06-4333-dd. That Bankruptcy case was dismissed on November 15, 2006. The Defendant filed a third Chapter Bankruptcy as Case no. 06-05381-dd on November 27, 2006. That Bankruptcy Case was dismissed on January 2, 2007. The Defendant filed fourth Chapter 13 Bankruptcy on January 17, 2007 as Case No.07-00234-jw. Pursuant to provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the stay provided by Section 362(a) of the Bankruptcy Code did not go into effect when the Defendant filed her current Chapter 13 Bankruptcy.

A hearing on Plaintiff's Motion for Summary Judgment was held on February 6, 2007 and a Decree of Foreclosure and Sale was filed on March 15, 2007. The property was sold at foreclosure sale by the Lee County Clerk of Court on May 7, 2007. Plaintiff was the highest bidder at sale and no further bids were received during the thirty (30) day period following the sale. A judicial deed conveying the subject property to Plaintiff has been issued and Plaintiff is in

mb#1

physical possession of the subject property. Plaintiff reserved its right to a deficiency judgment and the issuance of a deficiency judgment is a matter still pending before the court.

Defendant filed a Motion dated March 23, 2007 to Alter or Amend the Verdict pursuant to Rule 59(e) motion. Plaintiff filed a Motion to Supplement the Decree dated April 2, 2007. Defendant filed a Motion for Reconsideration pursuant to Rule 60 and for Stay of Enforcement of the Order on April 25, 2007.

The Special Referee herein recused himself from the case and Plaintiff filed a Motion for Supplemental Reference on July 31, 2007. By Order filed ____, The Honorable Richard L. Booth was appointed as supplemental Special Referee herein. Hearing was held on October 18, 2007 as to the pending motions. In attendance at the hearing was the Plaintiff's counsel, H. Guyton Murrell. Also in attendance were the Defendant Laura Toney and her counsel David Weeks. The Court heard argument from both parties as to the pending motions.

Defendant's Rule 59(e) Motion to Alter or Amend

Subsequent to the hearing of February 16, 2007, the Defendant Laura Toney filed a separate case Laura Toney v. LaSalle Bank, Case No.2007-CP-31-66 and obtained an ex parte injunction as to the pending foreclosure sale in this case. The ex parte injunction was obtained by attorney Joseph Henry and attorney Nathaniel Roberson as counsel for Laura Toney. By Order filed April 2, 2007, The Honorable Clifton Newman rescinded and vacated the ex parte injunction and dismissed Laura Toney's action for an injunction with prejudice. The Order made a specific finding that the requirements of Rule 11 (b) of the South Carolina Rules of Civil Procedure had not complied with and attorney Henry and attorney Roberson were not properly substituted as counsel for Laura Toney.

The Rule 59(e) Motion herein was also submitted by attorney Henry and attorney Roberson. The Order of Judge Newman in the injunction action and the record in this matter reflect that the requirements of Rule 11(b) have not been complied with and as a matter of procedure the motion is not properly before this court. Substantively, the motion argues that the merits hearing should have been stayed due to the Defendant's bankruptcy, the case was improperly referred to a judge outside of Lee County and the security interest had been rescinded and was therefore void. The Court finds that the issue of improper reference is without merit. The record reflects an initial reference to the Lee County Master-in-Equity and his subsequent recusal from the case. The record reflects proper notice given to Defendant's counsel of the application for an Order of Reference and objection to such reference was not raised until after

MB #2

the Judge's ruling was issued. The Court finds this issue has not been timely raised or preserved and has been waived. The issue as to rescission of the loan and the alleged invalidity of the mortgage is only relevant if the Defendant's Rule 60 motion is granted. As to the Bankruptcy issue, the Court has taken judicial notice of the orders issued in the Defendant's Chapter 13 Bankruptcy. The Order of the Honorable John Waites filed February 15, 2007 confirmed that no automatic stay was in effect and the motion by Laura Toney to impose a stay was denied. Therefore, the defendant's contention that the hearing should have been stayed due to the bankruptcy is without merit. The Court further notes that the subsequent Order of the Honorable John Waites filed March 7, 2007 made a finding that Laura Toney had filed her Chapter 13 Bankruptcy in bad faith and dismissed the case with prejudice. The Defendant argues that her bad faith actions in the Bankruptcy Court should have acted as a stay to the foreclosure proceedings despite the Bankruptcy Court's express refusal to grant a stay. Accordingly, the Motion to Alter or Amend the Judgment pursuant to Rule 59(e) is denied.

Defendant's Motion for Reconsideration pursuant to Rule 60

The Defendant Laura Toney filed a Motion for Reconsideration of Decision pursuant to Rule 60 and for Stay of Enforcement of the Order. The court finds, and the parties agree, that the motion to stay enforcement of the order is moot given that the property has been sold and a judicial deed issued. The remaining issue is reconsideration of the Decree pursuant to Rule 60(b).

Rule 60(b)(1), SCRCP provides that the court may relieve a party from a final judgment or order if the judgment was induced by mistake, inadvertence, surprise, or excusable neglect. This rule is an appropriate remedy for good faith mistakes of fact if all other applicable factors are met. See Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986). However, a party may not generally use Rule 60(b)(1) as a vehicle for relief from a mistake of law. See Savage & Cannon, 204 S.C. 473, 30 S.E.2d 70 (1944); see generally 11 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure §2858 (1973)(stating that an appellant is not entitled to relief under Rule 60(b)(1) for ignorance of the rules or ignorance of the law).

In this case, the mistake alleged by the Defendant Laura Toney is a mistake of law that an automatic stay was in effect pursuant to her fourth Chapter 13 Bankruptcy. Therefore, Rule 60(b) would be inapplicable. The Court notes that Laura Toney filed her Chapter 13 Bankruptcy pro se. "Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney." Goodson v. Am. Bankers Ins. Co., 295 S.C.

WB #7

400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988). Moreover, the contention by the Defendant Laura Toney that she believed an automatic stay to be in effect is not credible. The Order of the Honorable John Waites filed February 15, 2007 noted that Laura Toney had requested that a stay be imposed by the U.S. Bankruptcy Court and that the request was denied. The evidence clearly establishes that Laura Toney fully understood that a stay was not in effect due to the bankruptcy filing.

Furthermore, the Court finds that the Defendant Laura Toney lacks a meritorious defense to the foreclosure. In determining whether a default judgment should be set aside under Rule 60(b)(1), "[t]he promptness with which relief is sought, the reasons for the failure to act promptly, the existence of [a] meritorious defense, and the prejudice to the other parties are relevant." New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993)(quoting Harry M. Lightsey & James F. Flanagan, South Carolina Civil Procedure 82 (1985)). Plaintiff submitted sworn affidavits from the mortgage broker and the closing attorney that they personally witnessed Laura Toney sign the requisite documents and a copy of the signed documents was attached to the affidavits. Defendant has submitted the statement of a handwriting analyst questioning the validity of her signature on the documents. These are issues that the Defendant is now attempting to raise for the first time. The Court finds such statement not to be credible or persuasive given the first hand eyewitness testimony that the Defendant signed the documents.

Lastly and most importantly, the Court finds that the Defendant's own sworn statements in her bankruptcy proceedings mandate that Plaintiff's Motion for Summary Judgment be granted and preclude her from the relief she now seeks. Defendant has repeatedly filed Bankruptcy during the pendency of this foreclosure action. As part of the required declaration of assets in the Bankruptcy cases, the Defendant has affirmatively stated under oath that she possesses no "contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims". In the foreclosure, Plaintiff submitted into evidence Schedule B of the Chapter 13 Plan from the Defendant's third Bankruptcy filing.

Judicial Estoppel precludes a party from adopting a position in conflict with one taken in the same or related litigation. See Colleton Reg. Hosp. V. MRS Med. Rev. Syst., 866 F. Supp 896 (D.S.C. 1994). The purpose or function of the doctrine is to protect the integrity of the judicial process or the integrity of the courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries. 31 C.J.S. *Estoppel & Waiver* Section 139, at 593 (1996). See also Zimmerman v. Central Union Bank, 194 S.C. 518, 532, 8 S.E.2d 359, 365 (1940)("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interest have changed,

MM #4

assume a contrary position."). The Court finds that the statements under oath in the Defendant's Bankruptcy cases maintaining that no setoffs or counterclaims existed to declare as assets act as a bar to her assuming a contrary position in this litigation. Therefore, the sworn statements and filings by the Defendant Laura Toney in her Bankruptcy cases have established that she lacks a meritorious defense to the foreclosure

Plaintiff's Motion to Supplement the Decree

The final motion before the Court is Plaintiff's Motion to Supplement the Decree. Plaintiff reserved its right to a deficiency judgment. The Report on Sale reflects a deficiency between the judgment debt set forth in the Decree and the sales price obtained at foreclosure sale in the amount of $34,859.75, plus interest thereon at the rate of Eight and 365/1000ths (8.365%) percent from the date of compliance June 6, 2007. Plaintiff's Motion seeks to supplement the Decree, and the resulting deficiency judgment, with the fees and costs related incurred since the summary judgment hearing. The post-hearing fees and costs can be generally grouped as those incurred in responding to: 1) Defendant's separate action for an injunction and ex parte temporary restraining order in Laura Toney v. LaSalle Bank, Case No.2007-CP-31-66; 2) Chapter 13 and Chapter 7 bankruptcy actions; and 3) Defendant's post-trial motions. Plaintiff's counsel submitted an Affidavit of Attorney Fees that provided an itemized statement of the fees and costs incurred since the hearing on the motion for summary judgment.

The record reflects a pattern of bad faith and dilatory actions by the Defendant Laura Toney. The Court notes that these actions were either taken by Laura Toney pro se or through other counsel. In no way does the Court find or opposing counsel allege any bad faith actions were undertaken by her counsel herein David Weeks. However, these actions by the Defendant have caused the Plaintiff to incur further fees and costs to protect its security interest and to safeguard itself and its counsel against the unfounded allegations of wrongdoing leveled by Laura Toney in the various motions and related actions.

Laura Toney filed repetitive bankruptcy cases for the express purpose of frustrating Plaintiff's legitimate collection efforts. The U.S. Bankruptcy made express findings of bad faith in her last Chapter 13 Bankruptcy case and her subsequent Chapter 7 case. Both cases were dismissed with prejudice and with a bar imposed as to any subsequent bankruptcy filings for a term of one (1) year. The authority of the U.S. Bankruptcy Court is established by the U.S. Constitution and subsequent legislation and its power to affect all debts, including mortgage liens, is not in dispute. The Court finds that the Plaintiff defended its security interest in the

Bankruptcy proceedings as a matter of necessity and is accordingly entitled to the attorneys fees and costs incurred therein. The Court finds that the Decree and subsequent deficiency judgment should be supplemented to include the fees and costs incurred in the Defendant's bankruptcy cases.

Laura Toney filed a separate action through other counsel and obtained an ex parte injunction from the Honorable Clifton Newman as to the pending foreclosure sale. The ex parte injunction was rescinded by Judge Newman by Order filed April 2, 2007. The Order reflects that the injunction was issued in reliance on the allegations by Laura Toney that Plaintiff's counsel had knowingly violated a stay imposed by the bankruptcy filing. As previously set forth, the evidence establishes that Defendant Laura Toney knew this allegation of wrongdoing leveled at Plaintiff and its counsel was untrue and Judge Newman rescinded the injunction due to it being based on the misrepresentations by Laura Toney. Furthermore, the Order found that Laura Toney had her subsequent attorneys had failed to conform to the express rules as to substitution of counsel. Although the injunction action filed by Laura Toney was technically a separate case, there is a clear nexus between it and the present foreclosure action in that the injunction sought to stay the pending foreclosure sale. The injunction action cast serious allegation of wrongdoing at Plaintiff and its counsel and the necessity of responding to such allegations are obvious.

Although the fees and costs incurred by Plaintiff in the separate injunction action may have been necessary to protect its security interest, the Court must also determine if it is appropriate to assess such fees and costs against the Defendant Laura Toney in this action. The promissory note provides that the holder is entitled to "all of its costs and expenses in enforcing this Note not prohibited by applicable law. Those expenses include, for example, reasonable attorney's fees". The mortgage contains an identical provision. The mortgage also contains a provision in paragraph 9 (Protection of Lender's Interest in the Property and Rights Under this Security Instrument) that states:

> "If ... there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument ... then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument ... Lender's action can include, but are not limited to ... appearing in court; and paying reasonable attorneys' fees to protect its interest in the property and/or rights under this Security Instrument... Any amounts disbursed by Lender under this Section 9 shall become additional debt of the Borrower secured by this Security Instrument."

The Court finds that the note and mortgage provide for the award of fees and costs as the injunction action was a legal proceeding that might significantly affect the Lender's interest in the property and its rights under the security instrument. The Court finds that the Decree and

JW #6

subsequent deficiency judgment should be supplemented to include the fees and costs incurred by Plaintiff in the subsequent injunction action.

Lastly, the Plaintiff seeks to include the fees and costs incurred in relation to the post-trial motions in this case. The Court finds that the post-trial motions lack merit but Plaintiff was nonetheless required to defend its security interest by responding to the motions. The Court qualifies this ruling with the finding that Defendant's counsel David Weeks has in no way been a participant in any of the bad faith and dilatory actions enumerated in the record and related orders. The declaration under oath by Defendant Laura Toney in her Chapter 13 Bankruptcy that she possessed no claims or setoffs effectively barred her from asserting any defenses and counterclaims in the foreclosure under the doctrine of judicial estoppel. The Court finds that the Rule 60 Motion filed by Defendant's counsel David Weeks was filed in good faith but rendered meritless through the Defendant's own actions in Bankruptcy Court. Therefore, the Court finds that the Decree and subsequent deficiency judgment should be supplemented to include the fees and costs incurred by Plaintiff in the subsequent post-hearing motions.

The Attorney Fee Affidavit submitted by Plaintiff's counsel set forth $9,605.30 in fees and costs incurred subsequent to the summary judgment hearing and estimated fees and costs of $1,125.00 to attend this hearing and prepare a proposed order. When awarding attorney's fees, the trial court must consider the following six factors: (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged for similar legal services; and (6) the beneficial results obtained. Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 37 S.E.2d 296 (1989).

The Court finds that this has been a long and vigorously contested matter that has spanned several different judicial forums. The time and labor reflected on the fee affidavit is reasonable and the actions undertaken were necessary to protect the client's security interest. The Plaintiff's counsel enjoys a good standing in the legal community and is a frequent practitioner before the Equity Courts and Bankruptcy Courts. He is a frequent lecturer at legal seminars and is a published author in legal periodicals. The contingency of compensation is inapplicable. The hourly rate of $150.00 charged by Plaintiff's counsel is reasonable and equal or less than the fee customarily charged for similar legal services. The Plaintiff's counsel has ultimately obtained beneficial results through a Decree of Foreclosure and sale. Therefore, the Court finds that the additional fees and costs of $10,730.30 are reasonable and should added to the Decree of Foreclosure and subsequent Deficiency Judgment.

WPF7

IT IS SO ORDERED.

Richard L. Booth
Special Referee herein

Sumter, South Carolina
11/27, 2007.

at ___O'clock & ___min. ___M
FEB 2 6 2007
United States Bankruptcy Court
Columbia, South Carolina
ENTERED
FEB 2 6 2007
L.O.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 07-00234-JW
Laura Ann Toney,	Chapter 13
Debtor(s).	**ORDER**

This matter comes before the Court upon a Rule to Show Cause (the "Rule") requiring Laura Ann Toney ("Debtor") to appear and show cause why she has engaged in repetitive bankruptcy filings. Debtor filed the present case, *pro se,* on January 17, 2007. Debtor serially filed three Chapter 13 bankruptcy cases during 2006 before she filed this current case. Debtor filed her first Chapter 13 case (C/A No. 06-03028-jw) on July 20, 2006. The first case was dismissed for failure to appear at the § 341 meeting of creditors. On September 29, 2006, Debtor filed a second Chapter 13 case (C/A No. 06-04333-dd). Debtor's second case was dismissed for failure to timely file Schedules A through J, Statement of Financial Affairs, Statement of Income Calculation, payment advices, Statement of Increased Income/Expenses, Chapter 13 Plan and Pro se Statement of Assistance. On November 27, 2006, Debtor filed her third Chapter 13 case (C/A No. 06-05381-dd). Debtor's third case was dismissed for failure to file her Pro se Statement of Assistance, as required by local rules.

Debtor appeared at the hearing on the Rule and provided explanations for the failure of her previous cases. With respect to her first case, Debtor asserts that she attempted to attend the meeting of creditors, but was unable to attend due to car trouble. Debtor asserts that she timely mailed the required documents in her second case to the clerk of court, but due to circumstances beyond her control, the documents failed to arrive in time to be filed. As to her third case, Debtor asserts that she thought she had included her Pro se Statement of Assistance when she

complete their foreclosure proceedings. Two such creditors appeared at the hearing and supported dismissal. The prejudice caused to the creditors in this case weighs heavily in favor of a finding that Debtor filed her current case with a lack of good faith.

Finally, the Court finds that all parties had adequate notice of the probability of dismissal of the case as a result of repetitive filings; however, if Debtor seeks to continue this case despite the Court's prior ruling that denied the imposition of the stay, thereby allowing secured creditors to continue foreclosure, Debtor may file a written objection to dismissal with the Court within ten (10) days. In the event of a timely objection, the Court may issue a further order with or without a hearing.

For the foregoing reasons, the Court finds that Debtor filed her fourth bankruptcy in bad faith and that cause exists to dismiss the case with prejudice to bar a refiling under Chapters 11, 12 or 13 of the Bankruptcy Code for a period of one (1) year. Therefore, it is hereby

ORDERED that Debtor's Chapter 13 case be dismissed subject to the Court retaining jurisdiction to consider dismissal with prejudice and other sanctions pursuant to 11 U.S.C. § 105, 28 U.S.C. § 1927, and this Court's inherent authority to regulate litigants and address improper conduct.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
February 26, 2007

Notice Recipients

District/Off: 0420-3 User: miller Date Created: 4/21/2009
Case: 08-08382-dd Form ID: 200ddBNC Total: 12

Recipients of Notice of Electronic Filing:

tr	Joy S. Goodwin	ecf@ch13trustee.net
aty	Brandon A. Smith	bsmith@turnerpadget.com
aty	George O. Hallman, Jr.	frankd@scottlaw.com
aty	Joy S. Goodwin	ecf@ch13trustee.net
aty	Joy S. Goodwin	ecf@ch13trustee.net
aty	Shawn M. French, Sr.	ecf.smfrench@gmail.com

TOTAL: 6

Recipients submitted to the BNC (Bankruptcy Noticing Center):

db	Laura Ann Toney	PO Box 722 Bishopville, SC 29010
cr	Chase Home Finance LLC	10790 Rancho Bernardo Road San Diego, CA 92127
cr	Recovery Management Systems Corporation	25 SE Second Avenue Suite 1120 Miami, FL 33131
cr	American Recovery Specialist, Inc.	c/o Turner Padget P.O. Box 5478 1831 W. Evans Street Florence, SC 29502
cr	Chris Mangum	Turner Padget P.O. Box 5478 1831 W. Evans Street Florence, SC 29502
ust	US Trustee	Strom Thurmond Federal Bldg 1835 Assembly Street Suite 953 Columbia, SC 29201

TOTAL: 6

filed her schedules. She also asserted that she has filed each of her bankruptcy cases to save her home from foreclosure.

Debtor's serial filing of four cases in the past six months is suspect and may indicate abuse of the bankruptcy process. Under § 362(c)(4)(D) there is a presumption of bad faith filing when Debtor has had two or more previous bankruptcy cases pending within the past year. This Court has found that the lack of good faith in filing a chapter 13 case can constitute cause to dismiss the case. In re Harris, No. 06-05030-jw, slip. op. at 3 (Bankr. D.S.C. Dec. 28, 2006). As a serial filer, Debtor has the burden to show a substantial change of circumstances since the prior dismissal and that the current case is filed in good faith. Id. at 3-4; In re Hartley, 187 B.R. 506 (Bankr. D.S.C. 1995). To determine whether Debtor's fourth filing is filed in good faith, the Court will examine the following non-exclusive factors: Debtor's past bankruptcy filings, which includes a determination of whether Debtor has experienced a change in circumstances warranting a fourth filing; the time elapsed between the third and fourth filing; Debtor's pre-petition behavior; and the effect of Debtor's repeated filings on creditors. In re Brown, No. 03-07515, slip. op. at 4 (Bankr. D.S.C. Sept. 26, 2003).

Debtor's past bankruptcy filings are a relevant factor in determining whether Debtor's current case is filed in good faith. Debtor must prove with detailed testimony and convincing evidence that she is entitled to a fourth opportunity to file a bankruptcy petition. In re Marett, No. 96-75003, slip. op. at 14 (Bankr. D.S.C. Nov. 14, 1996). A substantial change in circumstances between the last filed case and the pending case may demonstrate that the current case was filed in good faith. Id. In response to Debtor's motion to impose the automatic stay, this Court previously analyzed whether Debtor had rebutted the presumption that the case was filed not in good faith by showing either a substantial excuse for her failure to file documents in her previous

cases under § 362(c)(4)(D)(i)(II) or showing a substantial change in Debtor's financial or personal affairs since her next most previous case. The Court found that Debtor presented no persuasive evidence of either a substantial excuse for her failure to file documents or a substantial change in circumstances. The Court denied Debtor's motion to impose the stay and found that Debtor failed to demonstrate, by clear and convincing evidence, that she filed this current case in good faith.

Another factor to be considered is the period of time that elapsed between the dismissal of Debtor's third case and the filing of the fourth case. Debtor's third case was dismissed on January 2, 2007. The current case was filed fifteen days later on January 17, 2007. The close proximity in the dismissal of Debtor's previous case and filing of the current case is evidence of a lack of good faith.

The pre-petition conduct of Debtor is also a factor to be examined. In re Brown, No. 03-07515-W, slip.op. at 6 (Bankr. D.S.C. Sept. 26, 2003). Prior to filing her current case, Debtor filed three chapter 13 bankruptcy cases in a six month period. Debtor informed the Court that she filed these cases to stop the foreclosure of her home. Although filing bankruptcy to save a home from foreclosure is not *per se* bad faith, a debtor's proclivity for repeatedly filing to stave off foreclosure can be considered as evidence of bad faith. In re Casse, 219 B.R. 657, 661 (Bankr. E.D.N.Y. 1998). Serial bankruptcy filings that are designed solely to delay creditors by imposing the automatic stay without benefiting creditors in any way are an abuse of the bankruptcy laws. Id.

The Court will also consider the effect of Debtor's fourth filing on her creditors. Debtor has repeatedly filed bankruptcy to frustrate or delay enforcement of her secured creditors' foreclosure rights. These creditors have incurred additional costs as a result of being unable to

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Respondent,

v.

Laura Toney, Appellant.

Appeal From Lee County
Richard L. Booth, Special Referee

Unpublished Opinion No. 2011-UP-334
Submitted June 1, 2011 – Filed June 27, 2011

AFFIRMED

Laura Toney, pro se, of Bishopville.

H. Guyton Murrell, of Columbia, for Respondent.

PER CURIAM: Laura Toney appeals the special referee's denial of her motion for relief from a foreclosure order pursuant to Rule 60(b), SCRCP. Toney argues the special referee erred in finding Toney had no meritorious defense and in failing to grant relief based on mistake and excusable neglect. We affirm[1] pursuant to Rule 220(b)(1), SCACR, and the following authorities: Rule 60(b), SCRCP ("On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect."); BB&T v. Taylor, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006) ("The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief."); id. at 551, 633 S.E.2d at 502 ("Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. [The appellate] standard of review, therefore, is limited to determining whether there was an abuse of discretion. An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." (citations omitted)).

AFFIRMED.

SHORT, KONDUROS, and GEATHERS, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Laura Toney, Plaintiff, v. LaSalle Bank National Association Trustee for Lehman Brothers Structured Asset Investment Loan Trust Sail 2005, Ocwen Federal Bank, also known as AltiSource Homes, Defendants.	)	Civil Action No. 3:11-1686-MBS-JRM **REPORT AND RECOMMENDATION**

Pro se Plaintiff, Laura Toney ("Toney"), filed this action on July 13, 2011. The Complaint is captioned "Complaint To Set Aside Fraudulent Transfer, And Fraud; Declaratory Judgment For Entry of Default: Gross Negligence; Emotional Distress; Deceptive And Unfair Practices." The named Defendants are lenders from whom Toney received a mortgage loan in October of 2004 secured by property located at 729 Chatman St., Bishopville, South Carolina. Bank of America, N.A. ("BANA") filed a motion to dismiss on October 21, 2011 which states that it is the successor by merger to LaSalle Bank National Association, Trustee for Lehman Brothers Structured Asset Investment Loan Trust Sail 2005 ("LaSalle"). Ocwen Federal Bank, a/k/a Altisource Homes ("Ocwen") filed an answer on December 28, 2011.

A "Preliminary Statement" in the Complaint indicates that Toney's claims are based on alleged "multiple violations of the Truth In Lending Act ("TILA").[1] The Complaint alleges that Toney did not receive at closing on October 6, 2004, required disclosures, such as "the choice of attorney notification, settlement statement, and good faith estimate." (Complaint, ¶ 7). Attached to the Complaint is a copy of a letter allegedly sent by Toney to Ocwen dated June 14, 2005 attempting to rescind her loan based on failure to receive the required disclosures.

Less than a month after the date of the rescission letter, LaSalle, which had been assigned the mortgage, filed a foreclosure action. A copy of the "Masters Order and Judgment of Foreclosure and Sale," dated March 9, 2007 is attached to Toney's Complaint. This foreclosure order details the mortgage loan and the procedural history of the foreclosure case. Toney filed an answer and counterclaim in the foreclosure action in which she advanced the exact claims being asserted in the present case. LaSalle filed a motion for summary judgment on March 29, 2006. Thereafter, Toney filed four separate bankruptcy actions. The Bankruptcy Court ruled that Toney was not entitled to an automatic stay based on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 in connection with her fourth bankruptcy case. A hearing was held on February 6, 2007, but neither Toney nor her attorney appeared. In granting the motion for summary judgment the foreclosure court specifically found:

> The Defendant Laura Toney alleges that she rescinded the loan by letter dated June 12, 2005. Pursuant to Title 15 Section 1635 of the U.S. Code, the obligor in a real estate secured consumer credit transaction shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms. The loan closing occurred on October 6, 2004, at which time the Defendant was provided the information and rescission forms. (Affidavit of Michael May filed March 29, 2006;

[1] *See* 15 U.S.C. § 1601, *et. seq.*

> Affidavit of Letia Benjamin). The information and rescission forms are signed by the Defendant Laura Toney to acknowledge that she was provided a copy of each at closing. Therefore, the Defendant's counterclaim that she rescinded the loan is without merit on its face since it is well outside the time to rescind permitted by law.

Apparently there was no appeal to the order of the foreclosure court and the property was sold at auction to LaSalle on May 7, 2007. (*See* deed attached to Complaint). Also attached to the Complaint is a notice of eviction dated April 27, 2011.

On July 13, 2011, Toney filed an "Entry of Default Application For Temporary Injunction and Permanent Injunction." (ECF No. 3). She seeks an order "voiding the Defendants' security interest in the Plaintiff's property," cancelling documents of record giving Defendants' a security interest in her property, and criminal penalties against the Defendants. (Pl.Motion, pp. 9-10). Toney asks for a temporary injunction followed by a hearing and permanent injunction.

The Court is required to consider and balance four factors in determining whether to grant injunctive relief prior to a trial on the merits:

(a) plaintiff's likelihood of success in the underlying dispute between the parties;

(b) whether plaintiff will suffer irreparable injury if the interim relief is denied;

(c) the injury to defendant if an injunction is issued; and

(d) the public interest.

Manning v. Hunt, 119 F.3d 254, 263 (4th Cir.1997); Hughes Network Sys., Inc. v. InterDigital Commc'n Corp., 17 F.3d 691, 693 (4th Cir.1994); North Carolina State Ports Auth. v. Dart Containerline Co., Ltd., 592 F.2d 749 (4th Cir.1979); Blackwelder Furniture Co. v. Seilig Manufacturing Co., 550 F.2d 189 (4th Cir.1977). The two most important factors are probable irreparable injury to a plaintiff if the relief is not granted and the likelihood of harm to a defendant

if the injunction is granted. Manning, 119 F.3d at 263; North Carolina State Ports Auth., 592 F.2d at 750.

A plaintiff does not have an automatic right to a preliminary injunction, and such relief should be used sparingly. The primary purpose of injunctive relief is to preserve the status quo pending a resolution on the merits. Injunctive relief which changes the status quo pending trial is limited to cases where "the exigencies of the situation demand such relief." Wetzel v. Edwards, 635 F.2d 283, 286 (4th Cir.1980).

In this motion and in her complaint, Toney asserts that she is entitled to "default" and other relief based upon Defendants' failure to respond to her recession letter in 2005 as required by the TILA. However, Defendants have raised defenses of *res judicata* and statute of limitations which would appear to apply to Toney's claims. As discussed above, Toney raised the same issues in her counterclaim in the foreclosure action. The court found against Toney. Therefore, the likelihood of success in her case is small. Further, Toney cannot show irreparable injury since she has been evicted from the property.

Hence, it is recommended that Toney's motion be **denied.**

Joseph R. McCrorey
United States Magistrate Judge

Columbia, South Carolina

February 27, 2012

The parties are referred to the Notice Page attached hereto.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, Plaintiff, vs. LaSalle Bank National Association Trustee for Lehman Brothers Secured Asset Investment Loan Trust Sail 2005, Ocwen Federal Bank, a/k/a AltiSource Homes, Defendants.	C.A. No. 3:11-cv-1686-MBS **ORDER AND OPINION**

Plaintiff Laura Toney ("Plaintiff") filed a pro se action alleging various federal and state law violations arising out of a foreclosure action instituted against her by Defendant LaSalle Bank National Association Trustee for Lehman Brothers Secured Asset Investment Loan Trust Sail 2005 ("LaSalle"). Plaintiff's motion for a temporary injunction to enjoin Defendant LaSalle and Defendant Ocwen Federal Bank ("Ocwen") from denying Plaintiff possession of the foreclosed property is currently before the court.

Background

On October 6, 2004 Plaintiff purchased and closed the sale on a property located at 729 Chatman Street in Bishopville, South Carolina ("the property"). During the closing, Plaintiff entered into and received a mortgage from Defendant Ocwen secured by the property. On June 14, 2005, Plaintiff sent a letter to Defendant Ocwen stating her intention to rescind the loan because of several federal disclosure violations that occurred during the processing of the loan. Plaintiff alleged that she did not receive any federal disclosures prior to the closing as required

by the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601, et seq. On or around July 2005, Defendant LaSalle, which had been assigned the mortgage by Defendant Ocwen, filed a foreclosure action against Plaintiff. Thereafter, Defendant LaSalle filed a motion for summary judgment. On October 15, 2005, Defendant LaSalle responded to Plaintiff's notice of rescission letter. On February 16, 2007, a foreclosure hearing was held in the absence of Plaintiff or her attorney. Plaintiff alleges that her attorney at the time, Mr. David Weeks, was a member of the South Carolina General Assembly and could not be present because the General Assembly was in session. Plaintiff alleges that a request to reschedule the hearing was submitted on behalf of Mr. Weeks, but that the hearing was held as previously scheduled. The judge presiding over the foreclosure hearing granted summary judgment in favor of Defendant LaSalle and found that,

> The Defendant Laura Toney alleges that she rescinded the loan by letter dated June 12, 2005. Pursuant to Title 15 Section 1635 of the U.S. Code, the obligor in a real estate secured consumer credit transaction shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms. The loan closing occurred on October 6, 2004, at which time the Defendant was provided the information and rescission forms. (Affidavit of Michael May filed March 29, 2006; Affidavit of Letia Benjamin). The information and rescission forms are signed by the Defendant Laura Toney to acknowledge that she was provided a copy of each at closing. Therefore, the Defendant's counterclaim that she rescinded the loan is without merit on its face since it is well outside the time to rescind permitted by law.

On March 22, 2007, Plaintiff filed an application for a temporary restraining order, preliminary injunction, and permanent injunction in state court. On April 25, 2007, Plaintiff filed a motion for reconsideration of the foreclosure decision. On April 27, 2007, a notice of eviction was filed against Plaintiff. Plaintiff was evicted from the property shortly thereafter. On May 7, 2007, the property was sold at an auction to Defendant LaSalle. At some point after the sale, Plaintiff's motions were denied and Plaintiff filed an appeal with the South Carolina

Court of Appeals. Plaintiff states that the case is currently pending with the South Carolina Supreme Court.

On July 13, 2011, Plaintiff filed the instant action, alleging among other state law violations, federal statutory violations of TILA. Plaintiff alleges that she did not receive certain required federal disclosures at the time of closing, including "choice of attorney notification, settlement statement, and good faith estimate." (Complaint, para. 7). Plaintiff alleges that Defendants' failure to make proper disclosures and failure to respond to her notice of rescission within twenty days resulted in Defendants' losing their interest in the property. Further, Plaintiff alleges that Defendants' failure to respond to her notice of rescission within twenty days had the effect of reinstating Plaintiff's interest in the property and relieving her obligations under the original loan. On October 21, 2011, Bank of America, N.A. ("BANA") filed a motion to dismiss, stating that it was the successor in interest to the property by merger with Defendant LaSalle. On December 28, 2011, Defendant Ocwen filed an answer. On July 13, 2011, Plaintiff filed a motion for a temporary injunction to enjoin Defendants LaSalle and Ocwen from denying Plaintiff possession of the property and requested a hearing on a preliminary and permanent injunction.

On February 27, 2012, the Magistrate Judge filed a Report and Recommendation in which he recommended denying Plaintiff's motion. The Magistrate Judge found that Plaintiff failed to show the likelihood of her success in the underlying action based on the opinion of the foreclosure court. The Magistrate Judge cited to Defendants' assertion that res judiciata of the foreclosure court's decision and the statute of limitations barred recovery of Plaintiff's rescission claim. The Magistrate Judge also found that Plaintiff could not demonstrate irreparable injury since she has already been evicted from the property. On March 7, 2012, Plaintiff filed

objections to the Magistrate Judge's Report and Recommendation. On March 16, 2012, Plaintiff re-filed identical objections to the Magistrate Judge's Report and Recommendation, except that in the most recent objections, Plaintiff failed to attach certain documents that were attached to the original objections.

Discussion

Standard of Review

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight. The responsibility for making a final determination remains with this court. Mathews v. Weber, 423 U.S. 261, 270 (1976). The court is charged with making a de novo determination of any portions of the Magistrate Judge's Report to which a specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or may recommit the matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b)(1).

A party seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008); Dewhurst v. Century Aluminum Co., 649 F.3d 287 (4th Cir. 2011).

Analysis

Plaintiff's first objection is that the Magistrate Judge failed to address in his Report and Recommendation the fact that Defendant Ocwen filed an answer eighty-five days past the original due date. The Magistrate Judge's failure to address the timeliness of Defendant Ocwen's answer in his Report and Recommendation is not objectionable because the Magistrate

Judge did not consider the substance of Defendant Ocwen's answer in his analysis of Plaintiff's motion for a temporary injunction. Furthermore, Defendant Ocwen's answer is not relevant to the analysis of whether Plaintiff can fulfill the Winter test for a preliminary injunction.

Plaintiff's next objection is that the hearing held by the foreclosure court violated South Carolina Code of Laws Section 2-1-150, which states that "no member of the General Assembly shall be required to appear in court as an attorney . . . during any regular day," referring to when the General Assembly is in session. Plaintiff argues that the hearing should not have been held in her and her attorney's absence. Plaintiff's objection is not relevant to the court's review of Plaintiff's motion for injunctive relief. Plaintiff's objection is alleging a state law violation, resolution of which is not necessary to determine whether a temporary injunction should be granted in the instant action.

Plaintiff also objects to the Magistrate Judge's finding that the res judicata effect of the foreclosure court's decision makes it unlikely that Plaintiff can succeed in the instant action. Plaintiff alleges that the foreclosure court's decision is not final, because her case is pending with the South Carolina Supreme Court. Furthermore, it appears that she is alleging that she did not get a full and fair opportunity to adjudicate the merits of her claim before the foreclosure court because neither she nor her attorney was present at the hearing. As to Plaintiff's contentions regarding the foreclosure proceedings, the court finds it is not necessary to address the res judicata effect of the foreclosure court's decision in order to resolve Plaintiff's motion for a temporary injunction.

Plaintiff's primary objection is that her deadline to rescind the loan was not three days, but was extended to three years, because Defendants failed to make the necessary disclosures required by TILA. Plaintiff cites to 12 C.F.R. § 226.23(3) for support, which states that, "If the

required notice or material disclosures are not delivered [to borrower], the right to rescind shall expire 3 years after consummation." Plaintiff states that the material disclosures included the annual percentage rate, applicable variable-rate disclosures, finance charge, amount financed, the total payments and the payment schedule. Based on language found elsewhere in § 226, requiring that disclosures be provided to borrowers before the closing, Plaintiff interprets § 226.23(3) as implying that Plaintiff's period of rescission is extended to 3 years if the material disclosures are not made prior to closing. Plaintiff concedes that she did receive the required TILA disclosures at the time of closing, but contends that Defendants were required to provide her with the disclosures prior to the time of closing. Specifically, Plaintiff alleges that Defendants were required to make the disclosures three days after Plaintiff submitted her loan application and their failure to do so extended Plaintiff's rescission period by three years. Furthermore, Plaintiff alleges that under the TILA, Defendants were required to respond to her notice of rescission within twenty days and that their failure to do so results in their loss of interest in the property and Plaintiff's reinstatement of interest in the property with no obligations under the original loan.

The TILA regulation found at 12 C.F.R. § 226.23(3) states that, "The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures, whichever occurs last. If the required notice or material disclosures [fn. 48] are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first." According to footnote 48, "material disclosures" means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment

schedule, and the disclosures and limitations referred to in §§ 226.32(c) and (d) and 226.35(b)(2).

The plain language of § 226.23(3) makes clear that if the required notice or material disclosures are not delivered, a three year rescission period is triggered for borrowers. England v. MG Investments, Inc., 93 F. Supp. 2d 718, 725 (S.D. W.Va. 2000). Certain errors in the material disclosures are effectively considered a failure to make material disclosures under § 226.23(3) and can also result in a three-year extension of the rescission period. For example, under §226.23(g), a material disclosure cannot understate the finance charge by more than 0.5 percent in order to fulfill the requirements of § 226.23(3). Furthermore, certain errors in the disclosure of the payment schedule can also trigger a three-year rescission period. Larrabee v. Bank of America, N.A., 714 F. Supp. 2d 562, 567 (E.D. Va. 2010)(citing American Mortgage Network, Inc. v. Shelton, 486 F.3d 815 (4th Cir. 2007)).

Plaintiff's objection, that she timely filed her rescission notice within the three year period allotted to her, is incorrect. The TILA regulation in pertinent part states: "The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures, **whichever occurs last.**" (emphasis added). Plaintiff alleges that the rescission period is extended by three years if material disclosures are not made prior to the closing. The plain language of the regulation stating "whichever occurs last" contemplates that material disclosures might be made on or after the closing and that the clock for the three-day rescission period does not begin until the later of the three triggering events. See Oscar v. Bank One, N.A., No. 05-5928, 2006 WL 401853, at *3 (E.D. Pa. Feb. 17, 2006); see generally, Watkins v. SunTrust Mortgage Inc., 663 F.3d 232 (4th Cir. 2011). Furthermore, federal courts as

noted above, have interpreted the condition permitting a three-year rescission period, "If the required notice or material disclosures are not delivered," to refer to situations where the material disclosure is not delivered at all or if the material disclosure is incorrect.

In this case, Plaintiff has conceded that the TILA material disclosures were made at the time of closing; therefore, as a preliminary matter, the rescission period ended on or around October 9, 2004, three days after the closing. Plaintiff filed a notice of rescission on June 14, 2005, which was almost 7 months after the closing and material disclosures were made. Therefore, Plaintiff's letter of rescission was not properly filed, relieving Defendants of their obligation to respond to the letter of rescission within twenty days. Even if it was possible that Defendants would be subject to liability under the TILA with regard to the timing of certain disclosures, the court finds that Plaintiff is unlikely to succeed on the merits of her claim that Defendants lost their interest in the property for failing to respond to Plaintiff's rescission letter within twenty days.

Conclusion

Plaintiff has not established that she is likely to succeed on the merits, as required by Winter, 555 U.S. at 20. Accordingly, the court adopts the Magistrate Judge's recommendation and denies Plaintiff's motion for temporary injunction and her request for a hearing for a preliminary and permanent injunction.

IT IS SO ORDERED.

s/ Margaret B. Seymour
Margaret B. Seymour
Chief United States District Judge

March 22, 2012
Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

LAURA TONEY, Plaintiff, v. LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE REGISTERED HOLDERS OF STRUCTURED ASSET SECURITIES CORPORATION, STRUCTURED ASSET INVESTMENT LOAN TRUST, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-11; AND OCWEN FEDERAL BANK A/K/A ALTISOURCE HOMES, Defendants.	Civil Action No. 3:11-1686-MBS-JRM **REPORT AND RECOMMENDATION**

The pro se Plaintiff, Laura Toney, filed this action on July 13, 2011.[1] Plaintiff appears to assert claims under the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601, et seq., as well as claims under South Carolina law. Defendants in this action are LaSalle Bank National Association, as

[1]Pretrial matters in this case were referred to the undersigned pursuant to Local Civil Rule 73.02(B)(2)(e) DSC. As these are dispositive motions, this Report and Recommendation is entered for review by the Court.

Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 ("LaSalle") and Ocwen Federal Bank, also known as AltiSource Homes ("Ocwen").[2] Plaintiff filed motions for entry of default against Ocwen on October 19 and 25, 2011. Ocwen filed a response on April 6, 2012, and Plaintiff filed a reply on April 16, 2012. Plaintiff filed a motion for entry of default against LaSalle on October 25, 2011, LaSalle filed responses on November 1 and 7, 2011, and Plaintiff filed replies on November 8 and 15, 2011.[3]

LaSalle filed a motion to dismiss on October 21, 2011. As Plaintiff is proceeding pro se, an order pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975) was issued on October 24, 2011, advising Plaintiff of the importance of a dispositive motion and of the need for her to file an adequate response. Plaintiff was specifically advised that if she failed to respond adequately, Defendant LaSalle's motion may be granted, thereby ending her case against LaSalle. Plaintiff filed responses on October 25 and 28, and November 2, 2011; LaSalle filed a reply on November 7, 2011; and Plaintiff filed a sur-reply on November 8, 2011. A hearing on pending motions was held before the undersigned on March 20, 2012.

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[2]LaSalle was originally named as LaSalle Bank National Association, Trustee for Lehman Brothers Secured Asset Investment Loan Trust Sail 2005. Plaintiff filed a motion to amend (on January 11, 2012) the name of this Defendant (as identified by Defendant LaSalle's in its motion to dismiss), which the undersigned granted on March 20, 2012. Defendant Ocwen asserts that it has been misidentified and that its correct name is Ocwen Loan Servicing, LLC. See Docs. 60 and 61. Ocwen also has stated it will accept service of an amended summons and amended complaint that reflects its corrected name. Plaintiff has not filed a motion to amend Ocwen's name.

[3]On March 22, 2012, the Honorable Margaret B. Seymour, Chief United States District Judge, District of South Carolina, denied Plaintiff's motion for a temporary injunction and request for a hearing for a preliminary and permanent injunction. Plaintiff, on April 2, 2012, filed a Notice of Appeal to the Court of Appeals for the Fourth Circuit, as to Judge Seymour's order. See Doc. 62.

After the hearing, Defendant Ocwen filed a motion to dismiss on April 6, 2012 (and it filed a response to the motions for default as detailed above). Another Roseboro order was issued on April 10, 2012. Plaintiff filed a response on May 14, 2012.

BACKGROUND

Plaintiff refinanced her house located in Bishopville, South Carolina ("the Property") on October 6, 2004. During the closing, Plaintiff entered into and received a mortgage[4] which was secured by the Property. On June 14, 2005, Plaintiff sent an unsigned letter to "Owen Federal Bank FSB" (see attachment to Complaint), which she asserts is a letter sent to Defendant Ocwen stating her intention to rescind the loan because of alleged federal disclosure violations that occurred during the processing of the loan. Plaintiff claims that, prior to closing, she did not receive the disclosures required by TILA. On or around July 2005, Defendant LaSalle, which had been assigned the mortgage, filed a foreclosure action against Plaintiff.[5] Plaintiff filed, through counsel, an answer and counterclaim (alleging a TILA violation) in the state foreclosure action on August 17, 2005. Thereafter, Defendant LaSalle filed a motion for summary judgment. Plaintiff states that the first reply to her rescission letter was on October 19, 2005 (see Doc. 52, p. 9). On February 16, 2007, a foreclosure hearing was held in the absence of Plaintiff or her attorney. Plaintiff asserts that her

[4]It appears the original mortgage was with Finance America., LLC. The mortgage was later assigned to LaSalle. The servicing was assigned in October 2004 (effective December 1, 2005) to Ocwen Federal Bank FSB. See Attachments to Complaint (Doc. 1) and to Plaintiff's April 16, 2012 Response (Doc. 70).

[5]In a pleading filed July 20, 2011 (prior to Plaintiff bringing this action into proper form), Plaintiff appears to attempt to remove the state foreclosure action to this Court. Any such attempt, however, is untimely. See 28 U.S.C. § 1446.

attorney was not there because he was a member of the South Carolina General Assembly and could not be present as the General Assembly was in session that day. Plaintiff claims that a request to reschedule the hearing was submitted on her behalf by her attorney, but the hearing was held as previously scheduled. The judge presiding over the foreclosure hearing granted summary judgment in favor of Defendant LaSalle and found that:

> The Defendant Laura Toney alleges that she rescinded the loan by letter dated June 12, 2005. Pursuant to Title 15 Section 1635 of the U.S. Code, the obligor in a real estate secured consumer credit transaction shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms. The loan closing occurred on October 6, 2004, at which time the Defendant was provided the information and rescission forms. (Affidavit of Michael May filed March 29, 2006; Affidavit of Letia Benjamin). The information and rescission forms are signed by the Defendant Laura Toney to acknowledge that she was provided a copy of each at closing. Therefore, the Defendant's counterclaim that she rescinded the loan is without merit on its face since it is well outside the time to rescind permitted by law.

Additionally, the judge found that Plaintiff was allowed to select her own closing attorney, and her allegations of entitlement to rescission were without merit and outside the time period for rescission as a matter of law. See March 9, 2007 Master's Order and Judgement of Foreclosure and Sale (Attachment to Doc. 1 - Complaint).

On March 22, 2007, Plaintiff filed an application for a temporary restraining order, preliminary injunction, and permanent injunction in state court. On April 25, 2007, Plaintiff filed a motion for reconsideration of the foreclosure decision. On April 27, 2007, a notice of eviction was filed against Plaintiff. On May 7, 2007, the Property was sold at an auction to Defendant LaSalle. At some point after the sale, Plaintiff's motions were denied and she filed an appeal with the South Carolina Court of Appeals, which affirmed the lower court's decision. Plaintiff then appealed the

state court action to the Supreme Court of South Carolina. It appears the appeal is still pending. Plaintiff has been evicted from the Property.

MOTIONS FOR DEFAULT JUDGMENT

On October 25, 2011, Plaintiff filed a motion pursuant to Fed. R. Civ. P. 55(a) for entry of default against Defendant LaSalle. She argues that the Summons and Complaint and her motion for injunction were filed on July 13, 2011; LaSalle was mailed an Order to answer the Summons and Complaint and motion for injunction; LaSalle was served with a copy of the Summons and Complaint and motion for injunction; an answer to the Complaint and motion for injunction were due on October 3, 2011; and LaSalle failed to appear, plead, or otherwise defend and is in default. LaSalle argues that Plaintiff's motion should be denied because it timely filed a motion to dismiss.

It is recommended that Plaintiff's motion for default as to LaSalle be denied. Plaintiff asserts that LaSalle's answer was due on October 3, 2011. She did not specify in her motion the date on which LaSalle was allegedly served. In a previous pleading, she asserted that LaSalle was served on September 19, 2011. See Doc. 17. Rule 12 provides that generally a defendant must serve a responsive pleading within twenty-one days after being served with the summons and complaint. See Fed. R. Civ. P. 12(a)(1)(A)(i). Thus, if LaSalle was served on September 19, 2011, its answer was due on October 11, 2011 (October 10, 2011 was a federal holiday). On October 7, 2011, LaSalle filed a timely motion to extend the time to file its answer until October 21, 2011, and the motion was granted on October 11, 2011. Thereafter, LaSalle timely filed a motion to dismiss on October 21, 2011. When a motion to dismiss under Rule 12 is filed, however, the time for the responsive

pleading is altered (if the court denies the motion to dismiss, "the responsive pleading must be served within 14 days after notice of the court's action"). Fed. R. Civ. P. 12(a)(4)(A).

On October 19, 2011, Plaintiff filed a motion pursuant to Fed. R. Civ. P. 55(a) for entry of default against Defendant Ocwen. She argues that the Summons and Complaint were filed on July 13, 2011; Ocwen was served with a copy of the Summons and Complaint; an answer was due on October 3, 2011; and Ocwen failed to appeal, plead, or otherwise defend within the time allowed and is in default. On October 25, 2011, Plaintiff filed a second motion for entry of default against Ocwen in which she reiterates her arguments from her earlier motion and also argues that Ocwen failed to respond to her motion for an injunction.

Ocwen, in a response filed April 6, 2012, argues that Plaintiff's motion for default judgment should be denied because its answer was filed prior to entry of default; Ocwen Loan Servicing, the proper party to this suit, is a wholly different entity from "Ocwen Federal Bank," and thus alleged service on "Ocwen Federal Bank" did not constitute service on Ocwen Loan Servicing; even if Plaintiff had named an existing entity called "Ocwen Federal Bank," service of process was not properly effected pursuant to applicable law; entry of judgment by default is a drastic remedy which should be used only in extreme situations; and entry of default judgment against the non-existent "Ocwen Federal Bank" should not be granted because it is a nullity.

It is recommended that Plaintiff's motions for entry of default against Ocwen be denied as she has not shown that Ocwen was properly served or that the correct entity was named in the Complaint. Ocwen has now filed an answer and asserts that it will accept service of an amended summons and complaint as to its correct name of Ocwen Loan Servicing, LLC. Rule 55(a) provides

> **Entering a Default.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

Although Plaintiff asserts in her affidavits accompanying her motions for default that Ocwen Federal Bank was served with a copy of the Summons and Complaint, there is nothing in the affidavits indicating when this Defendant was served. See Docs. 20 and 27. Review of the record reveals that Plaintiff filed purported service documents on October 7, 2011. Plaintiff attached a copy of two United States Postal Service "Domestic Return Receipt" forms indicating that "Ocwen Federal Bank A/K/A AltiSource Homes" was served by certified mail at "P.O. Box 24237 West Palm Beach, Fl 33416-4737" and "12650 Ingenuity Drive, Orlando, Florida, 32826 on September 15, 2011." See Doc. 17.

Ocwen asserts that it was not properly served. The Federal Rules of Civil Procedure provide, in pertinent part:

> **Serving a Corporation, Partnership, or Association.** Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:
>
> (1) in a judicial district of the United States:
>
> (A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or
>
> (B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and--if the agent is one authorized by statute and the statute so requires--by also mailing a copy of each to the defendant[.]

Fed. R. Civ. P. 4(h)(i). Service may be made by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made[.]" Fed. R. Civ. P. 4(e)(1). Under South Carolina law, a corporation is served:

> by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

S.C.R.Civ. P. 4(d)(3). The South Carolina Rules of Civil Procedure also provide that service on a corporation may be made "by registered or certified mail, return receipt requested and **delivery restricted to the addressee**." S.C. R. Civ. P. 4(d)(8)(emphasis added).

Here, the return receipts reveal that delivery was not restricted to the addressee such that service by certified mail was not proper under South Carolina law. The Florida Rules of Civil Procedure state that "at the time of personal service of process a copy of the initial pleading shall be delivered to the party upon whom service is made." Fla. R. Civ. P. 1.070(e). A corporation may be served by serving process on the president, vice president, cashier, treasurer, secretary, general manager, any director, or any officer or business agent residing in the state. Fla. Stat. § 48.081(1)(a-d). As an alternative, process may be served on the agent designated by the corporation as its registered agent. Id. Fl. Stat. § 48.081(3)(a). The Florida Rules of Civil Procedure provide for service of process by certified mail, but only if the defendant agrees to waive personal service. Fla. R. Civ. P. 1.070(i). There is no indication that Plaintiff received a waiver or served Defendants in accordance with the Florida Rules of Civil Procedure.

MOTIONS TO DISMISS

Plaintiff alleges that Defendants violated her rights under TILA and also appears to allege claims under South Carolina law. She claims that she did not receive certain required federal disclosures at the time of closing, including "choice of attorney notification, settlement statement, and good faith estimate." Complaint, Para. 7. She alleges that Defendants' failure to make proper

disclosures and their failure to respond to her notice of rescission within twenty days of receipt resulted in Defendants losing their security interest in the Property. Plaintiff also claims that Defendants' failure to timely respond to her notice of rescission reinstated her interest in the Property and relieved her obligations under the original loan. Defendant LaSalle contends that its motion to dismiss should be granted because: (1) Plaintiff's claims are barred by res judicata; (2) the Complaint fails to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)); (3) the Complaint fails to state a plausible cause of action; and (4) the Complaint fails to plead fraud with the specificity required (Fed. R. Civ. P. 9(b)). Ocwen contends that its motion to dismiss should be granted because: (1) the Complaint fails to meet the minimum federal pleading standard (Fed. R. Civ. P. 8); (2) Plaintiff's claims are barred by res judicata; (3) Plaintiff failed to rescind within three days of her closing date such that her right to rescind is time barred; (4) Plaintiff failed to file a rescission action within three years of the closing date such that her rescission action is time barred; (5) Plaintiff is not entitled to recover for emotional distress; (6) Plaintiff fails to state a claim for deceptive and unfair practices; (7) Plaintiff fails to state a claim for gross negligence; (8) Plaintiff fails to plead fraud or fraudulent transfer with the specificity required, and (9) Plaintiff fails to state a valid claim for declaratory judgment. Plaintiff argues that the motions to dismiss should be denied because: (1) Defendants are in default for failing to timely file answers and responses to her previous motion for injunctive relief;[6] (2) Defendant Ocwen did not file its motion to dismiss until after it filed its answer in violation of Fed. R. Civ. P. 12; (3) this action is not barred by the doctrine of res judicata because the state action is on appeal and thus is still pending; and (4) she has properly asserted her claims.

[6]It is recommended this argument be rejected as Plaintiff's motion for injunctive relief was previously denied and it is recommended that the motions for default be denied.

Defendant Ocwen did not file its motion to dismiss until after it filed its answer. Generally, a Rule 12(b)(6) motion to dismiss should be filed before a responsive pleading is filed. After the close of pleading, a Rule 12(c) motion (or a Rule 56 motion for summary judgment) is used to test the sufficiency of the complaint. However, the timing and sequence of these filings is not fatal to Ocwen's motion. "(A) motion to dismiss for failure to state a claim...that is styled as arising under Rule 12(b) but is filed after the close of pleading, should be construed by the district court as a motion for judgment on the pleadings under Rule 12(c)." Patel v. Contemporary Classics of Beverly Hills, 259 F.3d 123, 126 (2d Cir. 2001); see also Satkowiak v. Bay County Sheriff's Dep't, 47 F. App'x 376, 377 n. 1 (6th Cir. 2002); Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999); Shooting Point, L.L.C. v. Cumming, 238 F.Supp.2d 729, 735 (E.D.Va. 2002). Thus, the undersigned construes Defendant Ocwen's motion to dismiss as a motion for judgment on the pleadings.

1. Standard of Review

The federal court is charged with liberally construing the complaints filed by pro se litigants, to allow them to fully develop potentially meritorious cases. See Cruz v. Beto, 405 U.S. 319 (1972); Haines v. Kerner, 404 U.S. 519 (1972). The court's function, however, is not to decide issues of fact, but to decide whether there is an issue of fact to be tried. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, Weller v. Department of Social Servs., 901 F.2d 387 (4th Cir. 1990), nor can the court assume the existence of a genuine issue of material fact where none exists.

"[A] motion under Rule 12(c) ... is assessed under the same standard that applies to a Rule 12(b)(6) motion." Walker v. Kelly, 589 F.3d 127, 139 (4th Cir. 2009)(citing Edwards, 178 F.3d at

243). When considering a 12(b)(6) motion to dismiss, the court must accept as true the facts alleged in the complaint and view them in a light most favorable to the plaintiff. Ostrzenski v. Seigel, 177 F.3d 245, 251 (4th Cir. 1999). The United States Supreme Court has stated that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. Although "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," a pleading that merely offers "labels and conclusions," or "a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. Likewise, "a complaint [will not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancements.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557).

2. Res Judicata

Defendants contend that this action is barred by the doctrine of res judicata. Plaintiff argues that this action is not barred because her action in state court is on appeal such that there is no final judgment and res judciata does not apply.

Pursuant to 28 U.S.C. § 1738, state judicial proceedings shall have the same full faith and credit in every court within the United States as they have in the courts of the state from which they are taken. As a result, "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."

Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984). Thus, South Carolina law of claim preclusion (also called res judicata) must be applied to determine the effect of the South Carolina judgment.

In South Carolina "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Hilton Head Ctr. of South Carolina, Inc. v. Public Serv. Comm'n of South Carolina, 362 S.E.2d 176, 177 (S.C. 1987). South Carolina courts use various tests in determining whether a claim should have been raised in a prior suit: "(1) when there is identity of the subject matter in both cases; (2) where the cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; (3) when there is the same evidence in both cases; and [] (4) when the claims arise out of the same transaction or occurrence." Plum Creek Dev. Co., Inc. v. City of Conway, 512 S.E.2d 106, 109 n. 3 (S.C. 1999)(citing J. Flanagan, South Carolina Civil Procedure 649-650 (1996)). To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Riedman Corp. v. Greenville Steel Structures, Inc., 419 S.E.2d 217 (S.C. 1992); Sealy v. Dodge, 347 S.E.2d 504 (S.C. 1986).

Here, res judicata bars this action as all three elements of the test for res judicata have been met as shown by Plaintiff's Complaint and exhibits. Plaintiff does not appear to dispute that the first two elements (identity of the parties and identity of subject matter) are met. Although Plaintiff appears to slightly change the name of the trust that held her mortgage, the attachments to her Complaint indicate that she is referring to the same entities in the prior action. The foreclosing party was "LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset

Securities Corporation, Structured Asset investment Loan Trust, Mortgage pass-Through Certificates, Series 2004-11." Plaintiff asserts her claims against Ocwen as a successor or assignee.

The subject matter is the same in both lawsuits. If the primary right and duty and alleged wrong are the same in each action, there is an identity of subject matter. See Jimmy Martin Realty Group, Inc. v. Famcco Distrib., Inc., 386 S.E.2d 803 (S.C. Ct.App.1989). Plaintiff sought to prevent foreclosure of her home in Lee County, South Carolina in the state action and asserted a counterclaim for rescission, and seeks to have the foreclosure overturned and undone in the current action.

The third element is met because the judge in the state court action granted the motion for summary judgment[7] and the South Carolina Court of Appeals affirmed the decision. Plaintiff argues that this action is not barred by res judicata because the action is still pending in state court, as she has appealed her state court case to the Supreme Court of South Carolina. The Supreme Court of South Carolina, however, would likely hold "that a judgment is final for preclusion purposes in South Carolina during the pendency of an appeal." This view is in accordance with the majority rule among state courts. See Campbell v. Lake Hallowell Homeowners Ass'n, 852 A.2d 1029, 1039–40 (Md.Ct.Spec.App. 2004) (listing various state court cases demonstrating the majority view). Furthermore, this district has previously found that the Supreme Court of South Carolina would adopt the majority position. Sea Cabin on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach, 828 F.Supp. 1241, 1249 n. 20 (D.S.C.1993); Dawson v. State Law Enforcement Div., CA No. 3:91–1403–17, 1992 WL 208967 at *3–4 (D.S.C. Apr. 6, 1992). Therefore, it is recommended that

[7]Summary judgment is an adjudication on the merits of the case. See Baird v. Charleston County, 511 S.E.2d 69, 74 (S.C.1999).

Defendants' motions to dismiss based on res judicata be granted as the a trial court adjudication is final while pending appeal.

Alternatively, it is recommended that this action be dismissed because this Court should not interfere with the ongoing state proceedings. Abstention may be raised sua sponte. Bellotti v. Baird, 428 U.S. 132, 143 n. 10 (1976).

The Supreme Court of the United States has held that a federal court should not equitably interfere with state proceedings except in the most narrow and extraordinary of circumstances. Younger v. Harris, 401 U.S. 37 (1971); Gilliam v. Foster, 75 F.3d 881, 903 (4th Cir. 1996). In Younger, the Court noted that courts of equity should not act unless the moving party has no adequate remedy at law and will suffer irreparable injury if denied equitable relief. Younger, 401 U.S. at 43–44. While the Younger doctrine was originally applied to protect state interests represented in criminal prosecutions, the Supreme Court has extended Younger to prescribe abstention in favor of state civil actions as well, when important state interests are at stake. See Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975). The Fourth Circuit applies the following test to determine whether Younger abstention is appropriate: (1) whether there is an ongoing state judicial proceeding; (2) whether the proceedings implicate important state interests; and (3) whether there is an adequate opportunity in the state proceedings to raise federal claims. Richmond Rail Co. v. Forst, 4 F.3d 244, 251 (4th Cir.1993).

Here, Plaintiff asserts that there is an ongoing state judicial proceeding. There is an important state interest in adjudicating foreclosure matters pertaining to real property located within a state. See Shaffer v. Heitner, 433 U.S. 186, 207–208 (1977) (recognizing a state's "strong interests in assuring the marketability of property within its borders[ ] and in providing a procedure for peaceful

resolution of disputes about the possession of that property")(footnote omitted); see also Sergeon v. Home Loan Ctr., Inc., No. 3:09–CV–01113–J–32JBT, 2010 WL 5662930 (collecting cases applying Younger abstention in light of a pending state foreclosure proceeding); Borkowski v. Fremont Inv. & Loan of Anaheim, Cal., 368 F.Supp.2d 822, 828 (N.D.Ohio 2005) (applying Younger abstention in the context of a pending state foreclosure proceeding); Prindable v. Ass'n of Apt. Owners of 2987 Kalakaua, 304 F.Supp.2d 1245, 1262 (D.Haw. 2003) (finding that foreclosure and ejectment proceedings were important state interests under Younger).[8] Finally, Plaintiff has an adequate opportunity to raise her federal (TILA) claims in the state court proceedings.

3. Failure to State a Claim Upon Which Relief May be Granted

Defendants contend that Plaintiff fails to state claims upon which relief may be granted and that Plaintiff's claims fail as a matter of law. Plaintiff appears to assert that she has alleged sufficient facts such that her claims should survive the motions to dismiss.

a. TILA

Defendants contend that Plaintiff fails to state a sufficient claim for violations of TILA because the alleged non-disclosures were non-material, limiting Plaintiff's right to rescind to three days. They also argue that even if the non-disclosures were material, Plaintiff failed to file this action within the three-year period. Plaintiff appears to argue that the non-disclosures were

[8]In her memorandum in opposition to summary judgment, Plaintiff claims that Defendants violated S.C. Code Ann § 37-10-102 (providing that a lender must ascertain prior to closing the preferred attorney to represent the debtor in matters related to the closing) and § 37-10-105 (providing the penalties for the failure to obtain the attorney preference). These claims are not properly before the Court as they were not alleged in the Complaint and Plaintiff has not amended her Complaint to add such claims. Further, these statutes do not permit rescission of the Note and Mortgage for its violation. See S.C. Code Ann. § 37-10-105(A).

material and she timely filed her TILA claim because she filed her counterclaim in the state court action within three years of the closing.

The right to rescind a loan under TILA for failure to disclose extends up to three days after consummation of the loan, unless the items left undisclosed are material. See 12 C.F.R. § 226.23(a)(3); 15 U.S.C. §§ 1631, 1632, 1635, 1638. If the non-disclosures are material, the borrower's right to rescind a transaction pursuant to TILA expires after three years. See 12 C.F.R. § 226.23(a)(3); 15 U.S.C. § 1635(f)("An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, which occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this chapter have not been delivered to the obligor...."). The required material disclosures include, among other things, the annual percentage rate, the amount financed, the method of determining the finance charge, and the amount of the finance charge. See 12 C.F.R. § 226.23(a)(3) n. 48; 15 U.S.C. § 1601(a), § 1635(f), § 1639(a).

Plaintiff has not alleged any material non-disclosures which would trigger the longer (three-year) statute of limitations period. Although Plaintiff claims that she did not receive certain required documents within three days of her loan application,[9] she admits (see, e.g., Doc. 76 at 8) that she received the required disclosures on the date of her closing. She attached copies of disclosures signed by her on the date of closing (October 6, 2004) including a Good Faith Estimate, Truth-In-Lending Disclosure Statement, and Attorney Preference form. See Attachments to Doc. 7. The judge in the state court case specifically found that Plaintiff was provided the required information and

[9]There are signed disclosures dated August 11, 2004 included in the record. Plaintiff claims that her signatures on these documents are forgeries. See Attachments to Doc. 7 and Doc. 1 (Complaint). She has not, however, disputed that she signed disclosures on the date of her closing.

rescission forms. Plaintiff has not alleged an attempt to rescind within three days of the closing (October 6, 2004), such that her right to rescission is time barred.

Defendants contend that even if the non-disclosures are material, Plaintiff failed to file her rescission action in this Court within three years of the closing date, such that her rescission action is time barred. Plaintiff appears to claim that she timely filed because she filed the counterclaim in her state court action within three years of the closing of her loan.

The Fourth Circuit, in the recent decision of Gilbert v. Residential Funding, LLC, 678 F.3d 271, 275–77 (4th Cir. 2012), held that the borrowers' letter to their lender within three years of the transaction, rather than the filing of any suit, is all that is required for notice of rescission under TILA. Here, in the light most favorable to Plaintiff for purposes of the motions to dismiss, Plaintiff exercised her right to rescind when she notified Ocwen that she was exercising her right to rescind in June 2005. As noted by the Fourth Circuit:

> To complete the rescission and void the contract, however, more is required. Either the creditor much "acknowledge[] that the right of rescission is available" and the parties must unwind the transaction amongst themselves, or the borrower must file a lawsuit so that the court may enforce the right to rescind.

Gilbert v. Residential Funding, LLC, 678 F.3d at 277 (quoting American Mortg. Network, Inc. v. Shelton, 486 F.3d 815, 821 (4th Cir. 2007)).[10]

Thus, in the light most favorable to Plaintiff, she exercised her right to rescind within the three-year period. She, however, failed to timely file this action alleging a TILA violation. There is a one-year statute of limitations for filing a suit once a violation of TILA has occurred. 15 U.S.C.

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[10]"[U]nilateral notification of cancellation does not automatically void the loan contract." Shelton, 486 F.3d at 821. "[O]therwise a borrower could get out from under a secured loan simply by claiming TILA violations, whether or not the lender had actually committed any." Id. (Quoting Yamamoto v. Bank of N.Y., 329 F.3d 1167, 1172 (9th Cir. 2003))(internal quotation marks omitted).

§ 1640(e). Whether the alleged TILA violation occurred at closing (October 6, 2004), when Plaintiff mailed the notice of recision (June 14, 2005), or when Plaintiff claims she first received a reply to her notice of recision (October 19, 2005), she filed this action well over one year later.

b. Emotional Distress

Plaintiff alleges that she is entitled to damages for severe emotional distress and mental anguish due to an unspecified Defendant's alleged refusal to acknowledge her rescission notice. Defendants contend that Plaintiff fails to allege facts that would establish that Defendants' conduct was outrageous. They also contend that Plaintiff fails to state a claim for negligent infliction of emotional distress. In her reply, Plaintiff appears to assert that she has stated a claim for intentional infliction of emotional distress because she had to take medications for stress and anxiety as a result of being evicted, property was destroyed or missing as a result of the eviction, and her house and property have sentimental value.

South Carolina expressly recognized the cause of action of intentional infliction of emotional distress, sometimes referred to as "outrage," in Ford v. Hutson, 276 S.E.2d 776 (S.C. 1981). To recover under the tort of outrage, a plaintiff must establish the following elements:

> (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct;
> (2) the conduct was so "extreme and outrageous" as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community";
> (3) the actions of the defendant caused the plaintiff's emotional distress; and
> (4) the emotional distressed suffered by the plaintiff was "severe" so that "no reasonable man could be expected to endure it."

Id., at 778 (quoting Vicnire v. Ford Motor Credit Co., 401 A.2d 148 (Me. 1979))(internal citations omitted); see also Wright v. Sparrow, 381 S.E.2d 503, 505 (S.C. Ct. App. 1989). In considering the

defendant's motion for summary judgment, the court must initially determine whether the conduct complained of "'may reasonably be regarded as so extreme and outrageous as to permit recovery, and only where reasonable persons may differ is the question one for the jury.'" Holtzscheiter v. Thomson Newspapers, Inc., 411 S.E.2d 664, 666 (S.C. 1991), overruled on other grounds, 506 S.E.2d 497 (S.C.1998)(quoting Todd v. South Carolina Farm Bureau Mut. Ins. Co., 321 S.E.2d 602, 609 (S.C. Ct. App. 1984), quashed on other grounds, 336 S.E.2d 472 (S.C. 1985)); see also Barber v. Whirlpool Corp., 34 F.3d 1268, 1276 (4th Cir. 1994) ("It is the court's responsibility to first determine as a matter of law whether or not the conduct was outrageous before submitting that question to the jury."). Here, Plaintiff has not asserted facts that would establish that Defendants' conduct was sufficiently outrageous or intolerable so as to support a reasonable finding of outrage or intentional infliction of emotional distress. Further, Plaintiff has not asserted facts that the alleged conduct was so severe that no person could be expected to endure it.

Plaintiff also fails to establish a claim for negligent infliction of emotional distress. South Carolina law generally requires proof of physical injury for the recovery of mental anguish and emotional distress. See Phillips v. United States, 575 F.Supp. 1309, 1317 (D.S.C.1983)("'[E]motional distress is a proper element of tort damage as long as such distress encompasses some physical manifestation.'" (quoting Robertsen v. State Farm Mut. Auto. Ins. Co., 464 F.Supp. 876, 883 n. 9 (D.S.C.1979)). Here, Plaintiff has not shown any physical injury as a result of Defendants' alleged conduct. South Carolina courts have allowed claims for negligent infliction of emotion distress which are limited to claims of bystander liability. Doe v. Greenville County School Dist., 651 S.E.2d 305, 307 (S.C. 2007). To establish a claim for negligent infliction of emotional distress a plaintiff must establish: defendant's negligence caused death or serious injury

to another, plaintiff was a bystander in close proximity to the accident, plaintiff and the victim were closely related, plaintiff witnessed the incident and plaintiff must exhibit physical manifestations of emotional distress that can be established by expert testimony. Kinard v. Augusta Sash & Door Co., 336 S.E.2d 465, 467 (S.C.1985). Here, Plaintiff has not sufficiently alleged a claim for bystander liability.

c. Deceptive and Unfair Practices

Plaintiff claims that she has a right to recover for deceptive and unfair practices. Defendants contend that Plaintiff fails to identify any specific cause of action or legal grounds on which she could recover. They argue that to the extent that Plaintiff is attempting to make an allegation under the South Carolina Unfair Trade Practices Act ("SCUPTA"), §§ 39-5-10, et seq.; Plaintiff has not alleged or asserted any facts showing that Defendants' action adversely affected a public interest. In reply, Plaintiff claims she has stated a claim based on the definition of an unfair practice by the FDIC (but does not specify the legal grounds on which she can recover).

The SCUTPA broadly prohibits any "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C.Code Ann. § 39-5-20. In order to bring an action under the SCUTPA, the plaintiff must demonstrate that (1) the defendant engaged in an unlawful trade practice, (2) the plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice, and (3) the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest. See S.C. Code Ann. § 39-5-140; Havird Oil Co. v. Marathon Oil Co., Inc., 149 F.3d 283, 291 (4th Cir. 1998); Daisy Outdoor Advertising Co., Inc. v. Abbott, 473 S.E.2d 47, 49 (S.C. 1996).

Here, Plaintiff fails to state a claim under the SCUTPA because she has not alleged that a public interest is affected. The SCUTPA is not available to redress a private wrong where the public interest is unaffected. Noack Enterprises v. Country Corner Interiors, 351 S.E.2d 347 (S.C. 1986). Conduct which only affects the parties to the transaction provides no basis for a SCUTPA claim. See Key Co. v. Famcco Distribs., Inc., 357 S.E.2d 476 (S.C.Ct.App.1987).

d. Gross Negligence

Plaintiff appears to allege that Defendants were grossly negligent in failing to provide documents required by TILA, exercising good faith in its dealings, and failing to disclose truthful and accurate information. Defendants contend that Plaintiff fails to establish a claim for gross negligence because her action is predicated on an alleged breach of contract.

Gross negligence is defined as "the failure to exercise slight care," or the "intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 520 S.E.2d 142, 153 (S.C. 1999). Under South Carolina law, "if the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie." Enhance-It, L.L.C. v. American Access Techns., Inc., 413 F. Supp. 2d 626, 631 (D.S.C. 2006)(citing Meddin v. Southern Ry.-Carolina Div., 62 S.E.2d 109, 112 (S.C. 1995)). Here, Plaintiff's negligence claim appears to arise from the mortgage contract such that she cannot establish a claim for gross negligence.

Further, Plaintiff fails to show a duty of care owed to her by Defendants. In South Carolina, a bank does not owe a customers a "special duty of care" based purely on his or her status as a customer. Regions Bank v. Schmauch, 582 S.E.2d 432, 444 (S.C. Ct. App. 2003). Plaintiff has not

shown any duty owed her by Defendants other than to follow the applicable laws. As noted above, Plaintiff admits and the judge in the state court action found that the required disclosures were made at the closing.

e. Fraud/Fraudulent Transfer

Plaintiff appears to allege that Defendants made false representation in connection with the loan process and closing and they fraudulently foreclosed on the Property. Defendants contend that Plaintiff failed to plead fraud or fraudulent transfer with the specificity required.

Federal Rule 9 requires that a complainant plead fraud[11] with particularity. Fed. R. Civ. P. 9(b); Pearlstine Distribs., Inc. v. Freixenet USA, Inc., 678 F. Supp. 133, 136 (D.S.C. 1988). Under Rule 9, particularity of pleading is required "with regard to the time, place, speaker, and contents, as well as the manner in which statements are false and the specific acts raising an inference of fraud – the 'who, what, where, why, and when.'" In re First Union Corp. Sec. Litig., 128 F.Supp. 2d 871, 884 (W.D.N.C. 2001); see also Lemacks v. Consolidated Freightways Corp., No. Civ.A.

[11]To prove fraud under South Carolina Law, a plaintiff must prove the following elements by clear, cogent, and convincing evidence:

(1) a representation;
(2) its falsity;
(3) its materiality;
(4) either the speaker's knowledge of its falsity or a reckless disregard of its truth or falsity;
(5) the speaker's 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.

Cheney Bros., Inc. v. Batesville Casket Co. Inc., 47 F.3d 111, 114 (4th Cir. 1995); King v. Oxford, 318 S.E.2d 125 (S.C. App. 1984). Failure to prove any element is fatal to the plaintiff's claim. M.B. Kahn Constr. Co. v. South Carolina Nat'l Bank of Charleston, 271 S.E.2d 414, 415 (S.C. 1980).

1:95–2117–6, 1997 WL 998323, * 3 (D.S.C. July 16, 1997)(holding that "averments of fraud must state the precise time and place of the fraud and the acts alleged to be fraudulent...substantiated with particulars"). Plaintiffs "are forbidden from 'grouping defendants together without specifying which defendant committed which wrong'" and are required instead to "set forth with particularity each defendant's culpable conduct." First Union, 128 F.Supp. 2d at 884.

Review of the Complaint reveals that Plaintiff failed to allege fraud with particularity. She has not alleged with specificity what representations were false, how these alleged misrepresentations induced her to enter the mortgage transaction, why her reliance on the misrepresentations were reasonable, or how these misrepresentations caused her damage.[12]

MOTION FOR SANCTIONS

On March 7, 2012, Defendant LaSalle filed a motion for sanctions pursuant to Fed. R. Civ. P. 11. This Defendant asks for dismissal of this action with prejudice, a pre-filing injunction banning Plaintiff from filing further action in federal court, and reasonable attorneys' fees incurred in defending Plaintiff's frivolous lawsuits. LaSalle contends that Plaintiff has a long history of abusing the state and federal judicial systems with her meritless and vexatious filings, that the current lawsuit is Plaintiff's ninth attempt at preventing or otherwise disputing the lawful foreclosure sale of the Property; Plaintiff has filed a total of seven bankruptcy actions in the United States Bankruptcy Court District of South Carolina admittedly as an attempt to save the Property and based on multiple improper filings, the United State Bankruptcy Court banned Plaintiff from filing any further actions

[12]To the extent Plaintiff requests declaratory relief in this action, such relief should be denied as Plaintiff fails to state a claim upon which relief can be granted.

for a period of one year; Plaintiff has filed additional state court actions as to other pieces of property; and Plaintiff includes baseless allegations in her current litigation including requesting criminal penalties against Defendant LaSalle. Plaintiff appears to argue that LaSalle's motion should be denied because she believed she had to file an action in Federal Court to address perceived unethical actions in state court and to assert her federal claims, she does not believe her claims are frivolous because she believes Defendants violated TILA, and she did not file this action to harass Defendants.

Although LaSalle details allegedly frivolous actions in other courts, it is unclear that any of her previous filings in this Court were frivolous[13] or that this pro se litigant has been warned of the consequences of filing such actions in this Court. It is, therefore, recommended that Defendant LaSalle's motion for sanctions be denied without prejudice. Plaintiff, however, is warned that filing future frivolous actions may result in appropriate sanctions against Plaintiff including any sanctions available under Fed. R. Civ. P. 11.

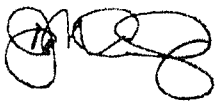
CONCLUSION

Based on the foregoing, it is recommended that Plaintiff's motions for entry of default (Docs. 20, 27, and 28) be **denied**; Defendant LaSalle's motion to dismiss (Doc. 21) be **granted**; and

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[13]Plaintiff filed one previous action in this court which was dismissed for lack of subject matter jurisdiction after the parties stipulated that the amount in controversy did not exceed the jurisdictional amount (Civil Action Nos. 3:96-cv-02840-MJP), another action was removed to this court by the defendant and later remanded to the state court (3:97-cv-01287-DWS), and she was named as a defendant in a foreclosure action (as the personal representative to the estate of Maxie Lee Thomas) instituted by the United States (3:05-cv-03322-JRM). Aloe Creme Laboratories, Inc. v. Francine Co., 425 F.2d 1295, 1296 (5th Cir. 1970) (This Court may take judicial notice of its own records.).

Defendant Ocwen's motion to dismiss (motion for judgment on the pleadings)(Doc. 61) be **granted.** It is also recommended that Defendant LaSalle's motion for sanctions (Doc. 51) be **denied** without prejudice.



Joseph R. McCrorey
United States Magistrate Judge

August 9, 2012
Columbia, South Carolina

The parties' attention is directed to the important information on the attached notice.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, Plaintiff, vs. LaSalle Bank National Association, Trustee for Lehman Brothers Structured Asset Investment Loan Trust Sail 2005, Ocwen Federal Bank, a/k/a AltiSource Homes, Defendants.	C.A. No. 3:11-1686-MBS **ORDER AND OPINION**

Plaintiff Laura Toney ("Plaintiff") filed this action pro se against Defendants, LaSalle Bank National Association, Trustee for Lehman Brothers Structured Asset Investment Loan Trust Sail 2005 ("LaSalle"), and Ocwen Federal Bank a/k/a AltiSource Homes ("Ocwen") (collectively "Defendants"), alleging claims under the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1667f, arising out of a foreclosure action instituted against her by Defendants. (ECF No. 1.) Plaintiff also seeks a declaratory judgment and asserts state law claims for intentional infliction of emotional distress, deceptive and unfair trade practices, gross negligence, fraud, and fraudulent transfer. (Id.) This matter is before the court on Plaintiff's motions for entry of default against Defendants pursuant to Fed. R. Civ. P. 55(a); LaSalle's motion to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6), 8, and 9(b); Ocwen's motion to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6); and LaSalle's motion for sanctions against Plaintiff pursuant to Fed. R. Civ. P. 11. (ECF Nos. 20, 21, 27, 28, 51, 61.)

In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02 D.S.C., the matter was referred to United States Magistrate Judge Joseph R. McCrorey for pretrial handling. On August

9, 2012, the Magistrate Judge issued a Report and Recommendation in which he recommended that the court deny Plaintiff's motions for entry of default, grant LaSalle's motion to dismiss, grant Ocwen's motion to dismiss, and deny LaSalle's motion for sanctions without prejudice. (ECF No. 79.) Plaintiff filed objections to the Report and Recommendation on August 22, 2012 and August 27, 2012, asking the court to reject the Magistrate Judge's recommendation. (ECF Nos. 81, 84.) For the reasons set forth below, the court adopts the Report and Recommendation of the Magistrate Judge, **GRANTS** the motions to dismiss of LaSalle and Ocwen, and **DENIES** LaSalle's motion for sanctions without prejudice and Plaintiff's motions for entry of default against LaSalle and Ocwen.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The facts in the complaint as viewed in the light most favorable to Plaintiff are discussed in the Report and Recommendation. The court concludes, upon its own careful review of the record, that the Magistrate Judge's factual summation is accurate. The court adopts this summary as its own, and will only reference facts pertinent to the analysis of Plaintiff's claims.

On October 6, 2004, Plaintiff refinanced her house located at 729 Chatman Street in Bishopville, South Carolina ("the Property"). (ECF No. 1-1, pp. 38, 43.) During the closing, Plaintiff entered into and received a mortgage which was secured by the Property. (Id.) On June 14, 2005, Plaintiff sent a letter to Ocwen stating her intention to rescind the loan due to the alleged occurrence of federal disclosure violations during the processing of the loan. (ECF No. 1-1, p. 1.) Plaintiff alleged that she was not provided any of the mandatory disclosures required by TILA prior to the closing. (Id.; see also ECF No. 1, p. 3.)

On or about July 21, 2005, LaSalle, which had been assigned the mortgage by Ocwen, filed a lis pendens and complaint against Plaintiff, captioned Lasalle Bank v. Laura Toney, Case

No. 2005-CP-31-169, in the Court of Common Pleas of Lee County, South Carolina (the "Lee County Court"), seeking foreclosure of Plaintiff's mortgage and sale of the Property. (ECF No. 1-1, pp. 3-11.) On October 19, 2005, Plaintiff alleges that LaSalle finally responded to her notice of rescission letter. (ECF No. 1, p. 5.) Thereafter, LaSalle filed a motion for summary judgment on March 29, 2006. (ECF No. 1-1, p. 34.)

On February 16, 2007, the Lee County Court held a foreclosure hearing in the absence of Plaintiff or her attorney.[1] (ECF No. 1-1, p. 35.) On March 15, 2007, the Lee County Court entered an order finding that LaSalle "should have judgment of foreclosure of the mortgage and the mortgaged property should be ordered sold at public auction after due advertisement" and, as a result, granted summary judgment in favor of LaSalle in the foreclosure action. (Id. at p. 40.) In support of the order granting summary judgment to LaSalle, the Lee County Court made the following findings of fact:

> The Defendant Laura Toney alleges that she rescinded the loan by letter dated June 12, 2005. Pursuant to Title 15 Section 1635 of the U.S. Code, the obligor in a real estate secured consumer credit transaction shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms. The loan closing occurred on October 6, 2004, at which time the Defendant was provided the information and rescission forms. (Affidavit of Michael May filed March 29, 2006; Affidavit of Letia Benjamin). The information and rescission forms are signed by the Defendant Laura Toney to acknowledge that she was provided a copy of each at closing. Therefore, the Defendant's counterclaim that she rescinded the loan is without merit on its face since it is well outside the time to rescind permitted by law.

(ECF No. 1-1, pp. 37-38.)

On March 22, 2007, Plaintiff filed an application for a temporary restraining order, preliminary injunction, and permanent injunction in the Lee County Court. (ECF No. 52-2, pp.

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1. Plaintiff alleges that her attorney at the time, Mr. David Weeks, was a member of the South Carolina General Assembly and could not be present because the General Assembly was in session. Plaintiff alleges that a request to reschedule the hearing was submitted on behalf of Mr. Weeks, but that the hearing was held as previously scheduled. (See ECF No. 52-2, pp. 1-2.)

8-13, 16-17.) On April 25, 2007, Plaintiff filed a motion for reconsideration of the foreclosure decision. (ECF No. 52-2, pp. 5-7.) On April 27, 2007, a notice of eviction was filed against Plaintiff and she was evicted from the Property shortly thereafter. (ECF No. 1-1, p. 49.) On May 7, 2007, the Property was sold at an auction to LaSalle. (Id. at pp. 45-47.) After the sale of the Property and the denial of her motions, Plaintiff filed an appeal with the South Carolina Court of Appeals. Plaintiff states that her foreclosure case is currently pending with the South Carolina Supreme Court. (ECF No. 76, p. 3; see also ECF No. 51-2, pp. 1-2.)

On July 13, 2011, Plaintiff filed in this court a "Complaint to Set Aside Fraudulent Transfer, and Fraud; Declaratory Judgment for Entry of Default[,] Gross Negligence[,] Emotional Distress[,] Deceptive and Unfair Trade Practices." (ECF No. 1.) Plaintiff alleges that she did not receive certain federal disclosures required by TILA at the time of her mortgage closing, including "choice of attorney notification, settlement statement, and good faith estimate." (Id. at p. 3.) Plaintiff alleges that Defendants' failure to make proper disclosures and failure to respond to her notice of rescission within twenty days resulted in Defendants losing their interest in the property. (Id. at p. 5.) Further, Plaintiff alleges that Defendants' failure to respond to her notice of rescission within twenty days had the effect of reinstating Plaintiff's interest in the property and relieving her obligations under the original loan. (Id. at pp. 5-8.) On July 13, 2011, Plaintiff filed a motion for a temporary injunction to enjoin Defendants from denying Plaintiff possession of the Property. (ECF No. 3.)

On October 7, 2011, LaSalle filed a motion to extend its time to file an answer until October 21, 2011, which motion was granted by the court on October 11, 2011. (ECF Nos. 16, 18.) On October 19, 2011, Plaintiff moved for entry of default against Ocwen. (ECF No. 20.) On October 21, 2011, LaSalle filed a motion to dismiss Plaintiff's complaint. (ECF No. 21.)

Plaintiff filed a second motion for entry of default against Ocwen on October 25, 2011. (ECF No. 27.) Additionally, on October 25, 2011, Plaintiff moved for entry of default against LaSalle. (ECF No. 28.) Plaintiff filed opposition to LaSalle's motion to dismiss on October 25, 2011, October 28, 2011, and November 2, 2011. (ECF Nos. 29, 30, 32.) On November 1, 2011, LaSalle filed opposition to Plaintiff's motion for entry of default. (ECF No. 31.) On December 28, 2011, Ocwen filed its answer to the complaint. (ECF No. 37.)

On February 27, 2012, the Magistrate Judge issued a Report and Recommendation in which he recommended denying Plaintiff's motion for temporary injunction, which recommendation was adopted by the court on March 22, 2012. (ECF Nos. 46, 57.) On March 7, 2012, LaSalle filed a motion for sanctions against Plaintiff, to which Plaintiff filed opposition on March 15, 2012. (ECF Nos. 51, 53.) On April 2, 2012, Plaintiff appealed the court's March 22, 2012 Order to the United States Court of Appeals for the Fourth Circuit. (ECF No. 62.) On April 6, 2012, Ocwen filed opposition to Plaintiff's motions for entry of default and a motion to dismiss the complaint.[2] (ECF Nos. 60, 61.) Plaintiff filed opposition to Ocwen's motion to dismiss on May 14, 2012. (ECF No. 76.)

Recently, on August 24, 2012, the Fourth Circuit affirmed the court's March 22, 2012 decision and issued the formal mandate of the court of appeals on September 17, 2012. (ECF Nos. 83, 89.)

II. LEGAL STANDARD AND ANALYSIS

A. Legal Standard

1. Magistrate Judge's Report and Recommendation

The Magistrate Judge makes only a recommendation to this court. The recommendation

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2. Ocwen did not file its motion to dismiss until after it filed its answer. The court agrees with the Magistrate Judge's analysis that Ocwen's motion to dismiss should be construed as a motion for judgment on the pleadings. (See ECF No. 79, p. 10.)

has no presumptive weight. The responsibility to make a final determination remains with this court. See Mathews v. Weber, 423 U.S. 261, 270-71 (1976). The court reviews de novo only those portions of a magistrate judge's report and recommendation to which specific objections are filed, and reviews those portions which are not objected to—including those portions to which only "general and conclusory" objections have been made—for clear error. Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005); Camby v. Davis, 718 F.2d 198, 200 (4th Cir. 1983); Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982). The court may accept, reject, or modify, in whole or in part, the recommendation of the magistrate judge or recommit the matter with instructions. See 28 U.S.C. § 636(b)(1).

2. Motions pursuant to Fed. R. Civ. P. 11

A pro se pleading is not subjected to the same scrutiny as one drafted by an attorney. Erickson v. Pardus, 551 U.S. 89, 94 (2007). Even pro se litigants, however, must follow the procedural rules of the court. Cox v. Deal, C/A No. 2:09-02715–DCN–BM, 2011 WL 3418397, at * 2 (D.S.C. Aug. 3, 2011). Rule 11 governs both attorneys and pro se litigants. Fed. R. Civ. P. 11.

Fed. R. Civ. P. 11(a) requires every pleading, written motion, or other paper to be signed by either the party's attorney, if represented, or the party itself, if the party proceeds without representation. See Fed. R. Civ. P. 11(a). By signing a filing, a party represents to the court and certifies "that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the filing is not "presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation," and "the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new

law." Fed. R. Civ. P. 11(b) (emphasis added). Rule 11(b)(3) requires that filings have a proper factual basis for each claim. See Fed. R. Civ. P. 11(b)(3).

Reasonableness of a filing party's actions under Fed. R. Civ. P. 11 involves an objective inquiry into the prefiling investigation. See In re Kunstler, 914 F.2d 505, 514 (4th Cir. 1990). Legal allegations fail the requirements of Fed. R. Civ. P. 11(b)(2) when there is "absolutely no chance of success under the existing precedent." Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 153 (4th Cir. 2002). In order to warrant sanctions, the legal position must be completely untenable, rather than merely unsuccessful. Id. at 151. The issue is whether a reasonable person under the same circumstances would have believed his or her actions to be legally justified. Id. at 153.

3. Motions pursuant to Fed. R. Civ. P. 12(b)(6)

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim should not be granted unless it appears certain that the plaintiff can prove no set of facts that would support her claim and would entitle her to relief. Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993). When considering a motion to dismiss, the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff. Ostrzenski v. Seigel, 177 F.3d 245, 251 (4th Cir. 1999); Mylan Labs., Inc., 7 F.3d at 1134. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, —— U.S. ——, ——, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The court must treat factual allegations of the nonmoving party as true. Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 217-18 (4th Cir. 1994).

Res judicata is an affirmative defense and is treated as a basis for dismissal under Fed. R.

Civ. P. 12(b)(6). See Davani v. Va. Dept. of Transp., 434 F.3d 712, 720 (4th Cir. 2006) (res judicata or claim preclusion challenge is to be considered pursuant to Rule 12(b)(6)); Andrews v. Daw, 201 F.3d 521, 524 n. 1 (4th Cir. 2000) (an affirmative defense such as res judicata may be raised under Rule 12(b)(6) "only if it clearly appears on the face of the complaint . . . ."). "Res judicata is applied to prevent the re-litigation of claims, and thus prevent the unsettling of a prior judgement, whether by increasing or decreasing the award or by reversing the result." Heckert v. Dotson, 272 F.3d 253, at 258 (4th Cir. 2001). "'For the doctrine of res judicata to be applicable, there must be: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or their privies in the two suits.'" Martin v. Am. Bancorp. Ret. Plan, 407 F.3d 643, 650 (4th Cir. 2005) (quoting Pueschel v. United States, 369 F.3d 345, 354–55 (4th Cir. 2004)). Further, res judicata not only "bar[s] claims that were raised and fully litigated," but also "'prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.'" Peugeot Motors v. E. Auto Distrib., 892 F.2d 355, 359 (4th Cir. 1989) (quoting Brown v. Felsen, 442 U.S. 127, 131 (1979)); see also Meekins v. United Transp. Union, 946 F.2d 1054, 1057 (4th Cir. 1991).

4. Motions pursuant to Fed. R. Civ. P. 55(a)

Rule 55(a) of the Federal Rules of Civil Procedure provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." Fed. R. Civ. P. 55(a). However, the clear policy of the Federal Rules of Civil Procedure is to discourage judgment by default and to encourage disposition of claims on their merits. Reizakis v. Loy, 490 F.2d 1132, 1135 (4th Cir. 1974)

B. Analysis

1. Plaintiff's Motions for Entry of Default

Plaintiff moves for entry of default against Defendants pursuant to Fed. R. Civ. P. 55(a). (See ECF Nos. 20, 27, 28.)

Upon his review, the Magistrate Judge recommended denying Plaintiff's motion for entry of default against LaSalle. Specifically, the Magistrate Judge found that LaSalle was served on September 19, 2011, and its answer would have been due on October 11, 2011[3], except that LaSalle received an extension from the court to file its answer on or before October 21, 2011. (ECF No. 79, p. 5 (citing ECF Nos. 17, 18).) The Magistrate Judge further found that the Fed. R. Civ. P. 12 motion to dismiss that LaSalle filed on October 21, 2011 was timely, and therefore Plaintiff's motion for entry of default against LaSalle is without merit. (Id. (citing ECF No. 21))

The Magistrate Judge also recommended denying Plaintiff's motion for default against Ocwen because Plaintiff has not shown that Ocwen was properly served or that the correct entity was named in the complaint. (Id. at p. 6.) In making this recommendation, the Magistrate Judge found convincing Ocwen's arguments that "its answer was filed prior to entry of default; Ocwen Loan Servicing, the proper party to this suit, is a wholly different entity from 'Ocwen Federal Bank,' and thus alleged service on 'Ocwen Federal Bank' did not constitute service on Ocwen Loan Servicing; even if Plaintiff had named an existing entity called 'Ocwen Federal Bank,' service of process was not properly effected pursuant to applicable law; entry of judgment by default is a drastic remedy which should be used only in extreme situations; and entry of default judgment against the non-existent 'Ocwen Federal Bank' should not be granted because it is a nullity." (Id.)

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3. The Magistrate Judge observed that October 10, 2011 was a federal holiday, Columbus Day. (ECF No. 79, p. 5.)

In her objections to the Magistrate Judge's recommendation, Plaintiff implies that the Magistrate Judge findings are wrong because Ocwen (1) was served by mail on September 12, 2011 (with a certified return receipt showing service on September 15, 2011), (2) failed to answer the complaint within twenty-one days as required by the federal rules, (3) failed to request an extension of time prior to the expiration of the answer deadline, and (4) filed an untimely answer eighty-five days after service. (ECF No. 84, pp. 4, 6-7, 19, 24.) Plaintiff further implies that the Magistrate Judge erred by not having awareness of Defendants' failure to file motions to set aside the default. (Id. at p. 7.)

In accordance with the preference that "defaults be avoided and that claims and defenses be disposed of on their merits," the court agrees with the Magistrate Judge that entry of default should not be made against either Ocwen or LaSalle. The timely filing of a Fed. R. Civ. P. 12 motion to dismiss by LaSalle and the failure of Ocwen to be properly served are appropriate reasons within the court's discretion to not enter default. U.S. ex rel. Knight v. Reliant Hospice, Inc., C/A No. 3:08–03724–CMC–JRM, 2011 WL 6130539, at *1 (D.S.C. Nov. 8, 2011) (In deciding whether to direct that entry of default be made as to a party, a district court must exercise "sound discretion."). Accordingly, the court denies Plaintiff's motion for entry of default against Defendants.

2. LaSalle's Motion for Sanctions

LaSalle moves pursuant to Fed. R. Civ. P. 11 for dismissal of Plaintiff's action with prejudice, a pre-filing injunction banning Plaintiff from filing further actions in federal court, and reasonable attorneys' fees incurred in defending against Plaintiff's frivolous lawsuits. (ECF No. 51, p. 1.) LaSalle contends that (1) Plaintiff has a long history of abusing the state and federal judicial systems with her meritless and vexatious filings, (2) the current lawsuit is

Plaintiff's ninth attempt at preventing or otherwise disputing the lawful foreclosure sale of the Property, (3) Plaintiff has filed a total of seven bankruptcy actions in the United States Bankruptcy Court for the District of South Carolina admittedly as an attempt to save her property, (4) the United States Bankruptcy Court for the District of South Carolina banned Plaintiff from filing any further actions for a period of one year, (5) Plaintiff has filed additional state court actions as to other pieces of property, and (6) Plaintiff includes baseless allegations in her current litigation, including requesting criminal penalties against LaSalle. (Id. at pp. 2-10.)

Upon his review, the Magistrate Judge recommended denying LaSalle's motion for sanctions without prejudice. (ECF No. 79, p. 24.) The Magistrate Judge concluded that, notwithstanding LaSalle's details of allegedly frivolous actions filed by Plaintiff in other courts, a finding of frivolousness could not be made regarding any of Plaintiff's previous filings in this court and Plaintiff lacked receipt of a warning regarding the consequences of filing frivolous actions in this court. (Id.) In this regard, the Magistrate Judge did advocate warning Plaintiff that filing future frivolous actions may result in appropriate sanctions against Plaintiff including any sanctions available under Fed. R. Civ. P. 11. (Id.)

LaSalle did not file objections to the Magistrate Judge's recommendation that its motion for sanctions be denied. In the absence of specific objections to the report of the Magistrate Judge, the court is not required to give any explanation for adopting the recommendation. See Camby v. Davis, 718 F.2d 198, 199 (4th Cir.1983). Accordingly, the court agrees with the Magistrate Judge that LaSalle's motion for sanctions should be denied.

3. Defendants' Motions to Dismiss

LaSalle moves to dismiss Plaintiff's complaint asserting that (1) Plaintiff's claims are barred by res judicata; (2) the complaint fails to state a claim upon which relief can be granted;

(3) the complaint fails to state a plausible cause of action; and (4) the Complaint fails to plead fraud with the required specificity. (ECF No. 21-1.) Ocwen contends that it is entitled to dismissal because (1) the complaint fails to meet the minimum federal pleading standard; (2) Plaintiff's claims are barred by res judicata; (3) Plaintiff failed to rescind the note within three days of her closing date such that her right to rescind is time barred; (4) Plaintiff failed to file a rescission action within three years of the closing date such that her rescission action is time barred; (5) Plaintiff is not entitled to recover for emotional distress; (6) Plaintiff fails to state a claim for deceptive and unfair practices; (7) Plaintiff fails to state a claim for gross negligence; (8) Plaintiff fails to plead fraud or fraudulent transfer with the specificity required, and (9) Plaintiff fails to state a valid claim for declaratory judgment. (ECF No. 61-1.)

a. *Res Judicata*

Defendants contend that this action is barred by the doctrine of res judicata. (ECF Nos. 21-1, pp. 5-7; 61-1, pp. 7-9.) Plaintiff argues that this action is not barred because her action in state court is on appeal such that there is no final judgment and res judicata does not apply. (ECF No. 76, p. 3.)

Upon his review, the Magistrate Judge concluded that res judicata bars this action as all three elements of the test for res judicata have been met. (ECF No. 79, p. 12.) The Magistrate Judge specified that to establish res judicata, a defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. (Id. (citing Riedman Corp. v. Greenville Steel Structures, Inc., 419 S.E.2d 217, 218 (S.C. 1992)) In this regard, the Magistrate Judge found that Plaintiff did not dispute that the first two elements were met. (Id.) Further, the third element was met because the judge in the state court action granted the motion for summary judgment, which satisfies the

requirement of an adjudication on the merits of the case, and the South Carolina Court of Appeals affirmed the state court's decision. (Id. at p. 13.) Alternatively, the Magistrate Judge recommended dismissing the action against Defendants because the court should not interfere with the ongoing state proceedings. (Id. at p. 14 (citing Bellotti v. Baird, 428 U.S. 132, 143 n. 10 (1976) (recognizing that abstention may be raised sua sponte)).) Based on the foregoing, the Magistrate Judge recommended granting Defendants' motions to dismiss the complaint.

In her objections to the Magistrate Judge's recommendation, Plaintiff asserts that res judicata does not apply to this matter because her state court case is still pending without a final determination having been made. (ECF No. 84, p. 15.) Plaintiff argues that this case clearly does not satisfy all the elements to establish res judicata "because the judgment is not final" and she has not been "given full and fair opportunity to be heard on the issue." (Id. at p. 16.)

The court agrees with the Magistrate Judge that the three elements of res judicata are clearly present. First, a final judgment has been entered on the merits against Plaintiff in at least two prior civil actions, Lasalle Bank v. Laura Toney, Case No. 2005-CP-31-169 and Laura A. Toney v. Ocwen Federal Bank, Case No. 2010-CP-31-180. (See ECF Nos. 1-1, pp. 34-43; 51-3, pp. 1-6.) See also Shoup v. Bell & Howell Co., 872 F.2d 1178, 1181 (4th Cir. 1989) (noting that grants of summary judgment are considered "on the merits" for the purposes of res judicata). Second, the allegations contained in the instant complaint stem from the same set of facts that gave rise to Plaintiff's claim for relief in Case No. 2005-CP-31-169 and Case No. 2010-CP-31-180, i.e., Defendants' entitlement to foreclosure of the Property versus Plaintiff's attempt to prevent the foreclosure of the Property. (Id.) Finally, the parties in this matter are the same entities as the ones in the prior foreclosure matters. (Id.) Based on the foregoing, Plaintiff is not entitled to maintain her action in this court because her issues have been raised and litigated in

prior actions. Accordingly, Defendants are entitled to dismissal of the complaint against them based on res judicata.

b. Defendants' Other Arguments in support of Dismissal

As this court finds that the instant action is barred by res judicata, it is unnecessary to address Defendants' remaining arguments in support of dismissal.

III. CONCLUSION

For the foregoing reasons, the court hereby **GRANTS** the motions to dismiss Plaintiff's complaint of LaSalle and Ocwen. (ECF Nos. 21, 61.) The court further **DENIES** LaSalle's motion for sanctions without prejudice and Plaintiff's motions for entry of default. (ECF Nos. 20, 27, 28, 51.) The court adopts the Magistrate Judge's Report and Recommendation and incorporates it herein by reference.

IT IS SO ORDERED.

/s/Margaret B.Seymour
Margaret B. Seymour
Chief United States District Judge

September 25, 2012
Columbia, South Carolina

The Supreme Court of South Carolina

LaSalle Bank National Association, as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11,
Respondent,

v.

Laura Toney, Petitioner.

Appellate Case No. 2011-201266

ORDER

Petitioner seeks a writ of certiorari to review the Court of Appeals' decision in *LaSalle Bank National Ass'n v. Toney*, Op. No. 2011-UP-334 (S.C. Ct. App. filed June 27, 2011). We deny the petition.

C.J.

FOR THE COURT

Columbia, South Carolina

December 20, 2012

cc:
The Honorable Jenny A. Kitchings
Henry Guyton Murrell
Laura Toney

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-2364

LAURA TONEY,

Plaintiff - Appellant,

v.

LASALLE BANK NATIONAL ASSOCIATION, As trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass/Through Certificates, Series 2004-11; OCWEN FEDERAL BANK, also known as AltiSource Homes,

Defendants - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Margaret B. Seymour, Senior District Judge. (3:11-cv-01686-MBS)

Submitted: February 26, 2013 Decided: February 28, 2013

Before MOTZ, WYNN, and DIAZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Laura Toney, Appellant Pro Se. Robert Ashley Muckenfuss, MCGUIREWOODS, LLP, Charlotte, North Carolina; Sean Alexander O'Connor, FINKEL LAW FIRM, LLC, North Charleston, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Laura Toney appeals the district court's order adopting the magistrate judge's recommendation and dismissing her civil action. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. See Toney v. LaSalle Bank Nat'l Ass'n, No. 3:11-cv-01686-MBS (D.S.C. Sept. 25, 2012). We deny Toney's "Motion to Request Federal Identification," and we dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: April 30, 2013

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-2364
(3:11-cv-01686-MBS)

LAURA TONEY

Plaintiff - Appellant

v.

LASALLE BANK NATIONAL ASSOCIATION, As trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass/Through Certificates, Series 2004-11; OCWEN FEDERAL BANK, also known as AltiSource Homes

Defendants - Appellees

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

(ORDER LIST: 571 U.S.)

MONDAY, DECEMBER 2, 2013

APPEAL -- SUMMARY DISPOSITION

13-395 AL LEGIS. BLACK CAUCUS, ET AL. V. ALABAMA, ET AL.

The appeal is dismissed for want of jurisdiction.

ORDERS IN PENDING CASES

13M55 SEMIEN, ANTHONY M. V. JACQUEZ, WARDEN

13M56 FULLER, IVORY V. FRIED, FRANK, HARRIS, SHRIVER

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

13M57 FINE, HOLLY C. V. MA DEPT. OF CHILDREN & FAMILIES

The motion to direct the Clerk to file a petition for writ of certiorari out of time under Rule 14.5 is denied.

13M58 ROSS-WEST, ROMELLE, ET VIR V. BANK OF NEW YORK MELLON CORP.

13M59 ANDREWS, DWAYNE V. PROFESSIONAL PARATRANSIT

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

12-10196 SWAIN, MICHAEL V. FLORIDA

12-10352 CARY, JERRY L. V. VIRGINIA

12-10678 REYES, JORGE L. V. DAVIS, WARDEN

The motions of petitioners for reconsideration of orders denying leave to proceed *in forma pauperis* are denied.

13-271 ONEOK, INC., ET AL. V. LEARJET, INC., ET AL.

The Solicitor General is invited to file a brief in this case expressing the views of the United States. Justice Alito took no part in the consideration or decision of this petition.

13-5597 WASHINGTON, RONALD D. V. KROGER LTD. PARTNERSHIP I

The motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* is denied.

13-6459 JOHNSON, PEARL L. V. EDWARDS, LONNIE, ET AL.

13-6518 MISSUD, PATRICK A. V. SUPERIOR COURT OF CA, ET AL.

13-6586 HARRISON, WILLIAM H. V. VIRGINIA

13-6908 TORDA, SUSAN C. V. FAIRFAX COUNTY SCHOOL BOARD

13-7036 ESCALANTE, MARIO V. HOLDER, ATT'Y GEN.

13-7057 AWAD, ALI V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* are denied. Petitioners are allowed until December 23, 2013, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

13-7163 SPATARO, MICHAEL V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* is denied. Petitioner is allowed until December 23, 2013, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court. Justice Kagan took no part in the consideration or decision of this motion.

CERTIORARI DENIED

12-1412 LOR, LEE V. V. UNITED STATES

12-1419 BEASLEY, JOHNNIE H. V. SHINSEKI, SEC. OF VA

12-10073 ALEXANDER, JULIET B. V. FIRST WIND ENERGY, LLC, ET AL.

12-10087 FREEMAN, TERRY G. V. STEPHENS, DIR., TX DCJ

12-10134 DEMAREST, JOAN A. V. OCWEN LOAN SERVICING, ET AL.

12-10158 RIVERA, GABRIEL V. CARY PLACE CONDOMINIUM ASSOC.

13-231 JUDD, CHARLES, ET AL. V. LIBERTARIAN PARTY OF VA, ET AL.

13-239 BERRY, PATRICK V. WEBLOYALTY.COM, INC., ET AL.

13-244 MAY, MARK, ET UX. V. CIR

13-252) OVERSTOCK.COM, INC. V. NY DEPT. OF TAXATION, ET AL.
)
13-259) AMAZON.COM LLC, ET AL. V. NY DEPT. OF TAXATION, ET AL.

13-266 GRAND RIVER ENTERPRISES V. OKLAHOMA, EX REL. PRUITT, ET AL.

13-306 LIBERTY UNIVERSITY, ET AL. V. LEW, SEC. OF TREASURY, ET AL.

13-338 BOWERS, GARY J., ET AL. V. FRANKS, DONNA

13-345 CAPPIELLO, ROBERT N. V. ICD PUBLICATIONS, INC.

13-346 KREHER, DETLEF V. LOE, ROSE

13-348 COMB, SHENITHA, ET AL. V. ROWELL, RON, ET AL.

13-359 SANTOS, SHELLEY M. V. HAWKINS, RICHARD S., ET AL.

13-360 SINGLETON, WILLIE V. STACK, STEPHEN, ET AL.

13-361 RECHTZIGEL, GENE V. FISCHER, PETER W.

13-362 SCOTT, MICHAEL A. V. VIRGINIA BEACH, VA, ET AL.

13-364 UNDERWOOD, BYRON V. FL DEPT. OF FINANCIAL SERVICES

13-367 MWANGI, MUMBI V. BRAEGELMANN, DALE, ET AL.

13-374 JACKSON, MARK V. DOW CHEMICAL COMPANY, ET AL.

13-378 DELANCEY, SANDRA V. CARLTON ARMS OF MAGNOLIA VALLEY

13-384 VURIMINDI, VAMSIDHAR R. V. PHILADELPHIA, PA, ET AL.

13-386 CFS ENTERPRISE, INC., ET AL. V. HECKADON, DAVID, ET UX.

13-388 SEITZ, DEBRA, ET AL. V. ELGIN, IL

13-396 JOHNSON, RONALD, ET UX. V. SHOREWOOD, MN

13-404 TONEY, LAURA V. LaSALLE BANK

13-406 SHRESTHA, MANOHAR, ET UX. V. LELIN, ROSS

13-409 DIGGS, BRENDA J. V. DONAHOE, POSTMASTER GEN.

13-420 BAKER, JOANNE V. NEW YORK

13-425 POTTS, ROSSI M. V. HOWARD UNIV. HOSPITAL, ET AL.

13-6514 RANDOLPH, CLARENCE V. LOUISIANA

13-6519 MOORE, LEE E. V. ROBINSON, WARDEN

13-6521 WOODS, THOMAS E. V. WENEROWICZ, SUPT., ET AL.

13-6522 WEBB, CHRISTOPHER W. V. STEVENS, CINDY

13-6523 ZAKAT, AALIYAH V. AVENT, BADR

13-6524 WIGGINS, MICHAEL A. V. MARYLAND

13-6527 WILLIAMS, SHANNON E. V. REYNOR RENSCH & PFIEFFER, ET AL.

13-6531 PALMER, WILL M. V. LEMOY, NURSE

13-6532 MATHIS, DOUGLAS M. V. CARPENTER, WARDEN

13-6536 JONES, ALAN L. V. NEW YORK

13-6543 SOLIS, ROBERT V. STEPHENS, DIR., TX DCJ

13-6547 DOWDY, MARK R. V. PRUETT, WARDEN

13-6552 PARKER, THOMAS V. WARREN, ADM'R, NJ, ET AL.

13-6560 KEELER, HIEDA A. V. RIVERSIDE HOSPITAL, INC., ET AL.

13-6565 PIERRE-GILLES, HERBY V. FLORIDA

13-6566 BOLIN, OSCAR R. V. FLORIDA

13-6569 JOHNSON, PAULA V. GIROUX, SUPT., MUNCY, ET AL.

13-6570 JIMENA, CARL L. V. STANDISH, CLIVE, ET AL.

13-6576 CHAND, NAREND V. BRAVO, WARDEN, ET AL.

13-6578 ESPINOZA, GABRIEL V. McDONALD, M. D.

13-6587 GREENE, JEFFERY V. FLORIDA

13-6589 ROSE, EDWARD J. V. ARIZONA

13-6598 PRYOR, DENNIS V. YATAURO, MEG A., ET AL.

13-6599 LINTON, DANIEL A. V. CALIFORNIA

13-6601 SEMULKA, EDWARD P. V. PENNSYLVANIA, ET AL.

13-6603 SATKIEWICZ, THOMAS E. V. MICHIGAN, ET AL.

13-6605 DAVIS, STEPHEN N. V. WORKMAN, WARDEN

13-6606 CHESHER, RAIN T. V. CHAPMAN, WARDEN

13-6613	COLLINS, LARRY E. V. FLORIDA
13-6614	CLARKE, PAUL T. V. RADER, WARDEN
13-6615	CLAUDE, STANLEY V. CREWS, SEC., FL DOC
13-6620	AGUIRRE, JOSE P. V. LEWIS, WARDEN, ET AL.
13-6623	BANKS, TORREY V. V. DOE, JOHN, ET AL.
13-6630	McLEOD, KAREN L. V. SELECT SPECIALTY HOSP., ET AL.
13-6676	PAPA, GEORGE V. HOLDER, ATT'Y GEN., ET AL.
13-6680	WILSON, TERRY L. V. OFFICE OF THE ATTORNEY GENERAL
13-6686	SPELLS, VINCENT B. V. CREWS, SEC., FL DOC
13-6689	BARROS-SUAREZ, CESAR X. V. HOLDER, ATT'Y GEN.
13-6704	SCHREANE, CLARENCE D. V. SANTOES, F., ET AL.
13-6718	JAMES, TYRONE V. WETZEL, SEC., PA DOC, ET AL.
13-6722	ZORNES, TRACY A. V. MINNESOTA
13-6730	CHARLINE P. V. CT DEPT. OF FAMILIES
13-6739	MOSES, ELNORA V. TX COMM'N ON ENVTL. QUALITY
13-6792	PIERRE, DAVE S. V. HOLDER, ATT'Y GEN.
13-6794	NEW, WILLIAM P. V. URIBE, WARDEN, ET AL.
13-6795	PORTILLO, RIGOBERTO H. V. UNITED STATES
13-6804	WIEGAND, MARIE C. V. BACHUS, J. KYLE, ET AL.
13-6819	CARRANZA, MIGUEL, ET UX. V. UNITED STATES
13-6838	GILYARD, MICHAEL L. V. ANGLIN, WARDEN
13-6843	DeSUE, MICHAEL C. V. CREWS, SEC., FL DOC, ET AL.
13-6845	VIRAY, BENJARDI B. V. DISTRICT COURT OF NV, ET AL.
13-6890	STRONG, RONALD J. V. UNITED STATES
13-6897	ALMY, ROBERT T. V. KICKERT SCHOOL BUS LINE, INC.
13-6899	CROWDER, KEVIN V. HEATH, SUPT., SING SING
13-6900	CUMMINGS, BRIAN J. V. SANTIAGO, WARDEN
13-6904	PARRA, RAUL V. TEXAS

13-426	WILLIAMS, ERIC V. DEPT. OF AIR FORCE
13-432	WESSELL, KEVIN W., ET AL. V. TOPIWALA, PANKAJ, ET AL.
13-489	COSTELLO, REGIS J. V. UNIV. OF WA MEDICAL CTR., ET AL.
13-507	GARCIA, EDWIN V. UNITED STATES
13-535	LAPIN, SHARON L. V. STATE BAR OF CA
13-540	HIE HOLDINGS, INC., ET AL. V. CIR
13-556	NADER, RALPH V. FEC
13-5040	BILYEU, JANINE A. V. NASHVILLE COUNTY, TN, ET AL.
13-5154	HALE, JEROME V. HOFFNER, WARDEN
13-5322	BEACH-MATHURA, LORNA V. MIAMI-DADE PUB. SCHOOLS, ET AL.
13-5354	ESPINOSA, HILDA V. BURGER KING CORPORATION
13-5431	HUMPHREY, KENNETH D. V. NAPOLITANO, SEC. OF HOMELAND
13-5451	BENTON, JONATHAN S. V. UNITED STATES
13-5487	MARYEA, LYNETTE V. UNITED STATES
13-5517	PETRI, DAN V. UNITED STATES
13-5568	SPROUSE, VICTORIA L. V. UNITED STATES
13-5714	KENNEDY, JOSEPH V. TEXAS
13-5716	WILLIAMS, MICHAEL K. V. UNITED STATES
13-5918	ELLIS, TODD W. V. UNITED STATES
13-5996	LAVER, CHRISTOPHER V. UNITED STATES
13-6021	MATTHEWS, DOUGLAS B. V. FLORIDA
13-6392	RONDENO, RICHARD R. V. LAW OFFICE OF WILLIAM S. VINCENT
13-6401	WILLIAMS, JEROME V. WILSON, SUPT., IN
13-6403	WEEMS, GIOVANNI V. HARDY, MARCUS
13-6409	McFADDEN, JOSEPH L. V. JEPERTINGER, JOHN C.
13-6413	PITNEY, PHILLIP V. CALIFORNIA
13-6416	HILTON, GARY M. V. FLORIDA
13-6421	BENAVIDES, RUBEN G. V. STEPHENS, DIR., TX DCJ

13-6426 LAYE, RANDALL V. CALDWELL, WARDEN

13-6430 STONE, DUNCAN V. OWENS, COMM'R, GA DOC, ET AL.

13-6431 SLOSS, TORREY L. V. CREWS, SEC., FL DOC, ET AL.

13-6433 STROLL, GEORGE A. V. JOHNSON, PHILIP L., ET AL.

13-6436 PATTON, EDGAR E. V. MISSISSIPPI

13-6437 PEREZ, PRUDENCIO V. V. TEXAS

13-6439 AGUILERA-GUERRA, JESUS J. V. RYAN, DIR., AZ DOC, ET AL.

13-6441 GRABER, NOVA-LEE, ET VIR V. CONWAY, R. L., ET AL.

13-6443 NASH, TIMOTHY V. OHIO

13-6452 NITZ, HERMAN L. V. BELL, MICHELLE, ET AL.

13-6457 MARIN, MEL M. V. TRUMBULL COUNTY COURT OF APPEALS

13-6462 GIVINS, ABE V. BRISCO, JAMES J., ET AL.

13-6463 HIGGINS, SHAWN V. CAIN, WARDEN

13-6465 BAGLEY, FREDERICK V. ILLINOIS

13-6466 BURTON, AUGUSTE V. ILLINOIS

13-6467 ARVIE, HUBERT V. TANNER, WARDEN, ET AL.

13-6473 DEWS, CLARENCE L. V. KERN RADIOLOGY MEDICAL GROUP

13-6476 DAVIS, PAUL V. ST. LOUIS, MO, ET AL.

13-6477 DIGGS, MARTIN V. LaVALLEY, SUPT., CLINTON

13-6479 FLUKER, ANNETTE V. REYNOLD'S AMERICAN INC.

13-6480 FLUKER, ANNETTE V. GENERAL MOTOR'S

13-6482 HAMILTON, LESTER V. CALIFORNIA

13-6483 GILBERT, PIERRE A. V. CALIFORNIA

13-6484 GRAVES, JERRY B. V. HOWERTON, WARDEN

13-6486 PORTER, SAMUEL K. V. HOWARD, MUABE, ET AL.

13-6492 CISNEROS, ALFREDO V. SOTO, WARDEN

13-6500 ELLIOTT, SAMUEL L. V. MICHIGAN

13-6503 MITCHELL, RICHARD A. V. HAMPTON, DANIEL H., ET AL.

13-6930	JIMENA, CARL L. V. WONG, SAI H.
13-6932	MELANSON, ROY A. V. CALIFORNIA
13-6935	BADINI, FRANCO V. UNITED STATES
13-6937	BRYANT, JAMES A. V. STEVENSON, WARDEN
13-6942	WILLIAMS, TORRENCE S. V. DONAHOE, POSTMASTER GEN.
13-6946	GARCIA, HERIBERTO V. HOLDER, ATT'Y GEN., ET AL.
13-6960	YOUNG, ALBERT V. UNITED STATES
13-6964	GARFIAS-GARCIA, JOSE M. V. UNITED STATES
13-6965	FOSTER, AARON D. V. UNITED STATES
13-6967	GONCALVES, JOSEPH S. V. KENTUCKY
13-6968	FRASIER, GARRY V. V. UNITED STATES
13-6971	MACK, JAMES V. UNITED STATES
13-6972	JOHNSON, LAWRENCE V. UNITED STATES
13-6983	NAPOLI, JOHN V. UNITED STATES
13-6984	PARK, JAMES V. UNITED STATES
13-6986	MORIMOTO, JOHN Q. V. OBENLAND, SUPT., CLALLAM BAY
13-7009	BELL, JOHNNY L. V. PERRY, SEC., NC DOPS
13-7024	WEHLAND, CHRISTOPHER L. V. PALMER, WARDEN, ET AL.
13-7038	THOMAS, GENTRIES V. STEPHENS, DIR., TX DCJ
13-7043	LUTZ, DAVID E. V. ANDERSON, WARDEN
13-7045	KE, ZHAOJIN V. EDINBORO UNIVERSITY, ET AL.
13-7052	HERNANDEZ-LIZARDI, ERNESTO V. UNITED STATES
13-7053	HAUCK, RALPH E. V. UNITED STATES
13-7055	GARDNER, KARINN V. UNITED STATES
13-7056	BAKER, EDDIE V. WERLINGER, WARDEN
13-7060	STEVENSON, LEO J. V. UNITED STATES
13-7061	CAULFIELD, MICHAEL V. UNITED STATES

13-7062) CURANOVIC, CHRISTOPHER. V. UNITED STATES
)
13-7076) FRANZESE, JOHN V. UNITED STATES

13-7064 SMITH, ALTON L. V. UNITED STATES

13-7069 PATTERSON, MAURICE V. UNITED STATES

13-7075 ORTIZ, GABINO V. UNITED STATES

13-7081 BAMDAD, MASOUD V. UNITED STATES

13-7084 BALDWIN, JIMMY Q. V. UNITED STATES

13-7085 HARRIS, GLENN A. V. UNITED STATES

13-7086 GONZALEZ-CORELLA, HECTOR V. UNITED STATES

13-7089 CHEN, YI Q. V. UNITED STATES

13-7090 CROWDER, MAURICE V. UNITED STATES

13-7092 STRINGER, THOMAS B. V. UNITED STATES

13-7095 EASLEY, ROBERT V. FLORIDA

13-7097 EDWARDS, TERRANCE V. CARTLEDGE, WARDEN

13-7099 JONES, ALBERT T. V. PASTRANA, WARDEN

13-7104 RICHARDSON, HENRY P. V. UNITED STATES

13-7106 CARRINGTON, DWIGHT E. V. UNITED STATES

13-7111 WALTON, JAMAL M. V. UNITED STATES

13-7113 LOPEZ-GARCIA, VICTOR V. UNITED STATES

13-7123 WORTHEY, DUSTIN L. V. UNITED STATES

13-7126 CAMPBELL, RONNIE S. V. UNITED STATES

13-7127 DREWERY, CARL, ET AL. V. UNITED STATES

13-7130 FRANCIS, TERRANCE V. UNITED STATES

13-7131 FLORES, VINCENT V. UNITED STATES

13-7133 MORRIS, OTIS V. UNITED STATES

13-7135 STOKES, CHARLES T. V. UNITED STATES

13-7139 PARKS, WILLIE V. UNITED STATES

13-7141 FREDERICKS, NATHANIAH, ET AL. V. UNITED STATES

13-7144 CARRASCO, JUAN M. V. UNITED STATES

13-7151 JONES, GREGORY V. UNITED STATES

13-7153 LOZANO, CESAR V. UNITED STATES

13-7156 RAMSEY, FREDERICO V. UNITED STATES

13-7165 ROBERTS, PRENTIS T. V. UNITED STATES

13-7166 RODRIGUEZ, ROBERTO V. UNITED STATES

13-7168 MINJAREZ, MICHAEL V. UNITED STATES

13-7170 McCLENDON, JEFFERY D. V. UNITED STATES

13-7175 BROWN, KEVIN R. V. UNITED STATES

13-7176 BARRAGAN-MALFABON, JAVIER V. UNITED STATES

13-7177 BRATTON-BEY, BOAZ S. V. UNITED STATES

13-7179 SHAHID, MIAN M. V. UNITED STATES

13-7181 ESTUPINAN-ESTUPINAN, EUSEBIO V. UNITED STATES

13-7182 DAVIS, PATRICK K. V. UNITED STATES

13-7183 CORDELL, HOWARD G. V. UNITED STATES

13-7185 CLARK, JAMES A. V. UNITED STATES

13-7187 GILBERTSON, CHRISTOPHER V. UNITED STATES

13-7188 FORDE, ORANDE V. UNITED STATES

13-7196 BAYLOR, TROY D., ET AL. V. UNITED STATES

13-7201 ZAINES-VARGAS, JOSE V. UNITED STATES

13-7203 MILLER, LAMONT L. V. UNITED STATES

13-7204 REAL, CARMEN O. V. UNITED STATES

13-7213 LITTLE DOG, EMIL E. V. UNITED STATES

13-7216 SHUFF, CLEVO V. UNITED STATES

13-7217 RIVERA, ISMAEL V. UNITED STATES

13-7220 WATSON, TERENCE V. UNITED STATES

13-7221 AGUILERA-SANDOVAL, PAULINO V. UNITED STATES

13-7223 BERNEGGER, PETER V. USDC ND MS

The petitions for writs of certiorari are denied.

13-260 DYNAMIC TRANSIT COMPANY, ET AL. V. TRANS PACIFIC VENTURES, INC.

The motion of Trucking Industry Defense Association for leave to file a brief as *amicus curiae* is granted. The petition for writ of certiorari is denied.

13-347 CALIFORNIA V. GUTIERREZ, BALDOMERO

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari is denied.

13-349 CHRISTINE FALLS OF NEW YORK, INC V. ALGONQUIN POWER INCOME FUND

The petition for writ of certiorari is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

13-371 A. S. E. V. A. S.

The motion of Family Defense Center, et al. for leave to file a brief as *amici curiae* is granted. The motion of Sargent Shriver National Center on Poverty Law for leave to file a brief as *amicus curiae* is granted. The petition for writ of certiorari is denied.

13-6485 MOSBY, ROGER D. V. KELLEY, WENDY

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for writ of certiorari is dismissed. See Rule 39.8.

13-6515 STARTUP, LINDA L. V. USDC CD CA, ET AL.

The petition for writ of certiorari is denied. Justice Alito took no part in the consideration or decision of this petition.

13-6959 HERTULAR, ROBERT V. UNITED STATES

The petition for writ of certiorari is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

13-6985 PITCHFORD, FREDERICK L. V. EEOC, ET AL.

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for writ of certiorari is dismissed. See Rule 39.8. As the petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin v. District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

13-6995 BOREN, THOMAS W. V. UNITED STATES

The petition for writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition.

13-7088 ERWIN, BONNIE B. V. UNITED STATES, ET AL.

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for writ of certiorari is dismissed. See Rule 39.8.

13-7102 MAYFIELD, KEVIN V. UNITED STATES

The petition for writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition.

13-7140 O'CONNOR, NYKA V. FLORIDA

The motion of petitioner for leave to proceed *in forma*

pauperis is denied, and the petition for writ of certiorari is dismissed. See Rule 39.8.

13-7159 REDMOND, LESLIE V. UPTON, WARDEN

The petition for writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition.

13-7162 SETTLE, KELVIN V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for writ of certiorari is dismissed. See Rule 39.8. Justice Kagan took no part in the consideration or decision of this motion and this petition.

13-7180 SANCHEZ, GABRIEL B. V. UNITED STATES

The petition for writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition.

13-7197 HINDMAN, JIMMY D. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for writ of certiorari is dismissed. See Rule 39.8. Justice Kagan took no part in the consideration or decision of this motion and this petition.

13-7218 VENTURA-VERA, JUAN V. UNITED STATES

13-7219 VENTURA-VERA, JUAN V. UNITED STATES

The petitions for writs of certiorari are denied. Justice Kagan took no part in the consideration or decision of these petitions.

HABEAS CORPUS DENIED

13-7148 IN RE JAMES SUDBERRY

13-7233 IN RE ANTHONY ATWATER

13-7258 IN RE TERRANCE T. BROWN

The petitions for writs of habeas corpus are denied.

MANDAMUS DENIED

13-414 IN RE EARLE A. PARTINGTON

13-6491 IN RE DAVID L. CULVERHOUSE

13-7212 IN RE LANA LE CHABRIER

The petitions for writs of mandamus are denied.

13-6474 IN RE HIEN A. DAO

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for writ of mandamus is dismissed. See Rule 39.8.

13-6561 IN RE DIANE JENKINS

The petition for writ of mandamus and/or prohibition is denied.

REHEARINGS DENIED

12-1286 DINICOLA, JOSEPH M. V. OR DEPT. OF REVENUE

12-1375 RUFF, JOHN D. V. GILLESS, A. C., ET AL.

12-1413 HOLKESVIG, RANDY V. NORTH DAKOTA

12-1454 XU, WEI V. CHEN, FANGRUO

12-1476 VAN AUKEN, RICHARD A. V. CATRON, FLETCHER R.

12-7720 STROUTH, DONALD W. V. COLSON, WARDEN

12-9952 MERZBACHER, JOHN J. V. SHEARIN, BOBBY P., ET AL.

12-9964 SANDERS, ANNE B. V. DEPT. OF H&HS, ET AL.

12-9980 GAMMONS, DENEEN R. V. DENVER, CO, ET AL.

12-10104 HUNT, KENNETH V. WILSON, WILLIAM R., ET AL.

12-10243 REED, STEVEN L. V. JOB COUNCIL OF OZARKS, ET AL.

12-10258 KILMARTIN, MARK V. HURLEY, WARDEN

12-10262 MORMAN-JOHNSON, ANGELA V. HATHAWAY, GARY S., ET AL.

12-10278	REYNOLDS, MICHAEL W. V. ALABAMA
12-10321	GENTRY, JONATHAN L. V. SINCLAIR, SUPT., WA
12-10396	KYEI, KOFI V. OR DEPT. OF TRANSPORTATION
12-10398	JENNINGS, LAURA A. V. INDIANAPOLIS, IN
12-10427	REVELES, MICHAEL M. V. TEGELS, WARDEN
12-10441	MARCUM, TIMOTHY, ET UX. V. AYERS, HASKEL, ET UX.
12-10449	HILL, WARREN L. V. HUMPHREY, WARDEN
12-10469	IN RE WARREN L. HILL, JR.
12-10508	OCHOA, MICHAEL R. V. RUBIN, ERIN
12-10593	FRAZIER, SHELTON L. V. SABINE RIVER AUTHORITY
12-10681	COOPER, JOHNNIE V. MISSOURI LOTTERY
12-10683	SMORYNSKI, DANIEL V. UNITED STATES
12-10731	IN RE WEI ZHOU
12-10740	GRENNING, NEIL V. WASHINGTON
12-10760	WHITEFORD, JOHN K. V. PENNSYLVANIA, ET AL.
12-10796	DiMONDA, NICHOLAS V. FLORIDA
12-10852	BROCK, RONALD G. V. BRAZELTON, ACTING WARDEN
12-10861	BELT, TARIQ L. V. USDC MD
12-10862	IN RE WILLIE J. BROWN
12-10864	BURFEINDT, JEFFREY C. V. UNITED STATES
12-10895	CLARK, CHRISTOPHER M. V. MINNESOTA
12-10913	LUH, TODD J. V. FARNSWORTH, COREY, ET AL.
12-10935	FENNER, KEVIN J. V. UNITED STATES
12-10995	HAWKINS, THOMAS V. LOS ANGELES, CA
13-18	JANDA, STEVEN A. V. WASHINGTON
13-21	SHINER, MARC V. UNITED STATES
13-24	DANIEL, JOHN V. UNIVERSAL ENSCO, INC.
13-114	MONREAL, FRANCISCO J. V. NEW YORK, ET AL.

13-122	WHITAKER, VIRGINIA D. V. NASH COUNTY, NC, ET AL.
13-189	VONEIDA, KENNETH L. V. STOEHR, KEVIN, ET AL.
13-220	FISCHER, LILLIAN V. NEW YORK, NY, ET AL.
13-5008	IN RE GARY HUNT
13-5032	JOHNSON, VINCENT S. V. UNITED STATES
13-5100	RICE, LAWRENCE V. GEORGIA
13-5127	THOMPSON, ANTWION E. V. RUNNELS, WARDEN, ET AL.
13-5168	JACOBS, ERIKA V. NONPUBLIC POSTSECONDARY ED. COM.
13-5189	REAGLE, JEFFREY L. V. JONES, DIR, OK DOC
13-5232	JACKSON, CLIFFORD V. CURRY, SAMUEL
13-5245	SORO, LUIS A. V. SORO, JOSE L.
13-5280	GREGORY, JOHNNY B. V. ADAMS, JUDGE, ETC., ET AL.
13-5297	MAY, DERIC L. V. PATTERSON, TONY, ET AL.
13-5335	RICHARDS, VELMA J. V. BRITISH PETROLEUM, ET AL.
13-5467	IN RE SAID GSSIME
13-5491	JACKSON, CLIFFORD A. V. HARGADON, EDWARD R.
13-5528	MARTINEZ, PATRICIA V. MARTINEZ, MICHAEL, ET AL.
13-5529	HOFLAND, RANDALL V. MAINE
13-5551	IN RE GARY E. SUTTON
13-5627	HARRIS, MICHAEL E. V. MESSITTE, JUDGE, ET AL.
13-5668	BUCZEK, SHANE C. V. UNITED STATES
13-5731	DUMEY, MELVIN V. KISSIMMEE UTILITY AUTHORITY
13-5748	IN RE DERRICK A. POLLY
13-5816	MARTINEZ, PATRICIA V. MARTINEZ, MICHAEL, ET AL.
13-5829	SHELL, ROBERT E. V. CLARKE, DIR., VA DOC
13-6125	LONG, WAY Q. V. UNITED STATES
13-6161	KEYS, BOBBY E. V. UNITED STATES

The petitions for rehearing are denied.

12-8364 FULKS, CHADRICK E. V. UNITED STATES

The petition for rehearing is denied. Justice Kagan took no part in the consideration or decision of this petition.

12-9125 CAIN, DAVID V. UNITED STATES

12-10843 KEARNEY, RICHARD V. GRAHAM, SUPT., AUBURN

The petitions for rehearing are denied. Justice Sotomayor took no part in the consideration or decision of these petitions.

12-10974 FIELDS, JIMMY L. V. UNITED STATES

13-5359 BRYANT, LOUIS A. V. UNITED STATES

The petitions for rehearing are denied. Justice Kagan took no part in the consideration or decision of these petitions.

13-5942 SESSA, MICHAEL V. UNITED STATES

The petition for rehearing is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

ATTORNEY DISCIPLINE

D-2747 IN THE MATTER OF DISCIPLINE OF MICHELLE HAMILTON DAVY

Michelle Hamilton Davy, of Largo, Maryland, is suspended from the practice of law in this Court and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

D-2748 IN THE MATTER OF DISCIPLINE OF GEORGE M. NACHWALTER

George M. Nachwalter, of Miami, Florida, is suspended from the practice of law in this Court and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

D-2749 IN THE MATTER OF DISCIPLINE OF MARK ALAN SARGENT

Mark Alan Sargent, of Devon, Pennsylvania, is suspended from

the practice of law in this Court and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Per Curiam

SUPREME COURT OF THE UNITED STATES

FORD MOTOR COMPANY *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 13–113. Decided December 2, 2013

PER CURIAM.

When a taxpayer overpays his taxes, he is generally entitled to interest from the Government for the period between the payment and the ultimate refund. See 26 U. S. C. §6611(a). That interest begins to run "from the date of overpayment." §§6611(b)(1), (b)(2). But the Code does not define "the date of overpayment."

In this case, after the Internal Revenue Service advised Ford Motor Company that it had underpaid its taxes from 1983 until 1989, Ford remitted a series of deposits to the IRS totaling $875 million. Those deposits stopped the accrual of interest that Ford would otherwise owe once the audits were completed and the amount of its underpayment was finally determined. See §6601; Rev. Proc. 84–58, 1984–2 Cum. Bull. 501. Later, Ford requested that the IRS treat the deposits as advance payments of the additional tax that Ford owed. Eventually the parties determined that Ford had overpaid its taxes in the relevant years, thereby entitling Ford to a return of the overpayment as well as interest. But the parties disagreed about when the interest began to run under 26 U. S. C. §6611(b)(1). Ford argued that "the date of overpayment" was the date that it first remitted the deposits to the IRS. *Ibid.* The Government countered that the date of overpayment was the date that Ford requested that the IRS treat the remittances as payments of tax. The difference between the parties' competing interpretations of §6611(b) is worth some $445 million.

Ford sued the Government in Federal District Court,

asserting jurisdiction under 28 U. S. C. §1346(a)(1). The Government did not contest the court's jurisdiction. See Brief in Opposition 3, n. 3. The District Court accepted the Government's construction of §6611(b) and granted its motion for judgment on the pleadings. A panel of the Court of Appeals for the Sixth Circuit affirmed, concluding that §6611 is a waiver of sovereign immunity that must be construed strictly in favor of the Government. 508 Fed. Appx. 506 (2012).

Ford sought certiorari, arguing that the Sixth Circuit was wrong to give §6611 a strict construction. In Ford's view, it is 28 U. S. C. §1346—not §6611—that waives the Government's immunity from this suit, and §6611(b) is a substantive provision that should not be construed strictly. See *Gómez-Pérez* v. *Potter*, 553 U. S. 474, 491 (2008); *United States* v. *White Mountain Apache Tribe*, 537 U. S. 465, 472–473 (2003). In its response to Ford's petition for certiorari, however, the Government contended for the first time that §1346(a)(1) does not apply at all to this suit; it argues that the only basis for jurisdiction, and "the only general waiver of sovereign immunity that encompasses [Ford's] claim," is the Tucker Act, 28 U. S. C. §1491(a). Brief in Opposition 3, n. 3. Although the Government acquiesced in jurisdiction in the lower courts, if the Government is now correct that the Tucker Act applies to this suit, jurisdiction over this case was proper only in the United States Court of Federal Claims. See §1491(a).

This Court "is one of final review, 'not of first view.'" *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 529 (2009) (quoting *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005)). The Sixth Circuit should have the first opportunity to consider the Government's new contention with respect to jurisdiction in this case. Depending on that court's answer, it may also consider what impact, if any, the jurisdictional determination has on the merits issues, especially whether or not §6611 is a waiver of sovereign

immunity that should be construed strictly.

The petition for certiorari is granted, the judgment of the Sixth Circuit is vacated, and the case is remanded for further proceedings.

It is so ordered.

STATE OF SOUTH CAROLINA COUNTY OF LEE	IN THE COURT OF COMMON PLEAS
LaSalle Bank National Association as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 , PLAINTIFF, vs. Laura Toney, DEFENDANT(S).	COMPLAINT (NON-JURY MORTGAGE FORECLOSURE) C/A NO: DEFICIENCY REQUESTED

F25-02718

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

1. That the Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of United Statse of America; and that the Defendant(s) Laura Toney is upon information and belief, a citizen(s) and resident(s) of the County of Lee, State 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 Lee, State of South Carolina.

4. That on or about October 6, 2004, for value received, Laura Toney, did execute and deliver to Finance America, LLC, a certain promissory note in writing according to the terms and conditions set out therein, wherein and whereby said Laura Toney promised to pay to Finance America, LLC the sum of Seventy-Six Thousand Five Hundred And 00/100 Dollars ($76,500.00), together with interest thereon at an adjustable rate per terms as set out in said Note.

5. That in order to better secure the payments of the said note and debt, in accordance with the terms and conditions thereof, Laura Toney, did execute and deliver on October 6, 2004 unto Mortgage Electronic Registration Systems, Inc. solely as nominee for Finance America, LLC, its successors and assigns, a mortgage covering the following described property:

Legal description and property address:

All that certain lot or parcel of land situate just North of the Town of Bishopville, County of Lee and State of South Carolina and being bounded as follows: On the North by Chapman Street; On the East by lot of West Wilson; on the South by Lots Nos., 9, 10, 11, 12 and 13 and on the West by Bay Street represented on a plat being of North Mohawk as Lot No. 14, said plat being of record in Plat Book E at page 46, in the Office of the Clerk of Court for Lee County, South Carolina Records.

This conveyance is made subject to any and all existing reservations, easements, right-of-way, zoning ordinances, and restrictive or protective covenants that may appear of record or on the premises.

This being the same property most recently to Laura Toney by deed from Milton Toney dated December 4, 1992 and recorded December 4, 1992 in Book V-5 at page 205 in the Lee County, South Carolina Records.

729 Chatman Street, Bishopville, SC 29010
TMS# 030-02-00-024

6. Thereafter said mortgage was recorded in Book 361 at page 79 on October 19, 2004 in the office of the Clerk of Court of Lee County.

7. Thereafter, by virtue of an assignment to be recorded Mortgage Electronic Registration Systems, Inc. solely as nominee for Finance America, LLC assigned said mortgage unto LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 making LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 the present lien holder and Plaintiff herein.

8. The above referenced instrument constitutes a first lien priority mortgage.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. The monthly payments due on said note and mortgage are in default since March 1, 2005, 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 March 1, 2005 the sum of Seventy-Six Thousand Three Hundred Fifty-Six And 05/100 Dollars ($76,356.05), together with interest at an adjustable rate per terms as set out in said Note from February 1, 2005 and also for the costs and disbursements of this action, including attorney's fees.

15. That the Plaintiff does not waive but specifically demands judgment against the Defendant(s), Laura Toney, 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(s) for any deficiency in this action remaining after sale of the mortgaged premises.

16. On information and belief, the Notice of consumer's Right to Cure, as contemplated under S.C. Code Sections 37-5-110 and 37-5-111, was sent to the Defendant or was not required.

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

(4) For an Order directing and empowering the Sheriff of Lee 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
JOHN B. KELCHNER/ALAN M.STEWART
LAURA B. BRENT/J. SCOTT WALLS
GUYTON MURRELL
Attorneys for Plaintiff

Columbia, South Carolina
July 13, 2005

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

1. The amount of the debt is stated in paragraph 7 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, disputed, in within, 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.

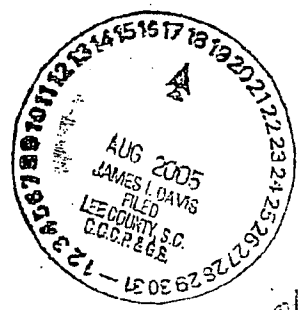
5. If the creditor named as Plaintiff in the attached Summons and Complaint is not the original creditor, and if the debtor(s) make a written request to the creditor's law firm within thirty (30) days from the receipt of this notice, the name and address of the original creditor will be mailed to the debtor(s) by the creditor's law firm.

Written requests should be addressed to Korn Law Firm, P.A., Post Office Box 11264, Columbia, South Carolina 29211-1264.

F15-02718

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEE) Case Number: 05-CP-31-169
)
LaSalle Bank National Association, as Trustee)
For the registered holders of Structured Asset)
Securities Corporation, Structured Asset Investment)
Loan Trust, Mortgage Pass-Through Certificates,)
Series 2004-11,)
)
Plaintiff,)
)
vs.)
)
Laura Toney,)
)
Defendant (s).)

ANSWER



The Defendant Answers as follows:

1. Each material allegation in Plaintiff's Complaint, except those specifically admitted herein are denied and Defendant demand strict proof thereof.

2. The allegations in Paragraph One are admitted.

3. That the allegations in Paragraph Two are admitted.

4. That the allegations in Paragraph Three are admitted.

5. That the allegations in Paragraph Four are admitted.

6. That the allegations in Paragraph Five are admitted.

7. That the allegations in Paragraph Six are admitted.

8. That the Defendant is without information to admit or deny the allegations of Paragraph Seven.

9. That the allegations in Paragraph Eight are admitted.

10. That the Defendant is without sufficient information to admit or deny

45.

the allegations of Paragraph Nine and demands strict proof thereof.

11. That the Allegations in Paragraph Ten are denied.

12. Defendant admits the allegations in Paragraph Eleven.

13. Defendant admits the allegations in Paragraph Twelve.

14. Defendant denies the allegations of Paragraph Thirteen.

15. Defendant admits the allegations of Paragraph Fourteen.

16. Defendant denies the allegations of Paragraph Fifteen.

17. Defendant denies the allegations of Paragraph Sixteen.

COUNTERCLAIM

18. The Defendant re-alleges the allegations contained in paragraphs 1-17 as if stated verbatim.

19. That the Plaintiffs owed the Defendant a duty of disclosing true and accurate information regarding the transaction of this matter pursuant to the Truth in Lending laws.

20. That the Plaintiffs failed to provide a good faith estimate of the property at issue.

21. That the Plaintiffs did not provide Defendant an opportunity to select the representative of her choice to act in her behalf at the closing of the loan.

22. That the Defendant forwarded a letter of rescission on June 12, 2005 via certified mail notifying the Plaintiff of her intent to rescind the loan based on the violation of federal laws by Plaintiff.

23. That Plaintiff failed to acknowledge Defendant's intent to rescind.

WHEREFORE, Plaintiff prays that:

1. The Court order the Plaintiffs to accept Defendant's rescission of the loan;
2. The Court dismisses Plaintiff's action; and
3. The Court order such other relief deemed just and proper.

LAURA TONEY
PRO SE
Post Office Box 722
Bishopville, South Carolina 29010
(803) 484-6609

Bishopville, South Carolina

August 17th 2005

RECEIVED MAR 2 9 2006

KORN LAW FIRM, P. A.
POST OFFICE BOX 11264,
1300 PICKENS STREET
COLUMBIA, SOUTH CAROLINA 29211
(803) 252-5817

March 28, 2006

J. David Weeks, Esquire
P.O. Box 370
Sumter, SC 29151

RE: LaSalle Bank v. Laura Toney
Docket No. 2005-CP-31-169

Dear Sir:

Enclosed please find the Plaintiff's Motion for Summary Judgment with supporting affidavit and Certificate of Service in the above noted action.

Very truly yours,

H. Guyton Murrell

STATE OF SOUTH CAROLINA COUNTY OF LEE LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, PLAINTIFF, vs. Laura Toney, DEFENDANT(S). F25-02718	IN THE COURT OF COMMON PLEAS (NON-JURY MORTGAGE FORECLOSURE) C/A No. 2005-CP-31-169

CERTIFICATE OF MAILING

The undersigned hereby certifies that on March 28, 2006, she served one copy of Plaintiff's Motion for Summary Judgment and Affidavit of Michael May upon the following by depositing a copy of same in the United States Mail, postage prepaid, and addressed as follows:

J. David Weeks, Esquire
P.O. Box 370
Sumter, SC 29151

Kathryn Howell
Kathryn Howell, Paralegal

March 28, 2006
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF LEE

LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11,

PLAINTIFF,

vs.

Laura Toney,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A NO:2005-CP-31-169

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO: J. DAVID WEEKS, ATTORNEY FOR THE DEFENDANT LAURA TONEY:

YOU WILL PLEASE TAKE NOTICE that the attorney for the plaintiff will, on April 11, 2006 at 2:30 p.m., or as soon thereafter as counsel may be heard, move before the Court for an Order pursuant to Rule 56 of the SCRCP granting the plaintiff Summary Judgment.

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 a judgment as a matter of law. This Motion is based on the pleadings in this case, discovery, affidavits, loan documents, and the applicable statutory and case law.

Korn Law Firm, P.A.
P.O. Box 12369
Columbia, SC 29211-2369
(803) 252-5817

H. Guyton Murrell, Esq.
Attorney for Plaintiff

March 28, 2006
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEE	)	FOR THE THIRD JUDICIAL CIRCUIT
	)	
	)	CIVIL ACTION NO.: 05-CP-31-169
LaSalle Bank National Association, as Trustee for registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11,	)	
Plaintiff,	)	
	)	NOTICE OF MOTION AND MOTION
vs.	)	FOR RECONSIDERATION OF
	)	DECISION AND FOR STAY OF
Laura Toney,	)	ENFORCEMENT OF THE ORDRER
	)	
Defendant.	)	

APR 2007 JAMES I. DAVIS FILED LEE COUNTY, SC C.C.P. & G.S.

TO W.C. COFFEY, JR. MASTER IN EQUITY and the KORN LAW FIRM P.A., ATTORNEYS FOR THE PLAINTIFF ABOVE NAMED:

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the above named Plaintiff will move before W.C. Coffey, Jr. Master in Equity, ten (10) days after service hereof, excluding the day of service, will move before the Court for an Order withdrawing its previous Foreclosure Order in the above captioned matter pursuant to SCRP Rule 60.

The Defendant presents this Motion, reserving all rights to appeal any and all findings, conclusions, results of the Order despite the fact that she may not raise all objections to such findings, conclusions, and results in this Motion. The Defendant files this Motion on the belief that the default judgment entered against her was the result of mistake and/or excusable neglect and shall therefore be reconsidered. SCRP Rule 60(b)1.

The Defendant respectfully requests that the Court imposes a stay on the enforcement of the Foreclose Order in the above captioned case, so this motion may be heard and ruled upon, and that the said Foreclosure Order be withdrawn upon the consideration of the following facts:

1. The Defendant on January 17, 2007 filed *pro se* a Chapter 13 Bankruptcy action (C/A No. 07-00234-JW).
2. Pursuant to 11 U.S.C. § 362(a), the Defendant believed that an automatic stay was to be put in place regarding the proceeding in the present foreclosure case; therefore, the Defendant move to the United States Bankruptcy Court to Impose the Stay on the present action.
3. Upon belief that the automatic stay was in place, the Defendant mistakenly believed that the Foreclosure Hearing would be postponed until the United States Bankruptcy Court ruled on the Motion to Impose the Stay filed by the Defendant, to which the Plaintiff in this case objected to.
4. On February 6, 2007, a foreclosure hearing was schedule in the present matter.
5. On February 6, 2007, under the belief that the issue of the stay was pending and due to scheduling issues, the Defendant's counsel made numerous attempts to postpone the foreclosure hearing.
6. On February 6, 2007, the South Carolina General Assembly was in session.
7. Mr. J. David Weeks, Esquire, as a Sumter County State Representative and the attorney of record for the Defendant in the above captioned case, shall have been granted a continuance as a matter of right, pursuant to South Carolina Code of Statute §2-1-150 (as amended).

8. On February 6, 2007, the Defendant and any her counsel mistakenly but excusably neglected to appear before the court, as the Motion to Impose the Stay had not yet been decided upon, and under the belief that the Defendant counsel successfully postponed the foreclosure hearing.
9. During the hearing of February 6, 2007, the Defendant was found to be in default and the Master in Equity move to impose a default judgment against the Defendant, thereby granting the Summary Judgment Motion of the Plaintiff.
10. On February 15, 2007, the United States Bankruptcy Court entered an Order against the Defendant denied her Motion to Impose the Stay.

This Motion shall be based upon such statutory and case law as will be presented at the hearing

Respectfully submitted,

WEEKS LAW OFFICE, L.L.C.

J. David Weeks
Attorney for the Defendant
35 South Sumter Street
PO Box 370
Sumter, SC 29151-0370
(803) 775-5856

Sumter, SC
April 25, 2007

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEE COUNTY
Common Pleas Court

Richard L. Booth, Special Referee

Case No. 2005-CP-31-169

LaSalle Bank National Association, as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Respondent,

v.

Laura Toney, Appellant.

RESPONDENT LASALLE BANK'S FINAL BRIEF

H. Guyton Murrell
Korn Law Firm
1300 Pickens Street
P.O. Box 12369
Columbia, SC 29211-2369
803-252-5811
Attorney for Respondent LaSalle Bank

TABLE OF CONTENTS

Table of Authorities..... ii

Statement of Issues on Appeal..... 1

Statement of the Case..... 1

Standard of Review..... 4

Arguments

I. THE APPELLANT'S SWORN STATEMENTS IN HER BANKRUPTCY ACTIONS BARRED HER COUNTERCLAIMS AND DEFENSES IN THE FORECLOSURE UNDER THE DOCTRINE OF JUDICIAL ESTOPPEL 5

II. THE DENIAL OF APPELLANT'S RULE 60(B) MOTION BY THE TRIAL COURT WAS NOT AN ABUSE OF DISCRETION

A. A RULE 60(B) MOTION REQUIRES A MISTAKE OF FACT AND NOT A MISTAKE OF LAW 7

B. THE APPELLANT LACKED A MERITORIOUS DEFENSE 9

III. THE APPEAL IS IMPROPERLY BASED UPON ALLEGED EVIDENCE NOT OF RECORD AND LEGAL ARGUMENTS NOT MADE BEFORE THE TRIAL COURT 16

A. POST-TRIAL FORGERY CLAIMS 16

B. ORDER OF REFERENCE 19

C. POST-TRIAL CLAIM OF REQUEST FOR CONTINUANCE 21

Conclusion..... 24

TABLE OF AUTHORITIES

CASES

American Mortgage Network, Inc. v. Shelton, 486 F.3d 815, 821 (4th Cir. 2007) ...13, 14

Coleman v. Dunlap, 306 S.C. 491, 413 S.E.2d 15 (1992) 4

Colleton Reg. Hosp. V. MRS Med. Rev. Syst., 866 F. Supp 896 (D.S.C. 1994) 6

Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 339 S.E.2d 524 (Ct. App. 1986) 7

Durham v. Vinson, 360 S.C. 639, 602 S.E.2d 760, (2004) 16

Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004) 10

Goodson v. Am. Bankers Ins. Co., 295 S.C. 400, 368 S.E.2d 687 (Ct. App. 1988) 7

Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997) 6

Honea v. Honea, 292 S.C. 456, 458, 357 S.E.2d 191, 192 (Ct. App. 1987) 16

Hough v. Hough, 312 S.C. 344, 440 S.E.2d 387 (Ct. App. 1994) 16

Hudson v. Hudson, 294 S.C. 166, 169, 363 S.E.2d 387, 389 (Ct. App. 1987) 16

Large v. Conseco Fin. Servicing Corp., 292 F.3d 49, 54-55 (1st Cir.2002) 14

Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 598 S.E.2d 712 (2004) 18

Moore v. Wells Fargo Bank, N.A., 597 F.Supp.2d 612 (4th Cir. 2009) 13

New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 435 S.E.2d 377 (Ct. App. 1993) ... 9

Peterson v. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999) 10

Powers v. Sims & Levin, 542 F.2d 1216 (4th Cir. 1976) 15

Precision Instrument Mfg. Co. v. Automotive Co., 324 U.S. 806, (1945) 24

Raby Const., L.L.P. v. Orr, 358 S.C. 10, 594 S.E.2d 478 (2004) 4

Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003) 10

Savage v. Cannon, 204 S.C. 473, 30 S.E.2d 70 (1944) 7

Timms v. Timms, 286 S.C. 291, 294, 333 S.E.2d 74, 75 (Ct. App. 1985) 16

Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 399 S.E.2d 779 (1990) .. 4

Walsh v. Woods, 371 S.C. 319, 638 S.E.2d 85 (Ct. App. 2006) 18

Wilder Corp. v. Wilkie, 330 S.C. 71, 497 S.E.2d 731 (1998) 16, 18

Williams v. Homestake Mortgage Co., 969 F.2d 1137, 1140 (11th Cir. 1992) 13

Yamamoto v. Bank of New York, 329 F.3d 1167, 1172 (9th Cir. 2003) 13

Zimmerman v. Central Union Bank, 194 S.C. 518, 8 S.E.2d 359 (1940) 6

STATUTES

United States Bankruptcy Code Section 541 5

15 United States Code § 1635 ..... 14, 15

SOUTH CAROLINA RULES OF CIVIL PROCEDURE

South Carolina Rules of Civil Procedure, Rule 6(d) 11

South Carolina Rules of Civil Procedure, Rule 11 3

South Carolina Rules of Civil Procedure, Rule 13(a) 10

South Carolina Rules of Civil Procedure, Rule 53(b) 19

South Carolina Rules of Civil Procedure, Rule 56(c) 10

South Carolina Rules of Civil Procedure, Rule 59(e) 17, 18, 20

South Carolina Rules of Civil Procedure, Rule 60(b)(1) 7, 9

South Carolina Rules of Civil Procedure, Rule 71(a) 19

OTHER AUTHORITIES

31 C.J.S. *Estoppel & Waiver* Section 139 (1996) 6

11 *Federal Practice & Procedure* §2858 (1973) 7

South Carolina Civil Procedure 82 (1985) 9

STATEMENT OF ISSUES ON APPEAL

I. DOES THE APPELLANT'S SWORN STATEMENTS IN HER BANKRUPTCY CASES BAR HER COUNTERCLAIMS AND DEFENSES IN THE FORECLOSURE UNDER THE DOCTRINE OF JUDICIAL ESTOPPEL?

II. WAS THE DENIAL OF APPELLANT'S RULE 60(B) MOTION BY THE TRIAL COURT AN ABUSE OF DISCRETION?

III. DOES THE APPEAL IMPROPERLY INCLUDE ALLEGED EVIDENCE NOT OF RECORD AND LEGAL ARGUMENTS NOT MADE BEFORE THE TRIAL COURT?

STATEMENT OF THE CASE

The statement of the case in Appellant's brief does not present an objective summary of the case and states as fact matters that are in dispute. The statement of the case in Respondent's brief shall only state those matters that are not in dispute.

This is an action for foreclosure as to property in Lee County. The Appellant Laura Toney obtained the loan to refinance the debt encumbering the property. Appellant signed an adjustable rate note on October 6, 2004 for a loan in the amount of $76,500.00. The Appellant also signed a mortgage designating the property as collateral for the debt. The mortgage was subsequently assigned to Respondent LaSalle Bank. Appellant made the monthly payments required under the note for December 2004, January 2005, February 2005 and March 2005. Appellant made no further payments on the loan.

This case was commenced with the lis pendens, summons and complaint filed on July 21, 2005. In her pro se answer filed August 18, 2005, Appellant Laura Toney admitted that she signed the subject note and mortgage and admitted that she had failed to make the payments required under the note. The Appellant denied that the mortgage provided for the loan to be accelerated upon a default, denied that the loan documents

provided for a deficiency judgment and denied that any notice of breach was provided. By way of counterclaim, Appellant alleged that she had not been provided a good faith estimate. She also disputed being provided an opportunity to select her own attorney to perform the closing. Additionally, she alleged an entitlement to rescind the loan pursuant to a letter of recession sent June 12, 2005. Respondent filed a reply on September 19, 2005 and an amended reply October 20, 2005. Appellant subsequently hired an attorney who notified the court and Respondent's counsel of his representation in a letter dated January 11, 2006. Respondent filed and served a motion for summary judgment with supporting affidavit on March 29, 2006 and a memorandum of law in support of the motion on September 22, 2006. Appellant did not file or serve any opposing affidavits or other evidence prior to the hearing on Respondent's motion for summary judgment.

During the pendency of the foreclosure, the Appellant Laura Toney filed four pro se Chapter 13 Bankruptcy petitions. Under the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Credit Act of 2005, no automatic stay was in effect during the Appellant's fourth Chapter 13 case and the Appellant filed a pro se motion requesting that the Bankruptcy Court impose a stay. A hearing on the Respondent's motion for summary judgment was held on February 6, 2007 with notice of the motion hearing in the foreclosure action mailed to Appellant's attorney on January 24, 2007. Neither the Appellant nor her attorney appeared at the motion hearing.

The Appellant's motion for the Bankruptcy Court to impose a stay was denied by order filed February 15, 2007 and the Appellant's Chapter 13 case was subsequently dismissed by order filed February 26, 2007. The order of dismissal made a finding that the Appellant Laura Toney had filed the case in bad faith and sanctioned the Appellant

Laura Toney with a one year ban on filing any further Chapter 13 cases.

A decree of foreclosure was subsequently filed on March 15, 2007. The Appellant then filed a pro se Chapter 7 Bankruptcy Petition on April 13, 2007. The Appellant's Chapter 7 case was dismissed by order filed May 15, 2007. The dismissal order made a finding that Laura Toney had filed the Chapter 7 case in bad faith and sanctioned her by barring any further bankruptcy filings for one year. None of the bankruptcy orders were appealed.

The Appellant Laura Toney filed a separate civil action through different attorneys on March 23, 2007 seeking to vacate the foreclosure decree. The Appellant Laura Toney also obtained an ex parte order filed March 23, 2007 granting an injunction as to the foreclosure sale. A hearing on the Appellant's application for a temporary restraining order was held before the Honorable Clifton Newman on March 27, 2007. By order filed April 2, 2007, Judge Newman dissolved the ex parte temporary restraining order and dismissed the injunction action as improperly filed. The order found that the request for an injunction was intrinsically related to the foreclosure action and exclusive jurisdiction remained with the trial judge under the order of reference. The order further found that the Appellant and her attorneys appearing at the injunction hearing had not complied with Rule 11 of the South Carolina Rules of Civil Procedure pertaining to substitution of counsel. The order dissolving the ex parte temporary restraining order and dismissing the action for an injunction was not appealed.

The Appellant Laura Toney filed a notice of motion and motion for reconsideration of decision and for stay of enforcement of the foreclosure order pursuant to Rule 60 through her foreclosure attorney on April 25, 2007.

A supplemental order of reference referred the matter to the Honorable Richard Booth as the original trial judge in the foreclosure action had recused himself due to a judicial grievance filed against him by the Appellant. Respondent's counsel also filed a motion to amend and supplement the foreclosure decree with the additional fees and costs incurred subsequent to the entry of the decree. A hearing was held before Judge Richard Booth on October 18, 2007. By order filed December 3, 2007, Judge Booth denied the Appellant's motion for relief under Rule 60(b). Respondent's motion to amend the decree was granted. The order also included a deficiency judgment against the Appellant. The Appellant filed a notice of appeal as to the order denying her motion for relief under Rule 60(b). This appeal was stayed by another Chapter 13 Bankruptcy filed by the Appellant on December 30, 2008. That bankruptcy case was dismissed by order filed April 21, 2009.

STANDARD OF REVIEW

Neither the foreclosure decree nor the order dismissing the request for an injunction was appealed and the only order on appeal is the order denying appellant's request for relief under Rule 60(b) SCRCP. Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the trial court. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). Therefore, the standard of review is limited to determining whether there was an abuse of discretion. Raby Const., L.L.P. v. Orr, 358 S.C. 10, 594 S.E.2d 478, 482 (2004). An abuse of discretion arises when the order was controlled by an error of law or when the order is based on factual conclusions that are without evidentiary support. Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

ARGUMENTS

I THE APPELLANT'S SWORN STATEMENTS IN HER BANKRUPTCY CASES BARRED HER COUNTERCLAIMS AND DEFENSES IN THE FORECLOSURE UNDER THE DOCTRINE OF JUDICIAL ESTOPPEL

As previously stated, the Respondent repeatedly filed serial bankruptcy petitions during the pendency of this foreclosure action. As part of the required declaration of assets in the bankruptcy cases, the Respondent was required to affirmatively state her assets and liabilities in her schedules. The petition and schedules are sworn statements by a debtor made under penalty of perjury. In Schedule B of her third bankruptcy petition, the Appellant affirmatively stated that she possessed no "contingent and unliquidated claims of every nature, including tax refunds, ***counterclaims of the debtor, and rights to setoff claims***" (emphasis added) (R.p. 191). Upon the filing of the Chapter 13 Bankruptcy petition, all the legal and equitable interests of the debtor become the property the bankruptcy estate. See Section 541 U.S. Bankruptcy Code. The bankruptcy petition submitted by this debtor, as with all bankruptcy debtors, is submitted under oath and under penalty of perjury. A person who knowingly and fraudulently conceals any of his property or assets in a bankruptcy case is subject to fine, imprisonment of not more than 5 years or both. In the foreclosure, Respondent submitted into evidence Schedule B of the Chapter 13 Plan from the Appellant's third bankruptcy filing. The trial court made a finding that the doctrine of judicial estoppel barred the Appellant from asserting claims and defenses in the foreclosure that were not declared as assets in her bankruptcy. (R.pp. 18 - 19).

Judicial estoppel precludes a party from adopting a position in conflict with one

taken in the same or related litigation. See Colleton Reg. Hosp. V. MRS Med. Rev. Syst., 866 F. Supp 896 (D.S.C. 1994). The purpose or function of the doctrine is to protect the integrity of the judicial process or the integrity of the courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries. 31 C.J.S. *Estoppel & Waiver* Section 139, at 593 (1996). See also Zimmerman v. Central Union Bank, 194 S.C. 518, 532, 8 S.E.2d 359, 365 (1940)("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position."). See also Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997) ("Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him").

The trial court correctly ruled that the Appellant's statements under oath in her bankruptcy case expressly confirming that no setoffs or counterclaims existed to declare as assets acted as a bar to her assuming a contrary position in the foreclosure. Therefore, the Appellant lacked a meritorious defense to the foreclosure not only due to her failure to submit any opposing affidavits or other evidence prior to hearing, but more importantly due to her sworn statements in her bankruptcy cases that she had no counterclaims or setoffs to declare as assets. It is anathema to the principles of equity for the appellant to make a sworn statement under penalty of perjury to the Bankruptcy Court for the purpose of obtaining the jurisdiction and protection of the Bankruptcy Court and then attempt to disavow such statements and avoid the consequences of such sworn

statements in the foreclosure action. The granting of this appeal would encourage perjury and severely denigrate the integrity of the judicial system for the benefit of a litigant who has been repeatedly found by various courts to have acted in bad faith.

II THE DENIAL OF APPELLANT'S RULE 60(B) MOTION BY THE TRIAL COURT WAS NOT AN ABUSE OF DISCRETION.

A. A RULE 60(B) MOTION REQUIRES A MISTAKE OF FACT AND NOT A MISTAKE OF LAW

Rule 60(b)(1), SCRCP provides that the court may relieve a party from a final judgment or order if the judgment was induced by mistake, inadvertence, surprise, or excusable neglect. This rule is an appropriate remedy for good faith mistakes of fact if all other applicable factors are met. See Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986). However, a party may not generally use Rule 60(b)(1) as a vehicle for relief from a mistake of law. See Savage v. Cannon, 204 S.C. 473, 30 S.E.2d 70 (1944); see generally 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* §2858 (1973)(stating that an appellant is not entitled to relief under Rule 60(b)(1) for ignorance of the rules or ignorance of the law).

In this case, the mistake alleged by the Appellant Laura Toney is a mistake of law that an automatic stay was in effect pursuant to her fourth Chapter 13 Bankruptcy. Therefore, Rule 60(b) would be inapplicable. "Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney." Goodson v. Am. Bankers Ins. Co., 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988). Moreover, the contention by the Appellant Laura Toney that she believed an automatic stay to be in effect is not credible as demonstrated by her actions at

the time. The Appellant Laura Toney filed four pro se Chapter 13 Bankruptcy petitions prior to the hearing on Respondent's motion for summary judgment. The Appellant demonstrated sufficient knowledge and familiarity with bankruptcy law and procedures in her fourth Chapter 13 case to realize that no automatic stay was in effect. The Appellant filed a motion requesting the Bankruptcy Court to impose a stay. The Appellant's motion for a stay was denied by Order of the Honorable John Waites, United States Bankruptcy Judge for the District of South Carolina filed February 15, 2007. (R.pp. 193 - 197). The order set forth with specificity the factors giving rise to an assumption that the Appellant had filed the case in bad faith. By Order of the Honorable John Waites filed February 26, 2007, the United States Bankruptcy Court made a specific finding of fact that the Appellant's fourth Chapter 13 Bankruptcy case was filed in bad faith and reserved jurisdiction to impose sanctions. (R.pp. 198 - 201). The United States Bankruptcy Court subsequently sanctioned the Appellant with a bar on any further filings under Chapter 13 for one year. (R.p. 203).

The Appellant subsequently filed a Chapter 7 case that was also dismissed with a finding of bad faith as the Appellant had filed a total of five bankruptcy petitions within the space of nine months. The order of dismissal also imposed a sanction barring the Appellant from any bankruptcy filings for one year. (R.pp. 204 - 205). After the one year ban lapsed, the Appellant filed another Chapter 13 Bankruptcy Petition that stayed this appeal until that case was also dismissed. None of the bankruptcy orders were appealed.

The lower court judge who heard the Appellant's post-trial Rule 60 motion correctly noted that either an automatic stay was in effect or it wasn't and in the present

case there is absolutely no doubt that no automatic stay was in effect. (R.p. 177, line 6 – p.180, line 10). Therefore, the evidence clearly established that no stay existed, Laura Toney fully understood that a stay was not in effect due to her bankruptcy filing and her claim that she mistakenly believed a stay to be in effect is disingenuous and not credible.

B. THE APPELLANT LACKED A MERITORIOUS DEFENSE

Furthermore, even if the mistake were a mistake of fact rather than a mistake of law, the appellant Laura Toney lacked a meritorious defense to the foreclosure. In determining whether a default judgment should be set aside under Rule 60(b)(1), "[t]he promptness with which relief is sought, the reasons for the failure to act promptly, the existence of [a] meritorious defense, and the prejudice to the other parties are relevant." New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993)(quoting Harry M. Lightsey & James F. Flanagan, *South Carolina Civil Procedure* 82 (1985)).

Respondent submitted sworn affidavits from the mortgage broker and the closing attorney that they personally witnessed Laura Toney sign the requisite documents and a copy of the signed documents was attached to the affidavits. (R.pp. 60 – 73, 94 – 96, 144; See Also Second Supplemental Record p. 12). The HUD Settlement Statement reflects that the proceeds were used to payoff a prior mortgage on the subject property. Additionally, the Appellant directly received proceeds of Twenty Thousand Nine Hundred Seventy Four and 19/100ths ($20,974.19) Dollars from the loan. (R.pp. 65 & 66, 91 & 92, 342)

The Respondent filed and properly served upon opposing counsel the motion for summary judgment, supporting affidavits and a memorandum of law. (R.pp. 60 – 79, 97

– 130, 144 – 146). In the eleven months between service of the Respondent's motion for summary judgment and the subsequent hearing, the Appellant did not file any pleading, affidavit or memorandum opposing the motion. Once the party moving for summary judgment meets the initial burden of showing an 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 v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004); Peterson v. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999); Rule 56(c), SCRCP.

Appellant has referenced in her brief the statement of a supposed handwriting "analyst" questioning the validity of her signature on certain documents. This is an issue that the Appellant did not raise before the trial court despite almost a year elapsing between the filing of the summary judgment motion with supporting affidavits and the subsequent hearing. The only mention made of a forgery claim is a passing reference by her attorney at the Rule 60 motion hearing. (R.p. 188, lines 1 - 8). This outrageous claim by Appellant was only made after she had delayed the foreclosure for as long as possible through multiple bad faith bankruptcy filings, an improperly filed separate action for an injunction and a judicial grievance against the trial judge. (R.pp. 151 & 152). This issue is dealt with more fully in the following portion of Respondent's brief. But it was not an issue before the trial court when respondent was granted summary judgment despite Appellant having ample time and opportunity to plead what was clearly a compulsory counterclaim pursuant to Rule 13(a) SCRCP. If it was an issue before the court at the

time of the Rule 60(b) motion, it was defective in not having been presented by way of proper affidavit per Rule 6(d) SCRCP. Given the Appellant's failure to raise the issue timely and properly in her pleadings, coupled with her well-established penchant for bad faith litigation and dilatory tactics, the court presumably viewed the claim as yet another desperate attempt delay the foreclosure action at any cost and by any means necessary.

The Appellant also now attempts to manufacture an issue for the first time on appeal as to whether certain documents were provided to her prior to the loan closing rather than at loan closing. A comparison between the Appellant's answer and counterclaim in the foreclosure and her appeal brief demonstrates her constant shifting of positions and arguments. Her answer and counterclaim makes some fairly ridiculous allegations, such as the loan documents not providing for the mortgagee's right to a deficiency judgment or the loan documents not providing for the loan to be accelerated upon a default or breach of its terms. The loan documents speak for themselves and the Appellant's denial of these express provisions of the loan documents is an example of her disregard for candor and truthfulness. The Appellant's answer and counterclaim makes no claim whatsoever as to any required documents not being provided prior to closing. The pleading only makes the general statements the "Plaintiffs failed to provide a good faith estimate" and "Plaintiffs did not provide Defendant an opportunity to select the representative of her choice to act in her behalf at the closing of the loan". (R.pp. 4 – 12, 14 - 15). It should also be noted that the Appellant's answer does not allege a failure to provide her the three day right of rescission at closing. Her pleading merely states that she rescinded the loan by letter dated June 12, 2005.

Respondent's counsel investigated and responded to the allegations in the most expedient and cost efficient manner possible. The mortgage broker was contacted and she provided an attorney preference form executed by the Appellant at the time of loan application along with the broker's notes from their initial meeting. The attorney preference form and notes were attached to an affidavit executed by the mortgage broker. (R.pp. 95 & 96). The closing attorney also provided a form executed by the Appellant confirming she had previously been given the opportunity to select the attorney of her choice. The closing attorney also provided a copy of the executed Good Faith Estimate form, Truth-in-Lending form and a Notice of three (3) day right of Rescission form. The closing attorney also signed an affidavit with those forms and other pertinent documents attached along with his sworn statement that he personally witnessed the Appellant sign those documents at closing. (R.pp. 63 - 73). If the Appellant had truly disputed whether certain documents had been provided to her prior to closing rather than at closing, then her pleadings should have stated that distinction. Her pleadings merely stated that she had never been provided those documents and Respondent's counsel was able to produce signed copies with supporting affidavits.

The lack of merit in this argument is further evidenced by a careful reading of Appellant's improperly filed action for an injunction. The complaint in that action, verified to be true and correct by the Appellant, states that "**during the closing** on Plaintiff's loan, Plaintiff was not provided the disclosures mandated by the federal Truth In Lending Act". (emphasis added)(R.pp. 41 & 45). Likewise, the application for an injunction alleges "Plaintiff was not provided the disclosures as required by the Truth in Lending Act **at the time of the closing** of the transaction that is the subject of this

action". (emphasis added)(R.p. 38). The distinction that Appellant now seeks to draw between documents required but allegedly not provided prior to closing rather than at closing, is part of Appellant's pattern of having a different "defense du jour" rather than adhering to the allegations of her pleadings. The evidence shows Appellant will allege anything she believes will frustrate the Respondent's case, regardless of whether such allegations are untrue and regardless of whether such allegations are not even set forth in her pleadings.

The Appellant further seeks to conceal her lack of a meritorious defense by misstating the applicable law pertaining to rescission of mortgage loans. Appellant's numerous statements in her appeal brief that her unilateral pronouncement of rescission more than eight months after the loan closing automatically made the mortgage null and void are not in accordance with the clearly established caselaw and statutes. A rescission must not only be timely, but must also be accompanied by a debtor's tender of the loan proceeds. When the facts of this case are applied to the correct legal standard, the Appellant's lack of a meritorious defense is apparent.

The equitable goal of rescission under TILA is to restore the parties to the "status quo ante." See Yamamoto v. Bank of New York, 329 F.3d 1167, 1172 (9th Cir. 2003); Williams v. Homestake Mortgage Co., 969 F.2d 1137, 1140 (11th Cir. 1992). The Fourth Circuit follows the majority view that "unilateral notification of cancellation does not automatically void the loan contract." Moore v. Wells Fargo Bank, N.A., 597 F.Supp.2d 612 (4th Cir. 2009)(quoting American Mortgage Network, Inc. v. Shelton, 486 F.3d 815, 821 (4th Cir. 2007). "The natural reading of [§ 1635(b)] is that the security interest becomes void when the obligor exercises a right to rescind that is available in the

particular case, either because the creditor acknowledges that the right of rescission is available, or because the appropriate decision maker has so determined ... Until such decision is made, the [borrowers] have only advanced a claim seeking rescission." Large v. Conseco Fin. Servicing Corp., 292 F.3d 49, 54-55 (1st Cir.2002). In a scenario involving a contested rescission ... if the trial judge determines that the plaintiff seeking rescission is "unable to tender the loan proceeds, the remedy of unconditional rescission [i]s inappropriate." *Id.*

The evidence submitted clearly established that the Appellant had received the notice of the standard three day right of rescission at the loan closing and therefore did not qualify for an expanded three year right of rescission. But even assuming that the Appellant had an expanded right of rescission, the evidence also clearly shows that Appellant did not and could not make an offer to tender the loan proceeds.

The United States Court of Appeals, Fourth Circuit, adjudicated a somewhat similar case in American Mortgage Network, Inc. v. Shelton, 486 F.3d 815 (4th Cir. 2007). In that case, the debtor timely notified the creditor of his desire to rescind the loan contract. The creditor (Amnet) confirmed that it was prepared to unwind the transaction upon receipt of confirmation from the debtor (Shelton) that he was prepared to return the net loan proceeds. The debtor's position in that case, like the Appellant Laura Toney in this case, was that the notice of rescission automatically voided the security interest and no offer to tender the net loan proceeds to the creditor was required. This rationale was unequivocally rejected by the 4th Circuit in *Shelton*:

"The Sheltons construe § 1635(b) as requiring Amnet to unconditionally release the security interest on the Sheltons' residence within 20 days of notification of cancellation, regardless of the Sheltons' admitted inability to tender the balance due on the loan, or reasonable value thereof. In fact, the Sheltons argue that the trial court erred

in not declaring the entire loan balance forfeited by reason of Amnet's refusal to unconditionally remove the mortgage lien. In essence, the Sheltons claim the right to simply walk away with a windfall of $313,468 without any further obligation. This construction not only offends traditional notions of equity, but misinterprets the procedural requirements of § 1635(b)."

In *Shelton*, the 4th Circuit also noted its previous decision in Powers v. Sims & Levin, 542 F.2d 1216 (4th Cir. 1976), rejecting the argument that § 1635 compelled a creditor to remove a mortgage lien in the absence of the debtor's tender of the loan proceeds. Id at 1220. "When rescission is attempted under circumstances which would deprive the lender of its legal due, the attempted rescission will not be judicially enforced unless it is so conditioned that the lender will be assured of receiving its legal due." Id at 1222.

The issue of Appellant's unwillingness and inability to return the net loan proceeds was not reached by the trial court in the present case because the evidence established that Appellant received notice of the three day right of rescission and did not rescind the loan during the requisite period. However, Schedule B of Appellant's third Bankruptcy petition states that she has zero funds to declare as assets. (R.p. 190) Appellant did not even have the $20,974.19 she received from the loan proceeds, much less the remaining sum she would be required to tender in a bona fide rescission. (R.p. 91). Therefore, rescission was not an option available to the Appellant due to her failure to timely rescind the loan and her inability to make an offer to tender the net loan proceeds.

III THE APPEAL IS IMPROPERLY BASED UPON ALLEGED EVIDENCE NOT OF RECORD AND LEGAL ARGUMENTS NOT MADE BEFORE THE TRIAL COURT

Issues cannot be raised for the first time on appeal, but must be raised to and ruled upon by the trial court to preserve it for appellate review. Wilder Corp. v. Wilkie, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998); See also Durham v. Vinson, 360 S.C. 639, 653-54, 602 S.E.2d 760, 767 (2004) (holding to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court, and a party may not argue one ground for objection at trial and another ground on appeal). The appellate court is confined to the record in deciding issues on appeal. Timms v. Timms, 286 S.C. 291, 294, 333 S.E.2d 74, 75 (Ct. App. 1985) (refusing to review evidence of insurance coverage outside the record on appeal). A litigant who fails to offer proof on an issue may not be heard to complain about the court's resolution of that issue. Hough v. Hough, 312 S.C. 344, 347, 440 S.E.2d 387, 389 (Ct. App. 1994); Hudson v. Hudson, 294 S.C. 166, 169, 363 S.E.2d 387, 389 (Ct. App. 1987); Honea v. Honea, 292 S.C. 456, 458, 357 S.E.2d 191, 192 (Ct. App. 1987).

A. POST-TRIAL FORGERY CLAIMS

The Respondent's motion for summary judgment and the affidavit of the closing attorney, Michael May, were served on the Appellant's counsel by mail on March 28, 2006. The closing attorney's affidavit included as attachments a Good Faith Estimate signed by Laura Toney, a Truth in Lending Disclosure Statement signed by Laura Toney, an Attorney Preference Disclosure signed by Laura Toney, an Attorney/Insurance Preference Checklist signed by Laura Toney and a Notice of Right to Cancel signed by Laura Toney. The affidavit also included a picture of Laura Toney's drivers license used

to confirm her identity at the closing. Despite the affidavit and accompanying documents being served nearly a full year prior to the motion hearing, the Appellant had not raised any claims of forgery prior to the hearing on Respondent's motion for summary judgment or submitted any opposing affidavits. The Appellant did not even serve any discovery requests during the pendency of the foreclosure case. It cannot be over emphasized that Appellant and her attorney were properly noticed of the motion hearing and elected not to attend. (R.pp. 208, 291, lines 3 – 5; R.p. 258, lines 10 - 16).

A motion for reconsideration under Rule 59(e) dated March 23, 2007 and improperly filed by another attorney for Appellant made no mention of any supposed forgery (R.pp. 49 - 51). The Appellant's motion for reconsideration under Rule 60 filed April 25, 2007 by her counsel of record also made no mention of forgery whatsoever. (R.pp. 80 - 82). The claims of forgery were not raised until after her five bankruptcy cases were dismissed, her grievances against Respondent's counsel were dismissed, a grievance against the trial judge prompted his recusal from the case, and her improperly obtained ex parte temporary restraining order in a separate action was dissolved and dismissed. It is noteworthy that the improperly filed action for an ex parte temporary restraining order also contained no allegations of forgery whatsoever. (R.pp. 36 - 43).

Subsequent to dismissal of the Appellant's improperly filed separate action for a temporary restraining order, a motion dated July 23, 2007 through her counsel of record seeking an injunction raised the issue of a supposed forgery for the first time. (R.pp. 54 - 56). An "analysis" performed almost two (2) months previously, but not previously provided to opposing counsel, accompanied the motion sent to Respondent's counsel. The "analysis" was not in the form of an affidavit as required by Rule 6(d) SCRCP. The

motion for an injunction did not include a certificate of service, so it is unknown to Respondent's counsel if the "analysis" was ever filed with the court. The supposed expert who performed the analysis did not appear at the subsequent hearing on Appellant's Rule 60 motion. Appellant's counsel made only a passing reference to the forgery claims at the motion hearing and no evidence was submitted by Appellant's counsel in support of the contention. (R.p. 311, lines 1 – 8). The Appellant's counsel was provided a copy of the proposed order denying the Rule 60 motion and her counsel was duly served with the subsequent filed order. (R.pp. 153 & 156). No request was ever made by Appellant or her counsel to revise the proposed order to include reference to the forgery claim when the proposed order was presented. No motion for reconsideration as to the order denying the Appellant's Rule 60 motion was ever filed by Appellant.

It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court. Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 510-511, 598 S.E.2d 712, 715 (2004). When an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion. See Wilder Corp. v. Wilkie, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998)(noting the proper use of a Rule 59(e) motion is to preserve issues raised but not ruled upon by the trial court); Walsh v. Woods, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006) (finding issue on appeal was not preserved because the trial court did not rule on the issue and it was not raised in a Rule 59(e) motion).

At the hearing on the Appellant's Rule 60 motion, forgery was only mentioned in passing and no evidence or testimony in support of the contention was submitted by Appellant. This is understandable as the forgery claims were only raised in a motion for an injunction that was subsequently abandoned as moot by Appellant. (R.pp. 181, line 23 – p. 183, line 9). Therefore, Appellant's inclusion in her appeal brief of an argument as to supposed forgery is improper.

B. ORDER OF REFERENCE

In her appeal brief, Appellant contests the propriety of the order of reference filed June 16, 2006 referring the foreclosure action to the Honorable William Coffey, Clarendon County Master in Equity. This is an issue that also was not properly raised at trial or preserved for appeal. Furthermore, the facts establish that this argument is entirely without merit.

This is an action for foreclosure and the case was properly referred to a master or special referee pursuant to Rule 53(b) and Rule 71(a) SCRCP. The case was initially referred to the Honorable Robert Jennings, Lee County Master in Equity. (R.pp. 29 & 30; See Also Second Supplemental Record pp. 2 - 4). By letter dated April 19, 2006, Judge Jennings recused himself from serving in the case. (R.p. 142). As noted in the letter dated May 31, 2006, Respondent's attorney attempted to communicate with Appellant's attorney as to a supplemental order of reference for over a month before finally submitting a supplemental order of reference referring the matter to the closest master willing to hear the case. (R.p. 143). Appellant's attorney was copied with the letter and proposed order of reference and no objections to the reference order were

raised at the time. The Appellant also did not appeal the order of reference when it was served on her attorney of record. (R.p. 155).

An objection to the supplemental order of reference was not raised until a post-trial Rule 59(e) motion filed by attorneys Nathaniel Roberson and Joseph Henry at approximately the same time they applied for an ex parte temporary restraining order from Judge Clifton Newman through false insinuations that Respondent's counsel had violated an automatic stay. (R.pp. 49 - 51). Pursuant to Judge Newman's bench ruling and the subsequent order dissolving the ex parte injunction and dismissing the injunction action with prejudice, the lower court made a finding that those two attorneys were not properly substituted as counsel. (Second Supplemental Record pp. 16, line 17 – p. 21, line 11; Second Supplemental Record pp. 25, line 20 – p. 26, line 4). Therefore, the Rule 59(e) motion filed by those attorneys was also improper.

Furthermore, the argument made by those attorneys at the hearing was that the case should have been referred to the master in a closer county, such as Florence County or Sumter County. (Second Supplemental Record pp. 14, line 25 – p. 15, line 23). As Respondent's counsel noted at the hearing, the Clarendon County Master in Equity was the nearest available sitting master as Florence County does not have a master and the Sumter County Master in Equity was under suspension at the time. (Second Supplemental Record pp. 13, line 21 – p. 14, line 23; Second Supplemental Record pp. 22, line 17 – p. 23, line 11). The lack of merit in this argument was amply demonstrated by Appellant's counsel expressly abandoning the argument at the subsequent Rule 60 motion hearing. (Second Supplemental Record p. 30, lines 7 – 16). Respondent would

argue that inclusion of this issue on appeal is frivolous because it was expressly abandoned by Appellant's counsel at the prior motion hearing.

C. POST-TRIAL CLAIM OF REQUEST FOR CONTINUANCE

The most troubling aspect of Appellant's pro se appeal is her contention that the hearing on Respondent's motion for summary judgment was conducted despite her counsel's request for a continuance. This allegation should be viewed critically in light of Appellant being determined by multiple courts to have engaged in bad faith litigation. Also, the facts and circumstances of the present case seriously undermine this allegation.

The record contains no correspondence from Appellant's counsel ever advising the trial judge or opposing counsel of any scheduling requirements due to his legislative duties or of a specific conflict with the date and time of the motion hearing held on February 6, 2007. The record does reflect that Respondent's counsel had previously extended the professional courtesy of consenting to a continuance due to Appellant's counsel having a doctor's appointment. (R.pp. 147, 148 & 207). The record also contains correspondence showing Respondent's counsel granted Appellant's counsel the professional courtesy of an extension to respond to discovery. (R.p. 141). The record also contains correspondence whereby the proposed order from the motion hearing was sent to Appellant's counsel at the same time and manner as the trial judge (R.p. 149). The proposed foreclosure decree was subsequently revised and again forwarded to the trial judge and Appellant's counsel (R.p. 150). Appellant's counsel raised no objection to the proposed foreclosure decrees and specifically no objection or motion based upon an alleged scheduling conflict was raised at that time.

The Appellant did not raise any issue of an alleged scheduling conflict with her attorney until almost three months after the motion hearing and after her attempt to frustrate the foreclosure through filing an improper action for a restraining order proved unsuccessful. The Appellant filed a separate action through different attorneys seeking an injunction staying the foreclosure sale. The pleadings in that action made no mention of her attorney in the foreclosure having an alleged scheduling conflict with the motion hearing. To the contrary, Appellant claimed in her improperly filed action for an injunction that attorney Weeks did not formally represent her. (Second Supplemental Record pp. 16, line 8 – p. 21, line 8).

It is uncontested that the Appellant and her attorney of record had received proper notice of the hearing. (R.p. 208). For the Appellant to now claim that neither she nor her attorney attended the foreclosure hearing because of his legislative duties is a blatantly false statement as evidenced by her previous sworn statements. At the hearing on Appellant's improperly filed action for an injunction, Laura Toney testified that "He told me ... Mr. Weeks said there was no point in going to the foreclosure proceedings because the loan was rescinded, and, plus, I was in bankruptcy." (R.p. 291, lines 3 – 5). It was only after Judge Newman chastised the Appellant and her subsequent attorneys in the improperly filed injunction action that any claim of a scheduling conflict with her attorney of record was raised. (R.pp. 33 - 35; Second Supplemental Record pp. 25, line 20 - p. 28, line 7).

When the issue was finally raised in a subsequent Rule 60 motion filed April 25, 2007, the motion only made a general statement that "Defendant's counsel made numerous attempts to postpone the foreclosure hearing" (R.p. 81). At the hearing on the

Rule 60 motion, Appellant's counsel referred to an affidavit executed by an employee of his office that allegedly contacted the judge's office and the office of Respondent's counsel to request a continuance. Respondent's counsel denied having ever been served or otherwise provided a copy of any such affidavit. The cover letter serving the motion and the accompanying certificate of service made no mention of any supporting affidavit. (Second Supplemental Record pp. 5 – 11). The transcript from the subsequent motion hearing shows that Appellant's counsel conceded that the affidavit had not been served and no further mention of any such affidavit was made at the motion hearing. (R.pp. 184, line 21 – p.187, line 4).

Respondent's counsel is at a supreme disadvantage in trying to respond to an affidavit that was never served upon or otherwise provided to him. The record does not reflect any request by Appellant or her attorney for a continuance. Appellant's claim that such request was not only made but ignored by the Respondent's attorney and the trial judge is patently false. The actual trial judge was in the best position to confirm or deny whether a request for continuance had ever been made to his office but the trial judge recused himself due to the judicial grievance filed by the Appellant. If the motion had contained cogent and specific allegations of any supposed request for continuance, the Respondent's counsel would have had the opportunity to investigate and disprove such allegations. Although the record reflects that Appellant apparently had no qualms as to committing perjury before the trial court, the lack of any testimony or other evidence in the record to corroborate her allegation of a request for a continuance speaks volumes as to this claim's lack of merit.

CONCLUSION

The record in this action, the ex parte injunction action and the related bankruptcy cases are replete with evidence of the Appellant Laura Toney's bad faith litigation and dilatory tactics. If the relief sought by the Appellant were granted, it would impugn the integrity of the court and seriously prejudice the interests of the Respondent. It would also encourage further bad faith actions in a case where no meritorious defense exists. He who comes into equity must come with clean hands. It is far more than a banality. It is a self-imposed ordinance that closes the door of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief. Precision Instrument Mfg. Co. v. Automotive Co., 324 U.S. 806, 814 (1945). The evidence shows that this appeal is without merit and is a continuation of the Appellant's frivolous litigation. She has failed to show any mistake, inadvertence, excusable neglect or newly discovered evidence that would justify this appeal. But more importantly, the Appellant's actions have demonstrated a disregard for the concepts of civility and fairness that are essential to our judicial system. Accordingly, Respondent requests that lower court's order denying Appellant's Rule 60 motion be affirmed and the appeal be dismissed.

H. Guyton Murrell
Korn Law Firm
1300 Pickens Street
PO Box 12369
Columbia, SC 29211-2369
803-252-5817
Attorney for Respondent LaSalle Bank

23 March, 2010
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEE COUNTY
Common Pleas Court

Richard L. Booth, Special Referee

Case No. 2005-CP-31-169

LaSalle Bank National Association, as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11.....Respondent,

v.

Laura Toney .....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

March 23, 2010

H. Guyton Murrell
Korn Law Firm
1300 Pickens Street
PO Box 12369
Columbia, SC 29211-2369
803-252-5817
Attorney for Respondent LaSalle Bank

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

RECEIVED
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Laura Toney,

Plaintiff,

V.

LaSalle Bank National Association
Trustee for Lehman Brothers
Structured Asset Investment Loan
Trust Sail 2005,
Ocwen Federal Bank
A/K/A AltiSource Homes,
Defendants.

COMPLAINT TO SET ASIDE FRAUDULENT TRANSFER , AND FRAUD; DECLARATORY JUDGMENT FOR ENTRY OF DEFAULT; GROSS NEGLIGENCE; EMOTIONAL DISTRESS; DECEPTIVE AND UNFAIR PRACTICES.

(JURY TRIAL DEMANDED)

PRELIMINARY STATEMENT

1. Plaintiff institutes this action for actual damages, statutory damages, punitive damages, attorney fees, and cost of this action against Defendants LaSalle Bank and Ocwen Federal Bank A/K/A Alti-Source Homes for multiple violations of the Truth In Lending Act, 15 U.S.C. 1640(e) and 28 U.S.C. 1331, 1332.

JURISDICTION

2. The jurisdiction of this court for the causes of actions is invoked pursuant to the Truth In Lending Act, 15 U.S.C. 1640(e) and 28 U.S.C. 1441, 1331 and 1332.

Plaintiff complains and for causes of action alleges as follows:

1. Plaintiff, Laura Toney, is, and all times mentioned in this complaint is, a resident of Bishopville, South Carolina and a citizen of the United States.
2. Defendants, LaSalle Bank and Ocwen Federal Bank A/K/A Alti-Source Homes are, and at all times mentioned in this complaint were, residents of Orlando, Florida to the best of the Plaintiff's knowledge.

3. That LaSalle Bank National Association and Ocwen Federal Banks A/K/A Altisource Homes are corporations organizing and existing by virtue of the laws of a State other than South Carolina and the United States of America.

4. Plaintiff is informed and believes and on that basis alleges, that all times mentioned in this complaint, Defendants were the agents and employees of their Codefendants, and in doing the things alleged in this complaint were acting within the course and scope of that agency and employment.

5. That on October 6, 2004, the Defendant refinanced Plaintiff's mortgage on her home located in the county of Lee, State of South Carolina.

6. That during the closing on Plaintiff's loan, Plaintiff was not provided with disclosures mandated by the Federal Truth In Lending Act.

7. That the disclosures which were not provided included but are not limited to the choice of attorney notification, settlement statement, and good faith estimate.

8. That the lenders failure to provide these disclosures triggers a three (3) year Right of Rescission for the Plaintiff.

9. That pursuant to the Right of Rescission contained in the Truth In Lending Act, Plaintiff sent, by certified mail two (2) letters and requested returned receipts, a Notice of Rescission to Defendants (please see attached copy of letter dated June 14, 2005 and copy of receipt dated June 16, 2005).

10. In June 14, 2005, the Plaintiff rescinded a mortgage with the Defendants by mailing (2) certified returned receipts letters to the Plaintiff after discovering she did not get the mandatory disclosures before consummation of the loan. (Regulation Z 226.15(a)(2), 226.23(a), Official Staff commentary 226.23(a)(2)-1 and 15 U.S.C. 1635(b). Later, after hiring a forensic handwriting specialist, it was discovered that these disclosures were forgeries. The Defendants had twenty (20) days to respond to the Plaintiff's letter to rescind according to the Truth In Lending Act, but failed. The Defendants instead began foreclosure of the Plaintiff's house on July 21, 2005. The Plaintiff answered with a counterclaim in August 18, 2005. (Please see attachment of foreclosure,

answer by the Plaintiff, and sale of Plaintiff's house). The Defendants' first reply to the Plaintiff's letter of rescission was October 19, 2005, and Order for foreclosure and sale on March 15, 2007. The Plaintiff's house was sold on May 7, 2007. The Defendants bought the Plaintiff's house.

5. In Yamamoto v. Bank of N.Y., the court ruled that "unilateral notification of cancellation does not automatically void the loan contract," but what the Defendant failed to acknowledge is that the Bank of N.Y. timely responded to the letter to rescind the loan within twenty (20) days which is mandated by the Truth-In-Lending. Plaintiff mailed a letter to rescind the loan on June 14, 2005. The Defendant failed to answer in the twenty (20) days mandated by the Truth In Lending Act and proceeded with the foreclosure and sale of my home. **According to Regulation Z, their interest in the Plaintiff's property was null and void. In Yamamoto, the court stated, "If BNY (Bank of N.Y.) had acquiesced in Tampon' notice of rescission, then the transaction would have been rescinded automatically, thereby causing the security interest to become void and triggering the sequence of events laid out in subsections (d)(2) and (d)(3).** But here BNY contested the notice and produced evidence sufficient to create a triable issue of fact about compliance with TILA's disclosure requirements. The Defendants

failed to file a Declaratory Judgment as mandated by Regulation Z, which nullified all of there interest in the Plaintiff's house. Also, as cited in this case, The Bank of New York discontinued the foreclosure proceedings until after the Truth-In-Lending violations were adjudicated. The Defendant went forward and filed foreclosure without even responding to the letter of rescission. In my case, there was no timely response from the Defendant after the Appellant mailed certified letters to them informing them of the Plaintiff's wish to cancel the loan. The doctrine of estoppel by acquiescence is applied when one party gives legal notice to a second party of a fact or claim, and the second party fails to challenge or refute that claim within a reasonable time. The second party is said to have acquiesced to the claim, and is estoppel from later challenging it , or making a counterclaim.

6. Also, in Williams v. Homestake Mortage Co., the court acknowledged the violations of the Truth-In-Lending Act. Homestake was cited as violating (3) federal disclosures in this case. In this case, the judgment was vacated and remanded for further proceedings. Homestake could not determine whether the Williams' had the ability to tender, they violated the TILA when they failed to respond to the letter to rescind the loan.

7. In American Mortgage Network Inc., v. Shelton, , American Mortgage Network, Inc. timely filed a Declaratory Judgment disputing that the Sheltons had the right to rescind their mortgage. The Fourth Circuit follows these cases. Also, in Large v. Conseco Fin. Servcing Corp., Conseco replied within the mandatory twenty (20) days to a letter of rescission.

8. According to the Office of Comptroller of the Currency and the Federal Trade Commission, the Respondent's security interest is void after a letter of rescission is mailed. The statute and regulation specify that the security interest, promissory note or lien arising by operation of law on the property becomes automatically void. (15 U.S.C. 1635(b); Reg. Z 226.15(d)(1), 226.23(d). As noted in the Official Staff Commentary, the creditor's interest in the property is "automatically negated regardless of its status and whether or not it was recorded or perfected." Also, Non-Compliance is a violation of the act which gives rise to a claim for actual and statutory damages under USC 1640.

9. **Once the court finds a violation such as not responding to the TILA rescission letter, no matter how technical, it has no discretion with respect to liability (in re Wright, supra. At 708; In re Porter v. Mid-Penn Consumer Discount Co., 961 F,2d 1066, 1078 (3d. Cir.**

1992); Smith v. Fidelity Consumer Discount Co., Supra. At 898. Any misgivings creditors may have about the technical nature of the requirements should be addressed to Congress or the Federal Reserve Board, not the courts.

10. If a lender fails to respond within twenty (20) days to the notice of rescission, the ownership of the property vests in the borrowers and they are no longer required to pay the loan. See 1635(b); Staley v. Americorp Credit Corp., 164 F. Supp. 2d 578, 584 9D. Md. 2001); Gill v. Mid-Penn Consumer Discount Co., 671f. Supp. 1021 (E.D. Pa 1987).

11. Regulation Z states that if the creditor disputes a valid letter of rescission he must file a Declaratory Judgment within twenty (20) days of receipt of the letter. The Plaintiff never responded to the letter, instead began foreclosure on the Appellant's home. The Appellant's home was illegally sold in Foreclosure on May 2007.

EMOTIONAL DISSTRESS

The Defendant's refusal to honor the rescission letter leads to noncompliance. This a violation which gives rise to a claim for actual and statutory damages. The Defendant's refusal to accept the Plaintiff's letter of rescission has caused the Plaintiff emotional distress,

embarrassment, and humiliation. Several items were stolen and destroyed during the eviction. Some of these items have sentimental value. Also, several real estate companies have attempted to sell the Plaintiff's house and could not obtain a clear title. The Plaintiff's bankruptcies have totally destroyed her credit in attempts to save her house. The Plaintiff is seeking actual, statutory, punitive damages as well as attorney fees and costs. The rescission process was intended to be self-enforcing, placing the burdens on the creditor. Failure to comply with its rescission obligations subjects the creditor to potential liability. Noncompliance is a violation of the Act which gives rise to a claim for actual and statutory damages under 15 U.S.C. 1640.

DECEPTIVE AND UNFAIR PRACTICES

The Defendant was aware that the Plaintiff had rescinded the loan in June 14, 2005, but proceeded with the foreclosure and sale of the Plaintiff's home. By virtue of Defendant's negligent conduct, the Plaintiff was damaged by the mortgage fraud and noncompliance to the rescission letter. The Plaintiff has suffered emotional distress and was actually damaged because the Defendant's conduct was willful, intentional, with malice, with reckless disregard of the rights of the Plaintiff, the Plaintiff seeks an award of actual, treble, and punitive damages, and attorney fees.

GROSS NEGLIGENCE

The Defendant owed duties to the Plaintiff including, but not limited to, disclosing truthful and accurate information to the Plaintiff, providing Good Faith Estimates of closing costs; permitting the Plaintiff to select her closing attorney; to permit advance inspection of certain disclosures; to produce accurate and actual disclosures pursuant to the Truth in Lending Statement; providing Plaintiff with other disclosure required by law; exercising good faith in its dealing and conduct with the Plaintiff; preventing its agents, servants and employees from engaging in illegal and unconscionable conduct; properly training and supervising its employees, servants and agents in the performance of the duties; adopting and implementing reasonable standards to train and supervise its employees, agents and servants in the performance of their duties; and hiring competent, honest and knowledgeable employees, servants and agents. By virtue of Defendant's negligent conduct, the Plaintiff has been damaged and because the Defendant's conduct was willful, intentional, with malice and reckless disregard of the rights of the Plaintiff, the Plaintiff seeks an award of double the finance charge, actual and punitive damages in accordance with her prayer for relief.

FRAUDULENT TRANSFER AND FRAUD

In the course of the loan application and loan closing process, the Defendant made representations that it was dealing in good faith, and that it complied with all state and federal laws. These representations were material to the Plaintiff actions in deciding to obtain said loan in executing said mortgage. The Defendants knew or should have known that its representations were false and were made with reckless disregard of their falsity. The Plaintiff requested disclosures several times before the loan closing, but none was provided. When the Plaintiff was finally allowed to obtain the federal loan disclosures, it was discovered by the Plaintiff and a Forensic Handwriting Specialist that the disclosures were forgeries in which the Plaintiff did not execute (please see attached forgery report). Also, the Defendant filed foreclosure papers and followed by the sale of the Plaintiff's house after being notified by the Plaintiff of her desire to rescind the loan. The Plaintiff was later evicted. The Defendant refused to follow the rules and regulations of the Truth In Lending Act by not responding to the letter of rescission in the mandatory twenty (20) days and proceeded with the illegal foreclosure and sale of the Plaintiff's house when the Defendant had lost all of it's interest by not responding to the letter of rescission. By virtue of the Defendant's fraudulent, deceitful and unconscionable conduct, the Plaintiff has been damaged and because the Defendant's conduct was willful, intentional, with malice and reckless disregard

to the rights of the Plaintiff, the Plaintiff is entitled to an award of actual and punitive damages in accordance with prayer for relief.

UNFAIR TRADE PRACTICES

The conduct of the Defendant amounted to an unfair method of competition and unfair or deceptive act or practice in the conduct of trade or commerce. The Plaintiff is informed and believes the Defendant engaged in practices which are immoral, unethical, oppressive, unscrupulous, substantially injurious to consumers and unconscionable. By virtue of the Defendant's unfair and deceptive acts or practices, the Plaintiff has been actually damaged. The Defendant's use or employment of unfair or deceptive methods, acts or practices were willful, knowing and intentional. The Plaintiff is informed and believes she is entitled to an award of three (3) times the actual damages sustained. The Plaintiff has suffered extreme emotional distress, humiliation, and embarrassment because of the actions of the Defendant. Several items were stolen and destroyed during the Plaintiff's evictions. **The Plaintiff has filed multiple bankruptcies pro se in attempts to save her home, and has been labeled as filing in bad faith. The Plaintiff made honest mistakes that were misinterpreted as bad faith. I am now also labeled as a**

bad faith litigant because of my determination to uncover the illegalities of lenders and the attorneys that they hire to cover up their illegal activities. T

For the aforementioned reasons, the Plaintiff respectfully prays that: The illegal foreclosure and sale are set aside and the court will issue a Declaratory Judgment and Entry of Default to that effect in accordance with the Truth In Lending Act 15, U.S.C. 1601, seq. ; Also, an order to cancel the security interest and return all monies paid by the Plaintiff ; also canceling documents creating a security interest and filing release or termination statements in the public record of FREE and CLEAR TITLE for the Defendant's refusal to respond to the letter of rescission within twenty (20) days of receipt along with actual and statutory damages pursuant to 15 U.S.C. 1635(b); Reg. Z-226.15(d)(2),226.23(d)(2).

1. Also, the Plaintiff is requesting statutory, actual, and punitive damages in the amount of $10,000.000.00;
2. The Plaintiff is also requesting attorney fees.
3. Criminal penalties should imposed on the Defendants according to the FTC because the Defendants' actions were willful and knowingly, which may be the imposition of a fine of $5,000.00, imprisonment for

up to one year, or both. The Plaintiff has not reported these violations to the Federal Trade Commission, Federal Reserve System, the Federal Deposit Insurance Corporation, and the Comptroller of the Currency.

July 13, 2011

Laura Toney, Pro Se
P.O. Box 722
Bishopville, SC 29010
(803) 459-6006

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

VERIFICATION

PERSONALLY APPEARED BEFORE ME, Laura Toney,

Who be duly sworn, deposes and says the she is the Plaintiff in the foregoing action, that she has read the contents of the foregoing compliant and knows the same to be true of her own knowledge, except those matters alleged upon information and belief, and as to those she believes them to be true.

Laura Toney

My Commission Expires
June 15, 2016

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June 14, 2005

P.O. Box 722
Bishopville, SC 29010

Owen Federal Bank FSB
P.O. Box 24737
West Palm Beach, Florida 33416-4737

RE: Loan Number:0040789935/ Laura Toney/ 251-11-6990
Property Location: 729 Chatmon Street, Bishopville, SC

To Whom It May Concern:

This letter is to inform you that I wish to rescind my loan with Owen Federal Bank because of several federal disclosure violations during the processing of the loan. I did not receive any disclosures required by federal law prior to the closing of the loan.

Please adhere to my request. My attorney will be contacting you in the near future.

Sincerely,

Laura Toney

Cc: Owen Federal Bank
Loan Resolution Department
12650 Ingenuity Dr.
Orlando, Florida 32826
ATTENTION: ODESSA BRAITHWAITE

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF SUMTER)	2005-CP-31-169
)	
LaSalle Bank National Association,)	
As Trustee for the registered holders)	
Of Structured Asset Investment)	
Corporation, Mortgage Pass-Through)	
Certificates, Series 2004-11,)	
)	
Plaintiff,)	
)	**DEFENDANT'S ANSWERS TO INTERROGATORIES**
vs.)	
)	
Laura Toney,)	
)	
Defendant.)	
)	

TO: H. GUYTON MURRELL, ATTORNEY FOR PLAINTIFF:

The following are response to Answers to Interrogatories of the Plaintiff:

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER: Laura Toney, PO Box 722, Bishopville, SC 29010. No written or recorded statement has been taken.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relates to the claim or defense in this case.

ANSWER: Enclosed.

3. Please set forth an itemized list of all civil actions in which the Defendant has been a party during the previous five (5) years, setting forth the county in which

STATE OF SOUTH CAROLINA

COUNTY OF LEE

IN THE COURT OF COMMON PLEAS

LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11

PLAINTIFF,

vs.

[redacted]

DEFENDANT(S).

CIVIL ACTION COVERSHEET

C/A NO: 05-CP-31-169

(Please Print) J. Scott Walls
Submitted By: Korn Law Firm, PA
Address: 1300 Pickens Street
Columbia, SC 29201

SC Bar #: 15582
Telephone #: 803.252.5817
Fax #: 803.779.2845
Other:
E-mail:

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
- ☐ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
- ☒ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- ☐ Other (299)

Torts - Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☒ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Sexual Predator (510)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Other (799)

Administrative Law/Relief
- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture (840)
- ☐ Other (899)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Administrative Law Judge (980)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Other (699)

Submitting Party Signature: [redacted] Date: July 13, 2005

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

SCCA / 234 (5/04)

STATE OF SOUTH CAROLINA COUNTY OF LEE LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 PLAINTIFF, vs. Laura Toney , DEFENDANT(S).	IN THE CIRCUIT COURT FOR THE ____ JUDICIAL CIRCUIT (NON-JURY MORTGAGE FORECLOSURE) CERTIFICATE OF EXEMPTION FROM ADR C/A NO: DEFICIENCY REQUESTED

I certify that this action is exempt from ADR because:

☐ this is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus of prohibition;

☐ this action is appellate in nature;

☐ this is a post-conviction relief matter;

☐ this is a contempt of court proceeding;

☐ this is forfeiture proceeding brought by the State;

☒ this is a case involving a mortgage foreclosure; or

☐ the parties submitted the case to voluntary mediation with a certified mediator prior to the filing of this action.

Plaintiff/Attorney(s) for Plaintiff(s)	Defendant/Attorney(s) for Defendant(s)
PETER D. KORN /JOHN S. KAY	
JOHN B. KELCHNER/ALAN M.STEWART	
LAURA B. BRENT/J. SCOTT WALLS	
H. GUYTON MURRELL	

Date: 7/15/05

STATE OF SOUTH CAROLINA COUNTY OF LEE LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 , PLAINTIFF, vs. Laura Toney, DEFENDANT(S).	IN THE COURT OF COMMON PLEAS SUMMONS 05-CP-31-169 (NON-JURY MORTGAGE FORECLOSURE) C/A NO: DEFICIENCY REQUESTED

JUL 2005
JAMES I. DAVIS
FILED
LEE COUNTY, S.C.
C.C.C.P. & G.S.

F25-02718

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.

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
~~ALAN M. STEWART / LAURA B. BRENT~~
JOHN B. KELCHNER / J. SCOTT WALLS
GUYTON MURRELL
Attorneys for Plaintiff

Columbia, South Carolina
July 13, 2005

STATE OF SOUTH CAROLINA COUNTY OF LEE	IN THE COURT OF COMMON PLEAS
LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 , PLAINTIFF, vs. Laura Toney, DEFENDANT(S). F25-02718	COMPLAINT (NON-JURY MORTGAGE FORECLOSURE) C/A NO: DEFICIENCY REQUESTED

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

1. That the Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of United Statse of America; and that the Defendant(s) Laura Toney is upon information and belief, a citizen(s) and resident(s) of the County of Lee, State 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 Lee, State of South Carolina.

4. That on or about October 6, 2004, for value received, Laura Toney, did execute and deliver to Finance America, LLC, a certain promissory note in writing according to the terms and conditions set out therein, wherein and whereby said Laura Toney promised to pay to Finance America, LLC the sum of Seventy-Six Thousand Five Hundred And 00/100 Dollars ($76,500.00), together with interest thereon at an adjustable rate per terms as set out in said Note.

5. That in order to better secure the payments of the said note and debt, in accordance with the terms and conditions thereof, Laura Toney, did execute and deliver on October 6, 2004 unto Mortgage Electronic Registration Systems, Inc. solely as nominee for Finance America, LLC, its successors and assigns, a mortgage covering the following described property:

Legal description and property address:

All that certain lot or parcel of land situate just North of the Town of Bishopville, County of Lee and State of South Carolina and being bounded as follows: On the North by Chapman Street; On the East by lot of West Wilson; on the South by Lots Nos., 9, 10, 11, 12 and 13 and on the West by Bay Street represented on a plat being of North Mohawk as Lot No. 14, said plat being of record in Plat Book E at page 46, in the Office of the Clerk of Court for Lee County, South Carolina Records.

This conveyance is made subject to any and all existing reservations, easements, right-of-way, zoning ordinances, and restrictive or protective covenants that may appear of record or on the premises.

This being the same property most recently to Laura Toney by deed from Milton Toney dated December 4, 1992 and recorded December 4, 1992 in Book V-5 at page 205 in the Lee County, South Carolina Records.

729 Chatman Street, Bishopville, SC 29010
TMS# 030-02-00-024

6. Thereafter said mortgage was recorded in Book 361 at page 79 on October 19, 2004 in the office of the Clerk of Court of Lee County.

7. Thereafter, by virtue of an assignment to be recorded Mortgage Electronic Registration Systems, Inc. solely as nominee for Finance America, LLC assigned said mortgage unto LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 making LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 the present lien holder and Plaintiff herein.

8. The above referenced instrument constitutes a first lien priority mortgage.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. The monthly payments due on said note and mortgage are in default since March 1, 2005, 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 March 1, 2005 the sum of Seventy-Six Thousand Three Hundred Fifty-Six And 05/100 Dollars ($76,356.05), together with interest at an adjustable rate per terms as set out in said Note from February 1, 2005 and also for the costs and disbursements of this action, including attorney's fees.

15. That the Plaintiff does not waive but specifically demands judgment against the Defendant(s), Laura Toney, 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(s) for any deficiency in this action remaining after sale of the mortgaged premises.

16. On information and belief, the Notice of consumer's Right to Cure, as contemplated under S.C. Code Sections 37-5-110 and 37-5-111, was sent to the Defendant or was not required.

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

(4) For an Order directing and empowering the Sheriff of Lee 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
JOHN B. KELCHNER/ALAN M.STEWART
LAURA B. BRENT/J. SCOTT WALLS
GUYTON MURRELL
Attorneys for Plaintiff

Columbia, South Carolina
July 13, 2005

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

1. The amount of the debt is stated in paragraph 7 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.

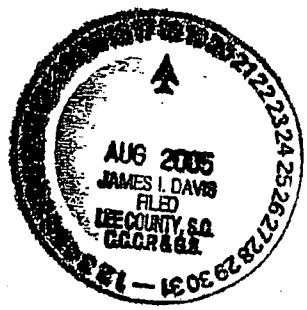
3. The debt as described in the Complaint attached hereto will be assumed to be valid by the creditor's law firm, unless the debtor(s), within thirty (30) days after the receipt of this notice, disputed, in within, the validity of the debt or some portion thereof.

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) make 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.

Written requests should be addressed to Korn Law Firm, P.A., Post Office Box 11264, Columbia, South Carolina 29211-1264.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEE) Case Number: 05-CP-31-169
)
LaSalle Bank National Association, as Trustee)
For the registered holders of Structured Asset)
Securities Corporation, Structured Asset Investment)
Loan Trust, Mortgage Pass-Through Certificates,)
Series 2004-11,)
)
Plaintiff,) ANSWER
)
vs.)
)
Laura Toney,)
)
Defendant (s).)



The Defendant Answers as follows:

1. Each material allegation in Plaintiff's Complaint, except those specifically admitted herein are denied and Defendant demand strict proof thereof.

2. The allegations in Paragraph One are admitted.

3. That the allegations in Paragraph Two are admitted.

4. That the allegations in Paragraph Three are admitted.

5. That the allegations in Paragraph Four are admitted.

6. That the allegations in Paragraph Five are admitted.

7. That the allegations in Paragraph Six are admitted.

8. That the Defendant is without information to admit or deny the allegations of Paragraph Seven.

9. That the allegations in Paragraph Eight are admitted.

10. That the Defendant is without sufficient information to admit or deny

Certified as a True Copy
Clerk, Court of Common and General Sessions, Lee County, South Carolina
BY DEPUTY

the allegations of Paragraph Nine and demands strict proof thereof.

11. That the Allegations in Paragraph Ten are denied.

12. Defendant admits the allegations in Paragraph Eleven.

13. Defendant admits the allegations in Paragraph Twelve.

14. Defendant denies the allegations of Paragraph Thirteen.

15. Defendant admits the allegations of Paragraph Fourteen.

16. Defendant denies the allegations of Paragraph Fifteen.

17. Defendant denies the allegations of Paragraph Sixteen.

COUNTERCLAIM

18. The Defendant re-alleges the allegations contained in paragraphs 1-17 as if stated verbatim.

19. That the Plaintiffs owed the Defendant a duty of disclosing true and accurate information regarding the transaction of this matter pursuant to the Truth in Lending laws.

20. That the Plaintiffs failed to provide a good faith estimate of the property at issue.

21. That the Plaintiffs did not provide Defendant an opportunity to select the representative of her choice to act in her behalf at the closing of the loan.

22. That the Defendant forwarded a letter of rescission on June 12, 2005 via certified mail notifying the Plaintiff of her intent to rescind the loan based on the violation of federal laws by Plaintiff.

23. That Plaintiff failed to acknowledge Defendant's intent to rescind.

WHEREFORE, Plaintiff prays that:

1. The Court order the Plaintiffs to accept Defendant's rescission of the loan;
2. The Court dismisses Plaintiff's action; and
3. The Court order such other relief deemed just and proper.

LAURA TONEY
PRO SE
Post Office Box 722
Bishopville, South Carolina 29010
(803) 484-6609

Bishopville, South Carolina

August 17th 2005

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF LEE	C/A No. 2005-CP-31-169
LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11,	**PLAINTIFF'S FIRST AMENDED REPLY TO DEFENDANT'S ANSWER AND COUNTERCLAIMS**
Plaintiff,	DEFICIENCY REQUESTED
v.	
Laura Toney,	
Defendant.	

The Plaintiff, LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, replies as follows to the Answer and Counterclaims of the Defendant Laura Toney (hereinafter "Defendant"):

1. Any allegations of the Answer and Counterclaims not hereinafter specifically admitted or qualified are denied in full and strict proof is demanded thereof.

2. Paragraphs One (1) through Seventeen (17) of Defendant's Answer and Counterclaims require no response as they are simply admissions or denials of the allegations of Plaintiff. However if a response is required, Plaintiff denies the allegations in full and demands strict and absolute proof thereof.

3. Paragraph Eighteen (18) of Defendant's Answer and Counterclaims requires no response. However if a response is required, Plaintiff denies the allegations in full and demands strict and absolute proof thereof.

4. Plaintiff denies the allegations set forth in Paragraph Nineteen (19) of Defendant's Answer and Counterclaims as legal conclusions that do not require a response. By way of further Reply, Plaintiff states that it did not originate the loan to Defendant and therefore could not have been involved in the disclosures made to Defendant prior to or at closing.

5. Plaintiff denies the allegations set forth in Paragraph Twenty (20) of Defendant's Answer and Counterclaims as Plaintiff did not originate the loan to Defendant and therefore could not have been involved in the disclosures made to Defendant prior to or at closing. By way of further Reply, Plaintiff has at least two Good Faith Estimates signed by Defendant.

6. Plaintiff denies the allegations set forth in Paragraph Twenty-one (21) of Defendant's Answer and Counterclaims as Plaintiff did not originate the loan to Defendant and therefore could not have been involved in whatever may have occurred prior to or at closing. By way of further Reply, Plaintiff has at least two copies of various waivers or selection of representatives for closing signed by Defendant.

7. Plaintiff is without sufficient information to admit or deny the allegations of Paragraph Twenty-two (22) of Defendant's Answer and Counterclaims and therefore denies the same.

8. Plaintiff is without sufficient information to admit or deny the allegations of Paragraph Twenty-three (23) of Defendant's Answer and Counterclaims and therefore denies the same.

AFFIRMATIVE DEFENSES

9. Plaintiff denies each and every allegation in Defendant's Answer and Counterclaims not specifically admitted in this Reply.

10. Defendant has failed to mitigate her damages, the existence of which is specifically denied.

11. Defendant has failed to state a claim upon which relief can be granted.

12. Plaintiff is not the proper party-in-interest.

13. Defendant's claims in part are barred by the applicable statute of limitations.

14. Defendant's claims are barred because all disclosures required under the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, Regulation Z, and the Real Estate Settlement and Procedures Act, 12 U.S.C. § 2601 *et seq.*, were made.

15. Plaintiff failed to tender a timely rescission notice to a creditor at its designated place of business within three (3) business days of consummation of the subject loan as required by 15 U.S.C. § 1635 and 12 C.F.R. § 226.23.

16. Though Plaintiff specifically denies that there are errors in the loan documents, any errors therein are bona fide errors and/or technical in nature and are therefore not actionable under the Truth in Lending Act.

17. Defendant's Truth-in-Lending claims are barred in whole or in part because the subject transaction was a Aresidential mortgage transaction," a transaction not involving consumer credit, or any right to cancel has been terminated by operation of law or Defendant's conduct.

18. As an assignee of the subject loan, Plaintiff is not a "creditor" under the statute and has the defenses of an assignee described in 15 U.S.C. § 1640(b) and (c) and § 1641 (a), (b), (d), (e) and (f).

19. The originating lender, Finance America, and any closing agents or title companies are not agents, employees or subsidiaries of Plaintiff such that Plaintiff could be vicariously liable for the acts or omissions of those persons or entities.

20. By her conduct, Defendant has waived her rescission claims, and/or should be estopped from raising such claim.

21. Plaintiff reserves the right to amend its Reply and to assert any affirmative defenses which come to light during the course of and after the completion of discovery.

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

a. That Defendant's Counterclaims be dismissed with costs;

b. That Plaintiff be granted the relief requested in the Complaint;

c. For other such relief as the court may deem just and proper.

The Korn Law Firm, P.A.
1300 Pickens St.
Post Office Box 12369
Columbia, South Carolina 29211-2369
(803) 252-5817

By: /s/ H. Guyton Murrell
H. Guyton Murrell
Attorney for the Plaintiff

October 19, 2005
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF LEE

IN THE COURT OF COMMON PLEAS

C/A No. 2005-CP-31-169

LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11,

Plaintiff,

v.

Laura Toney,

Defendant.

CERTIFICATE OF MAILING

The undersigned hereby certifies that on October 19, 2005, she served a copy of the Plaintiff's First Amended Reply to Defendant's Answer and Counterclaims upon the below listed parties or counsel by depositing a copy in the United States Mail, postage prepaid, regular mail, and also via Certified Mail, Return Receipt Requested, addressed as follows:

Laura Toney
P. O. Box 722
Bishopville, SC 29010

Kathryn Howell
Kathryn Howell

Dated: October 19, 2005
Columbia, SC

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF SUMTER)	2005-CP-31-169
)	
LaSalle Bank National Association,)	
As Trustee for the registered holders)	
Of Structured Asset Investment)	
Corporation, Mortgage Pass-Through)	
Certificates, Series 2004-11,)	
)	
Plaintiff,)	
)	**RESPONSE TO REQUEST FOR PRODUCTION**
vs.)	
)	
Laura Toney,)	
)	
Defendant.)	
)	

TO: H. GUYTON MURRELL, ATTORNEY FOR PLAINTIFF:

The following constitute the Defendant's Response to Request for Production of the Plaintiff:

1. Any and all statements and documents, including but not limited to reports, analyses, studies, letters, correspondence, ledgers, checks, receipts, invoices, memoranda records or notations of conversation or conferences, recorded statements or other documentation which Defendant Laura Toney proposes to introduce at the trial of this case.

ANSWER: Enclosed.

2. All documents in possession of Defendant Laura Toney that relate to any claim or defense in the case.

ANSWER: Enclosed.

3. Any and all documents proving all payments made by Defendant Laura Toney on the Mortgage in dispute, including, but not limited to, front and back of all payment receipts, money orders and checks.

ANSWER: Enclosed.

4. All documents proving or relating to allegations contained in the Defendant's Answer and Counterclaim.

ANSWER: Enclosed.

5. A copy of the purported recession letter including any attachments Defendant Laura Toney claims to have sent to Plaintiff on June 12, 2005 along with proof of mailing of same and any return or confirmation of service.

ANSWER: Enclosed.

Weeks Law Office

J. David Weeks, Esquire
Attorney for Defendant
PO Box 370
Sumter, SC 29151
(803) 778-1365

Sumter, South Carolina

January 13, 2006

STATE OF SOUTH CAROLINA COUNTY OF LEE LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Plaintiff, v. Laura Toney, DEFENDANT(S). F25-02718	IN THE COURT OF COMMON PLEAS **PLAINTIFF'S INTERROGATORIES TO DEFENDANT LAURA TONEY** (NON-JURY MORTGAGE FORECLOSURE) C/A No. 2005-CP-31-169 DEFICIENCY REQUESTED

TO: THE DEFENDANT LAURA TONEY:

In accordance with Rule 33 of the South Carolina Rules of Civil Procedure, the Plaintiff hereby propounds the following interrogatories to the Defendants to be answered separately and fully in writing, under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The party upon whom these interrogatories have been served shall, within thirty (30) days after such service, serve answers to such interrogatories on the undersigned attorney at 1300 Pickens Street, P.O. Box 11264, Columbia, South Carolina 29211-11264. These interrogatories shall be deemed to be continuing so as to require the Defendants to reasonably supplement or amend its answers thereto in accordance with Rule 26(e) of the South Carolina Rules of Civil Procedure.

INTERROGATORIES

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

2. Set forth a list of photographs, plats sketches or other prepared documents in possession of the party that relate to the claim or defense in the case.

3. Please set forth an itemized list of all civil actions in which Defendant has been a party during the previous five (5) years, setting forth the county in which the litigation occurred, the name of the case, the case number or judgment number, the nature of the dispute and the ultimate disposition of the case. brother house — out (in) homeowners claim — Nationwide / foreclosure on mother pd out of Ct. Settled

4. Set forth an itemized list of all payments Defendant claims have been made on the subject mortgage account since December 1, 2004, specifying the date of payment, amount of payment and form of payment.

5. Set forth an itemized list of damages, exclusive of pain and suffering, claimed to have been sustained by the party.

6. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial of the case.

7. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

8. Set forth the name of any insurance company providing coverage on the subject real property since December 1, 2004, the amount of coverage, the policy number, the named beneficiary and the issuing agent. Johnson & Johnson

The Korn Law Firm, P.A.
P.O. Box 11264
1300 Pickens St.
Columbia, SC 29211-1264
(803) 252-5817

Attorneys for Plaintiff
H. Guyton Murrell

November 16, 2005
Columbia, SC

STATE OF SOUTH CAROLINA

COUNTY OF LEE

LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11,

Plaintiff,

v.

Laura Toney,

Defendant.

IN THE COURT OF COMMON PLEAS

C/A No. 2005-CP-31-169

PLAINTIFF'S REQUESTS FOR PRODUCTION TO DEFENDANT LAURA TONEY

TO: LAURA TONEY, PRO SE DEFENDANT

YOU WILL PLEASE TAKE NOTICE, that pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, Defendant is hereby requested to produce copies of the documents listed below for inspection and copying at the Korn Law Firm, 1300 Pickens Street, P.O. Box 12369, Columbia, South Carolina 29211-2369 on or before thirty (30) days from the date of this request.

The term "documents" when used herein means all originals of any nature whatsoever, identical copies, and all non-identical copies thereof, pertaining to any medium upon which intelligence or information is recorded in your possession, custody or control, regardless of where located; including, without limiting the generality of the foregoing, plats, sketches, punch cards, print out sheets, movie film, slides, photographs, records, microfilm, notes, letters, memoranda, ledgers, worksheets, books, magazines, notebooks, diaries, calendars, appointment book registers, charts, cables, papers, agreements, contracts, purchase orders, acknowledgments, invoices, authorizations, budgets, analysis, projections, transcripts, minutes of meetings of any kind, correspondence, telegrams, drafts, data processing discs or tapes, or computer-produced

interpretations thereof, instructions, announcements, schedules and price lists. In all cases where originals and/or non-identical copies are not available, "document" also means identical copies of original documents and copies of non-original documents.

These requests shall be deemed to be continuing so as to require supplemental production pursuant to Rule 26(e) of the South Carolina Rules of Civil Procedure.

REQUESTS FOR PRODUCTION

1. Any and all statements and documents, including but not limited to reports, analyses, studies, letters, correspondence, ledgers, checks, receipts, invoices, memoranda records or notations of conversations or conferences, recorded statements, or other documentation which Defendant Laura Toney proposes to introduce at the trial of this case.

2. All documents in possession of Defendant Laura Toney that relate to any claim or defense in the case.

3. Any and all documents proving all payments made by Defendant Laura Toney on the Mortgage in dispute, including, but not limited to, front and back of all payment receipts, money orders, and checks.

4. All documents proving or relating to the allegations contained in the Defendant's Answer and Counterclaim.

5. A copy of the purported rescission letter including any attachments Defendant Laura Toney claims to have sent to Plaintiff on June 12, 2005, along with proof of mailing of same and any return or confirmation of service.

Korn Law Firm, P.A.
1300 Pickens St.
Post Office Box 12369
Columbia, South Carolina 29211-2369
(803) 252-5817

By: _____
H. Guyton Murrell
Attorney for Plaintiff

Dated this 17th day of November, 2005
Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF LEE	IN THE COURT OF COMMON PLEAS
LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Plaintiff, v. Laura Toney, DEFENDANT(S). F23-06439	(NON-JURY MORTGAGE FORECLOSURE) C/A No. 2005-CP-31-169 DEFICIENCY REQUESTED

CERTIFICATE OF MAILING

The undersigned hereby certifies that on November 17, 2005, she served one copy of Plaintiff's Interrogatories and Request for Production of Documents upon the following by depositing a copy of same in the United States Mail, postage prepaid, and addressed as follows:

Laura Toney
P.O. Box 722
Bishopville, SC 29010

Kathryn Howell
Kathryn Howell, Paralegal

November 17, 2005
Columbia, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF SUMTER)	2005-CP-31-169
)	
LaSalle Bank National Association,)	
As Trustee for the registered holders)	
Of Structured Asset Investment)	
Corporation, Mortgage Pass-Through)	
Certificates, Series 2004-11,)	
)	
Plaintiff,)	
)	**DEFENDANT'S REQUIST TO INTERROGATORIES**
vs.)	
)	
Laura Toney,)	
)	
Defendant.)	

TO: H. GUYTON MURRELL, ATTORNEY FOR PLAINTIFF:

The following are response to Answers to Interrogatories of the Plaintiff:

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER: Laura Toney, PO Box 722, Bishopville, SC 29010. No written or recorded statement has been taken.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relates to the claim or defense in this case.

ANSWER: Enclosed.

3. Please set forth an itemized list of all civil actions in which the Defendant has been a party during the previous five (5) years, setting forth the county in which

Statement Period: November 9 , 2004 Thru December 8 , 2004 Account Number: 270109844009

Other Debits From Your Account

Date	Description	Amount
11-09	FDR Debit Card Visa Debit Amoco Oil 04414876 Bishopville SC	35.14
11-10	Purchase 000270109844009 11-10 ATM 007244 Seq # 31529	201.16
	Lowe's SC Florence Avid H McLeodus	
11-10	FDR Debit Card Visa Debit Oriental Quick Stop Bishopville SC	19.71
11-10	FDR Debit Card Visa Debit Ihop Florence SC	17.14
11-12	Purchase 000270109844009 11-11 ATM 063000 Seq # 45668	153.56
	Wal-Mart Store 0630 Wal-Sams Florence SC	
11-12	Purchase 000270109844009 11-11 ATM 008656 Seq # 32271	25.00
	Cvs Pharmacy In SC Bishopville M Ain Street U S	
11-12	FDR Debit Card Visa Debit Golden Crown Restauran Florence SC	13.50
11-15	Purchase 000270109844009 11-15 ATM 000000 Seq # 0025	340.09
	Verizon Verizon + Phonec Irving Tx	
11-15	Purchase 000270109844009 11-15 ATM 000001 Seq # 0025	50.01
	Verizon Verizon + Phonec Irving Tx	
11-15	Purchase 000270109844009 11-15 ATM 000001 Seq # 0025	35.75
	Verizon Verizon + Phonec Irving Tx	
11-15	FDR Debit Card Visa Debit Carolina Mgmt Pizza Hu Greenwood SC	23.09
11-15	Withdrawal 000270109844009 11-12 ATM AI3609 Seq # 0000	21.00
	Health Facilitt 555 E Cheves St Florence SC	
11-15	Withdrawal 000270109844009 11-13 ATM AI3509 Seq # 0000	21.00
	Health Facilitt 555 E Cheves St Florence SC	
11-15	Purchase 000270109844009 11-14 ATM 583450 Seq # 25657	20.67
	Dollar General SC Bishopville M Ain St	
11-16	FDR Debit Card Visa Debit 0147 Cato - Cato Plus N Florence SC	231.03
11-16	Purchase 000270109844009 11-15 ATM 008747 Seq # 30694	125.38
	Lowe's SC Sumter Road S Treet US	
11-16	FDR Debit Card Visa Debit Kfc #0960002 09600024 Bishopville SC	9.94
11-17	Withdrawal 144 South Main S Bishopville SC X862 11-16 270109844009	200.00
11-17	FDR Debit Card Visa Debit Short Stop #207 Orangeburg SC	26.62
11-17	Transouth Ln Pmt Tel 2356681301	326.60
11-17	Capital One Phone Pymt 432139860017400	21.28
11-17	Capital One Phone Pymt 432139860017266	17.00
11-18	FDR Debit Card Visa Debit Progress Engy/Speedpay 111-111-1111 NC	145.08
11-18	FDR Debit Card Visa Debit Action Ford Mecury Inc Hartsville SC	56.75
11-18	FDR Debit Card Visa Debit Jared's Hardware Bishopville SC	63.33
11-18	FDR Debit Card Visa Debit Twc*timewarnercable 803-469-2200 SC	48.93
11-18	FDR Debit Card Visa Debit Carolina Wings Florenc Florence SC	40.00
11-18	FDR Debit Card Visa Debit Lowe's #559 Orangeburg SC	30.00
11-19	FDR Debit Card Visa Debit Lowe's #559 Orangeburg SC	423.12
11-19	FDR Debit Card Visa Debit Lowe's #559 Orangeburg SC	158.88
11-19	FDR Debit Card Visa Debit Mkr Dress Shields 800-401-9661 Pa	107.50
11-19	Withdrawal 144 South Main S Bishopville SC X862 11-18 270109844009	100.00
11-19	Withdrawal 144 South Main S Bishopville SC X862 11-18 270109844009	100.00
11-19	Purchase 000270109844009 11-18 ATM 240630 Seq # 31792	62.85
	Wal-Mart #0630 2530 David H Mcl Florence SC	
11-19	FDR Debit Card Visa Debit Ihop Florence SC	12.79
11-22	FDR Debit Card Visa Debit McLeod Pharmacy Bishopville SC	218.56
11-22	Withdrawal 144 South Main S Bishopville SC X862 11-21 270109844009	100.00
11-22	Purchase 000270109844009 11-21 ATM 063000 Seq # 45677	29.32
	Wal-Mart Store 0630 Wal-Sams Florence SC	
11-22	FDR Debit Card Visa Debit Shell Oil 53906400014 Bishopville SC	39.21
11-23	Purchase 000270109844009 11-23 ATM 008656 Seq # 30042	148.98
	Cvs Pharmacy In SC Bishopville M Ain Street U S	
11-23	Purchase 000270109844009 11-23 ATM 260398 Seq # 84337	123.39
	Food Lion #0398 517 S Main Bishopville SC	
11-23	Purchase 000270109844009 11-23 ATM 008656 Seq # 31643	75.00
	Cvs Pharmacy In SC Bishopville M Ain Street U S	
11-23	FDR Debit Card Visa Debit 0147 Cato - Cato Plus N Florence SC	54.03
11-23	Purchase 000270109844009 11-22 ATM 240630 Seq # 31305	51.61
	Wal-Mart #0630 2530 David H Mcl Florence SC	
11-23	Purchase 000270109844009 11-23 ATM 008656 Seq # 30331	36.52
	Cvs Pharmacy In SC Bishopville M Ain Street U S	
11-23	Purchase 000270109844009 11-23 ATM 583450 Seq # 46715	22.79
	Dollar General SC Bishopville M Ain St	
11-24	FDR Debit Card Visa Debit Amoco Oil 04414876 Bishopville SC	29.03
11-26	FDR Debit Card Visa Debit Cingular 3663392300135 800-331-0500 Tn	420.66
11-26	FDR Debit Card Visa Debit American Mobil00022590 Bishopville SC	21.19
11-26	Colonial Lfe Ins Ins. Prem. A00600806640	73.67
12-02	Ocwen Federal Ba Mtg Pmt 40789935	680.92 ✓
[redacted]		[redacted]

First Cit.
1225 Lady Street
PO Box 29
Columbia, SC 29202-0029

MILTON A TOWEY
LAURA A. TOWEY
729
PO B
BISH

Statement Period: December 9 , 2004 Thru January 10, 2005 Account Number : 270109844009
Branch : 201

Other Debits From Your Account

Date	Description	Amount
01-04	Ocwen Federal Ba Mtg Pmt 40789935	880.92
01-04	Ocwen Federal Ba Mtg Pmt 40790180	475.58
01-04	Ocwen Federal Ba Mtg Pmt 40789935	10.00
01-04	Ocwen Federal Ba Mtg Pmt 40790180	10.00
01-05	FDR Debit Card Visa Debit Professional Pharmacy Florence SC	1,272.00
01-05	Withdrawal 144 South Main S Bishopville SC X862 01-05 270109844009	300.00
01-05	FDR Debit Card Visa Debit Golden Corral 12508123 Columbia SC	41.10
01-06	FDR Debit Card Visa Debit Tommys Quick Mart Florence SC	10.04
01-07	Withdrawal 000270109844009 01-07 ATM 113509 Seq # 00603	11.00
	Bea 555 E Cheves St Florence SC	
01-07	FDR Debit Card Visa Debit Kwikombbi175 04230207 Florence SC	32.52
01-10	FDR Debit Card Visa Debit Cingular*36633923001J5 800-331-0500 Tn	378.89
01-10	000270109844009 01-08 ATM 137598 Seq # 22841	229.93
	Cva 1528 SC Bishopville M Ain Street	
01-10	Withdrawal 144 South Main S Bishopville SC X862 01-07 270109844009	100.00
01-10	Purchase 000270109844009 01-08 ATM 280398 Seq # 80448	44.98
	Food Lion 80398 517 S Main Bishopville SC	
01-10	Purchase 000270109844009 01-08 ATM 803450 Seq # 92884	16.43
	Dollar General SC Bishopville M Ain St	
	Total	7,479.69

Daily Balance Summary

Date	Balance	Date	Balance	Date	Balance
12-09	18,323.78+	12-21	14,201.46+	12-31	10,250.16+
12-10	17,467.96+	12-22	12,977.93+	01-03	10,614.29+
12-13	16,947.09+	12-24	12,958.94+	01-04	9,408.81+
12-15	16,360.58+	12-27	11,862.87+	01-05	7,305.83+
12-16	980.02+	12-28	11,077.96+	01-06	7,295.79+
	62+	12-29	10,982.50+	01-07	7,262.27+
	304	12-30	10,891.62+	01-10	5,620.41+

Around The Corner Or Around The Clock, Online Banking Gives You Every Option.

Learn more about how First Citizens helps protect you against e-mail and online fraud. Visit http://www.firstcitizensonline.com/security.htm

25% EARNED PREMIUM

JOHNSON & JOHNSON, INC., MGRS.

CERTIFICATE OF INSURANCE

effected through

Johnson & Johnson, Inc. Insurance Manager

315

DRESS OF INSURED

NEY

729 CHATMAN ST PO BOX 722

BISHOPVILLE SC 29010

LOCATION: (LEE)

729 CHATMAN ST PO BOX 722

BISHOPVILLE SC 29010

NEW DECLARATION

POLICY NO.: LSR1006484

This Certificate of Insurance is issued in accordance with the authorization granted under Contract No 330355/05 undersigned by LLOYD'S OF LONDON. London (hereinafter called "the Company".)
Whereas the Assured named in the Schedule has paid the premium specified herein the Company will indemnify the Assured in accordance with the term and conditions contained herein or endorsed hereon.

AGENT: 800123

TURBEVILLE INS. AGENCY INC-BISHOPVILLE
PO BOX 317
126 EAST CHURCH ST
BISHOPV E SC 29010

NO FLAT CANCELLATION

"This company has been approved by the director or his designee of the South Carolina Department of Insurance to write business in this state as an eligible surplus lines insurer, but it is not afforded guaranty fund protection."

EFFECTIVE FROM 08/29/2005 TO 08/29/2006

days at 12:01 a.m. Standard Time at the place where the risk insured is located.

SECTION I	LIMIT OF LIABILITY	PREMIUM
A DWELLING	150000	854
OTHER STRUCTURES	15000	
PERSONAL PROPERTY	75000	
LOS E	30000	INCL.
PE AL LIABILITY	300000	41.00
AYMENT	1000	INCL.

Prer 52 PolicyFee $50 St. 27.80 MUN Tax 18.90 Total 1,001.70

DEDUCTIBLE: 500 APPLIES TO ALL PERILS

FORMS:HO3(10/00),HO350(9/87),HO325(12/85),SKOEXCL01(1/94),HO322(9/87),MA2340(24/11/88),LSW1001(8/95),NMA1257(09/1990),NMA1998(24/4/86),HOO139(09/01),NMA2918(8/01),LSW1135B(5/01),(20/ 41191(7/5/59),HO2362, (85/95)

MORTGAGEE:
ALLSTATE HOME LOANS, INC
ISAOA, 1820 W ORANGEWOOD AVE SUITE 201

MORTGAGEE:

UNITED STATES POSTAL SERVICE

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4 in this box •

Laura Toney
P.O. Box 722
Bishopville, SC
29010

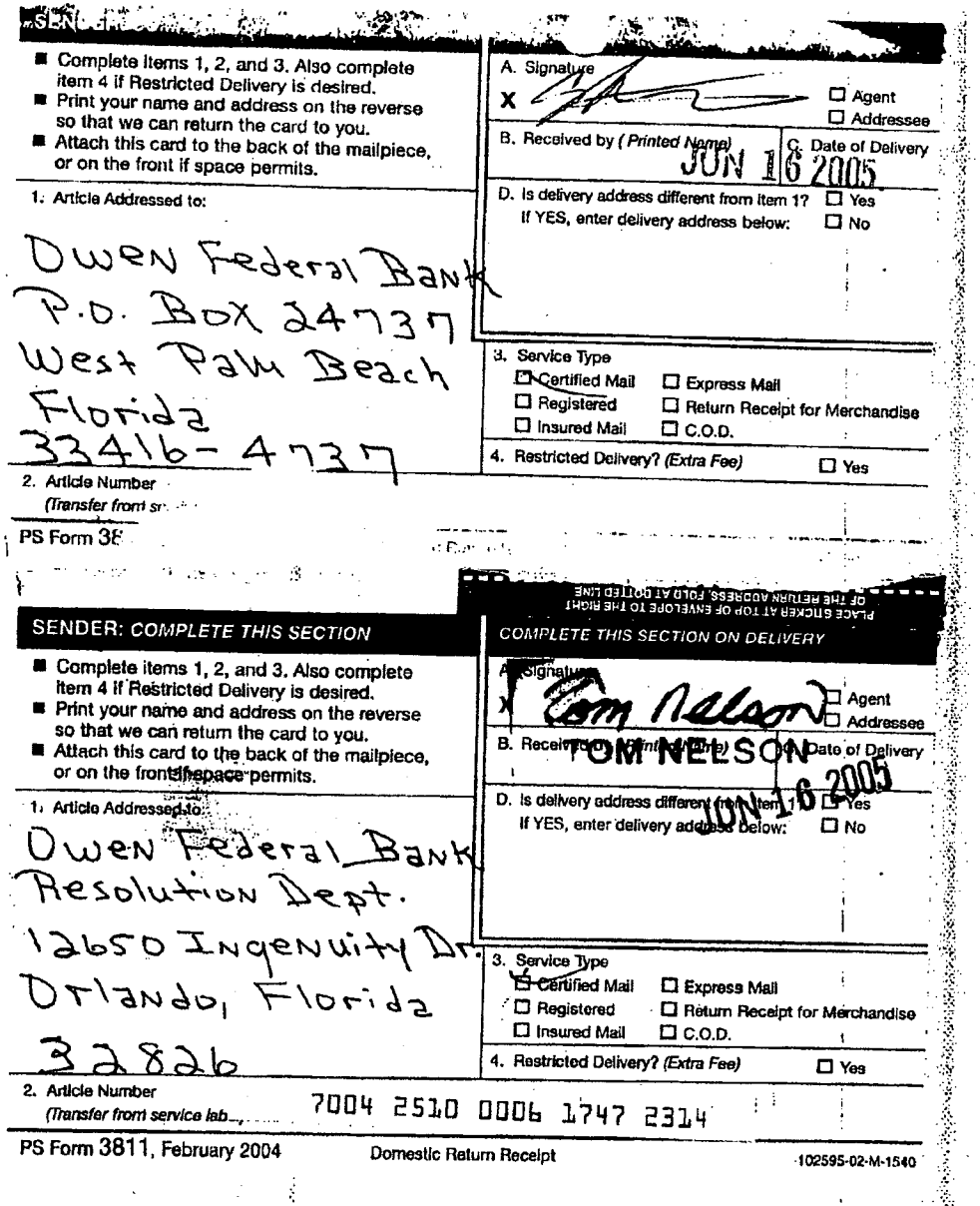
UNITED STATES POSTAL SERVICE

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4 in this box •

Laura Toney
P.O. Box 722
Bishopville, SC
29010

0343



SENDER

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Owen Federal Bank
P.O. Box 24737
West Palm Beach
Florida
33416-4737

A. Signature
X ☐ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery
JUN 16 2005

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☑ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number
(Transfer from sr...

PS Form 38...

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS, FOLD AT DOTTED LINE

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Owen Federal Bank
Resolution Dept.
12650 Ingenuity Dr.
Orlando, Florida
32826

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Tom Nelson ☐ Agent ☐ Addressee

B. Received by (Printed Name) TOM NELSON C. Date of Delivery JUN 16 2005

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

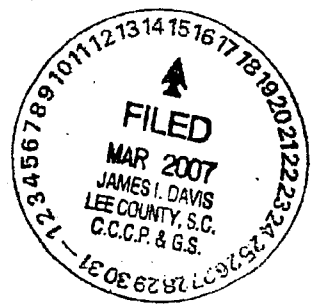
3. Service Type
☑ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number
(Transfer from service lab... 7004 2510 0006 1747 2314

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

STATE OF SOUTH CAROLINA COUNTY OF LEE LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 PLAINTIFF, vs. Laura Toney, DEFENDANT(S).	IN THE COURT OF COMMON PLEAS MASTER'S ORDER AND JUDGMENT OF FORECLOSURE AND SALE (NON-JURY MORTGAGE FORECLOSURE) C/A NO:2005-CP-31-169 DEFICIENCY REQUESTED



F25-02718

TO:
Korn Law Firm, P.A.
Attorney for Plaintiff

Pursuant to Rule 53 SCRCP, the above-entitled matter was referred to the undersigned to make appropriate findings of fact and conclusions of law with authority to enter a final judgment in the cause.

Pursuant to the said Order of Reference a hearing was held, attended by the attorneys of record, the testimony was taken, which is reported herewith, and from the testimony and evidence, I find conclude and order as follows:

FINDINGS OF FACT:

1. The Lis Pendens was filed on July 21, 2005.

2. The Summons and Complaint were filed on July 21, 2005. The Defendant Laura Toney filed an Answer and Counterclaim on August 18, 2005. Plaintiff filed a Reply to the Answer and Counterclaims on September 19, 2005 and an Amended Reply on October 20, 2005.

Plaintiff filed a Motion for Summary Judgment on March 29, 2006. Plaintiff filed a Memorandum of Law in Support of the Motion for Summary Judgment on September 22, 2006.

The Defendant filed a Chapter 13 Bankruptcy on July 20, 2006 as Case No. 06-03028-jw. That case was dismissed on August 30, 2006. The Defendant filed a second Chapter 13 Bankruptcy on September 29, 2006 as Case No.06-4333-dd. That Bankruptcy case was dismissed on November 15, 2006. The Defendant filed a third Chapter Bankruptcy as Case no.

06-05381-dd on November 27, 2006. That Bankruptcy Case was dismissed on January 2, 2007. The Defendant filed fourth Chapter 13 Bankruptcy on January 17, 2007 as Case No.07-00234-jw. Pursuant to provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the stay provided by Section 362(a) of the Bankruptcy Code did not go into effect when the Defendant filed her current Chapter 13 Bankruptcy.

A hearing on the Motion was held on February 6, 2007. The Defendant and her attorney of record were not in attendance and the Court confirmed that opposing counsel was provided notice of the hearing. A copy of the Notice of Hearing was submitted into evidence by Plaintiff's counsel as Exhibit No. One.

The Defendant's Answer and Counterclaim admits the existence of the debt and that the payments are in default. The Defendant denies that the loan documents provide for acceleration of the debt in the event of default. The Defendant further denies that she was provided Notice of Right to Cure. By way of Counterclaim, the Defendant alleges she was not provided a good faith estimate. Defendant further alleges she was not provided an opportunity to select the attorney of her preference for closing the loan. Lastly, Defendant alleges that she rescinded the loan by letter dated June 12, 2005.

Plaintiff's Motion for Summary Judgment is based upon several grounds. First, the Defendant has repeatedly filed Bankruptcy during the pendency of this foreclosure action. As part of the required declaration of assets in the Bankruptcy cases, the Defendant has affirmatively stated under oath that she possesses no "contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims". Plaintiff submitted into evidence Schedule B of the Chapter 13 Plan from the Defendant's third Bankruptcy filing. (Plaintiff's Exhibit Two).

Judicial Estoppel precludes a party from adopting a position in conflict with one taken in the same or related litigation. See Colleton Reg. Hosp. V. MRS Med. Rev. Syst., 866 F. Supp 896 (D.S.C. 1994). The purpose or function of the doctrine is to protect the integrity of the judicial process or the integrity of the courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries. 31 C.J.S. *Estoppel & Waiver* Section 139, at 593 (1996). See also Zimmerman v. Central Union Bank, 194 S.C. 518, 532, 8 S.E.2d 359, 365 (1940)("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interest have changed, assume a contrary position."). The Court finds that the statements under oath in the Defendant's Bankruptcy cases maintaining that no setoffs or counterclaims existed to declare as assets should act as a bar to her now assuming a contrary position in this litigation.

Summary Judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on filed, 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. Auto. 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 a motion for summary judgment, the trial judge must consider all of the documents and evidence within the record, including pleadings, depositions, answers to interrogatories, admissions on file, and affidavits).

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). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 1997). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall, 359 S.C. at 376, 597 S.E.2d at 183. Once the party moving for summary judgment meets the initial burden of showing an 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 v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004); Peterson v. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999); Rule 56(c), SCRCP.

The Plaintiff has further established its right to Summary Judgment based upon the evidence of record. In her Answer, the Defendant Laura Toney admits signing the Promissory Note for Seventy Six Thousand Five Hundred and 00/100ths ($76,500.00) Dollars. She further admits signing the Mortgage and the Court has taken judicial notice of the Mortgage as a matter of public record. The Defendant denies that the mortgage provides for acceleration of the debt upon default or for a deficiency judgment despite the plain language of the document. A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it. Sims v. Tyler, 276 S.C. 640, 643, 281 S.E.2d 76, 77 (1977). In this case, the Defendant does not deny reading the loan documents, she merely claims that the documents do not state what they plainly state.

Additionally, the loan documents provide that Plaintiff is required to send a notice of breach to subject property address. The Affidavit submitted on behalf of Plaintiff (Plaintiff's Exhibit No. Four) establishes that two (2) breach letters were sent to the subject property address as required. The Affidavit shifts the burden of proof to the Defendant to establish that either of the two (2) letters were not sent and Defendant cannot rely upon a bare denial to avoid Summary Judgment.

An affidavit of the closing attorney was filed on March 29, 2006 in support of the motion. The affidavit confirms that the Defendant Laura Toney received a Good Faith Estimate at closing and the copy of the Good Faith Estimate attached to the affidavit bears the signature of the Defendant confirming that she received a copy. (Affidavit of Michael May filed March 29, 2006). Again, the Defendant's allegations are not only unsupported by the evidence, her denials are conclusively discredited and disproved by the evidence.

The Affidavit of Letia Benjamin, the mortgage broker, confirms that the Defendant Laura Toney selected the closing attorney at the time of loan application. (Plaintiff's Exhibit No. Three). The contemporaneous Customer Notes kept by the mortgage broker confirm that the Defendant made her own selection as to the attorney for the loan closing. The Attorney/Insurance Preference Checklist attached to the Affidavit is signed by the Defendant Laura Toney and contains a confirmation by her that she has been notified of her right to select her own legal counsel as well as her selection. The Affidavit of the closing attorney also contains a form whereby the Defendant Laura Toney confirmed she had been advised by the lender prior to closing of her right to seek counsel to close the loan. (Affidavit of Michael May filed March 29, 2006). The form also confirmed that she was again advised of her right to the attorney of her preference at closing. Therefore, the evidence conclusively proves that the Defendant Laura Toney was provided the opportunity to select the attorney of her preference and she selected the attorney who performed the closing.

The Defendant Laura Toney alleges that she rescinded the loan by letter dated June 12, 2005. Pursuant to Title 15 Section 1635 of the U.S. Code, the obligor in a real estate secured consumer credit transaction shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms. The loan closing occurred on October 6, 2004, at which time the Defendant was provided the information and rescission forms. (Affidavit of Michael May filed March 29, 2006; Affidavit of Letia Benjamin). The information and rescission forms are signed by the Defendant Laura Toney to acknowledge that she was provided a copy of each at

closing. Therefore, the Defendant's counterclaim that she rescinded the loan is without merit on its face since it is well outside the time to rescind permitted by law.

When taken as a whole, the Pleadings, together with supporting documents and Affidavits, show that there is no genuine issue as to any material fact and that the Plaintiff is entitled to judgment as a matter of law. When no issues of material fact exist, the appropriate action is Summary Judgment. *Spencer v. Miller*, 192 S.E.2d 863 (1972). Therefore, the Court finds that the Plaintiff is entitled to Summary Judgment as a matter of law.

3. Service was made upon the Defendant(s) named in this Report as is shown by the Proof(s) of Service filed herein.

4. The Defendants and/or all attorneys of record were notified of the time, date, and place of the hearing in this matter.

5. According to the Affidavit filed herein, no Defendant in default is in the Military Service of the United States of America, as contemplated under the Soldiers' and Sailors' Civil Relief Act of 1940, and any amendments thereto.

6. For value received, Laura Toney made, executed and delivered a Note dated October 6, 2004, promising thereby to pay to the order of Mortgage Electronic Registration Systems, Inc. solely as nominee for Finance America, LLC the sum of Seventy-Six Thousand Five Hundred And 00/100 Dollars ($76,500.00), with interest at an adjustable rate per terms as set out in said Note percent per annum. Other terms and conditions are stated in the Note, which is of record herein.

7. To better secure the payment of the Note described above, the said Laura Toney made, executed and delivered to Mortgage Electronic Registration Systems, Inc. solely as nominee for Finance America, LLC a Mortgage in writing, dated October 6, 2004, covering real property in Lee County, which is the same as that described in the Complaint. The mortgage was filed on October 19, 2004, and is of record in the Office of the Clerk of Court for Lee County in Mortgage Book 361 at page 79.

8. Thereafter, by virtue of an assignment dated August 15, 2005, recorded December 22, 2005, in Mortgage Book 386 at page 211, Mortgage Electronic Registration Systems, Inc. solely as nominee for Finance America, LLC assigned said mortgage unto LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 . LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 is present lien holder and Plaintiff herein.

9. The above referenced instrument constitutes a first lien priority mortgage.

10. Payment due on the Note has not been made as provided for therein, and the Plaintiff, as the holder thereof, has elected to require immediate payment of the entire amount due thereon and has placed the Note and Mortgage in the hands of the attorney herein for collection.

11. I find that since the inception of this action, plaintiff's attorney has assumed responsibility for the institution of this action and has searched and updated the title on the subject property from the date the current owner received the property or the date the mortgage was executed to the date of the filing of the Lis Pendens. He has been responsible for the preparation of the following pleadings:

1. Lis Pendens
2. Summons and Complaint
3. Affidavit of Default
4. Order of Reference
5. Notice of Hearing
6. Proposed Final Decree
7. Notice of Sale
8. Transcript of Testimony
9. Other documents as applicable pertaining to service and finalization of this action.

Additionally, he has arranged for service of process on the defendant(s), has scheduled and attended the hearing in this matter, has provided reinstatement figures to the primary defendant, if requested, and has had telephone conversations with the defendant(s), if requested. Future duties include forwarding copies of the Decree to the defendant(s), advising the defendant(s) of the date that the property will be sold, arranging and coordinating the amount to be bid by plaintiff, representation of plaintiff at sale and preparation of after sale documentation as required. Eighteen hours have been spent on this file to date. Plaintiff's counsel anticipates spending approximately Six hours on the file after the hearing. In light of the potential liabilities inherent in a property matter, the attendant responsibilities and the size of the mortgage debt, I find that the attorney fees requested by the plaintiff in the amount of $7,500.00 are reasonable.

12. The amount due and owing on the Note, with interest at the rate provided in the Note, and other costs and expenses of collection, including an attorney's fee, secured by the Note and Mortgage, is as follows:

(a)	Principal due as of	$76,356.05
(b)	Interest from 3/1/05 through 2/6/07 at 8.3650 %	$13,382.91
(c)	Escrow Advances (Insurance, Taxes)	$ 955.06

(d)	Property Inspections	$ 363.00
(e)	Corporate Advance	$ 509.14
(k)	Costs of Collections Prior to Hearing	$ 401.00
(m)	Title Search Fee	$ 400.00
(o)	Attorney Fees	$ 7,500.00
	TOTAL DEBT secured by Note and Mortgage, including interest to date shown	$99,867.16

Interest for the period from the date shown in (b) above, through the date of this Judgment at the above stated rate to be added to the above stated "Total Debt" to comprise the amount of the judgment debt entered herein and interest after the date of judgment at the rate of an adjustable rate per terms as set out in said Note percent per annum (pursuant to the terms of the Note and Mortgage) on the judgment debt should be added to such judgment debt to comprise the amount of Plaintiff's debt secured by the mortgage through the date to which such interest is computed.

13. That the Plaintiff does not waive but specifically demands judgment against the Defendant(s), Laura Toney, 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(s) for any deficiency in this action remaining after sale of the mortgaged premises.

14. As a personal or deficiency judgment is demanded, the bidding will remain open for a period of thirty (30) days pursuant to S.C. CODE Ann. Section 15-39-720 (1976).

CONCLUSION OF LAW

I, therefore, conclude as follows:

1. There is no genuine issue as to any material fact in this case, therefore Plaintiff's Motion for Summary Judgment is granted.

2. Plaintiff should have judgment of foreclosure of the mortgage and the mortgaged property should be ordered sold at public auction after due advertisement.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. There is due to the Plaintiff on the obligation and mortgage set forth in the Complaint the sum of Ninety Nine Thousand Eight Hundred Sixty Seven and 16/100 ($99,867.16) Dollars representing the "Total Debt" due Plaintiff as set forth supra, together with interest at the rate provided therein on the balance of principal from the date aforesaid to the date hereof.

2. The amount due in the preceding paragraph (the "Total Debt" as set forth supra and later accrued interest on the principal) shall constitute the total judgment debt due the

Plaintiff and shall bear interest hereafter at the rate of an adjustable rate per terms as set out in said Note percent per annum.

3. That the Defendants liable for the aforesaid mortgage debt shall, on or before the date of sale of the property hereinafter described, pay to the Plaintiff, or Plaintiff's attorney the amount of Plaintiff's debt as aforesaid, together with the costs and disbursements of this action.

4. That on default of payment at or before the time herein indicated, the mortgaged premises described in the Complaint, as hereinafter set forth, be sold by the Lee County Clerk of Court at public auction at the Lee County Courthouse in Bishopville, South Carolina, on some convenient sales day hereafter (and should the regular day of judicial sales fall on a legal holiday, then and in the such event, the sales day shall be on Tuesday next succeeding such holiday), on the following terms, that is to say:

A. FOR CASH: The Clerk of Court will require a deposit of Five percent (5%) on the amount of the bid (in cash or equivalent) at the time of the sale, same to be applied on the purchase price only upon compliance with the bid, but in case of non-compliance within Thirty (30) days same to be forfeited and applied to the costs and Plaintiff's debt.

B. Interest on the balance of the bid shall be paid to the day of compliance at the rate of an adjustable rate per terms as set out in said Note percent.

C. The sale shall be subject to taxes and assessments, existing easements and easements and restrictions of record.

D. The above referenced instrument constitutes a first lien priority mortgage.

E. Purchaser to pay for Deed Stamps and costs of recording the Deed.

5. If Plaintiff be the successful bidder at the said sale, for a sum not exceeding the amount of costs, expenses and the indebtedness of the 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.

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

8. That the Clerk of Court will, by advertisement according to law, give notice of the time, and place of sale, and the terms thereof; and will execute to the Purchaser, or Purchasers, a deed to the premises sold. The Plaintiff, or any other party to this action, may

become a purchaser at such sale, and that if, upon such sale being made, the Purchaser, or Purchasers, should fail to comply with the terms thereof within Thirty (30) 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.

9. That the Clerk of Court will apply the proceeds of the sale as follows:

FIRST: To payment of the amount of the costs and expenses of this action, including any Guardian Ad Litem fee or fees of attorneys appointed under Order of Court.

NEXT: To the payment to the Plaintiff or Plaintiff's attorney, of the amount of Plaintiff's debt and interest, so much thereof as the purchase money will pay on the same.

NEXT: Any surplus will be held pending further order of the court.

10. It is further ORDERED, ADJUDGED AND DECREED that in the event the successful bidder to whom the deed of conveyance has been issued subsequent to the sale is other than the Defendants in possession herein, the Sheriff of Lee County is ordered and directed to eject and remove from the premises the occupants of the property sold, together with all personal property located thereon, and put the successful bidder to whom the deed of conveyance has been issued or his assigns in full, quiet and peaceable possession of said premises without delay, and to keep said successful bidder or his assigns in such peaceable possession.

11. And it is further ORDERED, ADJUDGED AND DECREED that each Defendant and all persons whomsoever claiming under him, her or them, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said mortgaged premises so sold, or any part thereof.

12. And it is further ORDERED, ADJUDGED AND DECREED that any prior lien that has been paid in full is hereby satisfied and cancelled of record.

13. IT IS FURTHER ORDERED that the Deed of conveyance made pursuant to said sale shall contain the names of only the first named Plaintiff and the first named Defendant and the Defendant who was the titleholder of the mortgaged property at the time of filing of the Notice of Pendency of the within action, and the name of the Grantee, and the Clerk of Court is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said Deed.

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

15. Upon issuance of a Report on Sale and Disbursements, the Register of Deeds is directed to release of record the mortgage lien being foreclosed, which mortgage lien is described as follows:

That Mortgage originally given to Mortgage Electronic Registration Systems, Inc. solely as nominee for Finance America, LLC by Laura Toney, dated 10/06/2004 and recorded 10/19/2004, in Mortgage Book 361 at page 79.

16. The following is a description of the premises herein ordered to be sold:

LEGAL DESCRIPTION AND PROPERTY ADDRESS:

All that certain lot or parcel of land situate just North of the Town of Bishopville, County of Lee and State of South Carolina and being bounded as follows: On the North by Chapman Street; On the East by lot of West Wilson; on the South by Lots Nos., 9, 10, 11, 12 and 13 and on the West by Bay Street represented on a plat being of North Mohawk as Lot No. 14, said plat being of record in Plat Book E at page 46, in the Office of the Clerk of Court for Lee County, South Carolina Records.

This conveyance is made subject to any and all existing reservations, easements, right-of-way, zoning ordinances, and restrictive or protective covenants that may appear of record or on the premises.

This being the same property most recently to Laura Toney by deed from Milton Toney dated December 4, 1992 and recorded December 4, 1992 in Book V-5 at page 205 in the Lee County, South Carolina Records.

729 Chatman Street, Bishopville, SC 29010

TMS 030-02-00-024

17. IT IS FURTHER ORDERED that if the Plaintiff or the Plaintiff's representative does not appear at the scheduled sale of the above-described property, then the sale of the property will be null, void and of no force and effect. In such event, the sale will be rescheduled for the next available sales day.

W. C. Coffey, Jr.
Master-in-Equity

Manning, South Carolina
2 March, 2007.

STATE OF SOUTH CAROLINA

COUNTY OF LEE

AFFIDAVIT

F25-02718

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information.

2. The property located at 729 Chatman Street, Bishopville, SC 29010, bearing Tax Map Number 030-02-00-034, was transferred by James Davis as Clerk of Court to LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 .

3. Check one of the following: The DEED is

(a) _____ subject to the deed recording fees as a transfer for consideration paid or to be paid in money or money's worth.

(b) _____ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity or is a transfer to a trust or as a distribution to a trust beneficiary.

(c) __X__ EXEMPT FROM RECORDING FEES AS FOLLOWS:

_____ #2 Transferred to a Government Agency

__X__ #13 Transferred to Mortgagee by Foreclosure or Deed in Lieu of Foreclosure

_____ Other _____

4. Complete the following if either item 3(a) or 3(b) above has been checked.

(a)$_____ The fee is computed on the consideration paid or to be paid in money or money's worth.

5. Check YES _____ or NO xxxxx to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES", the amount of the outstanding balance of this lien or encumbrance is $_____.

6. The DEED Recording Fee is computed as follows:

(a) $_____ the amount listed in item 4 above.

(b) $_____ the amount listed in item 5 above.

(c) $_____ subtract Line 6(b) from Line 6(a).

7. The deed recording fee due is based on the amount listed on Line 6(c) above and the deed recording fee is $ 10.00 .

8. As required by Code Section 12-24-70, I state that I am a responsible person who was connected to the transaction as: Plaintiff's Attorney.

9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Responsible Person Connected with this Transaction

SWORN to before me this 25
Day of June, 2007

Notary Public for South Carolina
My Commission Expires: 7/19/14

STATE OF SOUTH CAROLINA

COUNTY OF LEE

DEED
(PUBLIC SALE)

C/A NO: 2005-CP-31-169

I hereby certify that the within Deed was
Recorded this 28 day of June
AD 07 Recorded in Book 225
Of Deeds, Page 159
Clerk, Steward Auditor
For Lee County

F25-02718

To Whom These Presents shall concern:

I, James Davis as Clerk of Court for Lee County, State of South Carolina, send greetings:

WHEREAS, in an action in the Court of Common Pleas in Lee County between LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 and Laura Toney as Defendants, the Judge of said County by Order passed on March 15, 2007 did decree that the property described should be sold by the Clerk of Court for Lee County on the terms and for the purposes mentioned in the order granted in the case; and WHEREAS, I the undersigned, as Clerk of Court for Lee County, after due advertisement of the said property for sale at public outcry, did openly and publicly, and after the matter of auction, sell the said property on May 7, 2007 with the final sale being on June 6, 2007 for the sum of Seventy Thousand And 00/100 ($70,000.00) Dollars, said sum being the highest amount bid, to LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11,its successors and assigns.

NOW, KNOW ALL MEN, That I, the undersigned, as Clerk of Court for Lee County, pursuant to the forgoing and also in consideration of the said bid paid as the aforesaid by the said herein below named grantee, the receipt whereof is hereby acknowledged, have granted, bargained, sold, released, and by these presents do grant bargain and release the following described property unto the grantee, LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11,its successors and assigns.

LEGAL DESCRIPTION AND PROPERTY ADDRESS:

All that certain lot or parcel of land situate just North of the Town of Bishopville, County of Lee and State of South Carolina and being bounded as follows: On the North by Chapman Street; On the East by lot of West Wilson; on the South by Lots Nos., 9, 10, 11, 12 and 13 and on the West by Bay Street represented on a plat being of North Mohawk as Lot No. 14, said plat being of record in Plat Book E at page 46, in the Office of the Clerk of Court for Lee County, South Carolina Records.

This conveyance is made subject to any and all existing reservations, easements, right-of-way, zoning ordinances, and restrictive or protective covenants that may appear of record or on the premises.

This being the same property most recently to Laura Toney by deed from Milton Toney dated December 4, 1992 and recorded December 4, 1992 in Book V-5 at page 205 in the Lee County, South Carolina Records.

729 Chatman Street, Bishopville, SC 29010

TMS # 030-02-00-024

000001324
RECORDED 06/27/2007 10:43:54AM
Bk:BK00225 Ps:00159 Pages:3
Fee:10.00 State:0.00
COUNTY:0.00 Exempt:
James I. Davis, Clerk of Court
Lee County, SC

Grantees Address: 12650 Ingenuity Drive Orlando, FL 32826

TOGETHER, with all the singular the hereditaments, rights, members and appurtenances whatsoever to the said property belonging or in any wise incident or appertaining, and the reversions and remainders, rents, issues, and profits thereof; and also any estate, right, title, interest, dower, possession, benefit, claim or demand therein whatsoever of all parties to the said suit and of all other persons who might rightfully claim the same or any part thereof, by, from, or under them, or either of them;

TO HAVE AND TO HOLD the said property, with its hereditaments, privileges, and appurtenances, unto the said grantee, his/its successors and assigns for their own use, benefit, and behalf, forever.

IN WITNESS WHEREOF, I, the undersigned, as Clerk of Court for Lee County, under and by virtue of the said order(s), have hereunto set my Hand and Seal the 20th day of June in the year of our Lord Two Thousand Seven, and in the Two Hundred and Thirtieth year of Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
In the Presence of:

Kay M. Elmore

Loretta Ashes

James Davis (L.S.)
James Davis
Clerk of Court for Lee County

STATE OF SOUTH CAROLINA

COUNTY OF LEE

C/A NO: 2005-CP-31-169

PERSONALLY APPEARED the undersigned witness and made oath that (s)he saw James Davis, as Clerk of Court for Lee County, sign, seal, and deliver the within Deed; and that deponent together with the other witness signed their names as witnesses thereto.

Kay M. Elmore

SWORN to before me this
20th day of June, 2007

Loretta Ashes (L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: Jan. 11, 2017

This deed was prepared by Korn Law Firm, P.A., Attorney at Law, 1300 Pickens Street, Columbia, SC 29201

Index: Laura Toney
Clerk of Court

Grantees Address: 12650 Ingenuity Drive Orlando, FL 32826

TOGETHER, with all the singular the hereditaments, rights, members and appurtenances whatsoever to the said property belonging or in any wise incident or appertaining, and the reversions and remainders, rents, issues, and profits thereof; and also any estate, right, title, interest, dower, possession, benefit, claim or demand therein whatsoever of all parties to the said suit and of all other persons who might rightfully claim the same or any part thereof, by, from, or under them, or either of them;

TO HAVE AND TO HOLD the said property, with its hereditaments, privileges, and appurtenances, unto the said grantee, his/its successors and assigns for their own use, benefit, and behalf, forever.

IN WITNESS WHEREOF, I, the undersigned, as Clerk of Court for Lee County, under and by virtue of the said order(s), have hereunto set my Hand and Seal the 20th day of June in the year of our Lord Two Thousand Seven, and in the Two Hundred and Thirtieth year of Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
In the Presence of:

Kay M. Elmore

Loretta Ashes

James Davis (L.S.)
James Davis
Clerk of Court for Lee County

STATE OF SOUTH CAROLINA

COUNTY OF LEE

C/A NO: 2005-CP-31-169

PERSONALLY APPEARED the undersigned witness and made oath that (s)he saw James Davis, as Clerk of Court for Lee County, sign, seal, and deliver the within Deed; and that deponent together with the other witness signed their names as witnesses thereto.

Kay M. Elmore

SWORN to before me this
20th day of June, 2007

Loretta Ashes (L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: Jan 11, 2017

This deed was prepared by Korn Law Firm, P.A., Attorney at Law, 1300 Pickens Street, Columbia, SC 29201

Index: Laura Toney
Clerk of Court

DEFAULT SERVICES INC.
NATIONWIDE PROPERTY PRESERVATION SERVICES
Toll Free: (877) 275-6130 | Phone: (512) 382-0366 | Fax: (512) 382-0403
PO Box 91147 Austin, TX 78709
Email us at Info@defaultservicesinc.com
Or visit us online at www.defaultservicesinc.com

Date: 1-29-11

Property Address: 729 Chatman St.
Bishopville, SC 29010

Dear Occupant,

The subject property in which you are occupying has been acquired through foreclosure or Deed in Lieu of Foreclosure. The new owner "Altisource Holdings" is entitled to possession of the property. However, Altisource does not wish to take legal action at this time.

Therefore , Altisource is making a onetime offer to assist you in vacating the premises. You must contact me within 48 hours of this notice to discuss the details. If you fail to respond to this notice, Altisource will file suit for eviction and possession of the property.

Contact Name: Classic Preservation Servic

Phone Number: 803-847-0830
(803) 847-0830

LEE COUNTY
SHERIFF'S

NOTICE OF EVICTION

An Order has been issued by the Magistrate's Court for an eviction of the people and goods at this address. If you have not moved by

729 Chatmon 4/27/11
Date

At 10:00 AM.
Time

We will be forced to evict you.

Deputy Sheriff

COUNTY OF LEE
Office of the Sheriff
JUDICAL CENTER
P.O. BOX 89
BISHOPVILLE, S.C. 29010
803-484-5353

MARVIN H. DAWSON, JR.
FORENSIC DOCUMENT EXAMINER

DIPLOMATE AMERICAN BOARD
OF FORENSIC DOCUMENT EXAMINERS

AMERICAN ACADEMY
OF
FORENSIC SCIENCES

AMERICAN SOCIETY
OF
QUESTIONED DOCUMENTS EXAMINERS

SOUTHEASTERN ASSOCIATION
OF FORENSIC DOCUMENT EXAMINERS

CURRICULUM VITAE

PRESENT POSITION

Forensic Document Examiner – Forensic Photographer – Private Consultant

Dawson Document Laboratory, LLC
122 Hollyridge Road (29301)
Post Office Box 5066 (29304)
Spartanburg, South Carolina
(864) 439-1610 Facsimile (864) 439-2312

EDUCATION

Master of Criminal Justice
University of South Carolina
Columbia, South Carolina

Bachelor of Arts
University of South Carolina
Columbia, South Carolina

FBI National Academy
121st Session
FBI Academy
Quantico, Virginia

Professional Certificate
University of Virginia
FBI Academy Campus
Quantico, Virginia

EMPLOYMENT

South Carolina Law Enforcement Division (SLED)
1972-1988

OIC, designed, developed and staffed SLED's Forensic Photography Laboratory
1972-1977

Department Head (Lieutenant) designed, developed and staffed SLED's
Forensic Questioned Document Laboratory
1974-1988

Midlands Technical College, Adjunct Faculty
1987-1995

Department of Social Services, Division of Investigation
Forensic Document Examiner
1988-1999

Retired from the State of South Carolina, June 1999 having served 27 ½ years in state law enforcement; 25 of which in the laboratory as a forensic document examiner.

AREA OF EXPERTISE

Forensic Document Examiner — *Board Certified* by The American Board of Forensic Document Examiners (ABFDE) Certification No.: 251

Certified as a Law Enforcement Instructor by the South Carolina Criminal Justice Academy (SCCJA) October 1986 through October 1999.

COURT TESTIMONY

Qualified and testified as an expert in the area of Forensic Document Examination over three hundred (300) times in Federal, State and local courts as well as court martial, state boards and regulatory proceedings.

ORGANIZATIONAL AFFILATIONS

American Board of Forensic Document Examiners (ABFDE) Diplomate

American Society of Questioned Document Examiners (ASQDE) Membership and Credentials Chair (2005-2006), Membership and Credential Committee, Member (2006 -2007)

American Academy of Forensic Sciences (AAFS) Document Section, Member (1981 – Present)

Southeastern Association of Forensic Document Examiners (SAFDE) Charter Member, Secretary (1994 – 1996)

FBI National Academy Associates (FBINA) State and National Associations. Member
Secretary/Treasurer South Carolina (1981-1984)
President of South Carolina Chapter (1987)

International Association of Identification (IAI) Member
Regional Director (1980-1983)
President of South Carolina Chapter (1983)

American Society of Standards and Materials (ASTM) Member of E-30 Committee
(2004 - Present)

Scientific Working Group for Forensic Document Examination (SWGDOC)
(Committee Member 2008)

TRAINING (PARTIAL LIST)

Forensic Document Examiner (FDE) Internship, Georgia Bureau of Investigation (GBI) Atlanta, Georgia 1973 – 1974.

United States Secret Service Questioned Document Course, Washington, DC

Federal Bureau of Investigation, Quantico, Virginia
- Questioned Document Course
- Typewriter Seminar
- Photography Course (Laboratory)
- International Symposium (#1) on the Forensic Examination of Questioned Documents, Quantico, Virginia
- International Symposium (#2) on the Forensic Examination of Questioned Documents, Albany, New York

Photocopy Workshops, Atlanta, Georgia, Washington, DC and Lansing, MI.

Advanced Study Course in the Examination of Medical Records, Miami, Florida

Typography Short Course, Atlanta, Georgia

Signature Workshop, Des Moines, Iowa

Daubert Workshop, Columbia, South Carolina

Constructing a Scientific Paradigm for Forensic Handwriting Identification Evidence, Atlanta, Georgia

Print Quality Workshop, Montreal, Quebec

Cedar-Fox Workshop, Montreal, Quebec

Signature - Disguise of Signature Forgery Workshop, Part I, II, III and IV, Portland, Oregon

Fine and Subtle Features of Handwriting Workshop, Part I and II, Atlanta, Georgia.

Handwriting Workshop, Atlanta, Georgia

Examining Documents Requiring a Multi-Faceted Approach, Traverse City, Michigan

Forensic Examination of Computer Generated Documents, Traverse City, Michigan

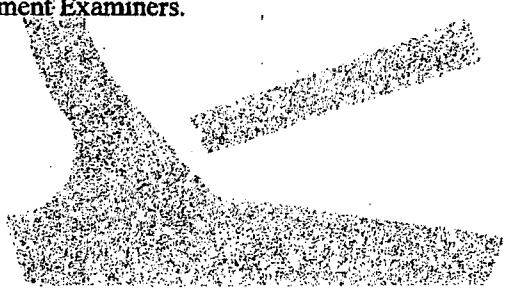
Courtroom Testimony for Forensic Document Examiners, Traverse City, Michigan

Methods Used for Authenticating Questioned Documents, Traverse City, Michigan

The Changing Face of "American" Handwriting, Atlanta, Georgia

Numerous other forensic document examiners workshops held in conjunction with or sponsored by the American Academy of Forensic Sciences, The American Society of Questioned Document Examiners, The Southeastern Association of Questioned Document Examiners and the American Board of Forensic Document Examiners.

Professional papers have been presented before the annual meetings of the Academy, Society and the Southeastern Association of Forensic Document Examiners.



07-07-08

Handwriting Workshop, Atlanta, Georgia

Examining Documents Requiring a Multi-Faceted Approach, Traverse City, Michigan

Forensic Examination of Computer Generated Documents, Traverse City, Michigan

Courtroom Testimony for Forensic Document Examiners, Traverse City, Michigan

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Professional papers have been presented before the annual meetings of the Academy, Society and the Southeastern Association of Forensic Document Examiners.

10-03-07

MARVIN H. DAWSON, JR.
FORENSIC DOCUMENT EXAMINER

DIPLOMATE AMERICAN BOARD OF FORENSIC DOCUMENT EXAMINERS
AMERICAN ACADEMY OF FORENSIC SCIENCES
AMERICAN SOCIETY OF QUESTIONED DOCUMENTS EXAMINERS
SOUTHEASTERN ASSOCIATION OF FORENSIC DOCUMENT EXAMINERS

June 5, 2007

HAND DELIVERED

Joseph Henry, P.C.
Attorney at Law
1708 B Richland Street
Columbia, South Carolina 29201

Re: Signature Examination
Laura A. Toney
DQDL Case No: 75237

Results of Examination

The following documents were received for examination in this laboratory on June 4, 2007.

Questioned Document

Q/1 Attorney/Insurance Preference Checklist (machine copy) dated 10-03-04 bearing two (2) "Laura Toney" signatures.

Specimen Signatures

K1.1 Lee County School District Statement of Physical and Mental Fitness (machine copy) dated 04-25-05,

K1.2 Lee County School District Memorandum (machine copy) dated 04-22-05,

K1.3 Lee County School District Continuing Contract (machine copy) dated 04-22-05.

122 HOLLYRIDGE ROAD (29301) • POST OFFICE BOX 5066 • SPARTANBURG, SC 29304 • (864) 439-1610 • FAX (864) 439-2312 • E-MAIL: DawsonMH@aol.com

K1.4 Lee County School District Miscellaneous Information Professional (machine copy) dated 04-22-05.

K1.5 Machine copy of five (5) cancelled checks -

K1.6 Machine copy of twenty (20) cancelled checks -

K1.7 Machine copy of twenty (20) cancelled checks

K1.9 Lee Country Continuing 04-26-99

Exhibits K1.1 thru K1.9 were submitted as bearing signatures attributed to Laura A Toney (K/1).

Purpose of the Examination

The previously described documents were submitted for the purposes of determining, if possible, the authenticity of authorship of the "Laura Toney" signatures appearing on Exhibit Q/1.

Examination Limitations

When attempting to conduct a comparison of signatures on non-original documents, certain limitations are present. First, it is impossible to conduct a microscopic examination of the signature for evidence of any line quality defects associated with simulation and/or traced signatures. The reproduction process may distort the writing or mask evidence of simulation or tracing. In the case of faxed documents, the digitizing of the document during transmission disrupts the continuity of the signature as it is printed on the receiving machine.

Secondly, the possibility of a *"cut and paste"* fabrication cannot be eliminated based upon an examination of a copy. The product of modern photocopiers and fax machines is such that an authentic signature can be reproduced and pasted onto a document without leaving discernible evidence of this fabrication. It is also possible to insert a computer graphic (*scanned*) image of an authentic signature onto a document that was never signed in ink. Another process may involve the production of a signature through mechanical means, such as the use of a rubber stamp or offset printing process. The only reliable method to eliminate these possibilities is to examine the original inked signature.

Thus, it is not possible to conclusively identify the signed of a document when no inked original can be produced. However, it may be possible to eliminate a particular person as signing a document where only a photocopy exists or is available for examination.

When fundamental differences are observed that cannot be attributed to the reproduction process, such as basic divergences in size and proportions of letters, placement on the signature line, writing style and slant; a conclusion of non-authorship may be rendered.

Examination and Findings

The aforelisted documents were examined in this laboratory on June 4, 2007. Comparison charts were prepared as part of the examination. Copies of these charts are included in this report for case of reference.

A detailed examination was undertaken and included microscopic examination of the questioned "Laura Toney" signatures appearing on Exhibit Q/1 and undisputed signatures attributed to Laura A. Toney. An examination of the signatures "Laura Toney" where they appear on Exhibit Q/1 are inconsistent with the formatting, signature style and other handwriting characteristics found in the specimen signatures attributed to Laura A. Toney. In particular:

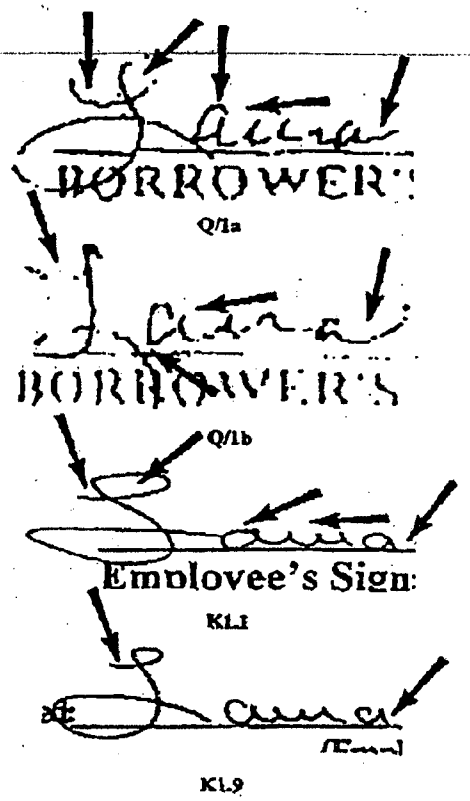
L-a-u-r-a

1. The upper loops of the questioned "L" are round – the known are elongated. The initial stroke of the "L" are long. The known are short.

2. The questioned "a" are vertical and pointed at the seven o'clock position.

3. The "a" is larger in height ratio than the following lower case letter forms. The known "a" is equal to all other lower case.

4. The terminal stroke of the known "a" is short; while the questioned terminal is long.



T-o-n-e-y

5. The questioned "Toney" is vertical or slightly slanted to the right, the specimen exhibits a left slant.

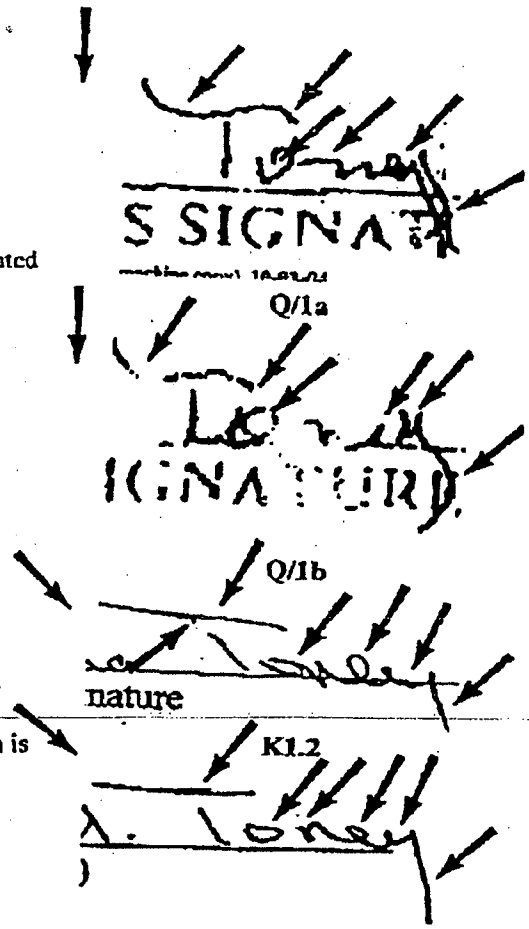
6. The crossbar of the questioned "T" is curved, the specimen exhibits a *retrace* and horizontal stroke.

7. The questioned "o" is angular, the known oblong.

8. The questioned "n" exhibits an extended initial stroke, the specimen does not.

9. The questioned "e" is closed, the specimen "e" is open.

10. The questioned "y" exhibits a *deep bowl*, the specimen bowl is *wide and shallow*. The lower extender of the questioned is curved, the specimen is straight.



Examination Results

Examination and comparison of questioned "Laura Toney" signatures appearing on Exhibit Q/1 in conjunction with specimen signatures attributed Laura A. Toney (K/1) leads to the following conclusion:

> There is a strong probability the writer of the K/1 specimen signatures, Laura A. Toney, *did not* execute the questioned "Laura Tony" signatures appearing on Exhibit Q/1.

Remarks

1. The above is qualified upon the examination of original inked signatures.
2. All exhibits are being returned with this report.

Respectfully submitted,

Marvin H. Dawson, Jr.
Forensic Document Examiner
Dawson Questioned Document Laboratory, LLC

Enclosures as noted above

Lee County
Third Judicial Circuit
Public Index

Lee County Home Page South Carolina Judicial Department Home Page SC.GOV Home Page

Switch View

Laura A Toney VS Lasalle Bank National Association

Case Number:	2013CP3100321	Court Agency:	Common Pleas	Filed Date:	11/13/2013
Case Type:	Common Pleas	Case Sub-Type:	Possession 450	File Type:	Jury
Status:	Pending/ADR	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:		Disposition Date:		Disposition Judge:	
Original Source Doc:		Original Case #:			
Judgment Number:		Court Roster:			

Case Parties | Judgments | Tax Map Information | Associated Cases | Actions | Financials

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Toney, Laura A	ADR/Alternative Dispute Resolution (Workflow)	Action		06/11/2014-15:45		
Toney, Laura A	Property Description	Filing		11/13/2013-15:45		
Toney, Laura A	Summons & Complaint	Filing		11/13/2013-15:44		

CMSWeb 6.1
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, Plaintiff, vs. LaSalle Bank National Association as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, Defendants.	Civil Action No. 3:13-cv-03481-MBS-SVH

DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SANCTIONS

COMES NOW, Defendants LaSalle Bank National Association and AltiSource Homes (respectively "LaSalle Bank" and "AltiSource Homes" or collectively "Defendants"), by and through undersigned counsel, and hereby file this their Motion to Dismiss and Motion for Sanctions pursuant to Rule 12(b)(6) and Rule 11 of the Federal Rules of Civil Procedure:

1. Plaintiff has a long history of filing frivolous claims against Defendants.

2. On March 15, 2007, the South Carolina Court of Common Pleas of Lee County entered an order entitling LaSalle Bank to foreclose on Plaintiff's property located at 729 Chatman Street, Bishopville, South Carolina because Plaintiff defaulted on her mortgage. The property was in fact sold at auction.

3. Plaintiff has continued to fight the validity of the foreclosure sale in South Carolina state and federal courts. Both courts have held that Plaintiff's claims are meritless.

4. When Plaintiff attempted to re-litigate her case, the United States District Court for the District of South Carolina dismissed Plaintiff's complaint on *res judicata* grounds.

5. The Court also warned that if Plaintiff filed another suit, she would be subject to sanctions.

6. Plaintiff has filed the instant action again challenging the validity of the foreclosure sale which took place in 2007.

7. Accordingly, her complaint should be dismissed under the doctrine of *res judicata*, and sanctions should be imposed.

8. Defendants rely upon their Memorandum of Law in Support of their Motion to Dismiss and Motion for Sanctions submitted contemporaneously herewith, as well as the following exhibits that are attached hereto:

Exhibit A: Magistrate Judge Joseph R. McCrorey's Report and Recommendation, Civil Action No. 3:11-1686-MBS-JRM; and

Exhibit B: Chief United States District Judge Margaret B. Seymour's Order and Opinion, Civil Action No. 3:11-1686-MBS.

WHEREFORE, Defendants respectfully request that their Motion to Dismiss be GRANTED and that this action be dismissed with prejudice. Defendants additionally request that their Motion for Sanctions be GRANTED and that the Court impose sanctions, including costs, attorneys' fees, and pre-filing injunctive relief and such further relief as the Court deems proper.

(SIGNATURE ON FOLLOWING PAGE)

Laura Toney v. LaSalle Bank National Association, et al.
DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SANCTIONS
Civil Action No.: 3:13-cv-03481

FINKEL LAW FIRM LLC

s/Sean A. O'Connor
Sean A. O'Connor (Dist. Id. No. 7601)
Post Office Box 41489
Charleston, South Carolina 29423
Telephone: (843) 577-5460
Facsimile: (843) 577-5135
soconnor@finkellaw.com

Attorneys for Defendants
LaSalle Bank National Association and
Altisource Homes

December 20, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, Plaintiff, vs. LaSalle Bank National Association as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, Defendants.	Civil Action No. _____ **CERTIFICATE OF SERVICE** Removed from Lee County, S.C. Case No. 2013-CP-31-321

The undersigned states that on **December 13, 2013**, he caused a true and correct copy of the *Notice of Removal*, with attached Exhibits, to be served upon the parties identified below by United States mail, proper postage affixed and addressed as follows:

Laura Toney
Post Office Box 722
Bishopville, South Carolina 29010
Plaintiff, Pro Se

Pro Capital Investors
50 South 16th Street, Suite 1950
Philadelphia, PA 19102
Defendant

Wayne Capell
Lee County Treasurer
Post Office Box 428
Bishopville, South Carolina 29010
Defendant

Lee County Planning and Zoning
3rd Floor of Courthouse, Room 302
Bishopville, South Carolina 29010
Defendant

s/Sean A. O'Connor
Sean A. O'Connor (Dist. Id. No. 7601)
FINKEL LAW FIRM LLC
Post Office Box 41489
Charleston, South Carolina 29423
Telephone: (843) 577-5460
Facsimile: (843) 577-5135
soconnor@finkellaw.com

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

LAURA TONEY, Plaintiff, v. LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE REGISTERED HOLDERS OF STRUCTURED ASSET SECURITIES CORPORATION, STRUCTURED ASSET INVESTMENT LOAN TRUST, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-11; AND OCWEN FEDERAL BANK A/K/A ALTISOURCE HOMES, Defendants.	Civil Action No. 3:11-1686-MBS-JRM **REPORT AND RECOMMENDATION**

The pro se Plaintiff, Laura Toney, filed this action on July 13, 2011.[1] Plaintiff appears to assert claims under the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601, et seq., as well as claims under South Carolina law. Defendants in this action are LaSalle Bank National Association, as

[1]Pretrial matters in this case were referred to the undersigned pursuant to Local Civil Rule 73.02(B)(2)(e) DSC. As these are dispositive motions, this Report and Recommendation is entered for review by the Court.

Exhibit A

Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 ("LaSalle") and Ocwen Federal Bank, also known as AltiSource Homes ("Ocwen").[2] Plaintiff filed motions for entry of default against Ocwen on October 19 and 25, 2011. Ocwen filed a response on April 6, 2012, and Plaintiff filed a reply on April 16, 2012. Plaintiff filed a motion for entry of default against LaSalle on October 25, 2011, LaSalle filed responses on November 1 and 7, 2011, and Plaintiff filed replies on November 8 and 15, 2011.[3]

LaSalle filed a motion to dismiss on October 21, 2011. As Plaintiff is proceeding pro se, an order pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975) was issued on October 24, 2011, advising Plaintiff of the importance of a dispositive motion and of the need for her to file an adequate response. Plaintiff was specifically advised that if she failed to respond adequately, Defendant LaSalle's motion may be granted, thereby ending her case against LaSalle. Plaintiff filed responses on October 25 and 28, and November 2, 2011; LaSalle filed a reply on November 7, 2011; and Plaintiff filed a sur-reply on November 8, 2011. A hearing on pending motions was held before the undersigned on March 20, 2012.

---

[2]LaSalle was originally named as LaSalle Bank National Association, Trustee for Lehman Brothers Secured Asset Investment Loan Trust Sail 2005. Plaintiff filed a motion to amend (on January 11, 2012) the name of this Defendant (as identified by Defendant LaSalle's in its motion to dismiss), which the undersigned granted on March 20, 2012. Defendant Ocwen asserts that it has been misidentified and that its correct name is Ocwen Loan Servicing, LLC. See Docs. 60 and 61. Ocwen also has stated it will accept service of an amended summons and amended complaint that reflects its corrected name. Plaintiff has not filed a motion to amend Ocwen's name.

[3]On March 22, 2012, the Honorable Margaret B. Seymour, Chief United States District Judge, District of South Carolina, denied Plaintiff's motion for a temporary injunction and request for a hearing for a preliminary and permanent injunction. Plaintiff, on April 2, 2012, filed a Notice of Appeal to the Court of Appeals for the Fourth Circuit, as to Judge Seymour's order. See Doc. 62.

After the hearing, Defendant Ocwen filed a motion to dismiss on April 6, 2012 (and it filed a response to the motions for default as detailed above). Another Roseboro order was issued on April 10, 2012. Plaintiff filed a response on May 14, 2012.

BACKGROUND

Plaintiff refinanced her house located in Bishopville, South Carolina ("the Property") on October 6, 2004. During the closing, Plaintiff entered into and received a mortgage[4] which was secured by the Property. On June 14, 2005, Plaintiff sent an unsigned letter to "Owen Federal Bank FSB" (see attachment to Complaint), which she asserts is a letter sent to Defendant Ocwen stating her intention to rescind the loan because of alleged federal disclosure violations that occurred during the processing of the loan. Plaintiff claims that, prior to closing, she did not receive the disclosures required by TILA. On or around July 2005, Defendant LaSalle, which had been assigned the mortgage, filed a foreclosure action against Plaintiff.[5] Plaintiff filed, through counsel, an answer and counterclaim (alleging a TILA violation) in the state foreclosure action on August 17, 2005. Thereafter, Defendant LaSalle filed a motion for summary judgment. Plaintiff states that the first reply to her rescission letter was on October 19, 2005 (see Doc. 52, p. 9). On February 16, 2007, a foreclosure hearing was held in the absence of Plaintiff or her attorney. Plaintiff asserts that her

[4]It appears the original mortgage was with Finance America., LLC. The mortgage was later assigned to LaSalle. The servicing was assigned in October 2004 (effective December 1, 2005) to Ocwen Federal Bank FSB. See Attachments to Complaint (Doc. 1) and to Plaintiff's April 16, 2012 Response (Doc. 70).

[5]In a pleading filed July 20, 2011 (prior to Plaintiff bringing this action into proper form), Plaintiff appears to attempt to remove the state foreclosure action to this Court. Any such attempt, however, is untimely. See 28 U.S.C. § 1446.

attorney was not there because he was a member of the South Carolina General Assembly and could not be present as the General Assembly was in session that day. Plaintiff claims that a request to reschedule the hearing was submitted on her behalf by her attorney, but the hearing was held as previously scheduled. The judge presiding over the foreclosure hearing granted summary judgment in favor of Defendant LaSalle and found that:

> The Defendant Laura Toney alleges that she rescinded the loan by letter dated June 12, 2005. Pursuant to Title 15 Section 1635 of the U.S. Code, the obligor in a real estate secured consumer credit transaction shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms. The loan closing occurred on October 6, 2004, at which time the Defendant was provided the information and rescission forms. (Affidavit of Michael May filed March 29, 2006; Affidavit of Letia Benjamin). The information and rescission forms are signed by the Defendant Laura Toney to acknowledge that she was provided a copy of each at closing. Therefore, the Defendant's counterclaim that she rescinded the loan is without merit on its face since it is well outside the time to rescind permitted by law.

Additionally, the judge found that Plaintiff was allowed to select her own closing attorney, and her allegations of entitlement to rescission were without merit and outside the time period for rescission as a matter of law. See March 9, 2007 Master's Order and Judgement of Foreclosure and Sale (Attachment to Doc. 1 - Complaint).

On March 22, 2007, Plaintiff filed an application for a temporary restraining order, preliminary injunction, and permanent injunction in state court. On April 25, 2007, Plaintiff filed a motion for reconsideration of the foreclosure decision. On April 27, 2007, a notice of eviction was filed against Plaintiff. On May 7, 2007, the Property was sold at an auction to Defendant LaSalle. At some point after the sale, Plaintiff's motions were denied and she filed an appeal with the South Carolina Court of Appeals, which affirmed the lower court's decision. Plaintiff then appealed the

state court action to the Supreme Court of South Carolina. It appears the appeal is still pending. Plaintiff has been evicted from the Property.

MOTIONS FOR DEFAULT JUDGMENT

On October 25, 2011, Plaintiff filed a motion pursuant to Fed. R. Civ. P. 55(a) for entry of default against Defendant LaSalle. She argues that the Summons and Complaint and her motion for injunction were filed on July 13, 2011; LaSalle was mailed an Order to answer the Summons and Complaint and motion for injunction; LaSalle was served with a copy of the Summons and Complaint and motion for injunction; an answer to the Complaint and motion for injunction were due on October 3, 2011; and LaSalle failed to appear, plead, or otherwise defend and is in default. LaSalle argues that Plaintiff's motion should be denied because it timely filed a motion to dismiss.

It is recommended that Plaintiff's motion for default as to LaSalle be denied. Plaintiff asserts that LaSalle's answer was due on October 3, 2011. She did not specify in her motion the date on which LaSalle was allegedly served. In a previous pleading, she asserted that LaSalle was served on September 19, 2011. See Doc. 17. Rule 12 provides that generally a defendant must serve a responsive pleading within twenty-one days after being served with the summons and complaint. See Fed. R. Civ. P. 12(a)(1)(A)(i). Thus, if LaSalle was served on September 19, 2011, its answer was due on October 11, 2011 (October 10, 2011 was a federal holiday). On October 7, 2011, LaSalle filed a timely motion to extend the time to file its answer until October 21, 2011, and the motion was granted on October 11, 2011. Thereafter, LaSalle timely filed a motion to dismiss on October 21, 2011. When a motion to dismiss under Rule 12 is filed, however, the time for the responsive

pleading is altered (if the court denies the motion to dismiss, "the responsive pleading must be served within 14 days after notice of the court's action"). Fed. R. Civ. P. 12(a)(4)(A).

On October 19, 2011, Plaintiff filed a motion pursuant to Fed. R. Civ. P. 55(a) for entry of default against Defendant Ocwen. She argues that the Summons and Complaint were filed on July 13, 2011; Ocwen was served with a copy of the Summons and Complaint; an answer was due on October 3, 2011; and Ocwen failed to appeal, plead, or otherwise defend within the time allowed and is in default. On October 25, 2011, Plaintiff filed a second motion for entry of default against Ocwen in which she reiterates her arguments from her earlier motion and also argues that Ocwen failed to respond to her motion for an injunction.

Ocwen, in a response filed April 6, 2012, argues that Plaintiff's motion for default judgment should be denied because its answer was filed prior to entry of default; Ocwen Loan Servicing, the proper party to this suit, is a wholly different entity from "Ocwen Federal Bank," and thus alleged service on "Ocwen Federal Bank" did not constitute service on Ocwen Loan Servicing; even if Plaintiff had named an existing entity called "Ocwen Federal Bank," service of process was not properly effected pursuant to applicable law; entry of judgment by default is a drastic remedy which should be used only in extreme situations; and entry of default judgment against the non-existent "Ocwen Federal Bank" should not be granted because it is a nullity.

It is recommended that Plaintiff's motions for entry of default against Ocwen be denied as she has not shown that Ocwen was properly served or that the correct entity was named in the Complaint. Ocwen has now filed an answer and asserts that it will accept service of an amended summons and complaint as to its correct name of Ocwen Loan Servicing, LLC. Rule 55(a) provides

> **Entering a Default.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

Although Plaintiff asserts in her affidavits accompanying her motions for default that Ocwen Federal Bank was served with a copy of the Summons and Complaint, there is nothing in the affidavits indicating when this Defendant was served. See Docs. 20 and 27. Review of the record reveals that Plaintiff filed purported service documents on October 7, 2011. Plaintiff attached a copy of two United States Postal Service "Domestic Return Receipt" forms indicating that "Ocwen Federal Bank A/K/A AltiSource Homes" was served by certified mail at "P.O. Box 24237 West Palm Beach, Fl 33416-4737" and "12650 Ingenuity Drive, Orlando, Florida, 32826 on September 15, 2011." See Doc. 17.

Ocwen asserts that it was not properly served. The Federal Rules of Civil Procedure provide, in pertinent part:

> **Serving a Corporation, Partnership, or Association**. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:
>
> (1) in a judicial district of the United States:
>
> (A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or
>
> (B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and--if the agent is one authorized by statute and the statute so requires--by also mailing a copy of each to the defendant[.]

Fed. R. Civ. P. 4(h)(i). Service may be made by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made[.]" Fed. R. Civ. P. 4(e)(1). Under South Carolina law, a corporation is served:

> by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

S.C.R.Civ. P. 4(d)(3). The South Carolina Rules of Civil Procedure also provide that service on a corporation may be made "by registered or certified mail, return receipt requested and **delivery restricted to the addressee**." S.C. R. Civ. P. 4(d)(8)(emphasis added).

Here, the return receipts reveal that delivery was not restricted to the addressee such that service by certified mail was not proper under South Carolina law. The Florida Rules of Civil Procedure state that "at the time of personal service of process a copy of the initial pleading shall be delivered to the party upon whom service is made." Fla. R. Civ. P. 1.070(e). A corporation may be served by serving process on the president, vice president, cashier, treasurer, secretary, general manager, any director, or any officer or business agent residing in the state. Fla. Stat. § 48.081(1)(a-d). As an alternative, process may be served on the agent designated by the corporation as its registered agent. Id. Fl. Stat. § 48.081(3)(a). The Florida Rules of Civil Procedure provide for service of process by certified mail, but only if the defendant agrees to waive personal service. Fla. R. Civ. P. 1.070(i). There is no indication that Plaintiff received a waiver or served Defendants in accordance with the Florida Rules of Civil Procedure.

MOTIONS TO DISMISS

Plaintiff alleges that Defendants violated her rights under TILA and also appears to allege claims under South Carolina law. She claims that she did not receive certain required federal disclosures at the time of closing, including "choice of attorney notification, settlement statement, and good faith estimate." Complaint, Para. 7. She alleges that Defendants' failure to make proper

disclosures and their failure to respond to her notice of rescission within twenty days of receipt resulted in Defendants losing their security interest in the Property. Plaintiff also claims that Defendants' failure to timely respond to her notice of rescission reinstated her interest in the Property and relieved her obligations under the original loan. Defendant LaSalle contends that its motion to dismiss should be granted because: (1) Plaintiff's claims are barred by res judicata; (2) the Complaint fails to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)); (3) the Complaint fails to state a plausible cause of action; and (4) the Complaint fails to plead fraud with the specificity required (Fed. R. Civ. P. 9(b)). Ocwen contends that its motion to dismiss should be granted because: (1) the Complaint fails to meet the minimum federal pleading standard (Fed. R. Civ. P. 8); (2) Plaintiff's claims are barred by res judicata; (3) Plaintiff failed to rescind within three days of her closing date such that her right to rescind is time barred; (4) Plaintiff failed to file a rescission action within three years of the closing date such that her rescission action is time barred; (5) Plaintiff is not entitled to recover for emotional distress; (6) Plaintiff fails to state a claim for deceptive and unfair practices; (7) Plaintiff fails to state a claim for gross negligence; (8) Plaintiff fails to plead fraud or fraudulent transfer with the specificity required, and (9) Plaintiff fails to state a valid claim for declaratory judgment. Plaintiff argues that the motions to dismiss should be denied because: (1) Defendants are in default for failing to timely file answers and responses to her previous motion for injunctive relief;[6] (2) Defendant Ocwen did not file its motion to dismiss until after it filed its answer in violation of Fed. R. Civ. P. 12; (3) this action is not barred by the doctrine of res judicata because the state action is on appeal and thus is still pending; and (4) she has properly asserted her claims.

[6]It is recommended this argument be rejected as Plaintiff's motion for injunctive relief was previously denied and it is recommended that the motions for default be denied.

Defendant Ocwen did not file its motion to dismiss until after it filed its answer. Generally, a Rule 12(b)(6) motion to dismiss should be filed before a responsive pleading is filed. After the close of pleading, a Rule 12(c) motion (or a Rule 56 motion for summary judgment) is used to test the sufficiency of the complaint. However, the timing and sequence of these filings is not fatal to Ocwen's motion. "(A) motion to dismiss for failure to state a claim...that is styled as arising under Rule 12(b) but is filed after the close of pleading, should be construed by the district court as a motion for judgment on the pleadings under Rule 12(c)." Patel v. Contemporary Classics of Beverly Hills, 259 F.3d 123, 126 (2d Cir. 2001); see also Satkowiak v. Bay County Sheriff's Dep't, 47 F. App'x 376, 377 n. 1 (6th Cir. 2002); Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999); Shooting Point, L.L.C. v. Cumming, 238 F.Supp.2d 729, 735 (E.D.Va. 2002). Thus, the undersigned construes Defendant Ocwen's motion to dismiss as a motion for judgment on the pleadings.

1. Standard of Review

The federal court is charged with liberally construing the complaints filed by pro se litigants, to allow them to fully develop potentially meritorious cases. See Cruz v. Beto, 405 U.S. 319 (1972); Haines v. Kerner, 404 U.S. 519 (1972). The court's function, however, is not to decide issues of fact, but to decide whether there is an issue of fact to be tried. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, Weller v. Department of Social Servs., 901 F.2d 387 (4th Cir. 1990), nor can the court assume the existence of a genuine issue of material fact where none exists.

"[A] motion under Rule 12(c) ... is assessed under the same standard that applies to a Rule 12(b)(6) motion." Walker v. Kelly, 589 F.3d 127, 139 (4th Cir. 2009)(citing Edwards, 178 F.3d at

243). When considering a 12(b)(6) motion to dismiss, the court must accept as true the facts alleged in the complaint and view them in a light most favorable to the plaintiff. Ostrzenski v. Seigel, 177 F.3d 245, 251 (4th Cir. 1999). The United States Supreme Court has stated that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. Although "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," a pleading that merely offers "labels and conclusions," or "a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. Likewise, "a complaint [will not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancements.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557).

2. Res Judicata

Defendants contend that this action is barred by the doctrine of res judicata. Plaintiff argues that this action is not barred because her action in state court is on appeal such that there is no final judgment and res judciata does not apply.

Pursuant to 28 U.S.C. § 1738, state judicial proceedings shall have the same full faith and credit in every court within the United States as they have in the courts of the state from which they are taken. As a result, "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."

Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984). Thus, South Carolina law of claim preclusion (also called res judicata) must be applied to determine the effect of the South Carolina judgment.

In South Carolina "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Hilton Head Ctr. of South Carolina, Inc. v. Public Serv. Comm'n of South Carolina, 362 S.E.2d 176, 177 (S.C. 1987). South Carolina courts use various tests in determining whether a claim should have been raised in a prior suit: "(1) when there is identity of the subject matter in both cases; (2) where the cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; (3) when there is the same evidence in both cases; and [] (4) when the claims arise out of the same transaction or occurrence." Plum Creek Dev. Co., Inc. v. City of Conway, 512 S.E.2d 106, 109 n. 3 (S.C. 1999)(citing J. Flanagan, South Carolina Civil Procedure 649-650 (1996)). To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Riedman Corp. v. Greenville Steel Structures, Inc., 419 S.E.2d 217 (S.C. 1992); Sealy v. Dodge, 347 S.E.2d 504 (S.C. 1986).

Here, res judicata bars this action as all three elements of the test for res judicata have been met as shown by Plaintiff's Complaint and exhibits. Plaintiff does not appear to dispute that the first two elements (identity of the parties and identity of subject matter) are met. Although Plaintiff appears to slightly change the name of the trust that held her mortgage, the attachments to her Complaint indicate that she is referring to the same entities in the prior action. The foreclosing party was "LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset

Securities Corporation, Structured Asset investment Loan Trust, Mortgage pass-Through Certificates, Series 2004-11." Plaintiff asserts her claims against Ocwen as a successor or assignee.

The subject matter is the same in both lawsuits. If the primary right and duty and alleged wrong are the same in each action, there is an identity of subject matter. See Jimmy Martin Realty Group, Inc. v. Fameco Distrib., Inc., 386 S.E.2d 803 (S.C. Ct.App.1989). Plaintiff sought to prevent foreclosure of her home in Lee County, South Carolina in the state action and asserted a counterclaim for rescission, and seeks to have the foreclosure overturned and undone in the current action.

The third element is met because the judge in the state court action granted the motion for summary judgment[7] and the South Carolina Court of Appeals affirmed the decision. Plaintiff argues that this action is not barred by res judicata because the action is still pending in state court, as she has appealed her state court case to the Supreme Court of South Carolina. The Supreme Court of South Carolina, however, would likely hold "that a judgment is final for preclusion purposes in South Carolina during the pendency of an appeal." This view is in accordance with the majority rule among state courts. See Campbell v. Lake Hallowell Homeowners Ass'n, 852 A.2d 1029, 1039–40 (Md.Ct.Spec.App. 2004) (listing various state court cases demonstrating the majority view). Furthermore, this district has previously found that the Supreme Court of South Carolina would adopt the majority position. Sea Cabin on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach, 828 F.Supp. 1241, 1249 n. 20 (D.S.C.1993); Dawson v. State Law Enforcement Div., CA No. 3:91–1403–17, 1992 WL 208967 at *3–4 (D.S.C. Apr. 6, 1992). Therefore, it is recommended that

[7]Summary judgment is an adjudication on the merits of the case. See Baird v. Charleston County, 511 S.E.2d 69, 74 (S.C.1999).

Defendants' motions to dismiss based on res judicata be granted as the a trial court adjudication is final while pending appeal.

Alternatively, it is recommended that this action be dismissed because this Court should not interfere with the ongoing state proceedings. Abstention may be raised sua sponte. Bellotti v. Baird, 428 U.S. 132, 143 n. 10 (1976).

The Supreme Court of the United States has held that a federal court should not equitably interfere with state proceedings except in the most narrow and extraordinary of circumstances. Younger v. Harris, 401 U.S. 37 (1971); Gilliam v. Foster, 75 F.3d 881, 903 (4th Cir. 1996). In Younger, the Court noted that courts of equity should not act unless the moving party has no adequate remedy at law and will suffer irreparable injury if denied equitable relief. Younger, 401 U.S. at 43–44. While the Younger doctrine was originally applied to protect state interests represented in criminal prosecutions, the Supreme Court has extended Younger to prescribe abstention in favor of state civil actions as well, when important state interests are at stake. See Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975). The Fourth Circuit applies the following test to determine whether Younger abstention is appropriate: (1) whether there is an ongoing state judicial proceeding; (2) whether the proceedings implicate important state interests; and (3) whether there is an adequate opportunity in the state proceedings to raise federal claims. Richmond Rail Co. v. Forst, 4 F.3d 244, 251 (4th Cir.1993).

Here, Plaintiff asserts that there is an ongoing state judicial proceeding. There is an important state interest in adjudicating foreclosure matters pertaining to real property located within a state. See Shaffer v. Heitner, 433 U.S. 186, 207–208 (1977) (recognizing a state's "strong interests in assuring the marketability of property within its borders[ ] and in providing a procedure for peaceful

resolution of disputes about the possession of that property")(footnote omitted); see also Sergeon v. Home Loan Ctr., Inc., No. 3:09–CV–01113–J–32JBT, 2010 WL 5662930 (collecting cases applying Younger abstention in light of a pending state foreclosure proceeding); Borkowski v. Fremont Inv. & Loan of Anaheim, Cal., 368 F.Supp.2d 822, 828 (N.D.Ohio 2005) (applying Younger abstention in the context of a pending state foreclosure proceeding); Prindable v. Ass'n of Apt. Owners of 2987 Kalakaua, 304 F.Supp.2d 1245, 1262 (D.Haw. 2003) (finding that foreclosure and ejectment proceedings were important state interests under Younger).[8] Finally, Plaintiff has an adequate opportunity to raise her federal (TILA) claims in the state court proceedings.

3. Failure to State a Claim Upon Which Relief May be Granted

Defendants contend that Plaintiff fails to state claims upon which relief may be granted and that Plaintiff's claims fail as a matter of law. Plaintiff appears to assert that she has alleged sufficient facts such that her claims should survive the motions to dismiss.

a. TILA

Defendants contend that Plaintiff fails to state a sufficient claim for violations of TILA because the alleged non-disclosures were non-material, limiting Plaintiff's right to rescind to three days. They also argue that even if the non-disclosures were material, Plaintiff failed to file this action within the three-year period. Plaintiff appears to argue that the non-disclosures were

[8]In her memorandum in opposition to summary judgment, Plaintiff claims that Defendants violated S.C. Code Ann § 37-10-102 (providing that a lender must ascertain prior to closing the preferred attorney to represent the debtor in matters related to the closing) and § 37-10-105 (providing the penalties for the failure to obtain the attorney preference). These claims are not properly before the Court as they were not alleged in the Complaint and Plaintiff has not amended her Complaint to add such claims. Further, these statutes do not permit rescission of the Note and Mortgage for its violation. See S.C. Code Ann. § 37-10-105(A).

material and she timely filed her TILA claim because she filed her counterclaim in the state court action within three years of the closing.

The right to rescind a loan under TILA for failure to disclose extends up to three days after consummation of the loan, unless the items left undisclosed are material. See 12 C.F.R. § 226.23(a)(3); 15 U.S.C. §§ 1631, 1632, 1635, 1638. If the non-disclosures are material, the borrower's right to rescind a transaction pursuant to TILA expires after three years. See 12 C.F.R. § 226.23(a)(3); 15 U.S.C. § 1635(f)("An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, which occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this chapter have not been delivered to the obligor...."). The required material disclosures include, among other things, the annual percentage rate, the amount financed, the method of determining the finance charge, and the amount of the finance charge. See 12 C.F.R. § 226.23(a)(3) n. 48; 15 U.S.C. § 1601(a), § 1635(f), § 1639(a).

Plaintiff has not alleged any material non-disclosures which would trigger the longer (three-year) statute of limitations period. Although Plaintiff claims that she did not receive certain required documents within three days of her loan application,[9] she admits (see, e.g., Doc. 76 at 8) that she received the required disclosures on the date of her closing. She attached copies of disclosures signed by her on the date of closing (October 6, 2004) including a Good Faith Estimate, Truth-In-Lending Disclosure Statement, and Attorney Preference form. See Attachments to Doc. 7. The judge in the state court case specifically found that Plaintiff was provided the required information and

[9]There are signed disclosures dated August 11, 2004 included in the record. Plaintiff claims that her signatures on these documents are forgeries. See Attachments to Doc. 7 and Doc. 1 (Complaint). She has not, however, disputed that she signed disclosures on the date of her closing.

rescission forms. Plaintiff has not alleged an attempt to rescind within three days of the closing (October 6, 2004), such that her right to rescission is time barred.

Defendants contend that even if the non-disclosures are material, Plaintiff failed to file her rescission action in this Court within three years of the closing date, such that her rescission action is time barred. Plaintiff appears to claim that she timely filed because she filed the counterclaim in her state court action within three years of the closing of her loan.

The Fourth Circuit, in the recent decision of Gilbert v. Residential Funding, LLC, 678 F.3d 271, 275–77 (4th Cir. 2012), held that the borrowers' letter to their lender within three years of the transaction, rather than the filing of any suit, is all that is required for notice of rescission under TILA. Here, in the light most favorable to Plaintiff for purposes of the motions to dismiss, Plaintiff exercised her right to rescind when she notified Ocwen that she was exercising her right to rescind in June 2005. As noted by the Fourth Circuit:

> To complete the rescission and void the contract, however, more is required. Either the creditor much "acknowledge[] that the right of rescission is available" and the parties must unwind the transaction amongst themselves, or the borrower must file a lawsuit so that the court may enforce the right to rescind.

Gilbert v. Residential Funding, LLC, 678 F.3d at 277 (quoting American Mortg. Network, Inc. v. Shelton, 486 F.3d 815, 821 (4th Cir. 2007)).[10]

Thus, in the light most favorable to Plaintiff, she exercised her right to rescind within the three-year period. She, however, failed to timely file this action alleging a TILA violation. There is a one-year statute of limitations for filing a suit once a violation of TILA has occurred. 15 U.S.C.

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[10]"[U]nilateral notification of cancellation does not automatically void the loan contract." Shelton, 486 F.3d at 821. "[O]therwise a borrower could get out from under a secured loan simply by claiming TILA violations, whether or not the lender had actually committed any." Id. (Quoting Yamamoto v. Bank of N.Y., 329 F.3d 1167, 1172 (9th Cir. 2003))(internal quotation marks omitted).

§ 1640(e). Whether the alleged TILA violation occurred at closing (October 6, 2004), when Plaintiff mailed the notice of recision (June 14, 2005), or when Plaintiff claims she first received a reply to her notice of recision (October 19, 2005), she filed this action well over one year later.

b. Emotional Distress

Plaintiff alleges that she is entitled to damages for severe emotional distress and mental anguish due to an unspecified Defendant's alleged refusal to acknowledge her rescission notice. Defendants contend that Plaintiff fails to allege facts that would establish that Defendants' conduct was outrageous. They also contend that Plaintiff fails to state a claim for negligent infliction of emotional distress. In her reply, Plaintiff appears to assert that she has stated a claim for intentional infliction of emotional distress because she had to take medications for stress and anxiety as a result of being evicted, property was destroyed or missing as a result of the eviction, and her house and property have sentimental value.

South Carolina expressly recognized the cause of action of intentional infliction of emotional distress, sometimes referred to as "outrage," in Ford v. Hutson, 276 S.E.2d 776 (S.C. 1981). To recover under the tort of outrage, a plaintiff must establish the following elements:

> (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct;
> (2) the conduct was so "extreme and outrageous" as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community";
> (3) the actions of the defendant caused the plaintiff's emotional distress; and
> (4) the emotional distressed suffered by the plaintiff was "severe" so that "no reasonable man could be expected to endure it."

Id., at 778 (quoting Vicnire v. Ford Motor Credit Co., 401 A.2d 148 (Me. 1979))(internal citations omitted); see also Wright v. Sparrow, 381 S.E.2d 503, 505 (S.C. Ct. App. 1989). In considering the

defendant's motion for summary judgment, the court must initially determine whether the conduct complained of "'may reasonably be regarded as so extreme and outrageous as to permit recovery, and only where reasonable persons may differ is the question one for the jury.'" Holtzscheiter v. Thomson Newspapers, Inc., 411 S.E.2d 664, 666 (S.C. 1991), overruled on other grounds, 506 S.E.2d 497 (S.C.1998)(quoting Todd v. South Carolina Farm Bureau Mut. Ins. Co., 321 S.E.2d 602, 609 (S.C. Ct. App. 1984), quashed on other grounds, 336 S.E.2d 472 (S.C. 1985)); see also Barber v. Whirlpool Corp., 34 F.3d 1268, 1276 (4th Cir. 1994) ("It is the court's responsibility to first determine as a matter of law whether or not the conduct was outrageous before submitting that question to the jury."). Here, Plaintiff has not asserted facts that would establish that Defendants' conduct was sufficiently outrageous or intolerable so as to support a reasonable finding of outrage or intentional infliction of emotional distress. Further, Plaintiff has not asserted facts that the alleged conduct was so severe that no person could be expected to endure it.

Plaintiff also fails to establish a claim for negligent infliction of emotional distress. South Carolina law generally requires proof of physical injury for the recovery of mental anguish and emotional distress. See Phillips v. United States, 575 F.Supp. 1309, 1317 (D.S.C.1983)("'[E]motional distress is a proper element of tort damage as long as such distress encompasses some physical manifestation.'" (quoting Robertsen v. State Farm Mut. Auto. Ins. Co., 464 F.Supp. 876, 883 n. 9 (D.S.C.1979)). Here, Plaintiff has not shown any physical injury as a result of Defendants' alleged conduct. South Carolina courts have allowed claims for negligent infliction of emotion distress which are limited to claims of bystander liability. Doe v. Greenville County School Dist., 651 S.E.2d 305, 307 (S.C. 2007). To establish a claim for negligent infliction of emotional distress a plaintiff must establish: defendant's negligence caused death or serious injury

to another, plaintiff was a bystander in close proximity to the accident, plaintiff and the victim were closely related, plaintiff witnessed the incident and plaintiff must exhibit physical manifestations of emotional distress that can be established by expert testimony. Kinard v. Augusta Sash & Door Co., 336 S.E.2d 465, 467 (S.C.1985). Here, Plaintiff has not sufficiently alleged a claim for bystander liability.

c. Deceptive and Unfair Practices

Plaintiff claims that she has a right to recover for deceptive and unfair practices. Defendants contend that Plaintiff fails to identify any specific cause of action or legal grounds on which she could recover. They argue that to the extent that Plaintiff is attempting to make an allegation under the South Carolina Unfair Trade Practices Act ("SCUPTA"), §§ 39-5-10, et seq., Plaintiff has not alleged or asserted any facts showing that Defendants' action adversely affected a public interest. In reply, Plaintiff claims she has stated a claim based on the definition of an unfair practice by the FDIC (but does not specify the legal grounds on which she can recover).

The SCUTPA broadly prohibits any "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C.Code Ann. § 39-5-20. In order to bring an action under the SCUTPA, the plaintiff must demonstrate that (1) the defendant engaged in an unlawful trade practice, (2) the plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice, and (3) the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest. See S.C. Code Ann. § 39-5-140; Havird Oil Co. v. Marathon Oil Co., Inc., 149 F.3d 283, 291 (4th Cir. 1998); Daisy Outdoor Advertising Co., Inc. v. Abbott, 473 S.E.2d 47, 49 (S.C. 1996).

Here, Plaintiff fails to state a claim under the SCUTPA because she has not alleged that a public interest is affected. The SCUTPA is not available to redress a private wrong where the public interest is unaffected. Noack Enterprises v. Country Corner Interiors, 351 S.E.2d 347 (S.C. 1986). Conduct which only affects the parties to the transaction provides no basis for a SCUTPA claim. See Key Co. v. Fameco Distribs., Inc., 357 S.E.2d 476 (S.C.Ct.App.1987).

d. Gross Negligence

Plaintiff appears to allege that Defendants were grossly negligent in failing to provide documents required by TILA, exercising good faith in its dealings, and failing to disclose truthful and accurate information. Defendants contend that Plaintiff fails to establish a claim for gross negligence because her action is predicated on an alleged breach of contract.

Gross negligence is defined as "the failure to exercise slight care," or the "intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 520 S.E.2d 142, 153 (S.C. 1999). Under South Carolina law, "if the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie." Enhance-It, L.L.C. v. American Access Techns., Inc., 413 F. Supp. 2d 626, 631 (D.S.C. 2006)(citing Meddin v. Southern Ry.-Carolina Div., 62 S.E.2d 109, 112 (S.C. 1995)). Here, Plaintiff's negligence claim appears to arise from the mortgage contract such that she cannot establish a claim for gross negligence.

Further, Plaintiff fails to show a duty of care owed to her by Defendants. In South Carolina, a bank does not owe a customers a "special duty of care" based purely on his or her status as a customer. Regions Bank v. Schmauch, 582 S.E.2d 432, 444 (S.C. Ct. App. 2003). Plaintiff has not

shown any duty owed her by Defendants other than to follow the applicable laws. As noted above, Plaintiff admits and the judge in the state court action found that the required disclosures were made at the closing.

e. Fraud/Fraudulent Transfer

Plaintiff appears to allege that Defendants made false representation in connection with the loan process and closing and they fraudulently foreclosed on the Property. Defendants contend that Plaintiff failed to plead fraud or fraudulent transfer with the specificity required.

Federal Rule 9 requires that a complainant plead fraud[11] with particularity. Fed. R. Civ. P. 9(b); Pearlstine Distribs., Inc. v. Freixenet USA, Inc., 678 F. Supp. 133, 136 (D.S.C. 1988). Under Rule 9, particularity of pleading is required "with regard to the time, place, speaker, and contents, as well as the manner in which statements are false and the specific acts raising an inference of fraud – the 'who, what, where, why, and when.'" In re First Union Corp. Sec. Litig., 128 F.Supp. 2d 871, 884 (W.D.N.C. 2001); see also Lemacks v. Consolidated Freightways Corp., No. Civ.A.

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[11]To prove fraud under South Carolina Law, a plaintiff must prove the following elements by clear, cogent, and convincing evidence:

(1) a representation;
(2) its falsity;
(3) its materiality;
(4) either the speaker's knowledge of its falsity or a reckless disregard of its truth or falsity;
(5) the speaker's 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.

Cheney Bros., Inc. v. Batesville Casket Co, Inc., 47 F.3d 111, 114 (4th Cir. 1995); King v. Oxford, 318 S.E.2d 125 (S.C. App. 1984). Failure to prove any element is fatal to the plaintiff's claim. M.B. Kahn Constr. Co. v. South Carolina Nat'l Bank of Charleston, 271 S.E.2d 414, 415 (S.C. 1980).

1:95-2117-6, 1997 WL 998323, * 3 (D.S.C. July 16, 1997)(holding that "averments of fraud must state the precise time and place of the fraud and the acts alleged to be fraudulent...substantiated with particulars"). Plaintiffs "are forbidden from 'grouping defendants together without specifying which defendant committed which wrong'" and are required instead to "set forth with particularity each defendant's culpable conduct." First Union, 128 F.Supp. 2d at 884.

Review of the Complaint reveals that Plaintiff failed to allege fraud with particularity. She has not alleged with specificity what representations were false, how these alleged misrepresentations induced her to enter the mortgage transaction, why her reliance on the misrepresentations were reasonable, or how these misrepresentations caused her damage.[12]

MOTION FOR SANCTIONS

On March 7, 2012, Defendant LaSalle filed a motion for sanctions pursuant to Fed. R. Civ. P. 11. This Defendant asks for dismissal of this action with prejudice, a pre-filing injunction banning Plaintiff from filing further action in federal court, and reasonable attorneys' fees incurred in defending Plaintiff's frivolous lawsuits. LaSalle contends that Plaintiff has a long history of abusing the state and federal judicial systems with her meritless and vexatious filings, that the current lawsuit is Plaintiff's ninth attempt at preventing or otherwise disputing the lawful foreclosure sale of the Property; Plaintiff has filed a total of seven bankruptcy actions in the United States Bankruptcy Court District of South Carolina admittedly as an attempt to save the Property and based on multiple improper filings, the United State Bankruptcy Court banned Plaintiff from filing any further actions

[12]To the extent Plaintiff requests declaratory relief in this action, such relief should be denied as Plaintiff fails to state a claim upon which relief can be granted.

for a period of one year; Plaintiff has filed additional state court actions as to other pieces of property; and Plaintiff includes baseless allegations in her current litigation including requesting criminal penalties against Defendant LaSalle. Plaintiff appears to argue that LaSalle's motion should be denied because she believed she had to file an action in Federal Court to address perceived unethical actions in state court and to assert her federal claims, she does not believe her claims are frivolous because she believes Defendants violated TILA, and she did not file this action to harass Defendants.

Although LaSalle details allegedly frivolous actions in other courts, it is unclear that any of her previous filings in this Court were frivolous[13] or that this pro se litigant has been warned of the consequences of filing such actions in this Court. It is, therefore, recommended that Defendant LaSalle's motion for sanctions be denied without prejudice. Plaintiff, however, is warned that filing future frivolous actions may result in appropriate sanctions against Plaintiff including any sanctions available under Fed. R. Civ. P. 11.

CONCLUSION

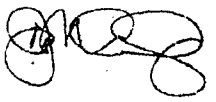
Based on the foregoing, it is recommended that Plaintiff's motions for entry of default (Docs. 20, 27, and 28) be **denied**; Defendant LaSalle's motion to dismiss (Doc. 21) be **granted**; and

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[13]Plaintiff filed one previous action in this court which was dismissed for lack of subject matter jurisdiction after the parties stipulated that the amount in controversy did not exceed the jurisdictional amount (Civil Action Nos. 3:96-cv-02840-MJP), another action was removed to this court by the defendant and later remanded to the state court (3:97-cv-01287-DWS), and she was named as a defendant in a foreclosure action (as the personal representative to the estate of Maxie Lee Thomas) instituted by the United States (3:05-cv-03322-JRM). Aloe Creme Laboratories, Inc. v. Francine Co., 425 F.2d 1295, 1296 (5th Cir. 1970) (This Court may take judicial notice of its own records.).

Defendant Ocwen's motion to dismiss (motion for judgment on the pleadings)(Doc. 61) be **granted.**

It is also recommended that Defendant LaSalle's motion for sanctions (Doc. 51) be **denied** without prejudice.



Joseph R. McCrorey
United States Magistrate Judge

August 9, 2012
Columbia, South Carolina

The parties' attention is directed to the important information on the attached notice.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, Plaintiff, vs. LaSalle Bank National Association, Trustee for Lehman Brothers Structured Asset Investment Loan Trust Sail 2005, Ocwen Federal Bank, a/k/a AltiSource Homes, Defendants.	C.A. No. 3:11-1686-MBS **ORDER AND OPINION**

Plaintiff Laura Toney ("Plaintiff") filed this action pro se against Defendants, LaSalle Bank National Association, Trustee for Lehman Brothers Structured Asset Investment Loan Trust Sail 2005 ("LaSalle"), and Ocwen Federal Bank a/k/a AltiSource Homes ("Ocwen") (collectively "Defendants"), alleging claims under the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1667f, arising out of a foreclosure action instituted against her by Defendants. (ECF No. 1.) Plaintiff also seeks a declaratory judgment and asserts state law claims for intentional infliction of emotional distress, deceptive and unfair trade practices, gross negligence, fraud, and fraudulent transfer. (Id.) This matter is before the court on Plaintiff's motions for entry of default against Defendants pursuant to Fed. R. Civ. P. 55(a); LaSalle's motion to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6), 8, and 9(b); Ocwen's motion to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6); and LaSalle's motion for sanctions against Plaintiff pursuant to Fed. R. Civ. P. 11. (ECF Nos. 20, 21, 27, 28, 51, 61.)

In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02 D.S.C., the matter was referred to United States Magistrate Judge Joseph R. McCrorey for pretrial handling. On August

Exhibit B

9, 2012, the Magistrate Judge issued a Report and Recommendation in which he recommended that the court deny Plaintiff's motions for entry of default, grant LaSalle's motion to dismiss, grant Ocwen's motion to dismiss, and deny LaSalle's motion for sanctions without prejudice. (ECF No. 79.) Plaintiff filed objections to the Report and Recommendation on August 22, 2012 and August 27, 2012, asking the court to reject the Magistrate Judge's recommendation. (ECF Nos. 81, 84.) For the reasons set forth below, the court adopts the Report and Recommendation of the Magistrate Judge, **GRANTS** the motions to dismiss of LaSalle and Ocwen, and **DENIES** LaSalle's motion for sanctions without prejudice and Plaintiff's motions for entry of default against LaSalle and Ocwen.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The facts in the complaint as viewed in the light most favorable to Plaintiff are discussed in the Report and Recommendation. The court concludes, upon its own careful review of the record, that the Magistrate Judge's factual summation is accurate. The court adopts this summary as its own, and will only reference facts pertinent to the analysis of Plaintiff's claims.

On October 6, 2004, Plaintiff refinanced her house located at 729 Chatman Street in Bishopville, South Carolina ("the Property"). (ECF No. 1-1, pp. 38, 43.) During the closing, Plaintiff entered into and received a mortgage which was secured by the Property. (Id.) On June 14, 2005, Plaintiff sent a letter to Ocwen stating her intention to rescind the loan due to the alleged occurrence of federal disclosure violations during the processing of the loan. (ECF No. 1-1, p. 1.) Plaintiff alleged that she was not provided any of the mandatory disclosures required by TILA prior to the closing. (Id.; see also ECF No. 1, p. 3.)

On or about July 21, 2005, LaSalle, which had been assigned the mortgage by Ocwen, filed a lis pendens and complaint against Plaintiff, captioned Lasalle Bank v. Laura Toney, Case

No. 2005-CP-31-169, in the Court of Common Pleas of Lee County, South Carolina (the "Lee County Court"), seeking foreclosure of Plaintiff's mortgage and sale of the Property. (ECF No. 1-1, pp. 3-11.) On October 19, 2005, Plaintiff alleges that LaSalle finally responded to her notice of rescission letter. (ECF No. 1, p. 5.) Thereafter, LaSalle filed a motion for summary judgment on March 29, 2006. (ECF No. 1-1, p. 34.)

On February 16, 2007, the Lee County Court held a foreclosure hearing in the absence of Plaintiff or her attorney.[1] (ECF No. 1-1, p. 35.) On March 15, 2007, the Lee County Court entered an order finding that LaSalle "should have judgment of foreclosure of the mortgage and the mortgaged property should be ordered sold at public auction after due advertisement" and, as a result, granted summary judgment in favor of LaSalle in the foreclosure action. (Id. at p. 40.) In support of the order granting summary judgment to LaSalle, the Lee County Court made the following findings of fact:

> The Defendant Laura Toney alleges that she rescinded the loan by letter dated June 12, 2005. Pursuant to Title 15 Section 1635 of the U.S. Code, the obligor in a real estate secured consumer credit transaction shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms. The loan closing occurred on October 6, 2004, at which time the Defendant was provided the information and rescission forms. (Affidavit of Michael May filed March 29, 2006; Affidavit of Letia Benjamin). The information and rescission forms are signed by the Defendant Laura Toney to acknowledge that she was provided a copy of each at closing. Therefore, the Defendant's counterclaim that she rescinded the loan is without merit on its face since it is well outside the time to rescind permitted by law.

(ECF No. 1-1, pp. 37-38.)

On March 22, 2007, Plaintiff filed an application for a temporary restraining order, preliminary injunction, and permanent injunction in the Lee County Court. (ECF No. 52-2, pp.

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1. Plaintiff alleges that her attorney at the time, Mr. David Weeks, was a member of the South Carolina General Assembly and could not be present because the General Assembly was in session. Plaintiff alleges that a request to reschedule the hearing was submitted on behalf of Mr. Weeks, but that the hearing was held as previously scheduled. (See ECF No. 52-2, pp. 1-2.)

8-13, 16-17.) On April 25, 2007, Plaintiff filed a motion for reconsideration of the foreclosure decision. (ECF No. 52-2, pp. 5-7.) On April 27, 2007, a notice of eviction was filed against Plaintiff and she was evicted from the Property shortly thereafter. (ECF No. 1-1, p. 49.) On May 7, 2007, the Property was sold at an auction to LaSalle. (Id. at pp. 45-47.) After the sale of the Property and the denial of her motions, Plaintiff filed an appeal with the South Carolina Court of Appeals. Plaintiff states that her foreclosure case is currently pending with the South Carolina Supreme Court. (ECF No. 76, p. 3; see also ECF No. 51-2, pp. 1-2.)

On July 13, 2011, Plaintiff filed in this court a "Complaint to Set Aside Fraudulent Transfer, and Fraud; Declaratory Judgment for Entry of Default[,] Gross Negligence[,] Emotional Distress[,] Deceptive and Unfair Trade Practices." (ECF No. 1.) Plaintiff alleges that she did not receive certain federal disclosures required by TILA at the time of her mortgage closing, including "choice of attorney notification, settlement statement, and good faith estimate." (Id. at p. 3.) Plaintiff alleges that Defendants' failure to make proper disclosures and failure to respond to her notice of rescission within twenty days resulted in Defendants losing their interest in the property. (Id. at p. 5.) Further, Plaintiff alleges that Defendants' failure to respond to her notice of rescission within twenty days had the effect of reinstating Plaintiff's interest in the property and relieving her obligations under the original loan. (Id. at pp. 5-8.) On July 13, 2011, Plaintiff filed a motion for a temporary injunction to enjoin Defendants from denying Plaintiff possession of the Property. (ECF No. 3.)

On October 7, 2011, LaSalle filed a motion to extend its time to file an answer until October 21, 2011, which motion was granted by the court on October 11, 2011. (ECF Nos. 16, 18.) On October 19, 2011, Plaintiff moved for entry of default against Ocwen. (ECF No. 20.) On October 21, 2011, LaSalle filed a motion to dismiss Plaintiff's complaint. (ECF No. 21.)

Plaintiff filed a second motion for entry of default against Ocwen on October 25, 2011. (ECF No. 27.) Additionally, on October 25, 2011, Plaintiff moved for entry of default against LaSalle. (ECF No. 28.) Plaintiff filed opposition to LaSalle's motion to dismiss on October 25, 2011, October 28, 2011, and November 2, 2011. (ECF Nos. 29, 30, 32.) On November 1, 2011, LaSalle filed opposition to Plaintiff's motion for entry of default. (ECF No. 31.) On December 28, 2011, Ocwen filed its answer to the complaint. (ECF No. 37.)

On February 27, 2012, the Magistrate Judge issued a Report and Recommendation in which he recommended denying Plaintiff's motion for temporary injunction, which recommendation was adopted by the court on March 22, 2012. (ECF Nos. 46, 57.) On March 7, 2012, LaSalle filed a motion for sanctions against Plaintiff, to which Plaintiff filed opposition on March 15, 2012. (ECF Nos. 51, 53.) On April 2, 2012, Plaintiff appealed the court's March 22, 2012 Order to the United States Court of Appeals for the Fourth Circuit. (ECF No. 62.) On April 6, 2012, Ocwen filed opposition to Plaintiff's motions for entry of default and a motion to dismiss the complaint.[2] (ECF Nos. 60, 61.) Plaintiff filed opposition to Ocwen's motion to dismiss on May 14, 2012. (ECF No. 76.)

Recently, on August 24, 2012, the Fourth Circuit affirmed the court's March 22, 2012 decision and issued the formal mandate of the court of appeals on September 17, 2012. (ECF Nos. 83, 89.)

II. LEGAL STANDARD AND ANALYSIS

A. Legal Standard

1. Magistrate Judge's Report and Recommendation

The Magistrate Judge makes only a recommendation to this court. The recommendation

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2. Ocwen did not file its motion to dismiss until after it filed its answer. The court agrees with the Magistrate Judge's analysis that Ocwen's motion to dismiss should be construed as a motion for judgment on the pleadings. (See ECF No. 79, p. 10.)

has no presumptive weight. The responsibility to make a final determination remains with this court. See Mathews v. Weber, 423 U.S. 261, 270-71 (1976). The court reviews de novo only those portions of a magistrate judge's report and recommendation to which specific objections are filed, and reviews those portions which are not objected to—including those portions to which only "general and conclusory" objections have been made—for clear error. Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005); Camby v. Davis, 718 F.2d 198, 200 (4th Cir. 1983); Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982). The court may accept, reject, or modify, in whole or in part, the recommendation of the magistrate judge or recommit the matter with instructions. See 28 U.S.C. § 636(b)(1).

2. Motions pursuant to Fed. R. Civ. P. 11

A pro se pleading is not subjected to the same scrutiny as one drafted by an attorney. Erickson v. Pardus, 551 U.S. 89, 94 (2007). Even pro se litigants, however, must follow the procedural rules of the court. Cox v. Deal, C/A No. 2:09-02715-DCN-BM, 2011 WL 3418397, at * 2 (D.S.C. Aug. 3, 2011). Rule 11 governs both attorneys and pro se litigants. Fed. R. Civ. P. 11.

Fed. R. Civ. P. 11(a) requires every pleading, written motion, or other paper to be signed by either the party's attorney, if represented, or the party itself, if the party proceeds without representation. See Fed. R. Civ. P. 11(a). By signing a filing, a party represents to the court and certifies "that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the filing is not "presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation," and "the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new

law." Fed. R. Civ. P. 11(b) (emphasis added). Rule 11(b)(3) requires that filings have a proper factual basis for each claim. See Fed. R. Civ. P. 11(b)(3).

Reasonableness of a filing party's actions under Fed. R. Civ. P. 11 involves an objective inquiry into the prefiling investigation. See In re Kunstler, 914 F.2d 505, 514 (4th Cir. 1990). Legal allegations fail the requirements of Fed. R. Civ. P. 11(b)(2) when there is "absolutely no chance of success under the existing precedent." Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 153 (4th Cir. 2002). In order to warrant sanctions, the legal position must be completely untenable, rather than merely unsuccessful. Id. at 151. The issue is whether a reasonable person under the same circumstances would have believed his or her actions to be legally justified. Id. at 153.

3. Motions pursuant to Fed. R. Civ. P. 12(b)(6)

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim should not be granted unless it appears certain that the plaintiff can prove no set of facts that would support her claim and would entitle her to relief. Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993). When considering a motion to dismiss, the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff. Ostrzenski v. Seigel, 177 F.3d 245, 251 (4th Cir. 1999); Mylan Labs., Inc., 7 F.3d at 1134. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, —— U.S. ——, ——, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The court must treat factual allegations of the nonmoving party as true. Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 217-18 (4th Cir. 1994).

Res judicata is an affirmative defense and is treated as a basis for dismissal under Fed. R.

Civ. P. 12(b)(6). See Davani v. Va. Dept. of Transp., 434 F.3d 712, 720 (4th Cir. 2006) (res judicata or claim preclusion challenge is to be considered pursuant to Rule 12(b)(6)); Andrews v. Daw, 201 F.3d 521, 524 n. 1 (4th Cir. 2000) (an affirmative defense such as res judicata may be raised under Rule 12(b)(6) "only if it clearly appears on the face of the complaint . . . ."). "Res judicata is applied to prevent the re-litigation of claims, and thus prevent the unsettling of a prior judgement, whether by increasing or decreasing the award or by reversing the result." Heckert v. Dotson, 272 F.3d 253, at 258 (4th Cir. 2001). "'For the doctrine of res judicata to be applicable, there must be: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or their privies in the two suits.'" Martin v. Am. Bancorp. Ret. Plan, 407 F.3d 643, 650 (4th Cir. 2005) (quoting Pueschel v. United States, 369 F.3d 345, 354–55 (4th Cir. 2004)). Further, res judicata not only "bar[s] claims that were raised and fully litigated," but also "'prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.'" Peugeot Motors v. E. Auto Distrib., 892 F.2d 355, 359 (4th Cir. 1989) (quoting Brown v. Felsen, 442 U.S. 127, 131 (1979)); see also Meekins v. United Transp. Union, 946 F.2d 1054, 1057 (4th Cir. 1991).

4. Motions pursuant to Fed. R. Civ. P. 55(a)

Rule 55(a) of the Federal Rules of Civil Procedure provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." Fed. R. Civ. P. 55(a). However, the clear policy of the Federal Rules of Civil Procedure is to discourage judgment by default and to encourage disposition of claims on their merits. Reizakis v. Loy, 490 F.2d 1132, 1135 (4th Cir. 1974)

B. Analysis

1. Plaintiff's Motions for Entry of Default

Plaintiff moves for entry of default against Defendants pursuant to Fed. R. Civ. P. 55(a). (See ECF Nos. 20, 27, 28.)

Upon his review, the Magistrate Judge recommended denying Plaintiff's motion for entry of default against LaSalle. Specifically, the Magistrate Judge found that LaSalle was served on September 19, 2011, and its answer would have been due on October 11, 2011[3], except that LaSalle received an extension from the court to file its answer on or before October 21, 2011. (ECF No. 79, p. 5 (citing ECF Nos. 17, 18).) The Magistrate Judge further found that the Fed. R. Civ. P. 12 motion to dismiss that LaSalle filed on October 21, 2011 was timely, and therefore Plaintiff's motion for entry of default against LaSalle is without merit. (Id. (citing ECF No. 21))

The Magistrate Judge also recommended denying Plaintiff's motion for default against Ocwen because Plaintiff has not shown that Ocwen was properly served or that the correct entity was named in the complaint. (Id. at p. 6.) In making this recommendation, the Magistrate Judge found convincing Ocwen's arguments that "its answer was filed prior to entry of default; Ocwen Loan Servicing, the proper party to this suit, is a wholly different entity from 'Ocwen Federal Bank,' and thus alleged service on 'Ocwen Federal Bank' did not constitute service on Ocwen Loan Servicing; even if Plaintiff had named an existing entity called 'Ocwen Federal Bank,' service of process was not properly effected pursuant to applicable law; entry of judgment by default is a drastic remedy which should be used only in extreme situations; and entry of default judgment against the non-existent 'Ocwen Federal Bank' should not be granted because it is a nullity." (Id.)

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3. The Magistrate Judge observed that October 10, 2011 was a federal holiday, Columbus Day. (ECF No. 79, p. 5.)

In her objections to the Magistrate Judge's recommendation, Plaintiff implies that the Magistrate Judge findings are wrong because Ocwen (1) was served by mail on September 12, 2011 (with a certified return receipt showing service on September 15, 2011), (2) failed to answer the complaint within twenty-one days as required by the federal rules, (3) failed to request an extension of time prior to the expiration of the answer deadline, and (4) filed an untimely answer eighty-five days after service. (ECF No. 84, pp. 4, 6-7, 19, 24.) Plaintiff further implies that the Magistrate Judge erred by not having awareness of Defendants' failure to file motions to set aside the default. (Id. at p. 7.)

In accordance with the preference that "defaults be avoided and that claims and defenses be disposed of on their merits," the court agrees with the Magistrate Judge that entry of default should not be made against either Ocwen or LaSalle. The timely filing of a Fed. R. Civ. P. 12 motion to dismiss by LaSalle and the failure of Ocwen to be properly served are appropriate reasons within the court's discretion to not enter default. U.S. ex rel. Knight v. Reliant Hospice, Inc., C/A No. 3:08–03724–CMC–JRM, 2011 WL 6130539, at *1 (D.S.C. Nov. 8, 2011) (In deciding whether to direct that entry of default be made as to a party, a district court must exercise "sound discretion."). Accordingly, the court denies Plaintiff's motion for entry of default against Defendants.

2. LaSalle's Motion for Sanctions

LaSalle moves pursuant to Fed. R. Civ. P. 11 for dismissal of Plaintiff's action with prejudice, a pre-filing injunction banning Plaintiff from filing further actions in federal court, and reasonable attorneys' fees incurred in defending against Plaintiff's frivolous lawsuits. (ECF No. 51, p. 1.) LaSalle contends that (1) Plaintiff has a long history of abusing the state and federal judicial systems with her meritless and vexatious filings, (2) the current lawsuit is

Plaintiff's ninth attempt at preventing or otherwise disputing the lawful foreclosure sale of the Property, (3) Plaintiff has filed a total of seven bankruptcy actions in the United States Bankruptcy Court for the District of South Carolina admittedly as an attempt to save her property, (4) the United States Bankruptcy Court for the District of South Carolina banned Plaintiff from filing any further actions for a period of one year, (5) Plaintiff has filed additional state court actions as to other pieces of property, and (6) Plaintiff includes baseless allegations in her current litigation, including requesting criminal penalties against LaSalle. (Id. at pp. 2-10.)

Upon his review, the Magistrate Judge recommended denying LaSalle's motion for sanctions without prejudice. (ECF No. 79, p. 24.) The Magistrate Judge concluded that, notwithstanding LaSalle's details of allegedly frivolous actions filed by Plaintiff in other courts, a finding of frivolousness could not be made regarding any of Plaintiff's previous filings in this court and Plaintiff lacked receipt of a warning regarding the consequences of filing frivolous actions in this court. (Id.) In this regard, the Magistrate Judge did advocate warning Plaintiff that filing future frivolous actions may result in appropriate sanctions against Plaintiff including any sanctions available under Fed. R. Civ. P. 11. (Id.)

LaSalle did not file objections to the Magistrate Judge's recommendation that its motion for sanctions be denied. In the absence of specific objections to the report of the Magistrate Judge, the court is not required to give any explanation for adopting the recommendation. See Camby v. Davis, 718 F.2d 198, 199 (4th Cir.1983). Accordingly, the court agrees with the Magistrate Judge that LaSalle's motion for sanctions should be denied.

3. Defendants' Motions to Dismiss

LaSalle moves to dismiss Plaintiff's complaint asserting that (1) Plaintiff's claims are barred by res judicata; (2) the complaint fails to state a claim upon which relief can be granted;

(3) the complaint fails to state a plausible cause of action; and (4) the Complaint fails to plead fraud with the required specificity. (ECF No. 21-1.) Ocwen contends that it is entitled to dismissal because (1) the complaint fails to meet the minimum federal pleading standard; (2) Plaintiff's claims are barred by res judicata; (3) Plaintiff failed to rescind the note within three days of her closing date such that her right to rescind is time barred; (4) Plaintiff failed to file a rescission action within three years of the closing date such that her rescission action is time barred; (5) Plaintiff is not entitled to recover for emotional distress; (6) Plaintiff fails to state a claim for deceptive and unfair practices; (7) Plaintiff fails to state a claim for gross negligence; (8) Plaintiff fails to plead fraud or fraudulent transfer with the specificity required, and (9) Plaintiff fails to state a valid claim for declaratory judgment. (ECF No. 61-1.)

a. *Res Judicata*

Defendants contend that this action is barred by the doctrine of res judicata. (ECF Nos. 21-1, pp. 5-7; 61-1, pp. 7-9.) Plaintiff argues that this action is not barred because her action in state court is on appeal such that there is no final judgment and res judicata does not apply. (ECF No. 76, p. 3.)

Upon his review, the Magistrate Judge concluded that res judicata bars this action as all three elements of the test for res judicata have been met. (ECF No. 79, p. 12.) The Magistrate Judge specified that to establish res judicata, a defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. (Id. (citing Riedman Corp. v. Greenville Steel Structures, Inc., 419 S.E.2d 217, 218 (S.C. 1992)) In this regard, the Magistrate Judge found that Plaintiff did not dispute that the first two elements were met. (Id.) Further, the third element was met because the judge in the state court action granted the motion for summary judgment, which satisfies the

requirement of an adjudication on the merits of the case, and the South Carolina Court of Appeals affirmed the state court's decision. (Id. at p. 13.) Alternatively, the Magistrate Judge recommended dismissing the action against Defendants because the court should not interfere with the ongoing state proceedings. (Id. at p. 14 (citing Bellotti v. Baird, 428 U.S. 132, 143 n. 10 (1976) (recognizing that abstention may be raised sua sponte)).) Based on the foregoing, the Magistrate Judge recommended granting Defendants' motions to dismiss the complaint.

In her objections to the Magistrate Judge's recommendation, Plaintiff asserts that res judicata does not apply to this matter because her state court case is still pending without a final determination having been made. (ECF No. 84, p. 15.) Plaintiff argues that this case clearly does not satisfy all the elements to establish res judicata "because the judgment is not final" and she has not been "given full and fair opportunity to be heard on the issue." (Id. at p. 16.)

The court agrees with the Magistrate Judge that the three elements of res judicata are clearly present. First, a final judgment has been entered on the merits against Plaintiff in at least two prior civil actions, Lasalle Bank v. Laura Toney, Case No. 2005-CP-31-169 and Laura A. Toney v. Ocwen Federal Bank, Case No. 2010-CP-31-180. (See ECF Nos. 1-1, pp. 34-43; 51-3, pp. 1-6.) See also Shoup v. Bell & Howell Co., 872 F.2d 1178, 1181 (4th Cir. 1989) (noting that grants of summary judgment are considered "on the merits" for the purposes of res judicata). Second, the allegations contained in the instant complaint stem from the same set of facts that gave rise to Plaintiff's claim for relief in Case No. 2005-CP-31-169 and Case No. 2010-CP-31-180, i.e., Defendants' entitlement to foreclosure of the Property versus Plaintiff's attempt to prevent the foreclosure of the Property. (Id.) Finally, the parties in this matter are the same entities as the ones in the prior foreclosure matters. (Id.) Based on the foregoing, Plaintiff is not entitled to maintain her action in this court because her issues have been raised and litigated in

prior actions. Accordingly, Defendants are entitled to dismissal of the complaint against them based on res judicata.

b. Defendants' Other Arguments in support of Dismissal

As this court finds that the instant action is barred by res judicata, it is unnecessary to address Defendants' remaining arguments in support of dismissal.

III. CONCLUSION

For the foregoing reasons, the court hereby **GRANTS** the motions to dismiss Plaintiff's complaint of LaSalle and Ocwen. (ECF Nos. 21, 61.) The court further **DENIES** LaSalle's motion for sanctions without prejudice and Plaintiff's motions for entry of default. (ECF Nos. 20, 27, 28, 51.) The court adopts the Magistrate Judge's Report and Recommendation and incorporates it herein by reference.

IT IS SO ORDERED.

/s/Margaret B.Seymour
Margaret B. Seymour
Chief United States District Judge

September 25, 2012
Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DICTRICT OF SOUTH CAROLINA
COLUMBIA

Laura Toney,

Plaintiff,

Case: 3:13-cv-03481

Vs.

LaSalle Bank National Association
As Trustee for the Registered Holders
Of Structured Asset Securities
Corporation, Structured Asset Investment
Loan Trust, Mortgaged Pass-Through
Certificates, Series 2004-11, AltiSource
Homes, Pro Capital Investors, Wayne
Capell, Lee County Treasure and
Lee County Planning and Zoning

Defendants.

MOTION TO STRIKE DEFENDANTS MR. WAYNE CAPELL, LEE COUNTY TREASURER AND LEE COUNTY PLANNING AND ZONING MOTION TO DISMISS

The Plaintiff respectfully requests that Mr. Wayne Capell, Lee County Treasurer, and Lee County Planning and Zoning are striked because of the following:

1. The Defendants were served on November 13, 2013, with the summon and complaint.

2. The Defendants failed to answer within the mandatory (30) days. The Defendants also filed a Motion to Dismiss with the Lee County Clerk of Court on December 20, 2013, which was also untimely. The Plaintiff filed a Reply to the Defendants' Motion to Dismiss on December 10, 2013, with the Lee County Clerk of Court.
3. The Defendants failed to claim any of the defenses in their answer on November 20, 2013, with the Lee County Clerk of Court and has waived any of the defenses under Rule 12(b).
4. The Defendants are attempting to file an additional answer with the South Carolina District Court.
5. The Defendants also failed to file a Notice or Consent to Removal.. The Defendants LaSalle Bank and AltiSourceHomes' failure to obtain the consent before removal of its co-defendants as required by the federal removal statute 28 U.S.C. §1441(a). constitutes a defect in the Defendants removal. Another defect in the removal notice is its failure to comply with the rule of unanimity. Section 1446 requires the unanimous consent of *all* defendants to the removal. *Loftis v.* U.S. Parcel *Serv., Inc.*, 342 F.3d 509, 516 (6th Cir. 2003). Therefore, all defendants who have been served must either join in the removal or file their written consent to the removal. *Ibid.* The petition that fails to explain the absence of co-defendants' consent to the removal is equally defective for violating the rule of unanimity. *See Northern Illionois Gas Co. v. Airco Industrial Gases*, 676 F.2d 270, 273(7th Cir. 1982); *Shadley v. Miller*, 733 F. Supp.

54, 55-56 (E.D. Mich. 1990). Pro Capital Investors was served on November 18, 2013, but failed to consent to the removal filed by Mr. Finkel on December 13, 2013. Mr. Finkel made false representation to the court that all defendants consented to the removal. Pro Capital Investors filed a Notice of Removal on December 31, 2013, which is (43) days since the date of service of complaint. Mr. Finkel has committed fraud on the court in his Notice of Removal.

False representation means a false or wrongful representation regarding a material fact with the knowledge or belief of its inaccuracy. False representation depends upon the peculiar circumstances and conditions involved in each case. False representation is the most common foundation for actions in fraud and deceit and grounds for equitable relief on the ground of fraud. The Plaintiff believes that the Defendants claims should be barred by "equitable estoppel."

Rule 11 does not authorize one party to make representations or file pleadings on behalf of another. Rather, Rule 11 requires that each pleading, motion, or other paper submitted to the court be signed by the party or its attorney of record, if represented. [Certain defendants who failed to sign personally the removal papers] are represented by counsel and clearly are "movants" subject to the requirements of Rule 11.

6. The defendants argued that this court has original jurisdiction under 28 U.S.C. §§ 1331 & 1343, and that this civil action may be removed under 28U.S.C. §§ 1441 &1443. The Defendants is attempting to mislead the court. The Plaintiff's Complaint filed in Lee County does not have anything to do with **Federal Question Jurisdiction**. The Plaintiff's complaint deals with property located in Lee County that was illegally partitioned by the Lee County Treasurer without a court order. It also has to do with a plat that was erroneously drawn by the Land and Zoning of Lee County.

7. The Defendant also claimed fraudulent joinder in order to defeat diversity of Lee County Treasurer, Mr. Wayne Capell and Lee County Planning and Zoning. The burden of establishing fraudulent joinder is a heavy one. A defendant seeking to prove fraudulent joinder must demonstrate by clear and convincing evidence either that: "(1) there is no possibility the plaintiff can establish a cause of action against the resident defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court." Henderson v. Washington Nat. Ins. Co., 454 F.3d 1278, 1281 (11th Cir. 2006) (quoting Crowe v. Coleman, 113)."A plaintiff typically may choose its own forum, but it may not join a nondiverse defendant simply to destroy diversity jurisdiction." *Schur v. L.A. Weight Loss Centers, Inc.* 577 F.3d 752, 763 (7th Cir. 2009). *See also*

Gottlieb v. Westin Hotel Co., 990 F.2d 323, 327 (7th Cir.1993)(collecting cases). "The 'fraudulent joinder' doctrine, therefore, permits a district court considering removal "to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and there by retain jurisdiction." *Schur*, 577 F.3d at 763.In the context of jurisdiction, "fraudulent" is a term of art. *See Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir.1992). "Although false allegations of jurisdictional fact may make joinder fraudulent ... in most cases fraudulent joinder involves a claim against an in-state defendant that simply has no chance of success whatever the plaintiff's motives." *Id.*(collecting cases). To prove fraudulent joinder, the out-of-state defendant must "show there exists no 'reasonable possibility that a state court would rule against the [in-state] defendant,' " *Schwartz v. State Farm MutualAuto. Ins. Co.*, 174 F.3d 875, 878 (7th Cir.1999) (citing Poulos, 959 F.2d at73)). The defendant bears a heavy burden in this regard. *Id. See also Schur*, 577 F.3d at 764 (in a fraudulent joinder analysis, the "district court must ask whether there is 'any reasonable possibility' that the plaintiff could prevail against the non-diverse defendant").4 *This* burden can be met by introducing uncontradicted evidence. *See Faucett v. Ingersoll-Rand Mining & Machinery Co.*, 960 F.2d 653, 655 (7th Cir.1992) (where uncontradicted affidavit of the non-diverse defendant attesting to facts showing that the plaintiff could not establish a cause of action against him under South

Carolina law was sufficient to establish fraudulent joinder). The Defendant failed to prove fraudulent joinder in its Motion for Summary Judgment. **The Defendants also failed to prove fraudulent joinder in its Summary Judgment by introducing evidence to that effect.**

8. The Defendants LaSalle Bank and AltiSourceHomes were served the Complaint on November 14, 2014, and had (30) days to answer. The Defendants filed a Summary Judgment on December 20, 2013, which was not timely filed. The Defendant Pro Capital Investors was served November 18, 2013, but failed to file a timely answer or Notice of Removal. Mr. Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning were served on November 13, 2013, but failed to answer in a timely manner.

For the aforementioned reasons, the Plaintiff respectfully requests:

1. That the Defendant's Motion to Dismiss AND Notice of Removal are striked; and declared moot with prejudice;
2. That the case is remanded back to state court;
3. Sanctions are imposed on the Defendants for fraud and misrepresentation on the Court;.

4. That the Defendants' claims are barred by "Equitable Estoppel" for Fraud and misrepresentation on the Court; **AND**

5. That the Plaintiff is awarded costs of this action.

January 13, 2014

Laura Toney
P.O. Box 722
Bishopville, SC 29010
(803) 459-6006

Finkel Law Firm, LLC
P.O. Box 41489
4000 Faber Place
Suite 450
Charleston, SC 29405

Stuckey, Fata,& Segars, LLC
P.O. Box 568
Bishopville, SC 29010

Pro Capital Investors
50 South 16th Street, Suite 1950
Philadelphia, PA 19102

IN THE UNITED STATES DISTRICT COURT
FOR THE DICTRICT OF SOUTH CAROLINA
COLUMBIA

Laura Toney,

Plaintiff,

Case: 3:13-cv-03481

Vs.

LaSalle Bank National Association
As Trustee for the Registered Holders
Of Structured Asset Securities
Corporation, Structured Asset Investment
Loan Trust, Mortgaged Pass-Through
Certificates, Series 2004-11, AltiSource
Homes, Pro Capital Investors, Wayne
Capell, Lee County Treasure and
Lee County Planning and Zoning

Defendants.

MOTION TO STRIKE DEFENDANTS MR. WAYNE CAPELL, LEE COUNTY TREASURER AND LEE COUNTY PLANNING AND ZONING MOTION TO DISMISS

CERTIFICATE OF SERVICE

The Plaintiff certifies that she served a copy of the Motion to Strike Defendants Mr. Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning via United States Postal Service on January 13, 2014, to the Defendants below.

January 13, 2014

Laura Toney
P.O. Box 722

Bishopville, SC 29010
(803) 459-6006

Finkel Law Firm, LLC
P.O. Box 41489
4000 Faber Place
Suite 450
Charleston, SC 29405

Stuckey, Fata,& Segars, LLC
P.O. Box 568
Bishopville, SC 29010

Pro Capital Investors
50 South 16th Street, Suite 1950
Philadelphia, PA 19102
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P.O. Box 722
Bishopville, SC 29010
(803) 459-6006

Finkel Law Firm, LLC
P.O. Box 41489
4000 Faber Place
Suite 450
Charleston, SC 29405

Stuckey, Fata,& Segars, LLC
P.O. Box 568
Bishopville, SC 29010

Pro Capital Investors
50 South 16th Street, Suite 1950
Philadelphia, PA 19102

STUCKEY, FATA & SEGARS, LLC

PAUL M. FATA
paulmfata@sfslawfirm.com

ATTORNEYS AT LAW
115 EAST CHURCH STREET
POST OFFICE DRAWER 568
BISHOPVILLE, SOUTH CAROLINA 29010

(803) 484-5409
Fax: (803) 484-9239

JAMES R. SEGARS, JR.
jsegars@sfslawfirm.com

George M. Stuckey
(1924-1995)

December 19, 2013

Ms. Laura Toney
Post Office Box 722
Bishopville, South Carolina 29010

RE: Laura Toney vs. LaSalle Bank Nation Association, et al
2013-CP-31-321

Dear Ms. Toney:

Please find enclosed herewith a copy of the Motion and Order Information Form and Coversheet, 12B Motion and Certificate of Service regarding the above captioned matter which I hereby serve upon you by mail.

Thank you kindly.

Yours very truly,

STUCKEY, FATA & SEGARS, LLC

Paul M. Fata

PAUL M. FATA

PMF:boh
Enclosures

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEE	)	
	)	
Laura Toney.	)	CASE NO.
☐ Plaintiff	)	2013-CP-31-147
	)	
v.	)	MOTION AND ORDER INFORMATION
	)	FORM AND COVER SHEET
Lasalle Bank National Association, Et Al	)	
☒ Defendant.	)	

Plaintiff's Attorney:	Defendant's Attorney:
Pro Se, Bar No.	Paul M. Fata , Bar No. 01966
Address:	Address:
	Post Office Drawer 568, Bishopville, SC 29010
phone: fax:	phone: (803) 484-5409 fax: (803) 484-9239
e-mail: other:	e-mail: paulmfata@sfslawfirm.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: 12 B Motion
Estimated Time Needed:15 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐Plaintiff / ☒Defendant — December 19, 2013 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: 25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE:

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE THIRD JUDICIAL CIRCUIT
COUNTY OF LEE)	2013-CP-31-321
)	
Laura Toney,)	
)	
PLAINTIFF)	
-vs-)	**12 B (6) MOTION**
)	
LaSalle Bank National Association, as Trustee)	
For Registered Holders of Structured Assets)	
Securities Corporation, Structured Asset)	
Investment Loan Trust, Mortgage Pass-)	
Through Certificates, Series 2004-11, Altisource)	
Homes, Pro Capital Investors, Wayne Capell,)	
Lee County Treasurer and Lee County)	
Planning and Zoning.)	
)	
DEFENDANTS)	
)	

TO: LAURA TONEY, PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that Defendant Wayne Capell, Lee County Treausrer and the Lee County Planning and Zoning, through its undersigned attorney, will move before this Court on the tenth day after filing of this Motion or as soon thereafter as they may be heard for an Order dismissing Defendant Capell and the Lee County Planning and Zoning for failing to state facts sufficient to constitute a cause of action pursuant to Rule 12 B (6) of the South Carolina Rules of Civil Procedure.

STUCKEY, FATA AND SEGARS, LLC

Bishopville, S.C.

December 19, 2013

BY: _____

PAUL M. FATA
ATTORNEY FOR DEFENDANT CAPELL AND
LEE COUNTY PLANNING & ZONING
115 E. CHURCH STREET
POST OFFICE DRAWER 568
BISHOPVILLE, S.C.29010
(803) 484-5409 FAX: (803) 484-9239
Email: paulmfata@sfslawfirm.com

STATE OF SOUTH CAROLINA COUNTY OF LEE Laura Toney, PLAINTIFF -vs- LaSalle Bank National Association, as Trustee For Registered Holders of Structured Assets Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource) Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning. DEFENDANTS	IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT 2013-CP-31-321 **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she is a secretary for the law firm of Stuckey, Fata and Segars, LLC; that a copy of the foregoing Motion and Order Information Form and Coversheet and 12B Motion was served upon the following by depositing same in the United States Mail with sufficient postage affixed thereto and return address clearly visible on the 19th day of December, 2013, pursuant to Rule 5 of the South Carolina Rules of Civil Procedure addressed to the following:

Ms. Laura Toney
Post Office Box 722
Bishopville, South Carolina 29010

Barbara O. Hancock
BARBARA O. HANCOCK

THE STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

COUNTY OF LEE

Laura Toney
Plaintiff,

v.

CASE NO: 2013-CP- 321

LaSalle Bank National Association
As Trustee for the Registered
Holders of Structured Asset
Securities Corporation, Structured
Asset Investment Loan Trust, Mortgage
Pass-Through Certificates, Series 2004-11,

COMPLAINT
FOR RECOVERY OF REAL PROPERTY

(JURY TRIAL DEMANDED)

A/K/A
AltiSource Homes
Address: P.O. Box 24237
West Palm Beach, Florida 33416-4737
And
12650 Ingenuity Drive
Orlando, Florida 32826
C/O Hunoval Law Firm
501 Minuet Lane
Suite 104A
Charlotte, North Carolina 28217

Pro Capital Investors
50 South 16th Street
Suite 1950
Philadelphia, Pa 19102

Wayne Capell, Lee County Treasurer
Lee County Planning and Zoning.

DEFENDANTS.

REPLY TO DEFENDANTS' MOTION TO DISMISS

Pursuant South Carolina Rules of Civil Procedures, the Plaintiff is requesting that the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning motion to dismiss is denied based on the following:

Both Defendants were served the Summon and Complaint on November 13, 2013. According to Rule 12 of the SCRCP, the Defendants had thirty (30) days to file an answer, but failed to do so A defendant shall serve his answer within 30 days after the service of the complaint upon him, unless the Court directs otherwise when service of process is made pursuant to Rule 4(e). A civil lawsuit begins by the plaintiff, or person filing the lawsuit, filing a summons and complaint with the appropriate court. Both the summons and complaint are then served on the defendant. The defendant must then answer the summons and complaint or risk a default judgment being entered against him or her. An answer must be in writing and filed with the court and the defendant within the statutory time frame allotted in the summons. The answer must address each allegation in the complaint and must contain any affirmative defenses.

A default judgment is conclusive and binding on the parties. If a default judgment is entered against a defendant (the person being sued in a lawsuit), the defendant can't later try to deny or fight the claims made in the lawsuit. A defendant is required to respond to a complaint that has been filed by the plaintiff (the person suing) within the time period set by law (usually 30 days). If the defendant fails to file a timely answer, the plaintiff can ask the court to enter a default judgment. If the plaintiff presents evidence supporting the claims contained in the complaint, the court can render a default judgment against the defendant.

"[A] party has a duty to monitor the progress of his case. "It is always a matter of regret that a party should not have his day in court. However, . . . [where] the defendant was duly served with the summons and complaint, [i]t was his duty to answer the complaint . [Therefore,] [h]e must suffer the consequence of his failure to answer." **Williams v. Ray, 232 S.C. 373, 383-84, S.E. 467 (1933)** (refusing to vacate a default judgment on the ground of excusable neglect where the defendant in an automobile collision case forwarded the summons to his insurance carrier which then failed to serve notice of appearance until after the plaintiff had obtained judgment).

The Defendant failed to answer the Complaint in a timely manner. The Defendant also failed to mention any of the Defenses in Federal Rule 12(b) in a

timely manner The Defendants filed a Motion to Dismiss on December 20, 2013, claiming defenses in 12(b). The (7) challenges that Rule 12(b) specifically allows to be made by preliminary motion are the following:

1. Lack of subject-matter jurisdiction;
2. Lack of personal jurisdiction;
3. Improper venue;
4. Insufficient process;
5. Insufficient service of process;
6. Failure to state a claim upon which relief can be granted; and
7. Failure to join a party under Rule 19.

A Defendant wishing to raise any one of these seven challenges has two options. Option one is to raise any and all of the defenses in the answer. "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required." Fed R. Civ. P. 12(b). The answer in the responsive pleading required to the complaint. Fed. R. Civ. P. (7)a. Option two is to raise any and all of these defenses in a preliminary motion, one made before the answer is pleaded. A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed." Fed. R. Civ. P. 12(b). The party may join all motions under Rule 12 into a single motion. Fed. R. Civ. P. 12(g)(1).

Those are the only two options: A defendant who brings a preliminary motion to dismiss that asserts fewer than all of the defenses and later attempts to assert an additional Rule 12(b) defense for the first time in the answer will waive it. Similarly, a defendant cannot make successive preliminary motions to dismiss; one is the quota allowed:

> Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

Fed. R. Civ. P. 12(g)(2).

All of the seven grounds for dismissal found in Federal 12(b) are threshold issues that can and should be disposed of before the parties and the court proceed to the work if deciding the merits of the case. With the exception of dismissal for failure to state a claim upon which relief can be granted, all of the grounds for dismissal are separable from the merits. With the exception of dismissal for failure to join a Rule 19 and failure to state a claim, all of the grounds for dismissal render the court powerless to act in the case because of a defect in jurisdiction, venue, or service of process. In the Defendants Motion to Dismiss filed December 20, 2013,, they claimed defenses in 12(b). By requiring defendant to assert these defenses early-either in preliminary motion or no later than the answer-the rules prevent defendant from laying in the weeds and springing such a ground for dismissal on plaintiff later should progress in the litigation not be favorable to defendants.

For the aforementioned reasons, the Plaintiff respectfully requests that the Defendants motion to dismiss is denied.

December 30, 2013

Laura Toney
P.O. Box 722
Bishopville, SC 29010
(803) 459-6006

CERTIFICATE OF SERVICE

The Plaintiff, Laura Toney certifies that she mailed a copy of the Plaintiff Reply to the Defendants' Motion to Dismiss via United States Postal Service on December 30, 2013 to Stuckey,Fata, & Segars,LLC addressed as follows: P.O. Box Drawer 568, Bishopville, SC 29010.

December 30, 2013

Laura Toney
P.O. Box 722
Bishopville, SC
29010

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

HUNOVAL Law Firm
501 Minuet Lane
Suite 104A
Charlotte, NC
28217

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name) Audrey McLaughlin C. Date of Delivery 11/14/13

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☐ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) EH 191501393 US

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-15

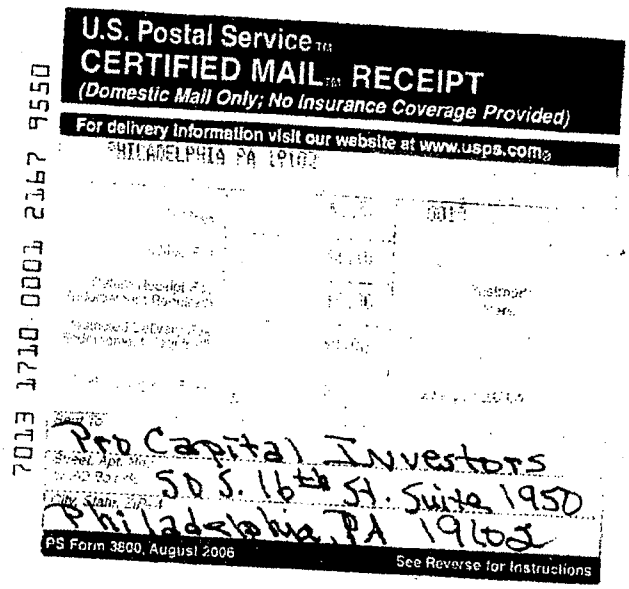
UNITED STATES POSTAL SERVICE

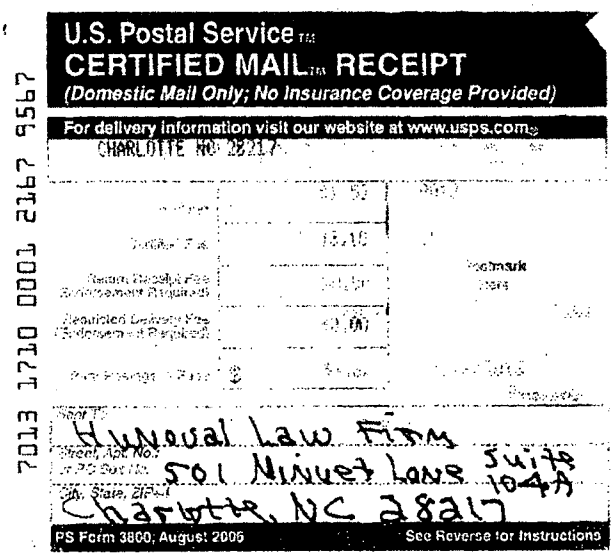
First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4 in this box •

Laura Toney
P.O. Box 722
Bishopville, SC
29010

9501 0072222


U.S. Postal Service
CERTIFIED MAIL RECEIPT
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For delivery information visit our website at www.usps.com
PHILADELPHIA PA 19102
7013 1710 0001 2167 9550
Pro Capital Investors
50 S. 16th St. Suite 1950
Philadelphia, PA 19102
PS Form 3800, August 2006
See Reverse for Instructions


U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com
CHARLOTTE NC 28217
7013 1710 0001 2167 9567
Kinneal Law Firm
501 Ninnet Lane Suite 104A
Charlotte, NC 28217
PS Form 3800, August 2006
See Reverse for Instructions

USPS Tracking™



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Have questions? We're here to help.

Tracking Number: **70131710000121679560**

Expected Delivery Date: **November 16, 2013**

Product & Tracking Information

Postal Product:
First-Class Mail®

Features:
Certified Mail™

Available Options

November 16, 2013, 4:31 pm	Delivered	PHILADELPHIA, PA 19102
November 16, 2013, 10:31 am	Out for Delivery	PHILADELPHIA, PA 19104
November 16, 2013, 10:21 am	Sorting Complete	PHILADELPHIA, PA 19104
November 16, 2013, 5:18 am	Arrival at Unit	PHILADELPHIA, PA 19104
November 14, 2013, 11:48 pm	Processed through USPS Sort Facility	PHILADELPHIA, PA 19176
November 14, 2013	Depart USPS Sort Facility	PHILADELPHIA, PA 19176
November 14, 2013	Depart USPS Sort Facility	COLUMBIA, SC 29201
November 13, 2013, 7:56 pm	Processed at USPS Origin Sort Facility	COLUMBIA, SC 29201
November 13, 2013, 3:46 pm	Dispatched to Sort Facility	BISHOPVILLE, SC 29010
November 13, 2013, 9:58 am	Acceptance	BISHOPVILLE, SC 29010

Track Another Package

What's your tracking (or receipt) number?

Track It

Product Tracking System

Pro Capital Investors

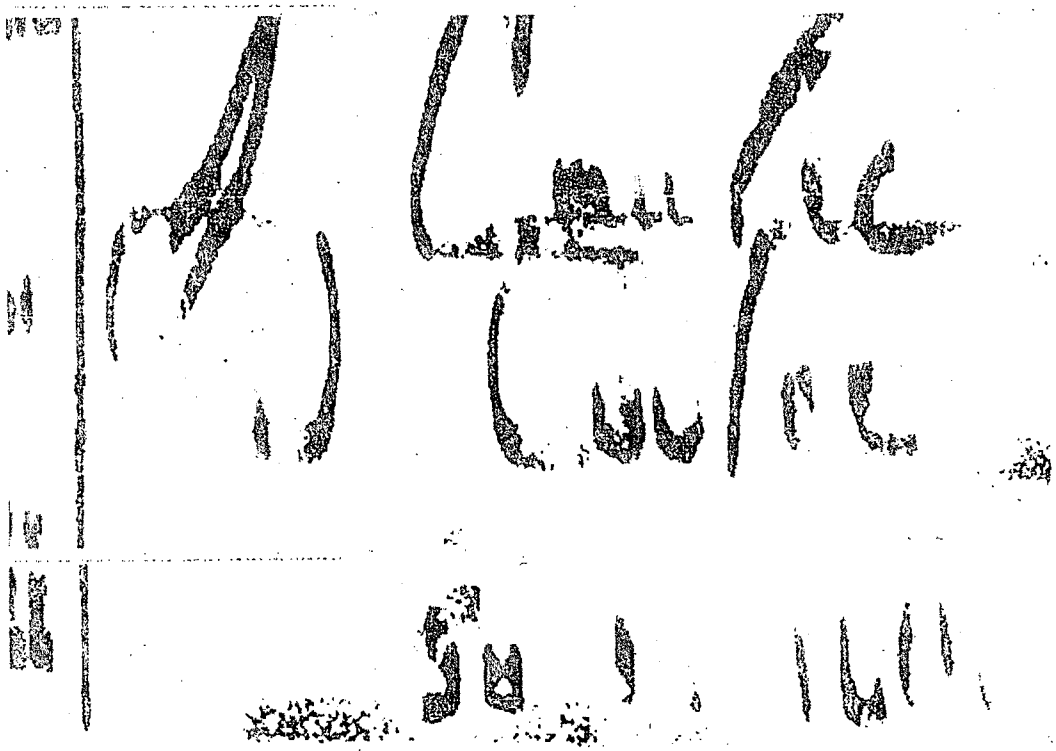
Track & Confirm Intranet

Delivery Signature and Address

Tracking Number: 7013 1710 0001 2167 9550

This item was delivered on 11/18/2013 at 16:31:00

< Return to Tracking Number View



Enter up to 10 items separated by commas.

AFFIDAVIT-HAND DELIVERY

State of South Carolina

County of Lee

Before me the undersigned authority, personally appeared November 13, 2013, who after being sworn, deposes and says that he/she:

Hand Delivered the Summon, Complaint and Lis Pendens to Mr. Wayne Capell, Lee County Treasurer.

On this 13 day of Nov. 2013.

By: Laura Toney

The foregoing instrument was acknowledged before me this 13 Nov 2013, by Laura Toney, who has produced Driver's License as identification and who did take an oath.

Prepared By:

NOTARY PUBLIC OF

SOUTH CAROLINA

My Commission Expires:

AFFIDAVIT-HAND DELIVERY

State of South Carolina

County of Lee

Before me the undersigned authority, personally appeared November 13, 2013, who after being sworn, deposes and says that he/she:

Hand Delivered the Summon, Complaint and Lis Pendens to Ms. Arlene Samuels for the Lee County Planning and Zoning.

On this 13 day of Nov 2013.

By: Laura Toney

The foregoing instrument was acknowledged before me this 13 Nov 2013, by Laura Toney, who has produced Driver's License as identification and who did take an oath.

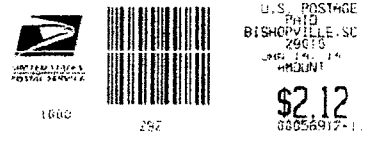
Prepared By:

NOTARY PUBLIC OF

SOUTH CAROLINA

My Commission Expires:

RECEIVED
USDC CLERK, COLUMBIA, SC
2014 JAN 15 PM 1:21



P.O. Box 723
Bishopville, SC 29010

South Carolina Dept. of Corr.
901 Richland Street
Columbia, SC 29201

11414

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, Plaintiff, vs. LaSalle Bank National Association as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, Defendants.	)	Civil Action No. 3:13-cv-03481-MBS-SVH

DEFENDANT'S AMENDED MOTION TO DISMISS AND MOTION FOR SANCTIONS

The Defendant U.S. Bank, National Association, as Trustee for Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 (hereinafter "U.S. Bank"), incorrectly named on page one of the Complaint as "LaSalle Bank National Association as Trustee for Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, A/K/A AltiSource Homes" (hereinafter "LaSalle Bank"), by and through undersigned counsel, and hereby files this its Motion to Dismiss and Motion for Sanctions pursuant to Rules 12(b)(4), 12(b)(5), and 12(b)(6) and Rule 11 of the Federal Rules of Civil Procedure:

1. Plaintiff has a long history of filing frivolous claims against Defendant.

2. On March 15, 2007, the South Carolina Court of Common Pleas of Lee County entered an order entitling LaSalle Bank, U.S. Bank's predecessor in interest, to foreclose on Plaintiff's property located at 729 Chatman Street, Bishopville, South Carolina because Plaintiff defaulted on her mortgage. The property was in fact sold at auction.

3. Plaintiff has continued to fight the validity of the foreclosure sale in South Carolina state and federal courts. Both courts have held that Plaintiff's claims are meritless.

4. When Plaintiff attempted to re-litigate her case, the United States District Court for the District of South Carolina dismissed Plaintiff's complaint on *res judicata* grounds.

5. The Court also warned that if Plaintiff filed another suit, she would be subject to sanctions.

6. Plaintiff has filed the instant action again challenging the validity of the foreclosure sale which took place in 2007, and seeking an order that title be vested with her.

7. Accordingly, her complaint should be dismissed under the doctrine of *res judicata*, and because Plaintiff has otherwise failed to state a claim upon which relief can be granted.

8. Additionally, Plaintiff failed to serve U.S. Bank and improperly served LaSalle Bank. Therefore, dismissal is proper under Rules 12(b)(4) and 12(b)(5).

9. Finally, Plaintiff should be sanctioned for her repeated filings and be enjoined from filing any other suit involving the same parties and property.

10. Defendant relies upon its Memorandum of Law in Support of its Amended Motion to Dismiss and Motion for Sanctions submitted contemporaneously herewith, as well as the following exhibits that are attached hereto:

Exhibit A: Magistrate Judge Joseph R. McCrorey's Report and Recommendation, Civil Action No. 3:11-1686-MBS-JRM; and

Exhibit B: Chief United States District Judge Margaret B. Seymour's Order and Opinion, Civil Action No. 3:11-1686-MBS.

WHEREFORE PREMISES CONSIDERED, Defendant respectfully requests that its Motion to Dismiss be GRANTED and that this action be dismissed with prejudice. Defendant additionally requests that its Motion for Sanctions be GRANTED and that the Court impose sanctions, including costs, attorneys' fees, and pre-filing injunctive relief and such further relief as the Court deems proper.

FINKEL LAW FIRM LLC

s/Sean A. O'Connor
Sean A. O'Connor (Dist. Id. No. 7601)
Post Office Box 41489
Charleston, South Carolina 29423
T: (843) 577-5460
F: (843) 577-5135
soconnor@finkellaw.com

Attorneys for Defendants
LaSalle Bank National Association and
Altisource Homes

January 20, 2014

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

LAURA TONEY, Plaintiff, v. LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE REGISTERED HOLDERS OF STRUCTURED ASSET SECURITIES CORPORATION, STRUCTURED ASSET INVESTMENT LOAN TRUST, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-11; AND OCWEN FEDERAL BANK A/K/A ALTISOURCE HOMES, Defendants.	Civil Action No. 3:11-1686-MBS-JRM **REPORT AND RECOMMENDATION**

The pro se Plaintiff, Laura Toney, filed this action on July 13, 2011.[1] Plaintiff appears to assert claims under the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601, et seq., as well as claims under South Carolina law. Defendants in this action are LaSalle Bank National Association, as

[1]Pretrial matters in this case were referred to the undersigned pursuant to Local Civil Rule 73.02(B)(2)(e) DSC. As these are dispositive motions, this Report and Recommendation is entered for review by the Court.

Exhibit A

Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 ("LaSalle") and Ocwen Federal Bank, also known as AltiSource Homes ("Ocwen").[2] Plaintiff filed motions for entry of default against Ocwen on October 19 and 25, 2011. Ocwen filed a response on April 6, 2012, and Plaintiff filed a reply on April 16, 2012. Plaintiff filed a motion for entry of default against LaSalle on October 25, 2011, LaSalle filed responses on November 1 and 7, 2011, and Plaintiff filed replies on November 8 and 15, 2011.[3]

LaSalle filed a motion to dismiss on October 21, 2011. As Plaintiff is proceeding pro se, an order pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975) was issued on October 24, 2011, advising Plaintiff of the importance of a dispositive motion and of the need for her to file an adequate response. Plaintiff was specifically advised that if she failed to respond adequately, Defendant LaSalle's motion may be granted, thereby ending her case against LaSalle. Plaintiff filed responses on October 25 and 28, and November 2, 2011; LaSalle filed a reply on November 7, 2011; and Plaintiff filed a sur-reply on November 8, 2011. A hearing on pending motions was held before the undersigned on March 20, 2012.

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[2]LaSalle was originally named as LaSalle Bank National Association, Trustee for Lehman Brothers Secured Asset Investment Loan Trust Sail 2005. Plaintiff filed a motion to amend (on January 11, 2012) the name of this Defendant (as identified by Defendant LaSalle's in its motion to dismiss), which the undersigned granted on March 20, 2012. Defendant Ocwen asserts that it has been misidentified and that its correct name is Ocwen Loan Servicing, LLC. See Docs. 60 and 61. Ocwen also has stated it will accept service of an amended summons and amended complaint that reflects its corrected name. Plaintiff has not filed a motion to amend Ocwen's name.

[3]On March 22, 2012, the Honorable Margaret B. Seymour, Chief United States District Judge, District of South Carolina, denied Plaintiff's motion for a temporary injunction and request for a hearing for a preliminary and permanent injunction. Plaintiff, on April 2, 2012, filed a Notice of Appeal to the Court of Appeals for the Fourth Circuit, as to Judge Seymour's order. See Doc. 62.

After the hearing, Defendant Ocwen filed a motion to dismiss on April 6, 2012 (and it filed a response to the motions for default as detailed above). Another Roseboro order was issued on April 10, 2012. Plaintiff filed a response on May 14, 2012.

BACKGROUND

Plaintiff refinanced her house located in Bishopville, South Carolina ("the Property") on October 6, 2004. During the closing, Plaintiff entered into and received a mortgage[4] which was secured by the Property. On June 14, 2005, Plaintiff sent an unsigned letter to "Owen Federal Bank FSB" (see attachment to Complaint), which she asserts is a letter sent to Defendant Ocwen stating her intention to rescind the loan because of alleged federal disclosure violations that occurred during the processing of the loan. Plaintiff claims that, prior to closing, she did not receive the disclosures required by TILA. On or around July 2005, Defendant LaSalle, which had been assigned the mortgage, filed a foreclosure action against Plaintiff.[5] Plaintiff filed, through counsel, an answer and counterclaim (alleging a TILA violation) in the state foreclosure action on August 17, 2005. Thereafter, Defendant LaSalle filed a motion for summary judgment. Plaintiff states that the first reply to her rescission letter was on October 19, 2005 (see Doc. 52, p. 9). On February 16, 2007, a foreclosure hearing was held in the absence of Plaintiff or her attorney. Plaintiff asserts that her

[4]It appears the original mortgage was with Finance America., LLC. The mortgage was later assigned to LaSalle. The servicing was assigned in October 2004 (effective December 1, 2005) to Ocwen Federal Bank FSB. See Attachments to Complaint (Doc. 1) and to Plaintiff's April 16, 2012 Response (Doc. 70).

[5]In a pleading filed July 20, 2011 (prior to Plaintiff bringing this action into proper form), Plaintiff appears to attempt to remove the state foreclosure action to this Court. Any such attempt, however, is untimely. See 28 U.S.C. § 1446.

attorney was not there because he was a member of the South Carolina General Assembly and could not be present as the General Assembly was in session that day. Plaintiff claims that a request to reschedule the hearing was submitted on her behalf by her attorney, but the hearing was held as previously scheduled. The judge presiding over the foreclosure hearing granted summary judgment in favor of Defendant LaSalle and found that:

> The Defendant Laura Toney alleges that she rescinded the loan by letter dated June 12, 2005. Pursuant to Title 15 Section 1635 of the U.S. Code, the obligor in a real estate secured consumer credit transaction shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms. The loan closing occurred on October 6, 2004, at which time the Defendant was provided the information and rescission forms. (Affidavit of Michael May filed March 29, 2006; Affidavit of Letia Benjamin). The information and rescission forms are signed by the Defendant Laura Toney to acknowledge that she was provided a copy of each at closing. Therefore, the Defendant's counterclaim that she rescinded the loan is without merit on its face since it is well outside the time to rescind permitted by law.

Additionally, the judge found that Plaintiff was allowed to select her own closing attorney, and her allegations of entitlement to rescission were without merit and outside the time period for rescission as a matter of law. See March 9, 2007 Master's Order and Judgement of Foreclosure and Sale (Attachment to Doc. 1 - Complaint).

On March 22, 2007, Plaintiff filed an application for a temporary restraining order, preliminary injunction, and permanent injunction in state court. On April 25, 2007, Plaintiff filed a motion for reconsideration of the foreclosure decision. On April 27, 2007, a notice of eviction was filed against Plaintiff. On May 7, 2007, the Property was sold at an auction to Defendant LaSalle. At some point after the sale, Plaintiff's motions were denied and she filed an appeal with the South Carolina Court of Appeals, which affirmed the lower court's decision. Plaintiff then appealed the

state court action to the Supreme Court of South Carolina. It appears the appeal is still pending. Plaintiff has been evicted from the Property.

MOTIONS FOR DEFAULT JUDGMENT

On October 25, 2011, Plaintiff filed a motion pursuant to Fed. R. Civ. P. 55(a) for entry of default against Defendant LaSalle. She argues that the Summons and Complaint and her motion for injunction were filed on July 13, 2011; LaSalle was mailed an Order to answer the Summons and Complaint and motion for injunction; LaSalle was served with a copy of the Summons and Complaint and motion for injunction; an answer to the Complaint and motion for injunction were due on October 3, 2011; and LaSalle failed to appear, plead, or otherwise defend and is in default. LaSalle argues that Plaintiff's motion should be denied because it timely filed a motion to dismiss.

It is recommended that Plaintiff's motion for default as to LaSalle be denied. Plaintiff asserts that LaSalle's answer was due on October 3, 2011. She did not specify in her motion the date on which LaSalle was allegedly served. In a previous pleading, she asserted that LaSalle was served on September 19, 2011. See Doc. 17. Rule 12 provides that generally a defendant must serve a responsive pleading within twenty-one days after being served with the summons and complaint. See Fed. R. Civ. P. 12(a)(1)(A)(i). Thus, if LaSalle was served on September 19, 2011, its answer was due on October 11, 2011 (October 10, 2011 was a federal holiday). On October 7, 2011, LaSalle filed a timely motion to extend the time to file its answer until October 21, 2011, and the motion was granted on October 11, 2011. Thereafter, LaSalle timely filed a motion to dismiss on October 21, 2011. When a motion to dismiss under Rule 12 is filed, however, the time for the responsive

pleading is altered (if the court denies the motion to dismiss, "the responsive pleading must be served within 14 days after notice of the court's action"). Fed. R. Civ. P. 12(a)(4)(A).

On October 19, 2011, Plaintiff filed a motion pursuant to Fed. R. Civ. P. 55(a) for entry of default against Defendant Ocwen. She argues that the Summons and Complaint were filed on July 13, 2011; Ocwen was served with a copy of the Summons and Complaint; an answer was due on October 3, 2011; and Ocwen failed to appeal, plead, or otherwise defend within the time allowed and is in default. On October 25, 2011, Plaintiff filed a second motion for entry of default against Ocwen in which she reiterates her arguments from her earlier motion and also argues that Ocwen failed to respond to her motion for an injunction.

Ocwen, in a response filed April 6, 2012, argues that Plaintiff's motion for default judgment should be denied because its answer was filed prior to entry of default; Ocwen Loan Servicing, the proper party to this suit, is a wholly different entity from "Ocwen Federal Bank," and thus alleged service on "Ocwen Federal Bank" did not constitute service on Ocwen Loan Servicing; even if Plaintiff had named an existing entity called "Ocwen Federal Bank," service of process was not properly effected pursuant to applicable law; entry of judgment by default is a drastic remedy which should be used only in extreme situations; and entry of default judgment against the non-existent "Ocwen Federal Bank" should not be granted because it is a nullity.

It is recommended that Plaintiff's motions for entry of default against Ocwen be denied as she has not shown that Ocwen was properly served or that the correct entity was named in the Complaint. Ocwen has now filed an answer and asserts that it will accept service of an amended summons and complaint as to its correct name of Ocwen Loan Servicing, LLC. Rule 55(a) provides

> **Entering a Default.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

Although Plaintiff asserts in her affidavits accompanying her motions for default that Ocwen Federal Bank was served with a copy of the Summons and Complaint, there is nothing in the affidavits indicating when this Defendant was served. See Docs. 20 and 27. Review of the record reveals that Plaintiff filed purported service documents on October 7, 2011. Plaintiff attached a copy of two United States Postal Service "Domestic Return Receipt" forms indicating that "Ocwen Federal Bank A/K/A AltiSource Homes" was served by certified mail at "P.O. Box 24237 West Palm Beach, Fl 33416-4737" and "12650 Ingenuity Drive, Orlando, Florida, 32826 on September 15, 2011." See Doc. 17.

Ocwen asserts that it was not properly served. The Federal Rules of Civil Procedure provide, in pertinent part:

> **Serving a Corporation, Partnership, or Association.** Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:
>
> (1) in a judicial district of the United States:
>
> (A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or
>
> (B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and--if the agent is one authorized by statute and the statute so requires--by also mailing a copy of each to the defendant[.]

Fed. R. Civ. P. 4(h)(i). Service may be made by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made[.]" Fed. R. Civ. P. 4(e)(1). Under South Carolina law, a corporation is served:

> by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

S.C.R.Civ. P. 4(d)(3). The South Carolina Rules of Civil Procedure also provide that service on a corporation may be made "by registered or certified mail, return receipt requested and **delivery restricted to the addressee**." S.C. R. Civ. P. 4(d)(8)(emphasis added).

Here, the return receipts reveal that delivery was not restricted to the addressee such that service by certified mail was not proper under South Carolina law. The Florida Rules of Civil Procedure state that "at the time of personal service of process a copy of the initial pleading shall be delivered to the party upon whom service is made." Fla. R. Civ. P. 1.070(e). A corporation may be served by serving process on the president, vice president, cashier, treasurer, secretary, general manager, any director, or any officer or business agent residing in the state. Fla. Stat. § 48.081(1)(a-d). As an alternative, process may be served on the agent designated by the corporation as its registered agent. Id. Fl. Stat. § 48.081(3)(a). The Florida Rules of Civil Procedure provide for service of process by certified mail, but only if the defendant agrees to waive personal service. Fla. R. Civ. P. 1.070(i). There is no indication that Plaintiff received a waiver or served Defendants in accordance with the Florida Rules of Civil Procedure.

MOTIONS TO DISMISS

Plaintiff alleges that Defendants violated her rights under TILA and also appears to allege claims under South Carolina law. She claims that she did not receive certain required federal disclosures at the time of closing, including "choice of attorney notification, settlement statement, and good faith estimate." Complaint, Para. 7. She alleges that Defendants' failure to make proper

disclosures and their failure to respond to her notice of rescission within twenty days of receipt resulted in Defendants losing their security interest in the Property. Plaintiff also claims that Defendants' failure to timely respond to her notice of rescission reinstated her interest in the Property and relieved her obligations under the original loan. Defendant LaSalle contends that its motion to dismiss should be granted because: (1) Plaintiff's claims are barred by res judicata; (2) the Complaint fails to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)); (3) the Complaint fails to state a plausible cause of action; and (4) the Complaint fails to plead fraud with the specificity required (Fed. R. Civ. P. 9(b)). Ocwen contends that its motion to dismiss should be granted because: (1) the Complaint fails to meet the minimum federal pleading standard (Fed. R. Civ. P. 8); (2) Plaintiff's claims are barred by res judicata; (3) Plaintiff failed to rescind within three days of her closing date such that her right to rescind is time barred; (4) Plaintiff failed to file a rescission action within three years of the closing date such that her rescission action is time barred; (5) Plaintiff is not entitled to recover for emotional distress; (6) Plaintiff fails to state a claim for deceptive and unfair practices; (7) Plaintiff fails to state a claim for gross negligence; (8) Plaintiff fails to plead fraud or fraudulent transfer with the specificity required, and (9) Plaintiff fails to state a valid claim for declaratory judgment. Plaintiff argues that the motions to dismiss should be denied because: (1) Defendants are in default for failing to timely file answers and responses to her previous motion for injunctive relief;[6] (2) Defendant Ocwen did not file its motion to dismiss until after it filed its answer in violation of Fed. R. Civ. P. 12; (3) this action is not barred by the doctrine of res judicata because the state action is on appeal and thus is still pending; and (4) she has properly asserted her claims.

[6]It is recommended this argument be rejected as Plaintiff's motion for injunctive relief was previously denied and it is recommended that the motions for default be denied.

Defendant Ocwen did not file its motion to dismiss until after it filed its answer. Generally, a Rule 12(b)(6) motion to dismiss should be filed before a responsive pleading is filed. After the close of pleading, a Rule 12(c) motion (or a Rule 56 motion for summary judgment) is used to test the sufficiency of the complaint. However, the timing and sequence of these filings is not fatal to Ocwen's motion. "(A) motion to dismiss for failure to state a claim...that is styled as arising under Rule 12(b) but is filed after the close of pleading, should be construed by the district court as a motion for judgment on the pleadings under Rule 12(c)." Patel v. Contemporary Classics of Beverly Hills, 259 F.3d 123, 126 (2d Cir. 2001); see also Satkowiak v. Bay County Sheriff's Dep't, 47 F. App'x 376, 377 n. 1 (6th Cir. 2002); Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999); Shooting Point, L.L.C. v. Cumming, 238 F.Supp.2d 729, 735 (E.D.Va. 2002). Thus, the undersigned construes Defendant Ocwen's motion to dismiss as a motion for judgment on the pleadings.

1. Standard of Review

The federal court is charged with liberally construing the complaints filed by pro se litigants, to allow them to fully develop potentially meritorious cases. See Cruz v. Beto, 405 U.S. 319 (1972); Haines v. Kerner, 404 U.S. 519 (1972). The court's function, however, is not to decide issues of fact, but to decide whether there is an issue of fact to be tried. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, Weller v. Department of Social Servs., 901 F.2d 387 (4th Cir. 1990), nor can the court assume the existence of a genuine issue of material fact where none exists.

"[A] motion under Rule 12(c) ... is assessed under the same standard that applies to a Rule 12(b)(6) motion." Walker v. Kelly, 589 F.3d 127, 139 (4th Cir. 2009)(citing Edwards, 178 F.3d at

243). When considering a 12(b)(6) motion to dismiss, the court must accept as true the facts alleged in the complaint and view them in a light most favorable to the plaintiff. Ostrzenski v. Seigel, 177 F.3d 245, 251 (4th Cir. 1999). The United States Supreme Court has stated that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. Although "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," a pleading that merely offers "labels and conclusions," or "a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. Likewise, "a complaint [will not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancements.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557).

2. Res Judicata

Defendants contend that this action is barred by the doctrine of res judicata. Plaintiff argues that this action is not barred because her action in state court is on appeal such that there is no final judgment and res judciata does not apply.

Pursuant to 28 U.S.C. § 1738, state judicial proceedings shall have the same full faith and credit in every court within the United States as they have in the courts of the state from which they are taken. As a result, "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."

Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984). Thus, South Carolina law of claim preclusion (also called res judicata) must be applied to determine the effect of the South Carolina judgment.

In South Carolina "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Hilton Head Ctr. of South Carolina, Inc. v. Public Serv. Comm'n of South Carolina, 362 S.E.2d 176, 177 (S.C. 1987). South Carolina courts use various tests in determining whether a claim should have been raised in a prior suit: "(1) when there is identity of the subject matter in both cases; (2) where the cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; (3) when there is the same evidence in both cases; and [] (4) when the claims arise out of the same transaction or occurrence." Plum Creek Dev. Co., Inc. v. City of Conway, 512 S.E.2d 106, 109 n. 3 (S.C. 1999)(citing J. Flanagan, South Carolina Civil Procedure 649-650 (1996)). To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Riedman Corp. v. Greenville Steel Structures, Inc., 419 S.E.2d 217 (S.C. 1992); Sealy v. Dodge, 347 S.E.2d 504 (S.C. 1986).

Here, res judicata bars this action as all three elements of the test for res judicata have been met as shown by Plaintiff's Complaint and exhibits. Plaintiff does not appear to dispute that the first two elements (identity of the parties and identity of subject matter) are met. Although Plaintiff appears to slightly change the name of the trust that held her mortgage, the attachments to her Complaint indicate that she is referring to the same entities in the prior action. The foreclosing party was "LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset

Securities Corporation, Structured Asset investment Loan Trust, Mortgage pass-Through Certificates, Series 2004-11." Plaintiff asserts her claims against Ocwen as a successor or assignee.

The subject matter is the same in both lawsuits. If the primary right and duty and alleged wrong are the same in each action, there is an identity of subject matter. See Jimmy Martin Realty Group, Inc. v. Fameco Distrib., Inc., 386 S.E.2d 803 (S.C. Ct.App.1989). Plaintiff sought to prevent foreclosure of her home in Lee County, South Carolina in the state action and asserted a counterclaim for rescission, and seeks to have the foreclosure overturned and undone in the current action.

The third element is met because the judge in the state court action granted the motion for summary judgment[7] and the South Carolina Court of Appeals affirmed the decision. Plaintiff argues that this action is not barred by res judicata because the action is still pending in state court, as she has appealed her state court case to the Supreme Court of South Carolina. The Supreme Court of South Carolina, however, would likely hold "that a judgment is final for preclusion purposes in South Carolina during the pendency of an appeal." This view is in accordance with the majority rule among state courts. See Campbell v. Lake Hallowell Homeowners Ass'n, 852 A.2d 1029, 1039–40 (Md.Ct.Spec.App. 2004) (listing various state court cases demonstrating the majority view). Furthermore, this district has previously found that the Supreme Court of South Carolina would adopt the majority position. Sea Cabin on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach, 828 F.Supp. 1241, 1249 n. 20 (D.S.C.1993); Dawson v. State Law Enforcement Div., CA No. 3:91–1403–17, 1992 WL 208967 at *3–4 (D.S.C. Apr. 6, 1992). Therefore, it is recommended that

[7]Summary judgment is an adjudication on the merits of the case. See Baird v. Charleston County, 511 S.E.2d 69, 74 (S.C.1999).

Defendants' motions to dismiss based on res judicata be granted as the a trial court adjudication is final while pending appeal.

Alternatively, it is recommended that this action be dismissed because this Court should not interfere with the ongoing state proceedings. Abstention may be raised sua sponte. Bellotti v. Baird, 428 U.S. 132, 143 n. 10 (1976).

The Supreme Court of the United States has held that a federal court should not equitably interfere with state proceedings except in the most narrow and extraordinary of circumstances. Younger v. Harris, 401 U.S. 37 (1971); Gilliam v. Foster, 75 F.3d 881, 903 (4th Cir. 1996). In Younger, the Court noted that courts of equity should not act unless the moving party has no adequate remedy at law and will suffer irreparable injury if denied equitable relief. Younger, 401 U.S. at 43–44. While the Younger doctrine was originally applied to protect state interests represented in criminal prosecutions, the Supreme Court has extended Younger to prescribe abstention in favor of state civil actions as well, when important state interests are at stake. See Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975). The Fourth Circuit applies the following test to determine whether Younger abstention is appropriate: (1) whether there is an ongoing state judicial proceeding; (2) whether the proceedings implicate important state interests; and (3) whether there is an adequate opportunity in the state proceedings to raise federal claims. Richmond Rail Co. v. Forst, 4 F.3d 244, 251 (4th Cir.1993).

Here, Plaintiff asserts that there is an ongoing state judicial proceeding. There is an important state interest in adjudicating foreclosure matters pertaining to real property located within a state. See Shaffer v. Heitner, 433 U.S. 186, 207–208 (1977) (recognizing a state's "strong interests in assuring the marketability of property within its borders[ ] and in providing a procedure for peaceful

resolution of disputes about the possession of that property")(footnote omitted); see also Sergeon v. Home Loan Ctr., Inc., No. 3:09–CV–01113–J–32JBT, 2010 WL 5662930 (collecting cases applying Younger abstention in light of a pending state foreclosure proceeding); Borkowski v. Fremont Inv. & Loan of Anaheim, Cal., 368 F.Supp.2d 822, 828 (N.D.Ohio 2005) (applying Younger abstention in the context of a pending state foreclosure proceeding); Prindable v. Ass'n of Apt. Owners of 2987 Kalakaua, 304 F.Supp.2d 1245, 1262 (D.Haw. 2003) (finding that foreclosure and ejectment proceedings were important state interests under Younger).[8] Finally, Plaintiff has an adequate opportunity to raise her federal (TILA) claims in the state court proceedings.

3. Failure to State a Claim Upon Which Relief May be Granted

Defendants contend that Plaintiff fails to state claims upon which relief may be granted and that Plaintiff's claims fail as a matter of law. Plaintiff appears to assert that she has alleged sufficient facts such that her claims should survive the motions to dismiss.

a. TILA

Defendants contend that Plaintiff fails to state a sufficient claim for violations of TILA because the alleged non-disclosures were non-material, limiting Plaintiff's right to rescind to three days. They also argue that even if the non-disclosures were material, Plaintiff failed to file this action within the three-year period. Plaintiff appears to argue that the non-disclosures were

[8]In her memorandum in opposition to summary judgment, Plaintiff claims that Defendants violated S.C. Code Ann § 37-10-102 (providing that a lender must ascertain prior to closing the preferred attorney to represent the debtor in matters related to the closing) and § 37-10-105 (providing the penalties for the failure to obtain the attorney preference). These claims are not properly before the Court as they were not alleged in the Complaint and Plaintiff has not amended her Complaint to add such claims. Further, these statutes do not permit rescission of the Note and Mortgage for its violation. See S.C. Code Ann. § 37-10-105(A).

material and she timely filed her TILA claim because she filed her counterclaim in the state court action within three years of the closing.

The right to rescind a loan under TILA for failure to disclose extends up to three days after consummation of the loan, unless the items left undisclosed are material. See 12 C.F.R. § 226.23(a)(3); 15 U.S.C. §§ 1631, 1632, 1635, 1638. If the non-disclosures are material, the borrower's right to rescind a transaction pursuant to TILA expires after three years. See 12 C.F.R. § 226.23(a)(3); 15 U.S.C. § 1635(f)("An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, which occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this chapter have not been delivered to the obligor...."). The required material disclosures include, among other things, the annual percentage rate, the amount financed, the method of determining the finance charge, and the amount of the finance charge. See 12 C.F.R. § 226.23(a)(3) n. 48; 15 U.S.C. § 1601(a), § 1635(f), § 1639(a).

Plaintiff has not alleged any material non-disclosures which would trigger the longer (three-year) statute of limitations period. Although Plaintiff claims that she did not receive certain required documents within three days of her loan application,[9] she admits (see, e.g., Doc. 76 at 8) that she received the required disclosures on the date of her closing. She attached copies of disclosures signed by her on the date of closing (October 6, 2004) including a Good Faith Estimate, Truth-In-Lending Disclosure Statement, and Attorney Preference form. See Attachments to Doc. 7. The judge in the state court case specifically found that Plaintiff was provided the required information and

[9]There are signed disclosures dated August 11, 2004 included in the record. Plaintiff claims that her signatures on these documents are forgeries. See Attachments to Doc. 7 and Doc. 1 (Complaint). She has not, however, disputed that she signed disclosures on the date of her closing.

rescission forms. Plaintiff has not alleged an attempt to rescind within three days of the closing (October 6, 2004), such that her right to rescission is time barred.

Defendants contend that even if the non-disclosures are material, Plaintiff failed to file her rescission action in this Court within three years of the closing date, such that her rescission action is time barred. Plaintiff appears to claim that she timely filed because she filed the counterclaim in her state court action within three years of the closing of her loan.

The Fourth Circuit, in the recent decision of Gilbert v. Residential Funding, LLC, 678 F.3d 271, 275–77 (4th Cir. 2012), held that the borrowers' letter to their lender within three years of the transaction, rather than the filing of any suit, is all that is required for notice of rescission under TILA. Here, in the light most favorable to Plaintiff for purposes of the motions to dismiss, Plaintiff exercised her right to rescind when she notified Ocwen that she was exercising her right to rescind in June 2005. As noted by the Fourth Circuit:

> To complete the rescission and void the contract, however, more is required. Either the creditor much "acknowledge[] that the right of rescission is available" and the parties must unwind the transaction amongst themselves, or the borrower must file a lawsuit so that the court may enforce the right to rescind.

Gilbert v. Residential Funding, LLC, 678 F.3d at 277 (quoting American Mortg. Network, Inc. v. Shelton, 486 F.3d 815, 821 (4th Cir. 2007)).[10]

Thus, in the light most favorable to Plaintiff, she exercised her right to rescind within the three-year period. She, however, failed to timely file this action alleging a TILA violation. There is a one-year statute of limitations for filing a suit once a violation of TILA has occurred. 15 U.S.C.

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[10]"[U]nilateral notification of cancellation does not automatically void the loan contract." Shelton, 486 F.3d at 821. "[O]therwise a borrower could get out from under a secured loan simply by claiming TILA violations, whether or not the lender had actually committed any." Id. (Quoting Yamamoto v. Bank of N.Y., 329 F.3d 1167, 1172 (9th Cir. 2003))(internal quotation marks omitted).

§ 1640(e). Whether the alleged TILA violation occurred at closing (October 6, 2004), when Plaintiff mailed the notice of recision (June 14, 2005), or when Plaintiff claims she first received a reply to her notice of recision (October 19, 2005), she filed this action well over one year later.

b. Emotional Distress

Plaintiff alleges that she is entitled to damages for severe emotional distress and mental anguish due to an unspecified Defendant's alleged refusal to acknowledge her rescission notice. Defendants contend that Plaintiff fails to allege facts that would establish that Defendants' conduct was outrageous. They also contend that Plaintiff fails to state a claim for negligent infliction of emotional distress. In her reply, Plaintiff appears to assert that she has stated a claim for intentional infliction of emotional distress because she had to take medications for stress and anxiety as a result of being evicted, property was destroyed or missing as a result of the eviction, and her house and property have sentimental value.

South Carolina expressly recognized the cause of action of intentional infliction of emotional distress, sometimes referred to as "outrage," in Ford v. Hutson, 276 S.E.2d 776 (S.C. 1981). To recover under the tort of outrage, a plaintiff must establish the following elements:

> (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct;
> (2) the conduct was so "extreme and outrageous" as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community";
> (3) the actions of the defendant caused the plaintiff's emotional distress; and
> (4) the emotional distressed suffered by the plaintiff was "severe" so that "no reasonable man could be expected to endure it."

Id., at 778 (quoting Vicnire v. Ford Motor Credit Co., 401 A.2d 148 (Me. 1979))(internal citations omitted); see also Wright v. Sparrow, 381 S.E.2d 503, 505 (S.C. Ct. App. 1989). In considering the

defendant's motion for summary judgment, the court must initially determine whether the conduct complained of "'may reasonably be regarded as so extreme and outrageous as to permit recovery, and only where reasonable persons may differ is the question one for the jury.'" Holtzscheiter v. Thomson Newspapers, Inc., 411 S.E.2d 664, 666 (S.C. 1991), overruled on other grounds, 506 S.E.2d 497 (S.C.1998)(quoting Todd v. South Carolina Farm Bureau Mut. Ins. Co., 321 S.E.2d 602, 609 (S.C. Ct. App. 1984), quashed on other grounds, 336 S.E.2d 472 (S.C. 1985)); see also Barber v. Whirlpool Corp., 34 F.3d 1268, 1276 (4th Cir. 1994) ("It is the court's responsibility to first determine as a matter of law whether or not the conduct was outrageous before submitting that question to the jury."). Here, Plaintiff has not asserted facts that would establish that Defendants' conduct was sufficiently outrageous or intolerable so as to support a reasonable finding of outrage or intentional infliction of emotional distress. Further, Plaintiff has not asserted facts that the alleged conduct was so severe that no person could be expected to endure it.

Plaintiff also fails to establish a claim for negligent infliction of emotional distress. South Carolina law generally requires proof of physical injury for the recovery of mental anguish and emotional distress. See Phillips v. United States, 575 F.Supp. 1309, 1317 (D.S.C.1983)("'[E]motional distress is a proper element of tort damage as long as such distress encompasses some physical manifestation.'" (quoting Robertsen v. State Farm Mut. Auto. Ins. Co., 464 F.Supp. 876, 883 n. 9 (D.S.C.1979)). Here, Plaintiff has not shown any physical injury as a result of Defendants' alleged conduct. South Carolina courts have allowed claims for negligent infliction of emotion distress which are limited to claims of bystander liability. Doe v. Greenville County School Dist., 651 S.E.2d 305, 307 (S.C. 2007). To establish a claim for negligent infliction of emotional distress a plaintiff must establish: defendant's negligence caused death or serious injury

to another, plaintiff was a bystander in close proximity to the accident, plaintiff and the victim were closely related, plaintiff witnessed the incident and plaintiff must exhibit physical manifestations of emotional distress that can be established by expert testimony. Kinard v. Augusta Sash & Door Co., 336 S.E.2d 465, 467 (S.C.1985). Here, Plaintiff has not sufficiently alleged a claim for bystander liability.

c. Deceptive and Unfair Practices

Plaintiff claims that she has a right to recover for deceptive and unfair practices. Defendants contend that Plaintiff fails to identify any specific cause of action or legal grounds on which she could recover. They argue that to the extent that Plaintiff is attempting to make an allegation under the South Carolina Unfair Trade Practices Act ("SCUPTA"), §§ 39-5-10, et seq., Plaintiff has not alleged or asserted any facts showing that Defendants' action adversely affected a public interest. In reply, Plaintiff claims she has stated a claim based on the definition of an unfair practice by the FDIC (but does not specify the legal grounds on which she can recover).

The SCUTPA broadly prohibits any "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C.Code Ann. § 39-5-20. In order to bring an action under the SCUTPA, the plaintiff must demonstrate that (1) the defendant engaged in an unlawful trade practice, (2) the plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice, and (3) the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest. See S.C. Code Ann. § 39-5-140; Havird Oil Co. v. Marathon Oil Co., Inc., 149 F.3d 283, 291 (4th Cir. 1998); Daisy Outdoor Advertising Co., Inc. v. Abbott, 473 S.E.2d 47, 49 (S.C. 1996).

Here, Plaintiff fails to state a claim under the SCUTPA because she has not alleged that a public interest is affected. The SCUTPA is not available to redress a private wrong where the public interest is unaffected. Noack Enterprises v. Country Corner Interiors, 351 S.E.2d 347 (S.C. 1986). Conduct which only affects the parties to the transaction provides no basis for a SCUTPA claim. See Key Co. v. Fameco Distribs., Inc., 357 S.E.2d 476 (S.C.Ct.App.1987).

d. Gross Negligence

Plaintiff appears to allege that Defendants were grossly negligent in failing to provide documents required by TILA, exercising good faith in its dealings, and failing to disclose truthful and accurate information. Defendants contend that Plaintiff fails to establish a claim for gross negligence because her action is predicated on an alleged breach of contract.

Gross negligence is defined as "the failure to exercise slight care," or the "intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 520 S.E.2d 142, 153 (S.C. 1999). Under South Carolina law, "if the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie." Enhance-It, L.L.C. v. American Access Techns., Inc., 413 F. Supp. 2d 626, 631 (D.S.C. 2006)(citing Meddin v. Southern Ry.-Carolina Div., 62 S.E.2d 109, 112 (S.C. 1995)). Here, Plaintiff's negligence claim appears to arise from the mortgage contract such that she cannot establish a claim for gross negligence.

Further, Plaintiff fails to show a duty of care owed to her by Defendants. In South Carolina, a bank does not owe a customers a "special duty of care" based purely on his or her status as a customer. Regions Bank v. Schmauch, 582 S.E.2d 432, 444 (S.C. Ct. App. 2003). Plaintiff has not

shown any duty owed her by Defendants other than to follow the applicable laws. As noted above, Plaintiff admits and the judge in the state court action found that the required disclosures were made at the closing.

e. Fraud/Fraudulent Transfer

Plaintiff appears to allege that Defendants made false representation in connection with the loan process and closing and they fraudulently foreclosed on the Property. Defendants contend that Plaintiff failed to plead fraud or fraudulent transfer with the specificity required.

Federal Rule 9 requires that a complainant plead fraud[11] with particularity. Fed. R. Civ. P. 9(b); Pearlstine Distribs., Inc. v. Freixenet USA, Inc., 678 F. Supp. 133, 136 (D.S.C. 1988). Under Rule 9, particularity of pleading is required "with regard to the time, place, speaker, and contents, as well as the manner in which statements are false and the specific acts raising an inference of fraud – the 'who, what, where, why, and when.'" In re First Union Corp. Sec. Litig., 128 F.Supp. 2d 871, 884 (W.D.N.C. 2001); see also Lemacks v. Consolidated Freightways Corp., No. Civ.A.

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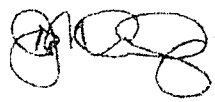
[11]To prove fraud under South Carolina Law, a plaintiff must prove the following elements by clear, cogent, and convincing evidence:

(1) a representation;
(2) its falsity;
(3) its materiality;
(4) either the speaker's knowledge of its falsity or a reckless disregard of its truth or falsity;
(5) the speaker's 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.

Cheney Bros., Inc. v. Batesville Casket Co. Inc., 47 F.3d 111, 114 (4th Cir. 1995); King v. Oxford, 318 S.E.2d 125 (S.C. App. 1984). Failure to prove any element is fatal to the plaintiff's claim. M.B. Kahn Constr. Co. v. South Carolina Nat'l Bank of Charleston, 271 S.E.2d 414, 415 (S.C. 1980).

Defendant Ocwen's motion to dismiss (motion for judgment on the pleadings)(Doc. 61) be **granted.**

It is also recommended that Defendant LaSalle's motion for sanctions (Doc. 51) be **denied** without prejudice.



Joseph R. McCrorey
United States Magistrate Judge

August 9, 2012
Columbia, South Carolina

The parties' attention is directed to the important information on the attached notice.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

1:95–2117–6, 1997 WL 998323, * 3 (D.S.C. July 16, 1997)(holding that "averments of fraud must state the precise time and place of the fraud and the acts alleged to be fraudulent...substantiated with particulars"). Plaintiffs "are forbidden from 'grouping defendants together without specifying which defendant committed which wrong'" and are required instead to "set forth with particularity each defendant's culpable conduct." First Union, 128 F.Supp. 2d at 884.

Review of the Complaint reveals that Plaintiff failed to allege fraud with particularity. She has not alleged with specificity what representations were false, how these alleged misrepresentations induced her to enter the mortgage transaction, why her reliance on the misrepresentations were reasonable, or how these misrepresentations caused her damage.[12]

MOTION FOR SANCTIONS

On March 7, 2012, Defendant LaSalle filed a motion for sanctions pursuant to Fed. R. Civ. P. 11. This Defendant asks for dismissal of this action with prejudice, a pre-filing injunction banning Plaintiff from filing further action in federal court, and reasonable attorneys' fees incurred in defending Plaintiff's frivolous lawsuits. LaSalle contends that Plaintiff has a long history of abusing the state and federal judicial systems with her meritless and vexatious filings, that the current lawsuit is Plaintiff's ninth attempt at preventing or otherwise disputing the lawful foreclosure sale of the Property; Plaintiff has filed a total of seven bankruptcy actions in the United States Bankruptcy Court District of South Carolina admittedly as an attempt to save the Property and based on multiple improper filings, the United State Bankruptcy Court banned Plaintiff from filing any further actions

[12]To the extent Plaintiff requests declaratory relief in this action, such relief should be denied as Plaintiff fails to state a claim upon which relief can be granted.

for a period of one year; Plaintiff has filed additional state court actions as to other pieces of property; and Plaintiff includes baseless allegations in her current litigation including requesting criminal penalties against Defendant LaSalle. Plaintiff appears to argue that LaSalle's motion should be denied because she believed she had to file an action in Federal Court to address perceived unethical actions in state court and to assert her federal claims, she does not believe her claims are frivolous because she believes Defendants violated TILA, and she did not file this action to harass Defendants.

Although LaSalle details allegedly frivolous actions in other courts, it is unclear that any of her previous filings in this Court were frivolous[13] or that this pro se litigant has been warned of the consequences of filing such actions in this Court. It is, therefore, recommended that Defendant LaSalle's motion for sanctions be denied without prejudice. Plaintiff, however, is warned that filing future frivolous actions may result in appropriate sanctions against Plaintiff including any sanctions available under Fed. R. Civ. P. 11.

CONCLUSION

Based on the foregoing, it is recommended that Plaintiff's motions for entry of default (Docs. 20, 27, and 28) be **denied**; Defendant LaSalle's motion to dismiss (Doc. 21) be **granted**; and

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[13]Plaintiff filed one previous action in this court which was dismissed for lack of subject matter jurisdiction after the parties stipulated that the amount in controversy did not exceed the jurisdictional amount (Civil Action Nos. 3:96-cv-02840-MJP), another action was removed to this court by the defendant and later remanded to the state court (3:97-cv-01287-DWS), and she was named as a defendant in a foreclosure action (as the personal representative to the estate of Maxie Lee Thomas) instituted by the United States (3:05-cv-03322-JRM). Aloe Creme Laboratories, Inc. v. Francine Co., 425 F.2d 1295, 1296 (5th Cir. 1970) (This Court may take judicial notice of its own records.).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, Plaintiff, vs. LaSalle Bank National Association, Trustee for Lehman Brothers Structured Asset Investment Loan Trust Sail 2005, Ocwen Federal Bank, a/k/a AltiSource Homes, Defendants.	C.A. No. 3:11-1686-MBS **ORDER AND OPINION**

Plaintiff Laura Toney ("Plaintiff") filed this action pro se against Defendants, LaSalle Bank National Association, Trustee for Lehman Brothers Structured Asset Investment Loan Trust Sail 2005 ("LaSalle"), and Ocwen Federal Bank a/k/a AltiSource Homes ("Ocwen") (collectively "Defendants"), alleging claims under the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1667f, arising out of a foreclosure action instituted against her by Defendants. (ECF No. 1.) Plaintiff also seeks a declaratory judgment and asserts state law claims for intentional infliction of emotional distress, deceptive and unfair trade practices, gross negligence, fraud, and fraudulent transfer. (Id.) This matter is before the court on Plaintiff's motions for entry of default against Defendants pursuant to Fed. R. Civ. P. 55(a); LaSalle's motion to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6), 8, and 9(b); Ocwen's motion to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6); and LaSalle's motion for sanctions against Plaintiff pursuant to Fed. R. Civ. P. 11. (ECF Nos. 20, 21, 27, 28, 51, 61.)

In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02 D.S.C., the matter was referred to United States Magistrate Judge Joseph R. McCrorey for pretrial handling. On August

Exhibit B

9, 2012, the Magistrate Judge issued a Report and Recommendation in which he recommended that the court deny Plaintiff's motions for entry of default, grant LaSalle's motion to dismiss, grant Ocwen's motion to dismiss, and deny LaSalle's motion for sanctions without prejudice. (ECF No. 79.) Plaintiff filed objections to the Report and Recommendation on August 22, 2012 and August 27, 2012, asking the court to reject the Magistrate Judge's recommendation. (ECF Nos. 81, 84.) For the reasons set forth below, the court adopts the Report and Recommendation of the Magistrate Judge, **GRANTS** the motions to dismiss of LaSalle and Ocwen, and **DENIES** LaSalle's motion for sanctions without prejudice and Plaintiff's motions for entry of default against LaSalle and Ocwen.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The facts in the complaint as viewed in the light most favorable to Plaintiff are discussed in the Report and Recommendation. The court concludes, upon its own careful review of the record, that the Magistrate Judge's factual summation is accurate. The court adopts this summary as its own, and will only reference facts pertinent to the analysis of Plaintiff's claims.

On October 6, 2004, Plaintiff refinanced her house located at 729 Chatman Street in Bishopville, South Carolina ("the Property"). (ECF No. 1-1, pp. 38, 43.) During the closing, Plaintiff entered into and received a mortgage which was secured by the Property. (Id.) On June 14, 2005, Plaintiff sent a letter to Ocwen stating her intention to rescind the loan due to the alleged occurrence of federal disclosure violations during the processing of the loan. (ECF No. 1-1, p. 1.) Plaintiff alleged that she was not provided any of the mandatory disclosures required by TILA prior to the closing. (Id.; see also ECF No. 1, p. 3.)

On or about July 21, 2005, LaSalle, which had been assigned the mortgage by Ocwen, filed a lis pendens and complaint against Plaintiff, captioned Lasalle Bank v. Laura Toney, Case

Plaintiff filed a second motion for entry of default against Ocwen on October 25, 2011. (ECF No. 27.) Additionally, on October 25, 2011, Plaintiff moved for entry of default against LaSalle. (ECF No. 28.) Plaintiff filed opposition to LaSalle's motion to dismiss on October 25, 2011, October 28, 2011, and November 2, 2011. (ECF Nos. 29, 30, 32.) On November 1, 2011, LaSalle filed opposition to Plaintiff's motion for entry of default. (ECF No. 31.) On December 28, 2011, Ocwen filed its answer to the complaint. (ECF No. 37.)

On February 27, 2012, the Magistrate Judge issued a Report and Recommendation in which he recommended denying Plaintiff's motion for temporary injunction, which recommendation was adopted by the court on March 22, 2012. (ECF Nos. 46, 57.) On March 7, 2012, LaSalle filed a motion for sanctions against Plaintiff, to which Plaintiff filed opposition on March 15, 2012. (ECF Nos. 51, 53.) On April 2, 2012, Plaintiff appealed the court's March 22, 2012 Order to the United States Court of Appeals for the Fourth Circuit. (ECF No. 62.) On April 6, 2012, Ocwen filed opposition to Plaintiff's motions for entry of default and a motion to dismiss the complaint.[2] (ECF Nos. 60, 61.) Plaintiff filed opposition to Ocwen's motion to dismiss on May 14, 2012. (ECF No. 76.)

Recently, on August 24, 2012, the Fourth Circuit affirmed the court's March 22, 2012 decision and issued the formal mandate of the court of appeals on September 17, 2012. (ECF Nos. 83, 89.)

II. LEGAL STANDARD AND ANALYSIS

A. Legal Standard

1. Magistrate Judge's Report and Recommendation

The Magistrate Judge makes only a recommendation to this court. The recommendation

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2. Ocwen did not file its motion to dismiss until after it filed its answer. The court agrees with the Magistrate Judge's analysis that Ocwen's motion to dismiss should be construed as a motion for judgment on the pleadings. (See ECF No. 79, p. 10.)

has no presumptive weight. The responsibility to make a final determination remains with this court. See Mathews v. Weber, 423 U.S. 261, 270-71 (1976). The court reviews de novo only those portions of a magistrate judge's report and recommendation to which specific objections are filed, and reviews those portions which are not objected to—including those portions to which only "general and conclusory" objections have been made—for clear error. Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005); Camby v. Davis, 718 F.2d 198, 200 (4th Cir. 1983); Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982). The court may accept, reject, or modify, in whole or in part, the recommendation of the magistrate judge or recommit the matter with instructions. See 28 U.S.C. § 636(b)(1).

2. Motions pursuant to Fed. R. Civ. P. 11

A pro se pleading is not subjected to the same scrutiny as one drafted by an attorney. Erickson v. Pardus, 551 U.S. 89, 94 (2007). Even pro se litigants, however, must follow the procedural rules of the court. Cox v. Deal, C/A No. 2:09-02715-DCN-BM, 2011 WL 3418397, at * 2 (D.S.C. Aug. 3, 2011). Rule 11 governs both attorneys and pro se litigants. Fed. R. Civ. P. 11.

Fed. R. Civ. P. 11(a) requires every pleading, written motion, or other paper to be signed by either the party's attorney, if represented, or the party itself, if the party proceeds without representation. See Fed. R. Civ. P. 11(a). By signing a filing, a party represents to the court and certifies "that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the filing is not "presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation," and "the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new

No. 2005-CP-31-169, in the Court of Common Pleas of Lee County, South Carolina (the "Lee County Court"), seeking foreclosure of Plaintiff's mortgage and sale of the Property. (ECF No. 1-1, pp. 3-11.) On October 19, 2005, Plaintiff alleges that LaSalle finally responded to her notice of rescission letter. (ECF No. 1, p. 5.) Thereafter, LaSalle filed a motion for summary judgment on March 29, 2006. (ECF No. 1-1, p. 34.)

On February 16, 2007, the Lee County Court held a foreclosure hearing in the absence of Plaintiff or her attorney.[1] (ECF No. 1-1, p. 35.) On March 15, 2007, the Lee County Court entered an order finding that LaSalle "should have judgment of foreclosure of the mortgage and the mortgaged property should be ordered sold at public auction after due advertisement" and, as a result, granted summary judgment in favor of LaSalle in the foreclosure action. (Id. at p. 40.) In support of the order granting summary judgment to LaSalle, the Lee County Court made the following findings of fact:

> The Defendant Laura Toney alleges that she rescinded the loan by letter dated June 12, 2005. Pursuant to Title 15 Section 1635 of the U.S. Code, the obligor in a real estate secured consumer credit transaction shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms. The loan closing occurred on October 6, 2004, at which time the Defendant was provided the information and rescission forms. (Affidavit of Michael May filed March 29, 2006; Affidavit of Letia Benjamin). The information and rescission forms are signed by the Defendant Laura Toney to acknowledge that she was provided a copy of each at closing. Therefore, the Defendant's counterclaim that she rescinded the loan is without merit on its face since it is well outside the time to rescind permitted by law.

(ECF No. 1-1, pp. 37-38.)

On March 22, 2007, Plaintiff filed an application for a temporary restraining order, preliminary injunction, and permanent injunction in the Lee County Court. (ECF No. 52-2, pp.

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[1] Plaintiff alleges that her attorney at the time, Mr. David Weeks, was a member of the South Carolina General Assembly and could not be present because the General Assembly was in session. Plaintiff alleges that a request to reschedule the hearing was submitted on behalf of Mr. Weeks, but that the hearing was held as previously scheduled. (See ECF No. 52-2, pp. 1-2.)

8-13, 16-17.) On April 25, 2007, Plaintiff filed a motion for reconsideration of the foreclosure decision. (ECF No. 52-2, pp. 5-7.) On April 27, 2007, a notice of eviction was filed against Plaintiff and she was evicted from the Property shortly thereafter. (ECF No. 1-1, p. 49.) On May 7, 2007, the Property was sold at an auction to LaSalle. (Id. at pp. 45-47.) After the sale of the Property and the denial of her motions, Plaintiff filed an appeal with the South Carolina Court of Appeals. Plaintiff states that her foreclosure case is currently pending with the South Carolina Supreme Court. (ECF No. 76, p. 3; see also ECF No. 51-2, pp. 1-2.)

On July 13, 2011, Plaintiff filed in this court a "Complaint to Set Aside Fraudulent Transfer, and Fraud; Declaratory Judgment for Entry of Default[,] Gross Negligence[,] Emotional Distress[,] Deceptive and Unfair Trade Practices." (ECF No. 1.) Plaintiff alleges that she did not receive certain federal disclosures required by TILA at the time of her mortgage closing, including "choice of attorney notification, settlement statement, and good faith estimate." (Id. at p. 3.) Plaintiff alleges that Defendants' failure to make proper disclosures and failure to respond to her notice of rescission within twenty days resulted in Defendants losing their interest in the property. (Id. at p. 5.) Further, Plaintiff alleges that Defendants' failure to respond to her notice of rescission within twenty days had the effect of reinstating Plaintiff's interest in the property and relieving her obligations under the original loan. (Id. at pp. 5-8.) On July 13, 2011, Plaintiff filed a motion for a temporary injunction to enjoin Defendants from denying Plaintiff possession of the Property. (ECF No. 3.)

On October 7, 2011, LaSalle filed a motion to extend its time to file an answer until October 21, 2011, which motion was granted by the court on October 11, 2011. (ECF Nos. 16, 18.) On October 19, 2011, Plaintiff moved for entry of default against Ocwen. (ECF No. 20.) On October 21, 2011, LaSalle filed a motion to dismiss Plaintiff's complaint. (ECF No. 21.)

law." Fed. R. Civ. P. 11(b) (emphasis added). Rule 11(b)(3) requires that filings have a proper factual basis for each claim. See Fed. R. Civ. P. 11(b)(3).

Reasonableness of a filing party's actions under Fed. R. Civ. P. 11 involves an objective inquiry into the prefiling investigation. See In re Kunstler, 914 F.2d 505, 514 (4th Cir. 1990). Legal allegations fail the requirements of Fed. R. Civ. P. 11(b)(2) when there is "absolutely no chance of success under the existing precedent." Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 153 (4th Cir. 2002). In order to warrant sanctions, the legal position must be completely untenable, rather than merely unsuccessful. Id. at 151. The issue is whether a reasonable person under the same circumstances would have believed his or her actions to be legally justified. Id. at 153.

3. Motions pursuant to Fed. R. Civ. P. 12(b)(6)

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim should not be granted unless it appears certain that the plaintiff can prove no set of facts that would support her claim and would entitle her to relief. Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993). When considering a motion to dismiss, the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff. Ostrzenski v. Seigel, 177 F.3d 245, 251 (4th Cir. 1999); Mylan Labs., Inc., 7 F.3d at 1134. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, —— U.S. ——, ——, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The court must treat factual allegations of the nonmoving party as true. Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 217-18 (4th Cir. 1994).

Res judicata is an affirmative defense and is treated as a basis for dismissal under Fed. R.

Civ. P. 12(b)(6). See Davani v. Va. Dept. of Transp., 434 F.3d 712, 720 (4th Cir. 2006) (res judicata or claim preclusion challenge is to be considered pursuant to Rule 12(b)(6)); Andrews v. Daw, 201 F.3d 521, 524 n. 1 (4th Cir. 2000) (an affirmative defense such as res judicata may be raised under Rule 12(b)(6) "only if it clearly appears on the face of the complaint . . . ."). "Res judicata is applied to prevent the re-litigation of claims, and thus prevent the unsettling of a prior judgement, whether by increasing or decreasing the award or by reversing the result." Heckert v. Dotson, 272 F.3d 253, at 258 (4th Cir. 2001). "'For the doctrine of res judicata to be applicable, there must be: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or their privies in the two suits.'" Martin v. Am. Bancorp. Ret. Plan, 407 F.3d 643, 650 (4th Cir. 2005) (quoting Pueschel v. United States, 369 F.3d 345, 354–55 (4th Cir. 2004)). Further, res judicata not only "bar[s] claims that were raised and fully litigated," but also "'prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.'" Peugeot Motors v. E. Auto Distrib., 892 F.2d 355, 359 (4th Cir. 1989) (quoting Brown v. Felsen, 442 U.S. 127, 131 (1979)); see also Meekins v. United Transp. Union, 946 F.2d 1054, 1057 (4th Cir. 1991).

4. Motions pursuant to Fed. R. Civ. P. 55(a)

Rule 55(a) of the Federal Rules of Civil Procedure provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." Fed. R. Civ. P. 55(a). However, the clear policy of the Federal Rules of Civil Procedure is to discourage judgment by default and to encourage disposition of claims on their merits. Reizakis v. Loy, 490 F.2d 1132, 1135 (4th Cir. 1974)

B. Analysis

1. Plaintiff's Motions for Entry of Default

Plaintiff moves for entry of default against Defendants pursuant to Fed. R. Civ. P. 55(a). (See ECF Nos. 20, 27, 28.)

Upon his review, the Magistrate Judge recommended denying Plaintiff's motion for entry of default against LaSalle. Specifically, the Magistrate Judge found that LaSalle was served on September 19, 2011, and its answer would have been due on October 11, 2011[3], except that LaSalle received an extension from the court to file its answer on or before October 21, 2011. (ECF No. 79, p. 5 (citing ECF Nos. 17, 18).) The Magistrate Judge further found that the Fed. R. Civ. P. 12 motion to dismiss that LaSalle filed on October 21, 2011 was timely, and therefore Plaintiff's motion for entry of default against LaSalle is without merit. (Id. (citing ECF No. 21))

The Magistrate Judge also recommended denying Plaintiff's motion for default against Ocwen because Plaintiff has not shown that Ocwen was properly served or that the correct entity was named in the complaint. (Id. at p. 6.) In making this recommendation, the Magistrate Judge found convincing Ocwen's arguments that "its answer was filed prior to entry of default; Ocwen Loan Servicing, the proper party to this suit, is a wholly different entity from 'Ocwen Federal Bank,' and thus alleged service on 'Ocwen Federal Bank' did not constitute service on Ocwen Loan Servicing; even if Plaintiff had named an existing entity called 'Ocwen Federal Bank,' service of process was not properly effected pursuant to applicable law; entry of judgment by default is a drastic remedy which should be used only in extreme situations; and entry of default judgment against the non-existent 'Ocwen Federal Bank' should not be granted because it is a nullity." (Id.)

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3. The Magistrate Judge observed that October 10, 2011 was a federal holiday, Columbus Day. (ECF No. 79, p. 5.)

In her objections to the Magistrate Judge's recommendation, Plaintiff implies that the Magistrate Judge findings are wrong because Ocwen (1) was served by mail on September 12, 2011 (with a certified return receipt showing service on September 15, 2011), (2) failed to answer the complaint within twenty-one days as required by the federal rules, (3) failed to request an extension of time prior to the expiration of the answer deadline, and (4) filed an untimely answer eighty-five days after service. (ECF No. 84, pp. 4, 6-7, 19, 24.) Plaintiff further implies that the Magistrate Judge erred by not having awareness of Defendants' failure to file motions to set aside the default. (Id. at p. 7.)

In accordance with the preference that "defaults be avoided and that claims and defenses be disposed of on their merits," the court agrees with the Magistrate Judge that entry of default should not be made against either Ocwen or LaSalle. The timely filing of a Fed. R. Civ. P. 12 motion to dismiss by LaSalle and the failure of Ocwen to be properly served are appropriate reasons within the court's discretion to not enter default. U.S. ex rel. Knight v. Reliant Hospice, Inc., C/A No. 3:08-03724-CMC-JRM, 2011 WL 6130539, at *1 (D.S.C. Nov. 8, 2011) (In deciding whether to direct that entry of default be made as to a party, a district court must exercise "sound discretion."). Accordingly, the court denies Plaintiff's motion for entry of default against Defendants.

2. LaSalle's Motion for Sanctions

LaSalle moves pursuant to Fed. R. Civ. P. 11 for dismissal of Plaintiff's action with prejudice, a pre-filing injunction banning Plaintiff from filing further actions in federal court, and reasonable attorneys' fees incurred in defending against Plaintiff's frivolous lawsuits. (ECF No. 51, p. 1.) LaSalle contends that (1) Plaintiff has a long history of abusing the state and federal judicial systems with her meritless and vexatious filings, (2) the current lawsuit is

Plaintiff's ninth attempt at preventing or otherwise disputing the lawful foreclosure sale of the Property, (3) Plaintiff has filed a total of seven bankruptcy actions in the United States Bankruptcy Court for the District of South Carolina admittedly as an attempt to save her property, (4) the United States Bankruptcy Court for the District of South Carolina banned Plaintiff from filing any further actions for a period of one year, (5) Plaintiff has filed additional state court actions as to other pieces of property, and (6) Plaintiff includes baseless allegations in her current litigation, including requesting criminal penalties against LaSalle. (Id. at pp. 2-10.)

Upon his review, the Magistrate Judge recommended denying LaSalle's motion for sanctions without prejudice. (ECF No. 79, p. 24.) The Magistrate Judge concluded that, notwithstanding LaSalle's details of allegedly frivolous actions filed by Plaintiff in other courts, a finding of frivolousness could not be made regarding any of Plaintiff's previous filings in this court and Plaintiff lacked receipt of a warning regarding the consequences of filing frivolous actions in this court. (Id.) In this regard, the Magistrate Judge did advocate warning Plaintiff that filing future frivolous actions may result in appropriate sanctions against Plaintiff including any sanctions available under Fed. R. Civ. P. 11. (Id.)

LaSalle did not file objections to the Magistrate Judge's recommendation that its motion for sanctions be denied. In the absence of specific objections to the report of the Magistrate Judge, the court is not required to give any explanation for adopting the recommendation. See Camby v. Davis, 718 F.2d 198, 199 (4th Cir.1983). Accordingly, the court agrees with the Magistrate Judge that LaSalle's motion for sanctions should be denied.

3. Defendants' Motions to Dismiss

LaSalle moves to dismiss Plaintiff's complaint asserting that (1) Plaintiff's claims are barred by res judicata; (2) the complaint fails to state a claim upon which relief can be granted;

(3) the complaint fails to state a plausible cause of action; and (4) the Complaint fails to plead fraud with the required specificity. (ECF No. 21-1.) Ocwen contends that it is entitled to dismissal because (1) the complaint fails to meet the minimum federal pleading standard; (2) Plaintiff's claims are barred by res judicata; (3) Plaintiff failed to rescind the note within three days of her closing date such that her right to rescind is time barred; (4) Plaintiff failed to file a rescission action within three years of the closing date such that her rescission action is time barred; (5) Plaintiff is not entitled to recover for emotional distress; (6) Plaintiff fails to state a claim for deceptive and unfair practices; (7) Plaintiff fails to state a claim for gross negligence; (8) Plaintiff fails to plead fraud or fraudulent transfer with the specificity required, and (9) Plaintiff fails to state a valid claim for declaratory judgment. (ECF No. 61-1.)

a. *Res Judicata*

Defendants contend that this action is barred by the doctrine of res judicata. (ECF Nos. 21-1, pp. 5-7; 61-1, pp. 7-9.) Plaintiff argues that this action is not barred because her action in state court is on appeal such that there is no final judgment and res judicata does not apply. (ECF No. 76, p. 3.)

Upon his review, the Magistrate Judge concluded that res judicata bars this action as all three elements of the test for res judicata have been met. (ECF No. 79, p. 12.) The Magistrate Judge specified that to establish res judicata, a defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. (Id. (citing Riedman Corp. v. Greenville Steel Structures, Inc., 419 S.E.2d 217, 218 (S.C. 1992)) In this regard, the Magistrate Judge found that Plaintiff did not dispute that the first two elements were met. (Id.) Further, the third element was met because the judge in the state court action granted the motion for summary judgment, which satisfies the

requirement of an adjudication on the merits of the case, and the South Carolina Court of Appeals affirmed the state court's decision. (Id. at p. 13.) Alternatively, the Magistrate Judge recommended dismissing the action against Defendants because the court should not interfere with the ongoing state proceedings. (Id. at p. 14 (citing Bellotti v. Baird, 428 U.S. 132, 143 n. 10 (1976) (recognizing that abstention may be raised sua sponte)).) Based on the foregoing, the Magistrate Judge recommended granting Defendants' motions to dismiss the complaint.

In her objections to the Magistrate Judge's recommendation, Plaintiff asserts that res judicata does not apply to this matter because her state court case is still pending without a final determination having been made. (ECF No. 84, p. 15.) Plaintiff argues that this case clearly does not satisfy all the elements to establish res judicata "because the judgment is not final" and she has not been "given full and fair opportunity to be heard on the issue." (Id. at p. 16.)

The court agrees with the Magistrate Judge that the three elements of res judicata are clearly present. First, a final judgment has been entered on the merits against Plaintiff in at least two prior civil actions, Lasalle Bank v. Laura Toney, Case No. 2005-CP-31-169 and Laura A. Toney v. Ocwen Federal Bank, Case No. 2010-CP-31-180. (See ECF Nos. 1-1, pp. 34-43; 51-3, pp. 1-6.) See also Shoup v. Bell & Howell Co., 872 F.2d 1178, 1181 (4th Cir. 1989) (noting that grants of summary judgment are considered "on the merits" for the purposes of res judicata). Second, the allegations contained in the instant complaint stem from the same set of facts that gave rise to Plaintiff's claim for relief in Case No. 2005-CP-31-169 and Case No. 2010-CP-31-180, i.e., Defendants' entitlement to foreclosure of the Property versus Plaintiff's attempt to prevent the foreclosure of the Property. (Id.) Finally, the parties in this matter are the same entities as the ones in the prior foreclosure matters. (Id.) Based on the foregoing, Plaintiff is not entitled to maintain her action in this court because her issues have been raised and litigated in

prior actions. Accordingly, Defendants are entitled to dismissal of the complaint against them based on res judicata.

b. Defendants' Other Arguments in support of Dismissal

As this court finds that the instant action is barred by res judicata, it is unnecessary to address Defendants' remaining arguments in support of dismissal.

III. CONCLUSION

For the foregoing reasons, the court hereby **GRANTS** the motions to dismiss Plaintiff's complaint of LaSalle and Ocwen. (ECF Nos. 21, 61.) The court further **DENIES** LaSalle's motion for sanctions without prejudice and Plaintiff's motions for entry of default. (ECF Nos. 20, 27, 28, 51.) The court adopts the Magistrate Judge's Report and Recommendation and incorporates it herein by reference.

IT IS SO ORDERED.

/s/Margaret B.Seymour
Margaret B. Seymour
Chief United States District Judge

September 25, 2012
Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, Plaintiff, vs. LaSalle Bank National Association as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, Defendants.	)	Civil Action No. 3:13-cv-03481-MBS-SVH

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF AMENDED MOTION TO DISMISS AND MOTION FOR SANCTIONS

The Defendant U.S. Bank, National Association, as Trustee for Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 (hereinafter "U.S. Bank"), incorrectly named on page one of the Complaint as "LaSalle Bank National Association as Trustee for Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, A/K/A AltiSource Homes" (hereinafter "LaSalle Bank"), hereby files this Memorandum of Law in Support of it Motion to Dismiss and Motion for Sanctions and would show unto the Court as follows:

INTRODUCTION

The underlying facts of this case are simple, muddled only by the relentless filings of Plaintiff. In short, Plaintiff defaulted on her mortgage and LaSalle Bank, predecessor in interest to U.S. Bank, rightfully foreclosed on the property in May 2007. Plaintiff has contested the foreclosure sale in South Carolina's state and federal courts on more than ten separate occasions. Both courts have entered final judgments against Plaintiff. Plaintiff is now beating a dead horse. This Court should dismiss this case with prejudice because it is barred by the doctrine of *res judicata* and otherwise fails to state a claim upon which relief can be granted. Plaintiff's Complaint should also be dismissed for insufficient process and insufficient service of process. Finally, this Court should sanction Plaintiff for her behavior.

STATEMENT OF FACTS

On October 6, 2004, Plaintiff refinanced her house located at 729 Chatman Street in Bishopville, South Carolina.[1] On June 14, 2005, Plaintiff sent a letter attempting to rescind the loan due to an alleged failure to make certain disclosures required by the Truth-in-Lending Act. On or around July 21, 2005, LaSalle Bank, U.S. Bank's predecessor in interest, filed a *lis pendens* and complaint seeking permission to foreclose on Plaintiff's property. *LaSalle Bank v. Laura Toney*, Case No. 2005-CP-31-169, in the Court of Common Pleas of Lee County, South Carolina. LaSalle Bank filed a motion for summary judgment which was granted on March 15, 2007. The court entered an order declaring that LaSalle Bank "should have judgment of foreclosure of the mortgage and the mortgage property should be ordered sold at public auction."

[1] Some of the facts in this section are not stated in Plaintiff's most recent complaint. They are, however, set forth in the record of a case previously before this Court (C.A. No. 3:11-1686-MBS). It is proper for the Court to take judicial notice of these facts. *See Weber v. Jones*, 8:13-CV-01040-GRA, 2013 WL 3328673, *5 (D.S.C. July 2, 2013) (citing *Aloe Creme Lab., Inc. v. Francine Co.*, 425 F.2d 1295, 1296 (5th Cir. 1970) (noting the district court had the right to take notice of its own files and records).

After repeated attempts by Plaintiff to prevent foreclosure, the property was sold on May 7, 2007.

Plaintiff appealed to the South Carolina Court of Appeals. The court affirmed the foreclosure sale.

Undeterred, Plaintiff then filed a motion for a temporary injunction and a "Complaint to Set Aside Fraudulent Transfer, and Fraud; Declaratory Judgment for Entry of Default, Gross Negligence, Emotional Distress, Deceptive and Unfair Trade Practices" on July 13, 2011 in the United States District Court for the District of South Carolina.

In March 2011, this Court denied Plaintiff's motion for injunction relief. Plaintiff then appealed to the Fourth Circuit, who affirmed the denial. Appeal No. 12-1452 (August 24, 2012).

With the injunction issue resolved, LaSalle Bank moved to dismiss Plaintiff's complaint. On August 9, 2012, United States Magistrate Judge Joseph R. McCrorey entered a detailed Report and Recommendation recommending that Plaintiff's case be dismissed because: (1) it was barred by the doctrine of *res judicata*; and (2) it failed to state any claim upon which relief could be granted.[2] Chief United States District Judge Margaret B. Seymour agreed and dismissed Plaintiff's case on *res judicata* grounds.[3]

Plaintiff appealed this decision to the United States Court of Appeals for the Fourth Circuit. On February 28, 2013, the court affirmed "for the reasons stated by the district court." Appeal No. 12-2364 (February 28, 2013). Belligerently, Plaintiff filed a writ of certiorari to the United States Supreme Court, which has since been denied.[4]

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[2] A copy of the Report and Recommendation is attached as Exhibit A.
[3] A copy of the Order and Opinion is attached as Exhibit B.
[4] The United States Supreme Court denied writ of certiorari on December 2, 2013. *Laura Toney v. LaSalle Bank National Association, Trustee*, No. 13-404.

Before the Supreme Court decided whether to accept Plaintiff's case, she filed the instant action. This Complaint is nothing more than an attempt to re-litigate a case which the South Carolina state and federal courts have already ruled meritless.

ARGUMENT

This Court should grant Defendant's Motion to Dismiss because Plaintiff's claims are barred by the doctrine of *res judicata*. Alternatively, Plaintiff's allegations fail to state a claim upon which relief can be granted. Furthermore, Plaintiff's case should be dismissed for insufficient process and insufficient service of process. Finally, this Court should grant Defendant's Motion for Sanctions because Plaintiff has already been given fair warning that she would be sanctioned for filing additional pleadings.

I. Plaintiff's Claims Should Be Dismissed Pursuant to Rule 12(b)(6).

A. Standard of Review

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of an action when the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of [her] entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal marks and citations omitted). *Res judicata* is an affirmative defense and is treated as a basis for dismissal under Rule 12(b)(6). *See Davani v. Va. Dep't of Transp.*, 434 F.3d 712, 720 (4th Cir. 2006) (*res judicata* or claim preclusion challenge is to be considered pursuant to Rule 12(b)(6)); *Andrews v. Daw*, 201 F.3d 521, 524 n.1 (4th Cir. 2000) (an affirmative defense such as *res judicata* may be raised under Rule 12(b)(6) "if it clearly appears on the face of the complaint.").

B. Plaintiff's claims are barred by the doctrine of *res judicata*.

Plaintiff's case should be dismissed on *res judicata* grounds because she is still trying to contest title to the Subject Property. "*Res judicata* is applied to prevent the re-litigation of claims, and thus prevent the unsettling of a prior judgment, whether by increasing or decreasing the award of by reversing the result." *Heckert v. Dotson*, 272 F.3d 253, 258 (4th Cir. 2001). "'For the doctrine of *res judicata* to be applicable, there must be: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or their privies in the two suits.'" *Martin v. Am. Bancorp. Ret. Plan*, 407 F.3d 643, 650 (4th Cir. 2005) (quoting *Pueschel v. United States*, 369 F.3d 345, 354-55 (4th Cir. 2004)). Furthermore, *res judicata* not only "bar[s] claims that were raised and fully litigated," but also "'prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceedings.'" *Peugeot Motors v. E. Auto Distrib.*, 892 F.2d 355, 359 (4th Cir. 1989) (quoting *Brown v. Felsen*, 442 U.S. 127, 131 (1979)).

Plaintiff's claims are barred by the doctrine of *res judicata* because all three elements are satisfied. First, this Court has already dismissed Plaintiff's claims on *res judicata* grounds. Exhibit B at p. 13 (noting that "final judgment has been entered on the merits against Plaintiff in at least two prior civil actions, *LaSalle Bank v. Laura Toney*, Case No. 2005-CP-31-169 and *Laura A. Toney v. Ocwen Federal Bank*, Case No. 2010-CP-31-180.").

Second, the allegations contained in the instant complaint stem from the same set of facts that gave rise to Plaintiff's claim for relief in the prior cases. As this Court noted, at the heart of the prior cases was a dispute regarding "Defendants' entitlement to foreclosure of the Property versus Plaintiff's attempt to prevent the foreclosure of the property." *Id.* Likewise, in this case

the Complaint is premised on the belief that "[t]he foreclosure of the Plaintiff's property was an illegal action." Compl. ¶ 3. The true nature of this case is further demonstrated by Plaintiff's numerous assertions that "she still possesses legal title to the premises." *Id.*; *see also id.* at ¶¶ 6-8, 12 and Prayer for Relief 1-5. Clearly, the underlying dispute is identical.

Finally, the parties in this case are the same as in the prior cases: Laura Toney and U.S. Bank, successor in interest to LaSalle Bank.[5]

For these reasons, the Court should dismiss Plaintiff's claims on *res judicata* grounds as it has already done previously. To the extent, if any, Plaintiff alleges claims not expressly mentioned in her prior suits, they are also barred by the doctrine of *res judicata* because Plaintiff had an opportunity to raise them. *Peugeot Motors*, 892 F.2d at 359 (*res judicata* "'prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceedings'") (quoting *Brown*, 442 U.S. at 131).

C. While not necessary for the Court to consider, Plaintiff's claims also fail to state a claim upon which relief can be granted.

Because Plaintiff's claims are barred by *res judicata*, the Court need not consider whether Plaintiff's claims have been adequately pleaded under Rule 12(b)(6). Should the Court wish to consider these arguments, the Court should adopt the Magistrate Judge's Report and Recommendation, attached as Exhibit A, which explains why Plaintiff's claims would also be barred under the Rule 12(b)(6) standard.

[5] LaSalle Bank held the mortgage at the time of the 2007 foreclosure. LaSalle Bank has since transferred its interest to U.S. Bank. Because U.S. Bank is a successor in interest to LaSalle Bank, res judicata is equally applicable. Furthermore, collateral estoppel would bar Plaintiff's claims even if this suit involved different parties. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 329 (1979) ("Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely 'switching adversaries.'").

II. U.S. Bank and its predecessors should be dismissed from this case pursuant to Rules 12(b)(4) and 12(b)(5).

U.S. Bank should be dismissed from this case on the basis of insufficient process and insufficient service of process. "Under Rules 12(b)(4) and (5), a defendant can move to dismiss a complaint where service of process failed to comply with the requirements of Rule 4 of the Federal Rules of Civil Procedure." *Price v. Ingles Markets No. 042*, 6:12-CV-00450-TMC, 2012 WL 3686678, *2 (D.S.C. July 18, 2012) *report and recommendation adopted*, CA 6:12-450-TMC-JDA, 2012 WL 3679667 (D.S.C. Aug. 24, 2012).

Rule 4(h) governs the service of process upon corporations, partnerships, and associations and provides that, within a judicial district of the United States, service may be accomplished:

> (A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or
>
> (B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant.

Fed. R. Civ. P. 4(h)(1). Rule 4(e)(1) provides that service of process may be accomplished pursuant to the law of the state in which the district court sits. Fed. R. Civ. P. 4(e)(1).

In South Carolina, similar to the Federal Rule, service of process may be accomplished upon a corporation, partnership, or unincorporated association:

> by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

S.C. R. Civ. P. 4(d)(3).

In this case, the current lienholder is U.S. Bank. Plaintiff incorrectly named U.S. Bank's predecessor in interest, LaSalle Bank instead. Consequently, U.S. Bank has not received any service to date.

Moreover, LaSalle Bank never received proper service as required by Rule 4. Service was improper as to LaSalle Bank because Plaintiff served the summons and complaint upon the Hunoval Law Firm. The Hunoval Law Firm is not an officer, director, managing agent, or another entity authorized to accept service on behalf of LaSalle Bank. Thus, service was insufficient.

Furthermore, it is unclear whether Plaintiff is attempting to sue Altisource directly because she vaguely and ambiguously named LaSalle Bank "A/K/A" Altisource as a defendant. To the extent that the Plaintiff is trying to sue Altisource individually, she failed to do so by using the AKA designation, and in any event there is no evidence that the Altisource entity, assuming it exists as described, was ever serviced with process. Thus, this entity should likewise be dismissed for improper process and improper service of process.

III. <u>Plaintiff should be sanctioned for continuing to file meritless claims.</u>

Plaintiff should be sanctioned for filing the instant suit because she has already received fair warning that she would be sanctioned if she brought another claim. The last time this case was before the Court, LaSalle Bank moved for sanctions because of Plaintiff's frivolous filings. Indeed, as the Court has noted previously, the pattern of Plaintiff's egregious behavior cannot be overemphasized: (1) Plaintiff has a long history of abusing the state and federal judicial systems with her meritless and vexatious filings, (2) Plaintiff has attempted to prevent or otherwise dispute the lawful foreclosure sale of the subject property more than ten times, (3) Plaintiff has filed a total of seven bankruptcy actions in the United States Bankruptcy Court for the District of

South Carolina admittedly as an attempt to save her property, (4) said Bankruptcy Court banned Plaintiff from filing any actions for a period of one year, (5) Plaintiff has filed additional state court actions as to other pieces of property, and (6) Plaintiff includes baseless allegations in her current litigation.[6]

The only reason sanctions were not imposed in the prior case was because it was unclear whether Plaintiff, a *pro se* litigant, had "been warned of the consequences of filing such actions in this Court."[7] While Plaintiff was shown leniency, the order also made clear the consequences of filing another suit: "Plaintiff, however, ***is warned*** that filing future frivolous actions may result in appropriate sanctions against Plaintiff including any sanctions available under Fed. R. Civ. P. 11."[8]

A clearer case for sanctions could not be made. In imposing sanctions against a *pro se* litigant, the South Carolina district court explained:

> The court warned Plaintiffs three years ago that their litigation tactics "would long ago have resulted in serious sanctions against members of the bar" and that the court was being "extremely patient" with them only because of their pro se status. *Potter v. Crestwood Golf Club, Inc., et al.*, C.A. No. 5:94–2047–22, Order filed 4/17/96 at 43 (*Potter II*).
>
> Despite this admonition, Plaintiffs persist in staging baseless collateral attacks on rulings related to claims against these Defendants.

Potter v. Mosteller, 199 F.R.D. 181, 188 (D.S.C. 2000) *aff'd*, 238 F.3d 414 (4th Cir. 2000).

Likewise, in this case, Plaintiff has a history of abusive filings. This Court warned Plaintiff that sanctions would be imposed if she filed suit again. Nevertheless, Plaintiff filed the instant action. Sanctions are now in order.

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[6] Exhibit B at pp. 10-11.
[7] Exhibit A at p. 24.
[8] *Id.* (emphasis added).

Additionally, Plaintiff should be enjoined from filing any suit involving the same parties or property. "Federal courts have the power and the obligation to protect themselves from abusive filing of frivolous and repetitive claims." *McMahon v. F & M Bank-Winchester*, 45 F.3d 426 (4th Cir. 1994) (citing *Procup v. Strickland*, 792 F.2d 1069, 1070-71 (11th Cir.1986)). For example, in *McMahon*, the Fourth Circuit Court of Appeals affirmed the district court's order (1) barring the plaintiff from "filing any civil action in any federal court without leave of court"; (2) requiring the plaintiff to "certify in her application for leave to file that the claim(s) she wishes to raise have never been 'raised or disposed of on the merits by any state or federal court'"; and (3) absolutely prohibiting the plaintiff "from filing any action that is related to the facts or parties in this case." *Id.* U.S. Bank seeks entry of a similar order here.

CONCLUSION

WHEREFORE, Defendant, respectfully request that this Honorable Court:

A. Grant the Motion to Dismiss;

B. Dismiss the Complaint with prejudice;

C. Award U.S. Bank reasonable attorney's fees and costs incurred in having to appear and defend against Plaintiff's allegations asserted in the Complaint;

D. Sanction Plaintiff for her long history of frivolous and abusive filings;

E. Entry of an Order (i) enjoining Plaintiff from filing any action in federal court without leave of court, (ii) requiring Plaintiff to certify in her motion for leave that the claims she seeks to raise have not be entertained in by any state or federal court, and (iii) prohibiting Plaintiff from filing any action contesting title to the subject property; and

F. Grant such other and further relief as this Court deems just and proper.

(SIGNATURE ON FOLLOWING PAGE)

LAURA TONEY v. LASALLE BANK, et al.
DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF AMENDED MOTION TO DISMISS AND MOTION FOR SANCTIONS
C/A No.: 3:13-cv-03481-MBS-SVH

FINKEL LAW FIRM LLC

s/Sean A. O'Connor
Sean A. O'Connor (Dist. Id. No. 7601)
Post Office Box 41489
Charleston, South Carolina 29423
T: (843) 577-5460
F: (843) 577-5135
soconnor@finkellaw.com

Attorneys for Defendants
LaSalle Bank National Association and
Altisource Homes

January 20, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, Plaintiff, vs. LaSalle Bank National Association as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, Defendants.	Civil Action No. 3:13-cv-03481-MBS-SVH **CERTIFICATE OF SERVICE**

The undersigned states that on **January 20, 2014**, he caused a true and correct copy of *Defendants' Amended Motion to Dismiss and Motion for Sanctions*, with attached Exhibits and *Defendants' Memorandum of Law in Support of Amended Motion to Dismiss and Motion for Sanctions* to be served upon the parties identified below by United States mail, proper postage affixed and addressed as follows:

Laura Toney
Post Office Box 722
Bishopville, South Carolina 29010
Plaintiff, Pro Se

A. Parker Barnes, III, Esq.
James Y. Becker, Esq.
Haynsworth Sinkler Boyd, P.A.
1201 Main Street, Suite 2200
Post Office Drawer 11889 (29211-1889)
Columbia, South Carolina 29201
Attorneys for Defendant US Bank Cust for Pro Cap III LLC

Paul M. Fata, Esq.
115 E. Church Street
Post Office Drawer 568
Bishopville, South Carolina 29010
Attorney for Defendant Capell and Lee County Planning and Zoning

s/Sean A. O'Connor
Sean A. O'Connor (Dist. Id. No. 7601)
FINKEL LAW FIRM LLC
Post Office Box 41489
Charleston, South Carolina 29423
Telephone: (843) 577-5460
Facsimile: (843) 577-5135
soconnor@finkellaw.com

Lee County
Third Judicial Circuit
Public Index

Switch View

Laura A Toney VS Lasalle Bank National Association , defendant, et al

Case Number:	2013CP3100321	Court Agency:	Common Pleas	Filed Date:	11/13/2013
Case Type:	Common Pleas	Case Sub Type:	Possession 450	File Type:	Jury
Status:	Disposed	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:	Ended by Non Jury	Disposition Date:	07/11/2016	Disposition Judge:	Newman, Clifton
Original Source Doc:		Original Case #:		Restore Reason:	Reopen Case for Appeal
Judgment Number:		Court Roster:			

Case Parties

Click the icon to show associated parties.

Name	Address	Race	Sex	Year Of Birth	Party Type	Party Status	Last Updated
Altisource Homes					Defendant		04/14/2015
Barnes, A. Parker III (Inactive)	PO Box 11889 Columbia SC 29211				Defendant Attorney		12/01/2015
Capelli, Wayne Lee County Treasurer					Defendant		04/14/2015
Fata, Paul M.	PO Drawer 568 Bishopville SC 29010				Defendant Attorney		12/22/2014
Lasalle Bank National Association					Defendant		04/14/2015
Lee County Planning And Zoning					Defendant		04/14/2015
O'Connor, Sean A.	4000 Faber Place Drive Suite 450 North Charleston SC 294058578				Defendant Attorney		01/22/2015
Pro Capital Investors (Inactive)					Defendant		12/01/2015
Toney, Laura A					Plaintiff		07/21/2016
Toney, Laura A	P.O. Box 722 Bishopville SC 29010				Plaintiff Pro Se		11/13/2013

Associated Cases

Agency	Case #	External	Relationship	Description	Case Filed Date	Disposition Date	Case Status	Disposition
Common Pleas	2013LP3100050	N	LP	Associated by LP to CP Transfer	11/13/2013		Pending/ADR	

Actions

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Lasalle Bank National Association	Service/Certificate Of Service	Filing		09/14/2016-13:26		
Altisource Homes	Service/Certificate Of Service	Filing		09/14/2016-13:26		
Toney, Laura A	Order Denying Motion	Order		08/29/2016-13:17		
Toney, Laura A	Amended Motion for Reconsideration	Filing		07/26/2016-16:23		
Toney, Laura A	Motion/Reconsider	Motion		07/20/2016-15:15	07/20/2016-15:15	
Altisource Homes	Response	Filing		07/20/2016-15:02		
Altisource Homes	Exhibit/Filing of Exhibits	Filing		07/20/2016-15:02		
Lasalle Bank National Association	Response	Filing		07/20/2016-15:02		
Lasalle Bank National Association	Exhibit/Filing of Exhibits	Filing		07/20/2016-15:02		
Toney, Laura A	Order Granting Motion to Dismiss	Order		07/11/2016-16:02		

Barnes, A. Parker III	Roster/Notice of Motions Roster Publication Sent	Action		01/22/2015-14:10	07/11/2016-14:10	
Barnes, A. Parker III	Roster/Notice of Motions Roster Publication Sent	Action		01/22/2015-14:10	07/11/2016-14:10	
Toney, Laura A	Motion/Strike for Insufficiency of Service of Process	Motion		12/23/2014-12:25	07/11/2016-12:25	
Fata, Paul M.	Motion/Summary Judgment	Motion		12/19/2014-11:37	07/11/2016-11:37	
Toney, Laura A	Motion/Strike Pro Capital's Answer to Complaint	Motion		12/08/2014-13:15	07/11/2016-13:15	
Toney, Laura A	Motion/Strike Lasalle Bank, Strike all Documents from Federa	Motion		12/08/2014-13:14	07/11/2016-13:14	
Pro Capital Investors	Response to Plaintiff's Motion to Strike and Default	Filing		12/03/2014-11:21	07/11/2016-11:21	
Barnes, A. Parker III	Motion/Dismiss	Motion		12/02/2014-15:49	07/11/2016-15:49	
Lasalle Bank National Association	Response to Motion for Default	Filing		12/01/2014-15:50	07/11/2016-15:50	
Altisource Homes	Response to Motion for Default	Filing		12/01/2014-15:50	07/11/2016-15:50	
O'Connor, Sean A.	Motion/Dismiss and Motion for Sanctions	Motion		12/01/2014-15:41	07/11/2016-15:41	
Lasalle Bank National Association	Motion/Dismiss	Motion		11/20/2014-16:21	07/11/2016-16:21	
Toney, Laura A	Affidavit/Default	Filing		11/17/2014-16:54	07/11/2016-16:54	
Toney, Laura A	Petition/Petition to Enjoin the Transfer of Real Estate	Filing		10/16/2014-16:32	07/11/2016-16:32	
Toney, Laura A	Roster/Notice of Motions Roster Publication Sent	Action		10/08/2014-14:42	07/11/2016-14:42	
Toney, Laura A	Returned Receipts	Filing		09/25/2014-12:54	07/11/2016-12:54	
Toney, Laura A	Motion/Default and Motion to Strike	Motion		09/25/2014-12:53	07/11/2016-12:53	
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	

THE STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEE

Laura Toney
Plaintiff,

v.

Case No: 2013-CP-321

LaSalle Bank National Association
As Trustee for the Registered
Holders of Structured Asset
Securities Corporation, Structured
Asset Investment Loan Trust, Mortgage
Pass-Through Certificates, Series 2004-11,

Complaint (Recovery of Real Property)

(Jury Trial Demanded)

A/K/A
AltiSource Homes
Address: P.O. Box 24237
West Palm Beach, Florida 33416-4737
And
12650 Ingenuity Drive
Orlando, Florida 32826
C/O Hunoval Law Firm
501 Minuet Lane
Suite 104A
Charlotte, North Carolina 28217

Pro Capital Investors
50 South 16th Street
Suite 1950
Philadelphia, Pa 19102
C/O Haynsworth Sinkler Boyd PA
P.O. Box 11889
Columbia, SC 29211-11889

Wayne Capell, Lee County Treasurer
Lee County Planning and Zoning.

DEFENDANTS.

MOTION FOR

RULINGS ON MOTIONS TO STRIKE

And

MOTION FOR DEFAULT

The case was remanded back to State Court for improper removal and there are several Motions to Strike filed by the Plaintiff that were not addressed in federal court. The Plaintiff also requests that a Motion for Default is granted.

The Defendants filed late answers in the above case without being granted permission from the court. Once a defendant has received a summons he or she has 30 days to file their answer. After the time to file an answer has expired, the answer may only be filed if the defendant files a motion requesting permission to file and where the failure was the result of excusable neglect. An answer filed after the deadline without a motion seeking leave to file is a nullity because there is no showing of excusable neglect.

Rule 6(b) : **Enlargement. " When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order. Upon motion made after the expiration of the specified period, the judge may permit the act to be**

done where the failure to act was the result of excusable neglect. Notwithstanding any other provisions of this rule, the parties may enter into binding stipulations without approval of the court enlarging the time, not to exceed in the aggregate 30 days, within which an act is required or allowed to be done under these rules, provided, however, that neither the court nor the parties may extend the time for taking any action under Rules 50(b), 52, 59(b), (d), (e), 60(b), except to the extent and under the conditions stated in them.

The Plaintiff filed a Motion to Strike on January 15, 2014.

The Defendant Pro Capital Investors was served November 18, 2013, but failed to answer until December 31, 2013. They did not get permission from the Court to file a late answer which makes their answer a nullity.

Upon research and interviews, it was discovered that Pro Capital Investors in the correct name of the Defendant. In an effort to mislead the Court, Mr. Finkel and Mr. Barnes submitted another name and stated that the Plaintiff misidentified the Defendant, Pro Capital Investors. The Lee County Treasurer's Office has the identical name and address that was in the Plaintiff's complaint. Also, upon a visit to 2 Office Park Court, Suite 103, Columbia, South Carolina, the Plaintiff discovered that Pro Cap III, LLC and his registered agent do not occupy that office. This office is being occupied by SearchTech, a National Data Access Corporation. The Plaintiff feels that Mr. Finkel and Mr. Barnes have committed fraud on the Court. Also, Pro Capital

Investors which is the true Defendant, is not registered with the Secretary of State with a valid address. The Plaintiff filed a Motion to Strike on January 15, 2014.(EFC No. 55)

Mr. Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning were served on November 13, 2013, but failed to answer in a timely manner. The Defendants filed a Motion to Dismiss with the Lee County Clerk of Court on December 20, 2013, which was also untimely. The Defendant later filed an answer in Federal Court on January 6, 2014, that was also untimely. Mr. Paul Fata accused the Plaintiff of "unclean Hands," but failed to inform the Court of his conflict of interest in this case.

The Defendants LaSalle Bank and AltiSourceHomes were served the Summons and Complaint on November 14, 2013, and had (30) days to answer. LaSalle Bank and AltiSourceHomes filed a Notice of Removal on December 13, 2013, without filing an answer. The Defendants filed a Summary Judgment on December 20, 2013, which was not timely filed. LaSalle Bank A/K/A AltisourceHomes claims they had 7 days after removal to federal court. This is untrue. **LaSalle Bank and Altisource were served on November 14, 2013, but did not file an answer until December 20, 2013. A Motion to Strike was filed by the Plaintiff on January 8, 2014 (EFC No. 27).**

A Notice of Removal was filed December 13, 2013, which was on day 30 after service of the summon and complaint, but the Defendants failed to file an answer (EFC No. 1).

Mr. Finkel referenced Rule 81 which states:

(c) REMOVED ACTIONS.

(1) *Applicability.* These rules apply to a civil action after it is removed from a state court.

(2) *Further Pleading.* After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the **longest** of these periods:

(A) 21 days after receiving—through service or otherwise—a copy of the initial pleading stating the claim for relief;

(B) 21 days after being served with the summons for an initial pleading on file at the time of service; or

(C) 7 days after the notice of removal is filed.

Mr. Finkel's answer should have been filed with the Notice of Removal for it to be timely. In an attempt to mislead the court, Mr. Finkel referenced the (7) days knowing that his answer should have been filed earlier within the longest of the period which was (21) days from the date of service.

McCanna v. Mutual Investment & agency Co.,37 NM 597, 26 P. 2d 231 (1933)(Plaintiff entitled to immediate default judgment upon remand where defendants failed to demur or answer in State Court when filing removal.

The South Carolina Court of Appeals ruled in *Lawton Limehouse, Sr. v. Paul H. Hulsey and The Hulsey Litigation Group,LLC*

Entry of Default

"Hulsey argues the trial court erred in failing to set aside entry of default because (a) the answer was timely or (b) good cause existed to set aside the entry of default under Rule 55(c), SCRCP. We disagree."

"As to the issue of whether the answer was timely filed, Hulsey points out this is an issue of interpretation of a rule or statute and is therefore reviewed de novo. See Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) (stating the interpretation of a statute is a question of law, which the appellate court is free to decide with no particular deference to the trial court). Further, our standard of review leaves the decision to set aside an entry of default within the sound discretion of the trial court, which we will not reverse absent an abuse of discretion. Stark Truss Co. v. Superior Const. Corp., 360 S.C. 503, 508, 602 S.E.2d 99, 101 (Ct. App. 2004). Such an abuse of discretion occurs when the decision is based upon an error of law or when the order is without evidentiary support. Id."

Timeliness of the Answer

"Rule 12(a), SCRCP, provides: "A defendant shall serve his answer within 30 days after the service of the complaint upon him[] . . . ." However, federal rules provide "[a] defendant who did not answer [in state court] before removal

must answer . . . within the longest of . . . :" (A) twenty days after being served or otherwise receiving the initial pleading or (B) within five days after notice of removal is filed. Rule 81(c)(2), FRCP."

"In this case, Hulsey removed fourteen days after being served. Thus, although under Rule 12(a), SCRCP, he was entitled to another sixteen days to answer, by choosing to remove the case to federal court, he willfully subjected himself to the shortened time period of Rule 81(c)(2), FRCP – providing he must answer within six days (twenty days after being served)."

b. Rule 55(c)

An affidavit of Default was filed against Lee County Treasurer, Mr. Wayne Capell and Lee County Land and Zoning on January 8, 2014 (EFC No. 30).

"Hulsey next argues the trial court erred in failing to set aside the entry of default under Rule 55(c), SCRCP. We disagree."

"The issue before this court is not whether we would find good cause, but whether the decision to deny the motion to set aside default is supportable by the evidence and not controlled by an error of law. Williams v. Vanvolkenburg, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994). A motion to set aside entry of default under Rule 55(c) is addressed to the sound discretion of the trial court. Id."

Under Rule 55(c), the entry of default may be set aside for "good cause shown," which is a less stringent standard than the excusable neglect standard of Rule 60(b). Sundown Operating Co. v. Intedge Indus. Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). The good cause standard of Rule 55(c) requires, as a threshold burden, a party to put forth "an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Id. "Once a party has put forth a satisfactory explanation . . . the trial court must also consider [the Wham factors]: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." Id. at 607-08, 681 S.E.2d at 888. However, a trial court need not make specific findings of fact for each factor if sufficient evidence supports a trial court's determination that no reasonable explanation exists for vacation of default. Id.

"In this case, the trial court held that because "there appears . . . to be no reasonable basis for [Hulsey's] assumption that the [thirty] day time to file an answer starts completely anew upon remand[,] . . . no good cause has been demonstrated . . . ." While we appreciate the trial court did not have the benefit of the Sundown opinion, we find Sundown did nothing to abate the discretion to which a trial court is entitled in ruling on a Rule 55(c) motion. Nor did it change the standard this court applies when reviewing such a decision. What constitutes a satisfactory explanation that serves the interests of justice remains within the sound discretion of the trial court." **The Plaintiff filed a Motion to Strike on February 7, 2014 (EFC No. 56).**

For the above reasons, the Plaintiff respectfully requests that her Motions to Strike are granted by the Court and the Defendants' answers are stricken and declared a nullity. The Plaintiff also requests attorney fees in this action. The plaintiff also respectfully requests that a default judgment is granted in favor of the Plaintiff.

Joanna Toney
9-25-2014

THE STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEE

Laura Toney
Plaintiff,

v.

CASE NUMBER: 2013-CP-321

LaSalle Bank National Association
As Trustee for the Registered
Holders of Structured Asset
Securities Corporation, Structured
Asset Investment Loan Trust, Mortgage
Pass-Through Certificates, Series 2004-11,

Complaint (Recovery of Real Property)

(Jury Trial Demanded)

A/K/A
AltiSource Homes
Address: P.O. Box 24237
West Palm Beach, Florida 33416-4737
And
12650 Ingenuity Drive
Orlando, Florida 32826
C/O Hunoval Law Firm
501 Minuet Lane
Suite 104A
Charlotte, North Carolina 28217

Pro Capital Investors
50 South 16th Street
Suite 1950
Philadelphia, Pa 19102
C/O Haynsworth Sinkler Boyd PA
P.O. Box 11889
Columbia, SC 29211-11889

Wayne Capell, Lee County Treasurer
Lee County Planning and Zoning.

DEFENDANTS.

MOTION FOR

RULINGS ON MOTIONS TO STRIKE

And

MOTION FOR DEFAULT

And

Affidavit of Default

CERTIFICATE OF MAILING

The Plaintiff certifies that she mailed a copy of the above motion to the Defendants below addressed as follows via United States Postal Service on September 25, 2014.

Finkel Law Firm, LLC
P.O. Box 41489
4000 Faber Place
Suite 450
Charleston, SC 29405

Stuckey, Fata,& Segars, LLC
P.O. Box 568
Bishopville, SC 29010

Pro Capital Investors
50 South 16th Street, Suite 1950
Philadelphia, PA 19102
C/O Haynsworth Sinkler, Boyd PA
P.O. Box 11889
Columbia, SC 29211-11889

Laura Toney

Laura Toney
P.O. Box 722
Bishopville, SC 29010
(803) 459-6006

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEE

Laura Toney

Plaintiff,

v.

Case No: 2013-CP-321

LaSalle Bank National Association
As Trustee for the Registered
Holders of Structured Asset
Securities Corporation, Structured
Asset Investment Loan Trust, Mortgage
Pass-Through Certificates, Series 2004-11,

AFFIDAVIT OF DEFAULT

A/K/A
AltiSource Homes
Address: P.O. Box 24237
West Palm Beach, Florida 33416-4737
And
12650 Ingenuity Drive
Orlando, Florida 32826
C/O Hunoval Law Firm
501 Minuet Lane
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50 South 16th Street
Suite 1950
Philadelphia, Pa 19102
C/O Haynsworth Sinkler Boyd PA
P.O. Box 11889
Columbia, SC 29211-11889

Wayne Capell, Lee County Treasurer
Lee County Planning and Zoning.

DEFENDANTS.

PERSONALLY appeared before, Laura Toney who, being duly sworn, states that she is the Plaintiff, Pro se **and** that thirty (30) days have elapsed since the service of the Summons and Complaint, exclusive of the date of Service, upon the Defendants(s) LaSalle Bank, AltisourceHomes, Pro Capital Investors, Mr. Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning and that no answer, Demurrer or Notice of Appearance has been served upon her as required by the Summons in this action; and that the Defendants are not a member of the military service; and the Defendant(s) are in Default.

Sworn to and Subscribed before me

25th **day of** Sept., **2014**

_____

Notary Public for South Carolina

My commission expires August 31, 2015

Laura Toney

Laura Toney, Pro Se

AFFIDAVIT-OF DEFAULT

State of South Carolina

County of Lee

Case No. 2013-CP-321

LaSalle Bank National Association

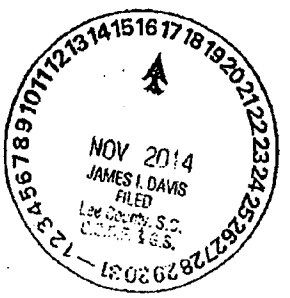
As Trustee for the Registered

Holders of Structured Asset

Securities Corporation, Structured

Asset Investment Loan Trust, Mortgage

Pass-Through Certificates, Series 2004-11,



A/K/A

AltiSource Homes

Address: P.O. Box 24237

West Palm Beach, Florida 33416-4737

C/O Finkel Law Firm
P.O Box 41489
4000 Faber Place
Suite 450
Charleston, SC 29405

And

Pro Capital Investors

50 South 16th Street

Suite 1950

Philadelphia, Pa 19102

C/O Haynsworth, Sinkler, Boyd

P.O. Box 11889
Columbia, SC 29211-11889

AND

Wayne Capell, Lee County Treasurer

Lee County Planning and Zoning

C/O Stuckey, Fata and Segars
P.O. Box 568
Bishopville, SC 29010

DEFENDANTS.

Before me the undersigned authority, personally appeared on November 17, 2014, who after being sworn, deposes and says that she: served on LaSalle Bank November 14, 2014, a Summon and Complaint on the Defendants; the Defendants Lee County Treasurer, Mr. Wayne Capell and Lee County Planning and Zoning were served on November 13, 2014; and Pro Capital Investors was served on November 18, 2014, they but failed to answer in State Court or made an appearance within 30 days in a timely manner. The Defendants are not members of the military and that Defendants have been defaulted for failure to appear and such Defendants are not minors or incompetent persons. The Plaintiff is requesting a Judgment in the amount of $10,000.000.00 which was requested in the pleading.

On this 17th **day of** Nov. **2014.**

By: Laura Fata

Prepared By: Laura Toney

NOTARY PUBLIC OF Lee CO

SOUTH CAROLINA

My Commission Expires: August 31, 2015

CERTIFICATE OF SERVICE

The Plaintiff, Laura Toney, certifies that she mailed a copy of the Affidavit of Default to the Defendants below addressed as follows on November 17, 2014, via United States Postal Service.

LaSalle Bank National Association

As Trustee for the Registered

Holders of Structured Asset

Securities Corporation, Structured

Asset Investment Loan Trust, Mortgage

Pass-Through Certificates, Series 2004-11,

A/K/A

AltiSource Homes

Address: P.O. Box 24237

West Palm Beach, Florida 33416-4737

C/O Finkel Law Firm
P.O Box 41489
4000 Faber Place
Suite 450
Charleston, SC 29405

And

Pro Capital Investors

50 South 16th Street

Suite 1950

Philadelphia, Pa 19102

C/O Haynsworth, Sinkler, Boyd

P.O. Box 11889
Columbia, SC 29211-11889

AND

Wayne Capell, Lee County Treasurer

Lee County Planning and Zoning

C/O Stuckey, Fata and Segars
P.O. Box 568
Bishopville, SC 29010

DEFENDANTS.

Laura Toney

Laura Toney
P.O. Box 722
Bishopville, SC 29010
(803) 459-6006

From: Sean O'Connor
Sent: Thursday, November 20, 2014 3:20 PM
To: jdavis@leecountysc.org
Cc: Paul M. Fata; Barnes, Parker (pbarnes@hsblawfirm.com)
Subject: Laura Toney v. LaSalle Bank National Association, et al., 2013-CP-31-00321

Dear Mr. Davis:

I represent Defendants LaSalle Bank National Association and Altisource Homes in the above-referenced action. I have attached a copy of a pending motion to dismiss that I filed on behalf of my clients. Although this motion was filed in January 2014, no hearing has been scheduled. I suspect this motion may have "slipped through the cracks," so to speak, as the motion was filed in federal court shortly after removal, but the case was ultimately remanded to state court. The U.S. District Court should have sent the whole file over to your office upon remand, but it may not have, or it's possible that this pending motion was received in Lee County but was overlooked. At any rate, could you please add this motion to the hearing roster in the next available civil motion term?

Please advise if I can assist further. Thanks.

Kind regards,

Sean O'Connor

Sean A. O'Connor
Attorney
Finkel Law Firm LLC
4000 Faber Place Drive, Suite 450
North Charleston, South Carolina 29405
Direct Dial 843.576.6304
Switchboard 843.577.5460
EFax 866.800.7954
<mailto:soconnor@finkellaw.com>
www.finkellaw.com

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEE	)	THIRD JUDICIAL CIRCUIT
Laura Toney,	)	Civil Action No. 2013-CP-31-00321
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
LaSalle Bank National Association as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning,	)	
	)	
Defendants.	)	



DEFENDANTS LASALLE BANK NATIONAL ASSOCIATION'S AND ALTISOURCE HOMES' RESPONSE TO PLAINTIFF'S MOTION FOR DEFAULT, SECOND AMENDED MOTION TO DISMISS AGAINST PLAINTIFF, AND MOTION FOR SANCTIONS AGAINST PLAINTIFF

COMES NOW Defendant U.S. Bank, National Association, as Trustee for Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 (hereinafter "U.S. Bank"), incorrectly named on page one of the Complaint as "LaSalle Bank National Association as Trustee for Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, A/K/A AltiSource Homes" (hereinafter "LaSalle Bank") (collectively, "Defendant"), by and through the undersigned counsel, and hereby files the herein Response to

Motion for Default and Motion to Strike, Motion to Dismiss pursuant to Rules 12(b)(4), 12(b)(5), and 12(b)(6) SCRCP, and Motion for Sanctions pursuant to S.C. Code Ann. § 15-36-10 *et seq.*, and would state unto this Honorable Court as follows:

1. Defendant removed this case to the United States District Court for the District of South Carolina, Columbia Division, on December 13, 2013, and in that court filed a *Motion to Dismiss for Failure to State a Claim* on December 20, 2013 (attached as Exhibit A). Defendant filed an *Amended Motion to Dismiss and Motion for Sanctions* (hereinafter "the Motion") on January 20, 2014 (attached as Exhibit B). Each of these motions is recognized as a responsive pleading and a defense within the meaning of the South Carolina Rules of Civil Procedure and the Federal Rules of Civil Procedure. Moreover, Rules 12(b)(4), 12(b)(5) and 12(b)(6) of the South Carolina Rules of Civil Procedure require these same defenses to be raised by motion before further pleading.[1] Defendant's Motion remained pending when the United States District Court remanded the case on August 5, 2014, without having ruled on the Motion, and the Motion therefore remains pending and is now properly before this Honorable Court. Defendant's original motion to dismiss was filed more than ten months before Plaintiff filed her Motion for Default on September 25, 2014, which filings were just two of several filings undertaken by Plaintiff and Defendant in the United States District Court before this case was ultimately remanded. Plaintiff absolutely cannot properly or in good faith be heard to assert that Defendant failed to plead or

[1] "Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state facts sufficient to constitute a cause of action, (7) failure to join a party under Rule 19, (8) another action is pending between the same parties for the same claim. A motion making any of these defenses shall be made before pleading if a further pleading is permitted." South Carolina Rule 12(b)

otherwise defend within the meaning of Rule 55, SCRCP. Therefore, Plaintiff's Motion for Default and Motion to Strike wholly lacks merit, is erroneous and improper, and should be denied. Plaintiff's baseless motion is merely the latest example of her long-standing, continuous and unabated efforts to deliberately manipulate the Court system to assert specious, frivolous claims against Defendant.

2. To ensure that this matter is brought before the Court, Defendant hereby renews its previously filed Amended Motion to Dismiss as described below and respectfully requests that said motion be heard at the next available motion hearing term, as said Motion has technically been pending since January 2014.

3. Plaintiff has a long history of filing frivolous claims against Defendant.

4. On March 15, 2007, the South Carolina Court of Common Pleas of Lee County entered an order entitling LaSalle Bank, U.S. Bank's predecessor in interest, to foreclose on Plaintiff's property located at 729 Chatman Street, Bishopville, South Carolina because Plaintiff defaulted on her mortgage. The property thereafter was sold at auction in accordance with applicable South Carolina law and procedure.

5. Plaintiff has continued to contest the validity of the foreclosure sale in South Carolina state courts and in the federal court system. Both have determined and ruled unequivocally that Plaintiff's claims are meritless.

6. When Plaintiff attempted to re-litigate the same dispute in the United States District Court for the District of South Carolina, Chief Judge Margaret B. Seymour of that Court dismissed Plaintiff's complaint on *res judicata* grounds on September 5, 2012. See Civil Action

No. 3:11-cv-01686-MBS. Judge Seymour's ruling was affirmed *per curiam* by the United Stated Court of Appeals for the Fourth Circuit on February 28, 2013.

7. Judge Seymour's Order of September 5, 2012 which ruled against Plaintiff Toney and dismissed her duplicative federal court lawsuit specifically noted that "the [U.S.] Magistrate Judge did advocate warning Plaintiff that filing future frivolous actions may result in appropriate sanctions against Plaintiff."

8. Plaintiff has filed the instant action once again challenging the validity of the same foreclosure sale which took place in 2007, and again seeking an order that title be vested with her.

9. Accordingly, Plaintiff's complaint in this action should be dismissed under the doctrine of *res judicata*, and because Plaintiff has otherwise failed to state a claim upon which relief can be granted.

10. Additionally, Plaintiff failed to serve U.S. Bank and improperly served LaSalle Bank. Therefore, dismissal is proper under Rules 12(b)(4) and 12(b)(5).

11. Finally, Plaintiff should be sanctioned for her repeated filings and in particular she should be specifically enjoined from filing any other suit in the future in any court involving the same parties and property, to wit, 729 Chatman Street, Bishopville, South Carolina.

12. Defendant relies upon its Memorandum of Law in Support of its Amended Motion to Dismiss and Motion for Sanctions submitted contemporaneously herewith, as well as the following exhibits which are attached hereto:

Exhibit C: Magistrate Judge Joseph R. McCrorey's Report and Recommendation, Civil

Action No. 3:11-1686-MBS-JRM; and

Exhibit D: Chief United States District Judge Margaret B. Seymour's Order and Opinion, Civil Action No. 3:11-1686-MBS.

WHEREFORE PREMISES CONSIDERED, Defendant respectfully requests that Plaintiff's Motion for Default and Motion to Strike be DENIED, Defendant's Motion to Dismiss be GRANTED such that this action shall be DISMISSED in its entirety with prejudice. Defendant further requests that its Motion for Sanctions be GRANTED and that the Court impose sanctions upon Plaintiff, including costs, attorneys' fees, and the pre-filing injunctive relief described herein above, along with and such further relief as the Court deems just and proper.

(SIGNATURE ON FOLLOWING PAGE)

Laura Toney vs. LaSalle Bank National Association et al.
Civil Action No. 2013-CP-31-00321
DEFENDANTS LASALLE BANK NATIONAL ASSOCIATION'S
AND ALTISOURCE HOMES' RESPONSE
TO PLAINTIFF'S MOTION FOR DEFAULT,
SECOND AMENDED MOTION TO DISMISS
AGAINST PLAINTIFF, AND MOTION FOR
SANCTIONS AGAINST PLAINTIFF

FINKEL LAW FIRM LLC

Sean A. O'Connor (SC Bar No. 68382)
4000 Faber Place Drive | Suite 450
North Charleston, South Carolina 29405
T: (843) 577-5460
F: (866) 800-7954
soconnor@finkellaw.com

Attorneys for Defendants
LaSalle Bank National Association and
Altisource Homes

November 24, 2014

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, Plaintiff, vs. LaSalle Bank National Association as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, Defendants.	Civil Action No. 3:13-cv-03481-MBS-SVH

DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SANCTIONS

COMES NOW, Defendants LaSalle Bank National Association and AltiSource Homes (respectively "LaSalle Bank" and "AltiSource Homes" or collectively "Defendants"), by and through undersigned counsel, and hereby file this their Motion to Dismiss and Motion for Sanctions pursuant to Rule 12(b)(6) and Rule 11 of the Federal Rules of Civil Procedure:

1. Plaintiff has a long history of filing frivolous claims against Defendants.

2. On March 15, 2007, the South Carolina Court of Common Pleas of Lee County entered an order entitling LaSalle Bank to foreclose on Plaintiff's property located at 729 Chatman Street, Bishopville, South Carolina because Plaintiff defaulted on her mortgage. The property was in fact sold at auction.

3. Plaintiff has continued to fight the validity of the foreclosure sale in South Carolina state and federal courts. Both courts have held that Plaintiff's claims are meritless.

4. When Plaintiff attempted to re-litigate her case, the United States District Court for the District of South Carolina dismissed Plaintiff's complaint on *res judicata* grounds.

5. The Court also warned that if Plaintiff filed another suit, she would be subject to sanctions.

6. Plaintiff has filed the instant action again challenging the validity of the foreclosure sale which took place in 2007.

7. Accordingly, her complaint should be dismissed under the doctrine of *res judicata*, and sanctions should be imposed.

8. Defendants rely upon their Memorandum of Law in Support of their Motion to Dismiss and Motion for Sanctions submitted contemporaneously herewith, as well as the following exhibits that are attached hereto:

Exhibit A: Magistrate Judge Joseph R. McCrorey's Report and Recommendation, Civil Action No. 3:11-1686-MBS-JRM; and

Exhibit B: Chief United States District Judge Margaret B. Seymour's Order and Opinion, Civil Action No. 3:11-1686-MBS.

WHEREFORE, Defendants respectfully request that their Motion to Dismiss be GRANTED and that this action be dismissed with prejudice. Defendants additionally request that their Motion for Sanctions be GRANTED and that the Court impose sanctions, including costs, attorneys' fees, and pre-filing injunctive relief and such further relief as the Court deems proper.

(SIGNATURE ON FOLLOWING PAGE)

Laura Toney v. LaSalle Bank National Association, et al.
DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SANCTIONS
Civil Action No.: 3:13-cv-03481

FINKEL LAW FIRM LLC

s/Sean A. O'Connor
Sean A. O'Connor (Dist. Id. No. 7601)
Post Office Box 41489
Charleston, South Carolina 29423
Telephone: (843) 577-5460
Facsimile: (843) 577-5135
soconnor@finkellaw.com

Attorneys for Defendants
LaSalle Bank National Association and
Altisource Homes

December 20, 2013

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

LAURA TONEY, Plaintiff, v. LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE REGISTERED HOLDERS OF STRUCTURED ASSET SECURITIES CORPORATION, STRUCTURED ASSET INVESTMENT LOAN TRUST, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-11; AND OCWEN FEDERAL BANK A/K/A ALTISOURCE HOMES, Defendants.	Civil Action No. 3:11-1686-MBS-JRM REPORT AND RECOMMENDATION

The pro se Plaintiff, Laura Toney, filed this action on July 13, 2011.[1] Plaintiff appears to assert claims under the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601, et seq., as well as claims under South Carolina law. Defendants in this action are LaSalle Bank National Association, as

[1]Pretrial matters in this case were referred to the undersigned pursuant to Local Civil Rule 73.02(B)(2)(e) DSC. As these are dispositive motions, this Report and Recommendation is entered for review by the Court.

Exhibit A

Trustee for the registered holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11 ("LaSalle") and Ocwen Federal Bank, also known as AltiSource Homes ("Ocwen").[2] Plaintiff filed motions for entry of default against Ocwen on October 19 and 25, 2011. Ocwen filed a response on April 6, 2012, and Plaintiff filed a reply on April 16, 2012. Plaintiff filed a motion for entry of default against LaSalle on October 25, 2011, LaSalle filed responses on November 1 and 7, 2011, and Plaintiff filed replies on November 8 and 15, 2011.[3]

LaSalle filed a motion to dismiss on October 21, 2011. As Plaintiff is proceeding pro se, an order pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975) was issued on October 24, 2011, advising Plaintiff of the importance of a dispositive motion and of the need for her to file an adequate response. Plaintiff was specifically advised that if she failed to respond adequately, Defendant LaSalle's motion may be granted, thereby ending her case against LaSalle. Plaintiff filed responses on October 25 and 28, and November 2, 2011; LaSalle filed a reply on November 7, 2011; and Plaintiff filed a sur-reply on November 8, 2011. A hearing on pending motions was held before the undersigned on March 20, 2012.

---

[2]LaSalle was originally named as LaSalle Bank National Association, Trustee for Lehman Brothers Secured Asset Investment Loan Trust Sail 2005. Plaintiff filed a motion to amend (on January 11, 2012) the name of this Defendant (as identified by Defendant LaSalle's in its motion to dismiss), which the undersigned granted on March 20, 2012. Defendant Ocwen asserts that it has been misidentified and that its correct name is Ocwen Loan Servicing, LLC. See Docs. 60 and 61. Ocwen also has stated it will accept service of an amended summons and amended complaint that reflects its corrected name. Plaintiff has not filed a motion to amend Ocwen's name.

[3]On March 22, 2012, the Honorable Margaret B. Seymour, Chief United States District Judge, District of South Carolina, denied Plaintiff's motion for a temporary injunction and request for a hearing for a preliminary and permanent injunction. Plaintiff, on April 2, 2012, filed a Notice of Appeal to the Court of Appeals for the Fourth Circuit, as to Judge Seymour's order. See Doc. 62.

After the hearing, Defendant Ocwen filed a motion to dismiss on April 6, 2012 (and it filed a response to the motions for default as detailed above). Another Roseboro order was issued on April 10, 2012. Plaintiff filed a response on May 14, 2012.

BACKGROUND

Plaintiff refinanced her house located in Bishopville, South Carolina ("the Property") on October 6, 2004. During the closing, Plaintiff entered into and received a mortgage[4] which was secured by the Property. On June 14, 2005, Plaintiff sent an unsigned letter to "Owen Federal Bank FSB" (see attachment to Complaint), which she asserts is a letter sent to Defendant Ocwen stating her intention to rescind the loan because of alleged federal disclosure violations that occurred during the processing of the loan. Plaintiff claims that, prior to closing, she did not receive the disclosures required by TILA. On or around July 2005, Defendant LaSalle, which had been assigned the mortgage, filed a foreclosure action against Plaintiff.[5] Plaintiff filed, through counsel, an answer and counterclaim (alleging a TILA violation) in the state foreclosure action on August 17, 2005. Thereafter, Defendant LaSalle filed a motion for summary judgment. Plaintiff states that the first reply to her rescission letter was on October 19, 2005 (see Doc. 52, p. 9). On February 16, 2007, a foreclosure hearing was held in the absence of Plaintiff or her attorney. Plaintiff asserts that her

[4]It appears the original mortgage was with Finance America., LLC. The mortgage was later assigned to LaSalle. The servicing was assigned in October 2004 (effective December 1, 2005) to Ocwen Federal Bank FSB. See Attachments to Complaint (Doc. 1) and to Plaintiff's April 16, 2012 Response (Doc. 70).

[5]In a pleading filed July 20, 2011 (prior to Plaintiff bringing this action into proper form), Plaintiff appears to attempt to remove the state foreclosure action to this Court. Any such attempt, however, is untimely. See 28 U.S.C. § 1446.

attorney was not there because he was a member of the South Carolina General Assembly and could not be present as the General Assembly was in session that day. Plaintiff claims that a request to reschedule the hearing was submitted on her behalf by her attorney, but the hearing was held as previously scheduled. The judge presiding over the foreclosure hearing granted summary judgment in favor of Defendant LaSalle and found that:

> The Defendant Laura Toney alleges that she rescinded the loan by letter dated June 12, 2005. Pursuant to Title 15 Section 1635 of the U.S. Code, the obligor in a real estate secured consumer credit transaction shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms. The loan closing occurred on October 6, 2004, at which time the Defendant was provided the information and rescission forms. (Affidavit of Michael May filed March 29, 2006; Affidavit of Letia Benjamin). The information and rescission forms are signed by the Defendant Laura Toney to acknowledge that she was provided a copy of each at closing. Therefore, the Defendant's counterclaim that she rescinded the loan is without merit on its face since it is well outside the time to rescind permitted by law.

Additionally, the judge found that Plaintiff was allowed to select her own closing attorney, and her allegations of entitlement to rescission were without merit and outside the time period for rescission as a matter of law. See March 9, 2007 Master's Order and Judgement of Foreclosure and Sale (Attachment to Doc. 1 - Complaint).

On March 22, 2007, Plaintiff filed an application for a temporary restraining order, preliminary injunction, and permanent injunction in state court. On April 25, 2007, Plaintiff filed a motion for reconsideration of the foreclosure decision. On April 27, 2007, a notice of eviction was filed against Plaintiff. On May 7, 2007, the Property was sold at an auction to Defendant LaSalle. At some point after the sale, Plaintiff's motions were denied and she filed an appeal with the South Carolina Court of Appeals, which affirmed the lower court's decision. Plaintiff then appealed the

state court action to the Supreme Court of South Carolina. It appears the appeal is still pending. Plaintiff has been evicted from the Property.

MOTIONS FOR DEFAULT JUDGMENT

On October 25, 2011, Plaintiff filed a motion pursuant to Fed. R. Civ. P. 55(a) for entry of default against Defendant LaSalle. She argues that the Summons and Complaint and her motion for injunction were filed on July 13, 2011; LaSalle was mailed an Order to answer the Summons and Complaint and motion for injunction; LaSalle was served with a copy of the Summons and Complaint and motion for injunction; an answer to the Complaint and motion for injunction were due on October 3, 2011; and LaSalle failed to appear, plead, or otherwise defend and is in default. LaSalle argues that Plaintiff's motion should be denied because it timely filed a motion to dismiss.

It is recommended that Plaintiff's motion for default as to LaSalle be denied. Plaintiff asserts that LaSalle's answer was due on October 3, 2011. She did not specify in her motion the date on which LaSalle was allegedly served. In a previous pleading, she asserted that LaSalle was served on September 19, 2011. See Doc. 17. Rule 12 provides that generally a defendant must serve a responsive pleading within twenty-one days after being served with the summons and complaint. See Fed. R. Civ. P. 12(a)(1)(A)(i). Thus, if LaSalle was served on September 19, 2011, its answer was due on October 11, 2011 (October 10, 2011 was a federal holiday). On October 7, 2011, LaSalle filed a timely motion to extend the time to file its answer until October 21, 2011, and the motion was granted on October 11, 2011. Thereafter, LaSalle timely filed a motion to dismiss on October 21, 2011. When a motion to dismiss under Rule 12 is filed, however, the time for the responsive

> by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

S.C.R.Civ. P. 4(d)(3). The South Carolina Rules of Civil Procedure also provide that service on a corporation may be made "by registered or certified mail, return receipt requested and delivery restricted to the addressee." S.C. R. Civ. P. 4(d)(8)(emphasis added).

Here, the return receipts reveal that delivery was not restricted to the addressee such that service by certified mail was not proper under South Carolina law. The Florida Rules of Civil Procedure state that "at the time of personal service of process a copy of the initial pleading shall be delivered to the party upon whom service is made." Fla. R. Civ. P. 1.070(e). A corporation may be served by serving process on the president, vice president, cashier, treasurer, secretary, general manager, any director, or any officer or business agent residing in the state. Fla. Stat. § 48.081(1)(a-d). As an alternative, process may be served on the agent designated by the corporation as its registered agent. Id. Fl. Stat. § 48.081(3)(a). The Florida Rules of Civil Procedure provide for service of process by certified mail, but only if the defendant agrees to waive personal service. Fla. R. Civ. P. 1.070(i). There is no indication that Plaintiff received a waiver or served Defendants in accordance with the Florida Rules of Civil Procedure.

MOTIONS TO DISMISS

Plaintiff alleges that Defendants violated her rights under TILA and also appears to allege claims under South Carolina law. She claims that she did not receive certain required federal disclosures at the time of closing, including "choice of attorney notification, settlement statement, and good faith estimate." Complaint, Para. 7. She alleges that Defendants' failure to make proper

disclosures and their failure to respond to her notice of rescission within twenty days of receipt resulted in Defendants losing their security interest in the Property. Plaintiff also claims that Defendants' failure to timely respond to her notice of rescission reinstated her interest in the Property and relieved her obligations under the original loan. Defendant LaSalle contends that its motion to dismiss should be granted because: (1) Plaintiff's claims are barred by res judicata; (2) the Complaint fails to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)); (3) the Complaint fails to state a plausible cause of action; and (4) the Complaint fails to plead fraud with the specificity required (Fed. R. Civ. P. 9(b)). Ocwen contends that its motion to dismiss should be granted because: (1) the Complaint fails to meet the minimum federal pleading standard (Fed. R. Civ. P. 8); (2) Plaintiff's claims are barred by res judicata; (3) Plaintiff failed to rescind within three days of her closing date such that her right to rescind is time barred; (4) Plaintiff failed to file a rescission action within three years of the closing date such that her rescission action is time barred; (5) Plaintiff is not entitled to recover for emotional distress; (6) Plaintiff fails to state a claim for deceptive and unfair practices; (7) Plaintiff fails to state a claim for gross negligence; (8) Plaintiff fails to plead fraud or fraudulent transfer with the specificity required, and (9) Plaintiff fails to state a valid claim for declaratory judgment. Plaintiff argues that the motions to dismiss should be denied because: (1) Defendants are in default for failing to timely file answers and responses to her previous motion for injunctive relief;[6] (2) Defendant Ocwen did not file its motion to dismiss until after it filed its answer in violation of Fed. R. Civ. P. 12; (3) this action is not barred by the doctrine of res judicata because the state action is on appeal and thus is still pending; and (4) she has properly asserted her claims.

[6]It is recommended this argument be rejected as Plaintiff's motion for injunctive relief was previously denied and it is recommended that the motions for default be denied.

pleading is altered (if the court denies the motion to dismiss, "the responsive pleading must be served within 14 days after notice of the court's action"). Fed. R. Civ. P. 12(a)(4)(A).

On October 19, 2011, Plaintiff filed a motion pursuant to Fed. R. Civ. P. 55(a) for entry of default against Defendant Ocwen. She argues that the Summons and Complaint were filed on July 13, 2011; Ocwen was served with a copy of the Summons and Complaint; an answer was due on October 3, 2011; and Ocwen failed to appeal, plead, or otherwise defend within the time allowed and is in default. On October 25, 2011, Plaintiff filed a second motion for entry of default against Ocwen in which she reiterates her arguments from her earlier motion and also argues that Oewen failed to respond to her motion for an injunction.

Ocwen, in a response filed April 6, 2012, argues that Plaintiff's motion for default judgment should be denied because its answer was filed prior to entry of default; Ocwen Loan Servicing, the proper party to this suit, is a wholly different entity from "Ocwen Federal Bank," and thus alleged service on "Ocwen Federal Bank" did not constitute service on Ocwen Loan Servicing; even if Plaintiff had named an existing entity called "Ocwen Federal Bank," service of process was not properly effected pursuant to applicable law; entry of judgment by default is a drastic remedy which should be used only in extreme situations; and entry of default judgment against the non-existent "Ocwen Federal Bank" should not be granted because it is a nullity.

It is recommended that Plaintiff's motions for entry of default against Ocwen be denied as she has not shown that Ocwen was properly served or that the correct entity was named in the Complaint. Ocwen has now filed an answer and asserts that it will accept service of an amended summons and complaint as to its correct name of Ocwen Loan Servicing, LLC. Rule 55(a) provides

> **Entering a Default.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

Although Plaintiff asserts in her affidavits accompanying her motions for default that Ocwen Federal Bank was served with a copy of the Summons and Complaint, there is nothing in the affidavits indicating when this Defendant was served. See Docs. 20 and 27. Review of the record reveals that Plaintiff filed purported service documents on October 7, 2011. Plaintiff attached a copy of two United States Postal Service "Domestic Return Receipt" forms indicating that "Ocwen Federal Bank A/K/A AltiSource Homes" was served by certified mail at "P.O. Box 24237 West Palm Beach, Fl 33416-4737" and "12650 Ingenuity Drive, Orlando, Florida, 32826 on September 15, 2011." See Doc. 17.

Ocwen asserts that it was not properly served. The Federal Rules of Civil Procedure provide, in pertinent part:

> Serving a Corporation, Partnership, or Association. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:
>
> (1) in a judicial district of the United States:
>
> (A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or
>
> (B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and--if the agent is one authorized by statute and the statute so requires--by also mailing a copy of each to the defendant[.]

Fed. R. Civ. P. 4(h)(i). Service may be made by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made[.]" Fed. R. Civ. P. 4(e)(1). Under South Carolina law, a corporation is served:

Defendant Ocwen did not file its motion to dismiss until after it filed its answer. Generally, a Rule 12(b)(6) motion to dismiss should be filed before a responsive pleading is filed. After the close of pleading, a Rule 12(c) motion (or a Rule 56 motion for summary judgment) is used to test the sufficiency of the complaint. However, the timing and sequence of these filings is not fatal to Ocwen's motion. "(A) motion to dismiss for failure to state a claim...that is styled as arising under Rule 12(b) but is filed after the close of pleading, should be construed by the district court as a motion for judgment on the pleadings under Rule 12(c)." Patel v. Contemporary Classics of Beverly Hills, 259 F.3d 123, 126 (2d Cir. 2001); see also Satkowiak v. Bay County Sheriff's Dep't, 47 F. App'x 376, 377 n. 1 (6th Cir. 2002); Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999); Shooting Point, L.L.C. v. Cumming, 238 F.Supp.2d 729, 735 (E.D.Va. 2002). Thus, the undersigned construes Defendant Ocwen's motion to dismiss as a motion for judgment on the pleadings.

1. Standard of Review

The federal court is charged with liberally construing the complaints filed by pro se litigants, to allow them to fully develop potentially meritorious cases. See Cruz v. Beto, 405 U.S. 319 (1972); Haines v. Kerner, 404 U.S. 519 (1972). The court's function, however, is not to decide issues of fact, but to decide whether there is an issue of fact to be tried. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, Weller v. Department of Social Servs., 901 F.2d 387 (4th Cir. 1990), nor can the court assume the existence of a genuine issue of material fact where none exists.

"[A] motion under Rule 12(c) ... is assessed under the same standard that applies to a Rule 12(b)(6) motion." Walker v. Kelly, 589 F.3d 127, 139 (4th Cir. 2009)(citing Edwards, 178 F.3d at

243). When considering a 12(b)(6) motion to dismiss, the court must accept as true the facts alleged in the complaint and view them in a light most favorable to the plaintiff. Ostrzenski v. Seigel, 177 F.3d 245, 251 (4th Cir. 1999). The United States Supreme Court has stated that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. Although "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," a pleading that merely offers "labels and conclusions," or "a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. Likewise, "a complaint [will not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancements.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557).

2. Res Judicata

Defendants contend that this action is barred by the doctrine of res judicata. Plaintiff argues that this action is not barred because her action in state court is on appeal such that there is no final judgment and res judicata does not apply.

Pursuant to 28 U.S.C. § 1738, state judicial proceedings shall have the same full faith and credit in every court within the United States as they have in the courts of the state from which they are taken. As a result, "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."

Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984). Thus, South Carolina law of claim preclusion (also called res judicata) must be applied to determine the effect of the South Carolina judgment.

In South Carolina "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Hilton Head Ctr. of South Carolina, Inc. v. Public Serv. Comm'n of South Carolina, 362 S.E.2d 176, 177 (S.C. 1987). South Carolina courts use various tests in determining whether a claim should have been raised in a prior suit: "(1) when there is identity of the subject matter in both cases; (2) where the cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; (3) when there is the same evidence in both cases; and [] (4) when the claims arise out of the same transaction or occurrence." Plum Creek Dev. Co., Inc. v. City of Conway, 512 S.E.2d 106, 109 n. 3 (S.C. 1999)(citing J. Flanagan, South Carolina Civil Procedure 649-650 (1996)). To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Riedman Corp. v. Greenville Steel Structures, Inc., 419 S.E.2d 217 (S.C. 1992); Sealy v. Dodge, 347 S.E.2d 504 (S.C. 1986).

Here, res judicata bars this action as all three elements of the test for res judicata have been met as shown by Plaintiff's Complaint and exhibits. Plaintiff does not appear to dispute that the first two elements (identity of the parties and identity of subject matter) are met. Although Plaintiff appears to slightly change the name of the trust that held her mortgage, the attachments to her Complaint indicate that she is referring to the same entities in the prior action. The foreclosing party was "LaSalle Bank National Association, as Trustee for the registered holders of Structured Asset

Securities Corporation, Structured Asset investment Loan Trust, Mortgage pass-Through Certificates, Series 2004-11." Plaintiff asserts her claims against Ocwen as a successor or assignee.

The subject matter is the same in both lawsuits. If the primary right and duty and alleged wrong are the same in each action, there is an identity of subject matter. See Jimmy Martin Realty Group, Inc. v. Fameco Distrib., Inc., 386 S.E.2d 803 (S.C. Ct.App.1989). Plaintiff sought to prevent foreclosure of her home in Lee County, South Carolina in the state action and asserted a counterclaim for rescission, and seeks to have the foreclosure overturned and undone in the current action.

The third element is met because the judge in the state court action granted the motion for summary judgment[7] and the South Carolina Court of Appeals affirmed the decision. Plaintiff argues that this action is not barred by res judicata because the action is still pending in state court, as she has appealed her state court case to the Supreme Court of South Carolina. The Supreme Court of South Carolina, however, would likely hold "that a judgment is final for preclusion purposes in South Carolina during the pendency of an appeal." This view is in accordance with the majority rule among state courts. See Campbell v. Lake Hallowell Homeowners Ass'n, 852 A.2d 1029, 1039–40 (Md.Ct.Spec.App. 2004) (listing various state court cases demonstrating the majority view). Furthermore, this district has previously found that the Supreme Court of South Carolina would adopt the majority position. Sea Cabin on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach, 828 F.Supp. 1241, 1249 n. 20 (D.S.C.1993); Dawson v. State Law Enforcement Div., CA No. 3:91–1403–17, 1992 WL 208967 at *3–4 (D.S.C. Apr. 6, 1992). Therefore, it is recommended that

[7]Summary judgment is an adjudication on the merits of the case. See Baird v. Charleston County, 511 S.E.2d 69, 74 (S.C.1999).

Defendants' motions to dismiss based on res judicata be granted as the a trial court adjudication is final while pending appeal.

Alternatively, it is recommended that this action be dismissed because this Court should not interfere with the ongoing state proceedings. Abstention may be raised sua sponte. Bellotti v. Baird, 428 U.S. 132, 143 n. 10 (1976).

The Supreme Court of the United States has held that a federal court should not equitably interfere with state proceedings except in the most narrow and extraordinary of circumstances. Younger v. Harris, 401 U.S. 37 (1971); Gilliam v. Foster, 75 F.3d 881, 903 (4th Cir. 1996). In Younger, the Court noted that courts of equity should not act unless the moving party has no adequate remedy at law and will suffer irreparable injury if denied equitable relief. Younger, 401 U.S. at 43–44. While the Younger doctrine was originally applied to protect state interests represented in criminal prosecutions, the Supreme Court has extended Younger to prescribe abstention in favor of state civil actions as well, when important state interests are at stake. See Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975). The Fourth Circuit applies the following test to determine whether Younger abstention is appropriate: (1) whether there is an ongoing state judicial proceeding; (2) whether the proceedings implicate important state interests; and (3) whether there is an adequate opportunity in the state proceedings to raise federal claims. Richmond Rail Co. v. Forst, 4 F.3d 244, 251 (4th Cir.1993).

Here, Plaintiff asserts that there is an ongoing state judicial proceeding. There is an important state interest in adjudicating foreclosure matters pertaining to real property located within a state. See Shaffer v. Heitner, 433 U.S. 186, 207–208 (1977) (recognizing a state's "strong interests in assuring the marketability of property within its borders[] and in providing a procedure for peaceful

resolution of disputes about the possession of that property")(footnote omitted); see also Sergeon v. Home Loan Ctr., Inc., No. 3:09-CV-01113-J-32JBT, 2010 WL 5662930 (collecting cases applying Younger abstention in light of a pending state foreclosure proceeding); Borkowski v. Fremont Inv. & Loan of Anaheim, Cal., 368 F.Supp.2d 822, 828 (N.D.Ohio 2005) (applying Younger abstention in the context of a pending state foreclosure proceeding); Prindable v. Ass'n of Apt. Owners of 2987 Kalakaua, 304 F.Supp.2d 1245, 1262 (D.Haw. 2003) (finding that foreclosure and ejectment proceedings were important state interests under Younger).[8] Finally, Plaintiff has an adequate opportunity to raise her federal (TILA) claims in the state court proceedings.

3. Failure to State a Claim Upon Which Relief May be Granted

Defendants contend that Plaintiff fails to state claims upon which relief may be granted and that Plaintiff's claims fail as a matter of law. Plaintiff appears to assert that she has alleged sufficient facts such that her claims should survive the motions to dismiss.

a. TILA

Defendants contend that Plaintiff fails to state a sufficient claim for violations of TILA because the alleged non-disclosures were non-material, limiting Plaintiff's right to rescind to three days. They also argue that even if the non-disclosures were material, Plaintiff failed to file this action within the three-year period. Plaintiff appears to argue that the non-disclosures were

[8]In her memorandum in opposition to summary judgment, Plaintiff claims that Defendants violated S.C. Code Ann § 37-10-102 (providing that a lender must ascertain prior to closing the preferred attorney to represent the debtor in matters related to the closing) and § 37-10-105 (providing the penalties for the failure to obtain the attorney preference). These claims are not properly before the Court as they were not alleged in the Complaint and Plaintiff has not amended her Complaint to add such claims. Further, these statutes do not permit rescission of the Note and Mortgage for its violation. See S.C. Code Ann. § 37-10-105(A).

material and she timely filed her TILA claim because she filed her counterclaim in the state court action within three years of the closing.

The right to rescind a loan under TILA for failure to disclose extends up to three days after consummation of the loan, unless the items left undisclosed are material. See 12 C.F.R. § 226.23(a)(3); 15 U.S.C. §§ 1631, 1632, 1635, 1638. If the non-disclosures are material, the borrower's right to rescind a transaction pursuant to TILA expires after three years. See 12 C.F.R. § 226.23(a)(3); 15 U.S.C. § 1635(f)("An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, which occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this chapter have not been delivered to the obligor...."). The required material disclosures include, among other things, the annual percentage rate, the amount financed, the method of determining the finance charge, and the amount of the finance charge. See 12 C.F.R. § 226.23(a)(3) n. 48; 15 U.S.C. § 1601(a), § 1635(f), § 1639(a).

Plaintiff has not alleged any material non-disclosures which would trigger the longer (three-year) statute of limitations period. Although Plaintiff claims that she did not receive certain required documents within three days of her loan application,[9] she admits (see, e.g., Doc. 76 at 8) that she received the required disclosures on the date of her closing. She attached copies of disclosures signed by her on the date of closing (October 6, 2004) including a Good Faith Estimate, Truth-In-Lending Disclosure Statement, and Attorney Preference form. See Attachments to Doc. 7. The judge in the state court case specifically found that Plaintiff was provided the required information and

[9]There are signed disclosures dated August 11, 2004 included in the record. Plaintiff claims that her signatures on these documents are forgeries. See Attachments to Doc. 7 and Doc. 1 (Complaint). She has not, however, disputed that she signed disclosures on the date of her closing.

rescission forms. Plaintiff has not alleged an attempt to rescind within three days of the closing (October 6, 2004), such that her right to rescission is time barred.

Defendants contend that even if the non-disclosures are material, Plaintiff failed to file her rescission action in this Court within three years of the closing date, such that her rescission action is time barred. Plaintiff appears to claim that she timely filed because she filed the counterclaim in her state court action within three years of the closing of her loan.

The Fourth Circuit, in the recent decision of Gilbert v. Residential Funding, LLC, 678 F.3d 271, 275–77 (4th Cir. 2012), held that the borrowers' letter to their lender within three years of the transaction, rather than the filing of any suit, is all that is required for notice of rescission under TILA. Here, in the light most favorable to Plaintiff for purposes of the motions to dismiss, Plaintiff exercised her right to rescind when she notified Ocwen that she was exercising her right to rescind in June 2005. As noted by the Fourth Circuit:

> To complete the rescission and void the contract, however, more is required. Either the creditor much "acknowledge[] that the right of rescission is available" and the parties must unwind the transaction amongst themselves, or the borrower must file a lawsuit so that the court may enforce the right to rescind.

Gilbert v. Residential Funding, LLC, 678 F.3d at 277 (quoting American Mortg. Network, Inc. v. Shelton, 486 F.3d 815, 821 (4th Cir. 2007)).[10]

Thus, in the light most favorable to Plaintiff, she exercised her right to rescind within the three-year period. She, however, failed to timely file this action alleging a TILA violation. There is a one-year statute of limitations for filing a suit once a violation of TILA has occurred. 15 U.S.C.

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[10]"[U]nilateral notification of cancellation does not automatically void the loan contract." Shelton, 486 F.3d at 821. "[O]therwise a borrower could get out from under a secured loan simply by claiming TILA violations, whether or not the lender had actually committed any." Id. (Quoting Yamamoto v. Bank of N.Y., 329 F.3d 1167, 1172 (9th Cir. 2003))(internal quotation marks omitted).

§ 1640(e). Whether the alleged TILA violation occurred at closing (October 6, 2004), when Plaintiff mailed the notice of recision (June 14, 2005), or when Plaintiff claims she first received a reply to her notice of recision (October 19, 2005), she filed this action well over one year later.

b. Emotional Distress

Plaintiff alleges that she is entitled to damages for severe emotional distress and mental anguish due to an unspecified Defendant's alleged refusal to acknowledge her rescission notice. Defendants contend that Plaintiff fails to allege facts that would establish that Defendants' conduct was outrageous. They also contend that Plaintiff fails to state a claim for negligent infliction of emotional distress. In her reply, Plaintiff appears to assert that she has stated a claim for intentional infliction of emotional distress because she had to take medications for stress and anxiety as a result of being evicted, property was destroyed or missing as a result of the eviction, and her house and property have sentimental value.

South Carolina expressly recognized the cause of action of intentional infliction of emotional distress, sometimes referred to as "outrage," in Ford v. Hutson, 276 S.E.2d 776 (S.C. 1981). To recover under the tort of outrage, a plaintiff must establish the following elements:

> (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct;
> (2) the conduct was so "extreme and outrageous" as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community";
> (3) the actions of the defendant caused the plaintiff's emotional distress; and
> (4) the emotional distressed suffered by the plaintiff was "severe" so that "no reasonable man could be expected to endure it."

Id., at 778 (quoting Vienire v. Ford Motor Credit Co., 401 A.2d 148 (Me. 1979))(internal citations omitted); see also Wright v. Sparrow, 381 S.E.2d 503, 505 (S.C. Ct. App. 1989). In considering the

defendant's motion for summary judgment, the court must initially determine whether the conduct complained of "'may reasonably be regarded as so extreme and outrageous as to permit recovery, and only where reasonable persons may differ is the question one for the jury.'" Holtzscheiter v. Thomson Newspapers, Inc., 411 S.E.2d 664, 666 (S.C. 1991), overruled on other grounds, 506 S.E.2d 497 (S.C.1998)(quoting Todd v. South Carolina Farm Bureau Mut. Ins. Co., 321 S.E.2d 602, 609 (S.C. Ct. App. 1984), quashed on other grounds, 336 S.E.2d 472 (S.C. 1985)); see also Barber v. Whirlpool Corp., 34 F.3d 1268, 1276 (4th Cir. 1994) ("It is the court's responsibility to first determine as a matter of law whether or not the conduct was outrageous before submitting that question to the jury."). Here, Plaintiff has not asserted facts that would establish that Defendants' conduct was sufficiently outrageous or intolerable so as to support a reasonable finding of outrage or intentional infliction of emotional distress. Further, Plaintiff has not asserted facts that the alleged conduct was so severe that no person could be expected to endure it.

Plaintiff also fails to establish a claim for negligent infliction of emotional distress. South Carolina law generally requires proof of physical injury for the recovery of mental anguish and emotional distress. See Phillips v. United States, 575 F.Supp. 1309, 1317 (D.S.C.1983)("'[E]motional distress is a proper element of tort damage as long as such distress encompasses some physical manifestation.'" (quoting Robertsen v. State Farm Mut. Auto. Ins. Co., 464 F.Supp. 876, 883 n. 9 (D.S.C.1979)). Here, Plaintiff has not shown any physical injury as a result of Defendants' alleged conduct. South Carolina courts have allowed claims for negligent infliction of emotion distress which are limited to claims of bystander liability. Doe v. Greenville County School Dist., 651 S.E.2d 305, 307 (S.C. 2007). To establish a claim for negligent infliction of emotional distress a plaintiff must establish: defendant's negligence caused death or serious injury

to another, plaintiff was a bystander in close proximity to the accident, plaintiff and the victim were closely related, plaintiff witnessed the incident and plaintiff must exhibit physical manifestations of emotional distress that can be established by expert testimony. Kinard v. Augusta Sash & Door Co., 336 S.E.2d 465, 467 (S.C.1985). Here, Plaintiff has not sufficiently alleged a claim for bystander liability.

c. Deceptive and Unfair Practices

Plaintiff claims that she has a right to recover for deceptive and unfair practices. Defendants contend that Plaintiff fails to identify any specific cause of action or legal grounds on which she could recover. They argue that to the extent that Plaintiff is attempting to make an allegation under the South Carolina Unfair Trade Practices Act ("SCUPTA"), §§ 39-5-10, et seq., Plaintiff has not alleged or asserted any facts showing that Defendants' action adversely affected a public interest. In reply, Plaintiff claims she has stated a claim based on the definition of an unfair practice by the FDIC (but does not specify the legal grounds on which she can recover).

The SCUTPA broadly prohibits any "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C.Code Ann. § 39-5-20. In order to bring an action under the SCUTPA, the plaintiff must demonstrate that (1) the defendant engaged in an unlawful trade practice, (2) the plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice, and (3) the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest. See S.C. Code Ann. § 39-5-140; Havird Oil Co. v. Marathon Oil Co., Inc., 149 F.3d 283, 291 (4th Cir. 1998); Daisy Outdoor Advertising Co., Inc. v. Abbott, 473 S.E.2d 47, 49 (S.C. 1996).

Here, Plaintiff fails to state a claim under the SCUTPA because she has not alleged that a public interest is affected. The SCUTPA is not available to redress a private wrong where the public interest is unaffected. Noack Enterprises v. Country Corner Interiors, 351 S.E.2d 347 (S.C. 1986). Conduct which only affects the parties to the transaction provides no basis for a SCUTPA claim. See Key Co. v. Fameco Distribs., Inc., 357 S.E.2d 476 (S.C.Ct.App.1987).

d. Gross Negligence

Plaintiff appears to allege that Defendants were grossly negligent in failing to provide documents required by TILA, exercising good faith in its dealings, and failing to disclose truthful and accurate information. Defendants contend that Plaintiff fails to establish a claim for gross negligence because her action is predicated on an alleged breach of contract.

Gross negligence is defined as "the failure to exercise slight care," or the "intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 520 S.E.2d 142, 153 (S.C. 1999). Under South Carolina law, "if the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie." Enhance-It, L.L.C. v. American Access Techns., Inc., 413 F. Supp. 2d 626, 631 (D.S.C. 2006)(citing Meddin v. Southern Ry.-Carolina Div., 62 S.E.2d 109, 112 (S.C. 1995)). Here, Plaintiff's negligence claim appears to arise from the mortgage contract such that she cannot establish a claim for gross negligence.

Further, Plaintiff fails to show a duty of care owed to her by Defendants. In South Carolina, a bank does not owe a customers a "special duty of care" based purely on his or her status as a customer. Regions Bank v. Schmauch, 582 S.E.2d 432, 444 (S.C. Ct. App. 2003). Plaintiff has not

shown any duty owed her by Defendants other than to follow the applicable laws. As noted above, Plaintiff admits and the judge in the state court action found that the required disclosures were made at the closing.

e. Fraud/Fraudulent Transfer.

Plaintiff appears to allege that Defendants made false representation in connection with the loan process and closing and they fraudulently foreclosed on the Property. Defendants contend that Plaintiff failed to plead fraud or fraudulent transfer with the specificity required.

Federal Rule 9 requires that a complainant plead fraud[11] with particularity. Fed. R. Civ. P. 9(b); Pearlstine Distribs., Inc. v. Freixenet USA, Inc., 678 F. Supp. 133, 136 (D.S.C. 1988). Under Rule 9, particularity of pleading is required "with regard to the time, place, speaker, and contents, as well as the manner in which statements are false and the specific acts raising an inference of fraud – the 'who, what, where, why, and when.'" In re First Union Corp. Sec. Litig., 128 F.Supp. 2d 871, 884 (W.D.N.C. 2001); see also Lemacks v. Consolidated Freightways Corp., No. Civ.A.

[11]To prove fraud under South Carolina Law, a plaintiff must prove the following elements by clear, cogent, and convincing evidence:

(1) a representation;
(2) its falsity;
(3) its materiality;
(4) either the speaker's knowledge of its falsity or a reckless disregard of its truth or falsity;
(5) the speaker's 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.

Cheney Bros., Inc. v. Batesville Casket Co. Inc., 47 F.3d 111, 114 (4th Cir. 1995); King v. Oxford, 318 S.E.2d 125 (S.C. App. 1984). Failure to prove any element is fatal to the plaintiff's claim. M.B. Kahn Constr. Co. v. South Carolina Nat'l Bank of Charleston, 271 S.E.2d 414, 415 (S.C. 1980).

1:95-2117-6, 1997 WL 998323, * 3 (D.S.C. July 16, 1997)(holding that "averments of fraud must state the precise time and place of the fraud and the acts alleged to be fraudulent...substantiated with particulars"). Plaintiffs "are forbidden from 'grouping defendants together without specifying which defendant committed which wrong'" and are required instead to "set forth with particularity each defendant's culpable conduct." First Union, 128 F.Supp. 2d at 884.

Review of the Complaint reveals that Plaintiff failed to allege fraud with particularity. She has not alleged with specificity what representations were false, how these alleged misrepresentations induced her to enter the mortgage transaction, why her reliance on the misrepresentations were reasonable, or how these misrepresentations caused her damage.[12]

MOTION FOR SANCTIONS

On March 7, 2012, Defendant LaSalle filed a motion for sanctions pursuant to Fed. R. Civ. P. 11. This Defendant asks for dismissal of this action with prejudice, a pre-filing injunction banning Plaintiff from filing further action in federal court, and reasonable attorneys' fees incurred in defending Plaintiff's frivolous lawsuits. LaSalle contends that Plaintiff has a long history of abusing the state and federal judicial systems with her meritless and vexatious filings, that the current lawsuit is Plaintiff's ninth attempt at preventing or otherwise disputing the lawful foreclosure sale of the Property; Plaintiff has filed a total of seven bankruptcy actions in the United States Bankruptcy Court District of South Carolina admittedly as an attempt to save the Property and based on multiple improper filings, the United State Bankruptcy Court banned Plaintiff from filing any further actions

[12]To the extent Plaintiff requests declaratory relief in this action, such relief should be denied as Plaintiff fails to state a claim upon which relief can be granted.

for a period of one year; Plaintiff has filed additional state court actions as to other pieces of property; and Plaintiff includes baseless allegations in her current litigation including requesting criminal penalties against Defendant LaSalle. Plaintiff appears to argue that LaSalle's motion should be denied because she believed she had to file an action in Federal Court to address perceived unethical actions in state court and to assert her federal claims, she does not believe her claims are frivolous because she believes Defendants violated TILA, and she did not file this action to harass Defendants.

Although LaSalle details allegedly frivolous actions in other courts, it is unclear that any of her previous filings in this Court were frivolous[13] or that this pro se litigant has been warned of the consequences of filing such actions in this Court. It is, therefore, recommended that Defendant LaSalle's motion for sanctions be denied without prejudice. Plaintiff, however, is warned that filing future frivolous actions may result in appropriate sanctions against Plaintiff including any sanctions available under Fed. R. Civ. P. 11.

CONCLUSION

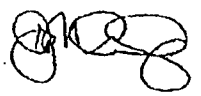
Based on the foregoing, it is recommended that Plaintiff's motions for entry of default (Docs. 20, 27, and 28) be denied; Defendant LaSalle's motion to dismiss (Doc. 21) be granted; and

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[13]Plaintiff filed one previous action in this court which was dismissed for lack of subject matter jurisdiction after the parties stipulated that the amount in controversy did not exceed the jurisdictional amount (Civil Action Nos. 3:96-cv-02840-MJP), another action was removed to this court by the defendant and later remanded to the state court (3:97-cv-01287-DWS), and she was named as a defendant in a foreclosure action (as the personal representative to the estate of Maxie Lee Thomas) instituted by the United States (3:05-cv-03322-JRM). Aloe Creme Laboratories, Inc. v. Francine Co., 425 F.2d 1295, 1296 (5th Cir. 1970) (This Court may take judicial notice of its own records.).

Defendant Ocwen's motion to dismiss (motion for judgment on the pleadings)(Doc. 61) be granted.

It is also recommended that Defendant LaSalle's motion for sanctions (Doc. 51) be denied without prejudice.



Joseph R. McCrorey
United States Magistrate Judge

August 9, 2012
Columbia, South Carolina

The parties' attention is directed to the important information on the attached notice.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, Plaintiff, vs. LaSalle Bank National Association, Trustee for Lehman Brothers Structured Asset Investment Loan Trust Sail 2005, Ocwen Federal Bank, a/k/a AltiSource Homes, Defendants.	C.A. No. 3:11-1686-MBS ORDER AND OPINION

Plaintiff Laura Toney ("Plaintiff") filed this action pro se against Defendants, LaSalle Bank National Association, Trustee for Lehman Brothers Structured Asset Investment Loan Trust Sail 2005 ("LaSalle"), and Ocwen Federal Bank a/k/a AltiSource Homes ("Ocwen") (collectively "Defendants"), alleging claims under the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1667f, arising out of a foreclosure action instituted against her by Defendants. (ECF No. 1.) Plaintiff also seeks a declaratory judgment and asserts state law claims for intentional infliction of emotional distress, deceptive and unfair trade practices, gross negligence, fraud, and fraudulent transfer. (Id.) This matter is before the court on Plaintiff's motions for entry of default against Defendants pursuant to Fed. R. Civ. P. 55(a); LaSalle's motion to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6), 8, and 9(b); Ocwen's motion to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6); and LaSalle's motion for sanctions against Plaintiff pursuant to Fed. R. Civ. P. 11. (ECF Nos. 20, 21, 27, 28, 51, 61.)

In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02 D.S.C., the matter was referred to United States Magistrate Judge Joseph R. McCrorey for pretrial handling. On August

Exhibit B

9, 2012, the Magistrate Judge issued a Report and Recommendation in which he recommended that the court deny Plaintiff's motions for entry of default, grant LaSalle's motion to dismiss, grant Ocwen's motion to dismiss, and deny LaSalle's motion for sanctions without prejudice. (ECF No. 79.) Plaintiff filed objections to the Report and Recommendation on August 22, 2012 and August 27, 2012, asking the court to reject the Magistrate Judge's recommendation. (ECF Nos. 81, 84.) For the reasons set forth below, the court adopts the Report and Recommendation of the Magistrate Judge, GRANTS the motions to dismiss of LaSalle and Ocwen, and DENIES LaSalle's motion for sanctions without prejudice and Plaintiff's motions for entry of default against LaSalle and Ocwen.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The facts in the complaint as viewed in the light most favorable to Plaintiff are discussed in the Report and Recommendation. The court concludes, upon its own careful review of the record, that the Magistrate Judge's factual summation is accurate. The court adopts this summary as its own, and will only reference facts pertinent to the analysis of Plaintiff's claims.

On October 6, 2004, Plaintiff refinanced her house located at 729 Chatman Street in Bishopville, South Carolina ("the Property"). (ECF No. 1-1, pp. 38, 43.) During the closing, Plaintiff entered into and received a mortgage which was secured by the Property. (Id.) On June 14, 2005, Plaintiff sent a letter to Ocwen stating her intention to rescind the loan due to the alleged occurrence of federal disclosure violations during the processing of the loan. (ECF No. 1-1, p. 1.) Plaintiff alleged that she was not provided any of the mandatory disclosures required by TILA prior to the closing. (Id.; see also ECF No. 1, p. 3.)

On or about July 21, 2005, LaSalle, which had been assigned the mortgage by Ocwen, filed a lis pendens and complaint against Plaintiff, captioned Lasalle Bank v. Laura Toney, Case

No. 2005-CP-31-169, in the Court of Common Pleas of Lee County, South Carolina (the "Lee County Court"), seeking foreclosure of Plaintiff's mortgage and sale of the Property. (ECF No. 1-1, pp. 3-11.) On October 19, 2005, Plaintiff alleges that LaSalle finally responded to her notice of rescission letter. (ECF No. 1, p. 5.) Thereafter, LaSalle filed a motion for summary judgment on March 29, 2006. (ECF No. 1-1, p. 34.)

On February 16, 2007, the Lee County Court held a foreclosure hearing in the absence of Plaintiff or her attorney.[1] (ECF No. 1-1, p. 35.) On March 15, 2007, the Lee County Court entered an order finding that LaSalle "should have judgment of foreclosure of the mortgage and the mortgaged property should be ordered sold at public auction after due advertisement" and, as a result, granted summary judgment in favor of LaSalle in the foreclosure action. (Id. at p. 40.) In support of the order granting summary judgment to LaSalle, the Lee County Court made the following findings of fact:

> The Defendant Laura Toney alleges that she rescinded the loan by letter dated June 12, 2005. Pursuant to Title 15 Section 1635 of the U.S. Code, the obligor in a real estate secured consumer credit transaction shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms. The loan closing occurred on October 6, 2004, at which time the Defendant was provided the information and rescission forms. (Affidavit of Michael May filed March 29, 2006; Affidavit of Letia Benjamin). The information and rescission forms are signed by the Defendant Laura Toney to acknowledge that she was provided a copy of each at closing. Therefore, the Defendant's counterclaim that she rescinded the loan is without merit on its face since it is well outside the time to rescind permitted by law.

(ECF No. 1-1, pp. 37-38.)

On March 22, 2007, Plaintiff filed an application for a temporary restraining order, preliminary injunction, and permanent injunction in the Lee County Court. (ECF No. 52-2, pp.

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1. Plaintiff alleges that her attorney at the time, Mr. David Weeks, was a member of the South Carolina General Assembly and could not be present because the General Assembly was in session. Plaintiff alleges that a request to reschedule the hearing was submitted on behalf of Mr. Weeks, but that the hearing was held as previously scheduled. (See ECF No. 52-2, pp. 1-2.)

8-13, 16-17.) On April 25, 2007, Plaintiff filed a motion for reconsideration of the foreclosure decision. (ECF No. 52-2, pp. 5-7.) On April 27, 2007, a notice of eviction was filed against Plaintiff and she was evicted from the Property shortly thereafter. (ECF No. 1-1, p. 49.) On May 7, 2007, the Property was sold at an auction to LaSalle. (Id. at pp. 45-47.) After the sale of the Property and the denial of her motions, Plaintiff filed an appeal with the South Carolina Court of Appeals. Plaintiff states that her foreclosure case is currently pending with the South Carolina Supreme Court. (ECF No. 76, p. 3; see also ECF No. 51-2, pp. 1-2.)

On July 13, 2011, Plaintiff filed in this court a "Complaint to Set Aside Fraudulent Transfer, and Fraud; Declaratory Judgment for Entry of Default[,] Gross Negligence[,] Emotional Distress[,] Deceptive and Unfair Trade Practices." (ECF No. 1.) Plaintiff alleges that she did not receive certain federal disclosures required by TILA at the time of her mortgage closing, including "choice of attorney notification, settlement statement, and good faith estimate." (Id. at p. 3.) Plaintiff alleges that Defendants' failure to make proper disclosures and failure to respond to her notice of rescission within twenty days resulted in Defendants losing their interest in the property. (Id. at p. 5.) Further, Plaintiff alleges that Defendants' failure to respond to her notice of rescission within twenty days had the effect of reinstating Plaintiff's interest in the property and relieving her obligations under the original loan. (Id. at pp. 5-8.) On July 13, 2011, Plaintiff filed a motion for a temporary injunction to enjoin Defendants from denying Plaintiff possession of the Property. (ECF No. 3.)

On October 7, 2011, LaSalle filed a motion to extend its time to file an answer until October 21, 2011, which motion was granted by the court on October 11, 2011. (ECF Nos. 16, 18.) On October 19, 2011, Plaintiff moved for entry of default against Ocwen. (ECF No. 20.) On October 21, 2011, LaSalle filed a motion to dismiss Plaintiff's complaint. (ECF No. 21.)

Plaintiff filed a second motion for entry of default against Ocwen on October 25, 2011. (ECF No. 27.) Additionally, on October 25, 2011, Plaintiff moved for entry of default against LaSalle. (ECF No. 28.) Plaintiff filed opposition to LaSalle's motion to dismiss on October 25, 2011, October 28, 2011, and November 2, 2011. (ECF Nos. 29, 30, 32.) On November 1, 2011, LaSalle filed opposition to Plaintiff's motion for entry of default. (ECF No. 31.) On December 28, 2011, Ocwen filed its answer to the complaint. (ECF No. 37.)

On February 27, 2012, the Magistrate Judge issued a Report and Recommendation in which he recommended denying Plaintiff's motion for temporary injunction, which recommendation was adopted by the court on March 22, 2012. (ECF Nos. 46, 57.) On March 7, 2012, LaSalle filed a motion for sanctions against Plaintiff, to which Plaintiff filed opposition on March 15, 2012. (ECF Nos. 51, 53.) On April 2, 2012, Plaintiff appealed the court's March 22, 2012 Order to the United States Court of Appeals for the Fourth Circuit. (ECF No. 62.) On April 6, 2012, Ocwen filed opposition to Plaintiff's motions for entry of default and a motion to dismiss the complaint.[2] (ECF Nos. 60, 61.) Plaintiff filed opposition to Ocwen's motion to dismiss on May 14, 2012. (ECF No. 76.)

Recently, on August 24, 2012, the Fourth Circuit affirmed the court's March 22, 2012 decision and issued the formal mandate of the court of appeals on September 17, 2012. (ECF Nos. 83, 89.)

II. LEGAL STANDARD AND ANALYSIS

A. Legal Standard

1. Magistrate Judge's Report and Recommendation

The Magistrate Judge makes only a recommendation to this court. The recommendation

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2. Ocwen did not file its motion to dismiss until after it filed its answer. The court agrees with the Magistrate Judge's analysis that Ocwen's motion to dismiss should be construed as a motion for judgment on the pleadings. (See ECF No. 79, p. 10.)

Civ. P. 12(b)(6). See Davani v. Va. Dept. of Transp., 434 F.3d 712, 720 (4th Cir. 2006) (res judicata or claim preclusion challenge is to be considered pursuant to Rule 12(b)(6)); Andrews v. Daw, 201 F.3d 521, 524 n. 1 (4th Cir. 2000) (an affirmative defense such as res judicata may be raised under Rule 12(b)(6) "only if it clearly appears on the face of the complaint . . . ."). "Res judicata is applied to prevent the re-litigation of claims, and thus prevent the unsettling of a prior judgement, whether by increasing or decreasing the award or by reversing the result." Heckert v. Dotson, 272 F.3d 253, at 258 (4th Cir. 2001). "'For the doctrine of res judicata to be applicable, there must be: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or their privies in the two suits.'" Martin v. Am. Bancorp. Ret. Plan, 407 F.3d 643, 650 (4th Cir. 2005) (quoting Pueschel v. United States, 369 F.3d 345, 354–55 (4th Cir. 2004)). Further, res judicata not only "bar[s] claims that were raised and fully litigated," but also "'prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.'" Peugeot Motors v. E. Auto Distrib., 892 F.2d 355, 359 (4th Cir. 1989) (quoting Brown v. Felsen, 442 U.S. 127, 131 (1979)); see also Meekins v. United Transp. Union, 946 F.2d 1054, 1057 (4th Cir. 1991).

4. Motions pursuant to Fed. R. Civ. P. 55(a)

Rule 55(a) of the Federal Rules of Civil Procedure provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." Fed. R. Civ. P. 55(a). However, the clear policy of the Federal Rules of Civil Procedure is to discourage judgment by default and to encourage disposition of claims on their merits. Reizakis v. Loy, 490 F.2d 1132, 1135 (4th Cir. 1974)

B. Analysis

1. Plaintiff's Motions for Entry of Default

Plaintiff moves for entry of default against Defendants pursuant to Fed. R. Civ. P. 55(a). (See ECF Nos. 20, 27, 28.)

Upon his review, the Magistrate Judge recommended denying Plaintiff's motion for entry of default against LaSalle. Specifically, the Magistrate Judge found that LaSalle was served on September 19, 2011, and its answer would have been due on October 11, 2011[3], except that LaSalle received an extension from the court to file its answer on or before October 21, 2011. (ECF No. 79, p. 5 (citing ECF Nos. 17, 18).) The Magistrate Judge further found that the Fed. R. Civ. P. 12 motion to dismiss that LaSalle filed on October 21, 2011 was timely, and therefore Plaintiff's motion for entry of default against LaSalle is without merit. (Id. (citing ECF No. 21))

The Magistrate Judge also recommended denying Plaintiff's motion for default against Ocwen because Plaintiff has not shown that Ocwen was properly served or that the correct entity was named in the complaint. (Id. at p. 6.) In making this recommendation, the Magistrate Judge found convincing Ocwen's arguments that "its answer was filed prior to entry of default; Ocwen Loan Servicing, the proper party to this suit, is a wholly different entity from 'Ocwen Federal Bank,' and thus alleged service on 'Ocwen Federal Bank' did not constitute service on Ocwen Loan Servicing; even if Plaintiff had named an existing entity called 'Ocwen Federal Bank,' service of process was not properly effected pursuant to applicable law; entry of judgment by default is a drastic remedy which should be used only in extreme situations; and entry of default judgment against the non-existent 'Ocwen Federal Bank' should not be granted because it is a nullity." (Id.)

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3. The Magistrate Judge observed that October 10, 2011 was a federal holiday, Columbus Day. (ECF No. 79, p. 5.)

has no presumptive weight. The responsibility to make a final determination remains with this court. See Mathews v. Weber, 423 U.S. 261, 270-71 (1976). The court reviews de novo only those portions of a magistrate judge's report and recommendation to which specific objections are filed, and reviews those portions which are not objected to—including those portions to which only "general and conclusory" objections have been made—for clear error. Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005); Camby v. Davis, 718 F.2d 198, 200 (4th Cir. 1983); Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982). The court may accept, reject, or modify, in whole or in part, the recommendation of the magistrate judge or recommit the matter with instructions. See 28 U.S.C. § 636(b)(1).

2. Motions pursuant to Fed. R. Civ. P. 11

A pro se pleading is not subjected to the same scrutiny as one drafted by an attorney. Erickson v. Pardus, 551 U.S. 89, 94 (2007). Even pro se litigants, however, must follow the procedural rules of the court. Cox v. Deal, C/A No. 2:09-02715-DCN-BM, 2011 WL 3418397, at * 2 (D.S.C. Aug. 3, 2011). Rule 11 governs both attorneys and pro se litigants. Fed. R. Civ. P. 11.

Fed. R. Civ. P. 11(a) requires every pleading, written motion, or other paper to be signed by either the party's attorney, if represented, or the party itself, if the party proceeds without representation. See Fed. R. Civ. P. 11(a). By signing a filing, a party represents to the court and certifies "that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the filing is not "presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation," and "the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new

law." Fed. R. Civ. P. 11(b) (emphasis added). Rule 11(b)(3) requires that filings have a proper factual basis for each claim. See Fed. R. Civ. P. 11(b)(3).

Reasonableness of a filing party's actions under Fed. R. Civ. P. 11 involves an objective inquiry into the prefiling investigation. See In re Kunstler, 914 F.2d 505, 514 (4th Cir. 1990). Legal allegations fail the requirements of Fed. R. Civ. P. 11(b)(2) when there is "absolutely no chance of success under the existing precedent." Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 153 (4th Cir. 2002). In order to warrant sanctions, the legal position must be completely untenable, rather than merely unsuccessful. Id. at 151. The issue is whether a reasonable person under the same circumstances would have believed his or her actions to be legally justified. Id. at 153.

3. Motions pursuant to Fed. R. Civ. P. 12(b)(6)

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim should not be granted unless it appears certain that the plaintiff can prove no set of facts that would support her claim and would entitle her to relief. Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993). When considering a motion to dismiss, the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff. Ostrzenski v. Seigel, 177 F.3d 245, 251 (4th Cir. 1999); Mylan Labs., Inc., 7 F.3d at 1134. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, — U.S. —, —, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The court must treat factual allegations of the nonmoving party as true. Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 217-18 (4th Cir. 1994).

Res judicata is an affirmative defense and is treated as a basis for dismissal under Fed. R.

In her objections to the Magistrate Judge's recommendation, Plaintiff implies that the Magistrate Judge findings are wrong because Ocwen (1) was served by mail on September 12, 2011 (with a certified return receipt showing service on September 15, 2011), (2) failed to answer the complaint within twenty-one days as required by the federal rules, (3) failed to request an extension of time prior to the expiration of the answer deadline, and (4) filed an untimely answer eighty-five days after service. (ECF No. 84, pp. 4, 6-7, 19, 24.) Plaintiff further implies that the Magistrate Judge erred by not having awareness of Defendants' failure to file motions to set aside the default. (Id. at p. 7.)

In accordance with the preference that "defaults be avoided and that claims and defenses be disposed of on their merits," the court agrees with the Magistrate Judge that entry of default should not be made against either Ocwen or LaSalle. The timely filing of a Fed. R. Civ. P. 12 motion to dismiss by LaSalle and the failure of Ocwen to be properly served are appropriate reasons within the court's discretion to not enter default. U.S. ex rel. Knight v. Reliant Hospice, Inc., C/A No. 3:08-03724-CMC-JRM, 2011 WL 6130539, at *1 (D.S.C. Nov. 8, 2011) (In deciding whether to direct that entry of default be made as to a party, a district court must exercise "sound discretion."). Accordingly, the court denies Plaintiff's motion for entry of default against Defendants.

2. LaSalle's Motion for Sanctions

LaSalle moves pursuant to Fed. R. Civ. P. 11 for dismissal of Plaintiff's action with prejudice, a pre-filing injunction banning Plaintiff from filing further actions in federal court, and reasonable attorneys' fees incurred in defending against Plaintiff's frivolous lawsuits. (ECF No. 51, p. 1.) LaSalle contends that (1) Plaintiff has a long history of abusing the state and federal judicial systems with her meritless and vexatious filings, (2) the current lawsuit is

Plaintiff's ninth attempt at preventing or otherwise disputing the lawful foreclosure sale of the Property, (3) Plaintiff has filed a total of seven bankruptcy actions in the United States Bankruptcy Court for the District of South Carolina admittedly as an attempt to save her property, (4) the United States Bankruptcy Court for the District of South Carolina banned Plaintiff from filing any further actions for a period of one year, (5) Plaintiff has filed additional state court actions as to other pieces of property, and (6) Plaintiff includes baseless allegations in her current litigation, including requesting criminal penalties against LaSalle. (Id. at pp. 2-10.)

Upon his review, the Magistrate Judge recommended denying LaSalle's motion for sanctions without prejudice. (ECF No. 79, p. 24.) The Magistrate Judge concluded that, notwithstanding LaSalle's details of allegedly frivolous actions filed by Plaintiff in other courts, a finding of frivolousness could not be made regarding any of Plaintiff's previous filings in this court and Plaintiff lacked receipt of a warning regarding the consequences of filing frivolous actions in this court. (Id.) In this regard, the Magistrate Judge did advocate warning Plaintiff that filing future frivolous actions may result in appropriate sanctions against Plaintiff including any sanctions available under Fed. R. Civ. P. 11. (Id.)

LaSalle did not file objections to the Magistrate Judge's recommendation that its motion for sanctions be denied. In the absence of specific objections to the report of the Magistrate Judge, the court is not required to give any explanation for adopting the recommendation. See Camby v. Davis, 718 F.2d 198, 199 (4th Cir.1983). Accordingly, the court agrees with the Magistrate Judge that LaSalle's motion for sanctions should be denied.

3. Defendants' Motions to Dismiss

LaSalle moves to dismiss Plaintiff's complaint asserting that (1) Plaintiff's claims are barred by res judicata; (2) the complaint fails to state a claim upon which relief can be granted;

(3) the complaint fails to state a plausible cause of action; and (4) the Complaint fails to plead fraud with the required specificity. (ECF No. 21-1.) Ocwen contends that it is entitled to dismissal because (1) the complaint fails to meet the minimum federal pleading standard; (2) Plaintiff's claims are barred by res judicata; (3) Plaintiff failed to rescind the note within three days of her closing date such that her right to rescind is time barred; (4) Plaintiff failed to file a rescission action within three years of the closing date such that her rescission action is time barred; (5) Plaintiff is not entitled to recover for emotional distress; (6) Plaintiff fails to state a claim for deceptive and unfair practices; (7) Plaintiff fails to state a claim for gross negligence; (8) Plaintiff fails to plead fraud or fraudulent transfer with the specificity required, and (9) Plaintiff fails to state a valid claim for declaratory judgment. (ECF No. 61-1.)

a. *Res Judicata*

Defendants contend that this action is barred by the doctrine of res judicata. (ECF Nos. 21-1, pp. 5-7; 61-1, pp. 7-9.) Plaintiff argues that this action is not barred because her action in state court is on appeal such that there is no final judgment and res judicata does not apply. (ECF No. 76, p. 3.)

Upon his review, the Magistrate Judge concluded that res judicata bars this action as all three elements of the test for res judicata have been met. (ECF No. 79, p. 12.) The Magistrate Judge specified that to establish res judicata, a defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. (Id. (citing Riedman Corp. v. Greenville Steel Structures, Inc., 419 S.E.2d 217, 218 (S.C. 1992)) In this regard, the Magistrate Judge found that Plaintiff did not dispute that the first two elements were met. (Id.) Further, the third element was met because the judge in the state court action granted the motion for summary judgment, which satisfies the

requirement of an adjudication on the merits of the case, and the South Carolina Court of Appeals affirmed the state court's decision. (Id. at p. 13.) Alternatively, the Magistrate Judge recommended dismissing the action against Defendants because the court should not interfere with the ongoing state proceedings. (Id. at p. 14 (citing Bellotti v. Baird, 428 U.S. 132, 143 n. 10 (1976) (recognizing that abstention may be raised sua sponte)).) Based on the foregoing, the Magistrate Judge recommended granting Defendants' motions to dismiss the complaint.

In her objections to the Magistrate Judge's recommendation, Plaintiff asserts that res judicata does not apply to this matter because her state court case is still pending without a final determination having been made. (ECF No. 84, p. 15.) Plaintiff argues that this case clearly does not satisfy all the elements to establish res judicata "because the judgment is not final" and she has not been "given full and fair opportunity to be heard on the issue." (Id. at p. 16.)

The court agrees with the Magistrate Judge that the three elements of res judicata are clearly present. First, a final judgment has been entered on the merits against Plaintiff in at least two prior civil actions, Lasalle Bank v. Laura Toney, Case No. 2005-CP-31-169 and Laura A. Toney v. Ocwen Federal Bank, Case No. 2010-CP-31-180. (See ECF Nos. 1-1, pp. 34-43; 51-3, pp. 1-6.) See also Shoup v. Bell & Howell Co., 872 F.2d 1178, 1181 (4th Cir. 1989) (noting that grants of summary judgment are considered "on the merits" for the purposes of res judicata). Second, the allegations contained in the instant complaint stem from the same set of facts that gave rise to Plaintiff's claim for relief in Case No. 2005-CP-31-169 and Case No. 2010-CP-31-180, i.e., Defendants' entitlement to foreclosure of the Property versus Plaintiff's attempt to prevent the foreclosure of the Property. (Id.) Finally, the parties in this matter are the same entities as the ones in the prior foreclosure matters. (Id.) Based on the foregoing, Plaintiff is not entitled to maintain her action in this court because her issues have been raised and litigated in

prior actions. Accordingly, Defendants are entitled to dismissal of the complaint against them based on res judicata.

b. Defendants' Other Arguments in support of Dismissal

As this court finds that the instant action is barred by res judicata, it is unnecessary to address Defendants' remaining arguments in support of dismissal.

III. CONCLUSION

For the foregoing reasons, the court hereby GRANTS the motions to dismiss Plaintiff's complaint of LaSalle and Ocwen. (ECF Nos. 21, 61.) The court further DENIES LaSalle's motion for sanctions without prejudice and Plaintiff's motions for entry of default. (ECF Nos. 20, 27, 28, 51.) The court adopts the Magistrate Judge's Report and Recommendation and incorporates it herein by reference.

IT IS SO ORDERED.

/s/Margaret B.Seymour
Margaret B. Seymour
Chief United States District Judge

September 25, 2012
Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, Plaintiff, vs. LaSalle Bank National Association as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, Defendants.	Civil Action No. 3:13-cv-03481-MBS-SVH

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND MOTION FOR SANCTIONS

COMES NOW, Defendants LaSalle Bank National Association and AltiSource Homes (respectively "LaSalle Bank" and "AltiSource Homes" or collectively "Defendants"), by and through undersigned counsel, and hereby file this Memorandum of Law in Support of their Motion to Dismiss and Motion for Sanctions and would show unto the Court as follows:

INTRODUCTION

The underlying facts of this case are simple; muddled only by the relentless filings of Plaintiff. In short, Plaintiff defaulted on her mortgage and LaSalle Bank rightfully foreclosed on the property in May 2007. Plaintiff has contested the foreclosure sale in South Carolina's state and federal courts on more than ten separate occasions. Both courts have entered final judgments against Plaintiff. Plaintiff is now beating a dead horse. This Court should dismiss

this case with prejudice because it is barred by the doctrine of *res judicata* and otherwise fails to state a claim upon which relief can be granted. This Court should also sanction Plaintiff for her behavior.

STATEMENT OF FACTS

On October 6, 2004, Plaintiff refinanced her house located at 729 Chatman Street in Bishopville, South Carolina.[1] On June 14, 2005, Plaintiff sent a letter attempting to rescind the loan due to an alleged failure to make certain disclosures required by the Truth-in-Lending Act. On or around July 21, 2005, LaSalle Bank filed a *lis pendens* and complaint seeking permission to foreclose on Plaintiff's property. *LaSalle Bank v. Laura Toney*, Case No. 2005-CP-31-169, in the Court of Common Pleas of Lee County, South Carolina. LaSalle Bank filed a motion for summary judgment which was granted on March 15, 2007. The court entered an order declaring that LaSalle Bank "should have judgment of foreclosure of the mortgage and the mortgage property should be ordered sold at public auction." After repeated attempts by Plaintiff to prevent foreclosure, the property was sold on May 7, 2007.

Plaintiff appealed to the South Carolina Court of Appeals. The court affirmed the foreclosure sale.

Undeterred, Plaintiff then filed a motion for a temporary injunction and a "Complaint to Set Aside Fraudulent Transfer, and Fraud; Declaratory Judgment for Entry of Default, Gross Negligence, Emotional Distress, Deceptive and Unfair Trade Practices" on July 13, 2011 in the United States District Court for the District of South Carolina.

[1] Some of the facts in this section are not stated in Plaintiff's most recent complaint. They are, however, set forth in the record of a case previously before this Court (C.A. No. 3:11-1686-MBS). It is proper for the Court to take judicial notice of these facts. *See Weber v. Jones*, 8:13-CV-01040-GRA, 2013 WL 3328673, *5 (D.S.C. July 2, 2013) (citing *Aloe Creme Lab., Inc. v. Francine Co.*, 425 F.2d 1295, 1296 (5th Cir. 1970) (noting the district court had the right to take notice of its own files and records).

In March 2011, this Court denied Plaintiff's motion for injunction relief. Plaintiff then appealed to the Fourth Circuit, who affirmed the denial. Appeal No. 12-1452 (August 24, 2012).

With the injunction issue resolved, LaSalle Bank moved to dismiss Plaintiff's complaint. On August 9, 2012, United States Magistrate Judge Joseph R. McCrorey entered a detailed Report and Recommendation recommending that Plaintiff's case be dismissed because: (1) it was barred by the doctrine of *res judicata*; and (2) it failed to state any claim upon which relief could be granted.[2] Chief United States District Judge Margaret B. Seymour agreed and dismissed Plaintiff's case on *res judicata* grounds.[3]

Plaintiff appealed this decision to the United States Court of Appeals for the Fourth Circuit. On February 28, 2013, the court affirmed "for the reasons stated by the district court." Appeal No. 12-2364 (February 28, 2013). Belligerently, Plaintiff filed a writ of certiorari to the United States Supreme Court, which has since been denied.[4]

Before the Supreme Court decided whether to accept Plaintiff's case, she filed the instant action. This Complaint is nothing more than an attempt to re-litigate a case which the South Carolina state and federal courts have already ruled meritless.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of an action when the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of [her] entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action

[2] A copy of the Report and Recommendation is attached as Exhibit A.
[3] A copy of the Order and Opinion is attached as Exhibit B.
[4] The United States Supreme Court denied writ of certiorari on December 2, 2013. *Laura Toney v. LaSalle Bank National Association, Trustee*, No. 13-404.

will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal marks and citations omitted). *Res judicata* is an affirmative defense and is treated as a basis for dismissal under Rule 12(b)(6). *See Davani v. Va. Dep't of Transp.*, 434 F.3d 712, 720 (4th Cir. 2006) (*res judicata* or claim preclusion challenge is to be considered pursuant to Rule 12(b)(6)); *Andrews v. Daw*, 201 F.3d 521, 524 n.1 (4th Cir. 2000) (an affirmative defense such as *res judicata* may be raised under Rule 12(b)(6) "if it clearly appears on the face of the complaint.").

ARGUMENT

This Court should grant Defendants' Motion to Dismiss because Plaintiff's claims are barred by the doctrine of *res judicata*. Alternatively, Plaintiff's allegations fail to state a claim upon which relief can be granted. This Court should also grant Defendants' Motion for Sanctions because Plaintiff has already been given fair warning that she would be sanctioned for filing additional pleadings.

I. Plaintiff's Claims Should Be Dismissed.

A. Plaintiff's claims are barred by the doctrine of *res judicata*.

"Res judicata is applied to prevent the re-litigation of claims, and thus prevent the unsettling of a prior judgment, whether by increasing or decreasing the award of by reversing the result." *Heckert v. Dotson*, 272 F.3d 253, 258 (4th Cir. 2001). "'For the doctrine of res judicata to be applicable, there must be: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or their privies in the two suits.'" *Martin v. Am. Bancorp. Ret. Plan*, 407 F.3d 643, 650 (4th Cir. 2005) (quoting *Pueschel v. United States*, 369 F.3d 345, 354-55 (4th Cir. 2004)). Furthermore, *res judicata* not only "bar[s] claims that were raised and fully litigated," but also "'prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties,

regardless of whether they were asserted or determined in the prior proceedings.'" *Peugeot Motors v. E. Auto Distrib.*, 892 F.2d 355, 359 (4th Cir. 1989) (quoting *Brown v. Felsen*, 442 U.S. 127, 131 (1979)).

Plaintiff's claims are barred by the doctrine of *res judicata* because all three elements are satisfied. First, this Court has already dismissed Plaintiff's claims on *res judicata* grounds. Exhibit B at p. 13 (noting that "final judgment has been entered on the merits against Plaintiff in at least two prior civil actions, *LaSalle Bank v. Laura Toney*, Case No. 2005-CP-31-169 and *Laura A. Toney v. Ocwen Federal Bank*, Case No. 2010-CP-31-180.").

Second, the allegations contained in the instant complaint stem from the same set of facts that gave rise to Plaintiff's claim for relief in the prior cases. As this Court noted, at the heart of the prior cases was a dispute regarding "Defendants' entitlement to foreclosure of the Property versus Plaintiff's attempt to prevent the foreclosure of the property." *Id.* Likewise, in this case the Complaint is premised on the belief that "[t]he foreclosure of the Plaintiff's property was an illegal action." Compl. ¶ 3. Clearly, the underlying dispute is identical.

Finally, the parties in this case are the same as in the prior cases: Laura Toney, LaSalle Bank, and AltiSource.

For these reasons, the Court should dismiss Plaintiff's claims on *res judicata* grounds as it has already done previously. To the extent, if any, Plaintiff alleges claims not expressly mentioned in her prior suits, they are also barred by the doctrine of *res judicata* because Plaintiff had an opportunity to raise them. *Peugeot Motors*, 892 F.2d at 359 (*res judicata* "'prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceedings'") (quoting *Brown*, 442 U.S. at 131).

B. While not necessary for the Court to consider, Plaintiff's claims also fail to state a claim upon which relief can be granted.

Because Plaintiff's claims are barred by *res judicata*, the Court need not consider whether Plaintiff's claims have been adequately pleaded under Rule 12(b)(6). Should the Court wish to consider these arguments, the Court should adopt the Magistrate Judge's Report and Recommendation which explains why Plaintiff's claims would also be barred under the Rule 12(b)(6) standard.

II. Plaintiff Should Be Sanctioned For Continuing To File Meritless Claims.

Plaintiff should be sanctioned for filing the instant suit because she has already received fair warning that she would be sanctioned if she brought another claim. The last time this case was before the Court, Defendants moved for sanctions because of Plaintiff's frivolous filings. Indeed, as the Court has noted previously, the pattern of Plaintiff's egregious behavior cannot be overemphasized: (1) Plaintiff has a long history of abusing the state and federal judicial systems with her meritless and vexatious filings, (2) Plaintiff has attempted to prevent or otherwise dispute the lawful foreclosure sale of the subject property more than ten times, (3) Plaintiff has filed a total of seven bankruptcy actions in the United States Bankruptcy Court for the District of South Carolina admittedly as an attempt to save her property, (4) said Bankruptcy Court banned Plaintiff from filing any actions for a period of one year, (5) Plaintiff has filed additional state court actions as to other pieces of property, and (6) Plaintiff includes baseless allegations in her current litigation.[5]

The only reason sanctions were not imposed in the prior case was because it was unclear whether Plaintiff, a *pro se* litigant, had "been warned of the consequences of filing such actions

[5] Exhibit B at pp. 10-11.

in this Court."[6] While Plaintiff was shown leniency, the order also made clear the consequences of filing another suit: "Plaintiff, however, *is warned* that filing future frivolous actions may result in appropriate sanctions against Plaintiff including any sanctions available under Fed. R. Civ. P. 11."[7]

A clearer case for sanctions could not be made. In imposing sanctions against a *pro se* litigant, the South Carolina district court explained:

> The court warned Plaintiffs three years ago that their litigation tactics "would long ago have resulted in serious sanctions against members of the bar" and that the court was being "extremely patient" with them only because of their pro se status. *Potter v. Crestwood Golf Club, Inc., et al.*, C.A. No. 5:94–2047–22, Order filed 4/17/96 at 43 (*Potter II*).
>
> Despite this admonition, Plaintiffs persist in staging baseless collateral attacks on rulings related to claims against these Defendants.

Potter v. Mosteller, 199 F.R.D. 181, 188 (D.S.C. 2000) *aff'd*, 238 F.3d 414 (4th Cir. 2000). *See also McMahon v. F & M Bank-Winchester*, 45 F.3d 426 (4th Cir. 1994) (affirming district court's imposition of pre-filing injunction and monetary sanctions against *pro se* litigant).

In sum, Plaintiff has a history of abusive filings. This Court warned Plaintiff that sanctions would be imposed if she filed suit again. Nevertheless, Plaintiff filed the instant suit. Sanctions are now in order.

CONCLUSION

WHEREFORE, Defendants, respectfully request that this Honorable Court:

A. Grant the Motion to Dismiss;

B. Dismiss the Complaint with prejudice;

C. Award Defendants reasonable attorney's fees and costs incurred in having to appear and defend against Plaintiff's allegations asserted in the Complaint;

[6] Exhibit A at p. 24.

[7] *Id.* (emphasis added).

D. Sanction Plaintiff for her long history of frivolous and abusive filings;

E. Grant such other and further relief as this Court deems just and proper.

FINKEL LAW FIRM LLC

s/Sean A. O'Connor
Sean A. O'Connor (Dist. Id. No. 7601)
Post Office Box 41489
Charleston, South Carolina 29423
Telephone: (843) 577-5460
Facsimile: (843) 577-5135
soconnor@finkellaw.com

Attorneys for Defendants LaSalle Bank National Association and Altisource Homes

December 20, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Laura Toney, Plaintiff, vs. LaSalle Bank National Association as Trustee for the Registered Holders of Structured Asset Securities Corporation, Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-11, Altisource Homes, Pro Capital Investors, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, Defendants.	Civil Action No. 3:13-cv-03481-MBS-SVH CERTIFICATE OF SERVICE

The undersigned states that on December 20, 2013, he caused a true and correct copy of *Defendants' Motion to Dismiss and Motion for Sanctions*, with attached Exhibits, and *Defendants' Memorandum of Law in Support of Motion to Dismiss and Motion for Sanctions* to be served upon the parties identified below by United States mail, proper postage affixed and addressed as follows:

Laura Toney
Post Office Box 722
Bishopville, South Carolina 29010
Plaintiff, Pro Se

Pro Capital Investors
50 South 16th Street, Suite 1950
Philadelphia, PA 19102
Defendant

Wayne Capell
Lee County Treasurer
Post Office Box 428
Bishopville, South Carolina 29010
Defendant

Lee County Planning and Zoning
3rd Floor of Courthouse, Room 302
Bishopville, South Carolina 29010
Defendant

s/Sean A. O'Connor
Sean A. O'Connor (Dist. Id. No. 7601)
FINKEL LAW FIRM LLC
Post Office Box 41489
Charleston, South Carolina 29423
Telephone: (843) 577-5460
Facsimile: (843) 577-5135
soconnor@finkellaw.com