

THE STATE OF SOUTH CAROLINA
IN SOUTH CAROLINA COURT OF APPEALS

APPEAL FROM LEE COUNTY

The Honorable Clifton Newman
Circuit Court Judge

RECEIVED
JAN 26 2018
SC Court of Appeals

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.**

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STATE OF SOUTH CAROLINA)

COUNTY OF)

IN THE COURT OF COMMON PLEAS

Laura Toney)

Plaintiff(s))

CIVIL ACTION COVERSHEET

2013-CP - 31- 321

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
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Defendant(s))

(Please Print)

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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)	☐ Mechanics

SCCA / 234 (01/2011)

Page 1 of 3

☐ Breach of Contract (140)	20 -CP-	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)	☐ Notice/ File Med Mal (230)	☐ Personal Injury (350)	☒ Possession (450)
	☐ Other (299)	☐ Wrongful Death (360)	☐ Building Code Violation (460)
		☐ Other (399)	☒ Other (499) Quiet Title and Conversion
-
Inmate Petitions	Judgments/Settlements	Administrative Law/Relief	Appeals
☐ PCR (500)	☐ Death Settlement (700)	☐ Reinstate Driver's License (800)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Foreign Judgment (710)	☐ Judicial Review (810)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Magistrate's Judgment (720)	☐ Relief (820)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Minor Settlement (730)	☐ Permanent Injunction (830)	☐ Municipal (930)
	☐ Transcript Judgment (740)	☐ Forfeiture-Petition (840)	☐ Probate Court (940)
	☐ Lis Pendens (750)	☐ Forfeiture—Consent Order (850)	☐ SCDOT (950)
	☐ Transfer of Structured Settlement Payment Rights Application (760)	☐ Other (899)	☐ Worker's Comp (960)
	☐ Other (799)		☐ Zoning Board (970)
	Special/Complex /Other		☐ Public Service Commission (990)
☐ Environmental (600)	☐ Pharmaceuticals (630)		☐ Employment Security Comm (991)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)		☐ Other (999)
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☐ Other (699)	☐ Motion to Quash Subpoena in an Out-of-County Action (660)		
	☐ Sexual Predator (510)		

Submitting Party Signature: Sama Torrey

Date: 12-8-14

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

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EXHIBIT B

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.

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January 20, 2014

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.

²LaSalle 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.

³On 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 mortgage⁴ 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

⁴It 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).

⁵In 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.* Fla. 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.

⁶It 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.

I. 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 judgment⁷ 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. See 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

⁷Summary 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-32JRT, 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

⁸In 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

⁹There 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 must "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.

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 rescission (June 14, 2005), or when Plaintiff claims she first received a reply to her notice of rescission (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 Vicire 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 Robertson 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 ("SCUTPA"), §§ 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 fraud¹¹ with particularity. Fed. R. Civ. P. 9(b); Pearlstone 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.

¹¹To 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

¹²To 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 frivolous¹³ 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

¹³Plaintiff 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.

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

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. Markari, 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, 2011³, 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.*)

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.) Owen 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 its 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

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. 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, 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.

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

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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

Paul M. Fata, Esq.
115 E. Church Street
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Lee County Planning and Zoning*

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Columbia, South Carolina 29201
*Attorneys for Defendant US Bank Cust for
Pro Cap III LLC*

s/Sean A. O'Connor
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EXHIBIT C

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

Laura Toney,	)	
	)	
Plaintiff,	)	Civil Action No. 3:11-1686-MBS-JRM
	)	
v.	)	
	)	
LaSalle Bank National Association	)	REPORT AND RECOMMENDATION
Trustee for Lehman Brothers	)	
Structured Asset Investment Loan	)	
Trust Sail 2005, Ocwen Federal	)	
Bank, also known as Altisource	)	
Homes,	)	
	)	
Defendants.	)	

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;

¹See 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.

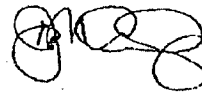
Manning v. Hunt, 119 F.3d 254, 263 (4th Cir.1997); Hughes Network Sys., Inc. v. InterDigital Comm'n Corp., 17 F.3d 691, 693 (4th Cir.1994); North Carolina State Ports Auth. v. Dart Containerline Co., Ltd., 592 F.2d 749 (4th Cir.1979); Blackwelder Furniture Co. v. Scilig Manufacturing Co., 550 F.2d 189 (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).

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

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 judicata 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

EXHIBIT D

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

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

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, Altisource
Homes, Pro Capital Investors, Wayne
Capell, Lee County Treasurer and
Lee County Planning and Zoning,

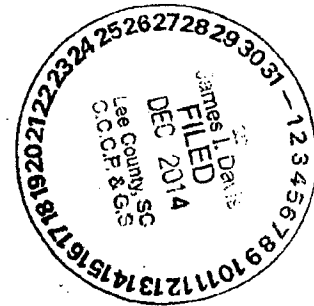
Defendants.

IN THE COURT OF COMMON PLEAS

THIRD JUDICIAL CIRCUIT

Case No.: 2013-CP-31-00321

CERTIFICATE OF SERVICE



The undersigned states that on November 24, 2014, she caused a true and correct copy of *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* to be served upon the parties as indicated below by placing same in the U.S. Mail, proper postage prepaid, addressed as follows:

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Plaintiff, Pro Se

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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, Altisource)
Homes, Pro Capital Investors, Wayne)
Capell, Lee County Treasurer and)
Lee County Planning and Zoning,)

Defendants.)

IN THE COURT OF COMMON PLEAS

THIRD JUDICIAL CIRCUIT

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

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) SCRCF, 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 States 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

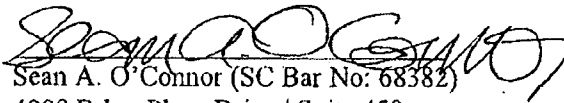
Exhibit D: Chief United States District Judge Margaret B. Seymour's Order and Opinion, Civil Action No. 3:11-1686-MBS.

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

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*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,	)	Civil Action No. <u>3:13-cv-03481-MBS-SVH</u>
	)	
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' 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

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*Attorneys for Defendants
LaSalle Bank National Association and
Allsource Homes*

December 20, 2013

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

LAURA TONEY,	)	Civil Action No. 3:11-1686-MBS-JRM
	)	
Plaintiff,	)	
	)	
v.	)	
	)	REPORT AND RECOMMENDATION
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.	)	

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

¹Pretrial 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.

²LaSalle 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.

³On 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 mortgage⁴ 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

⁴It 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).

⁵In 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.* Fla. 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 TII.A 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

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

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.

⁶It 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 Dept., 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

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 judgment⁷ 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

⁷Summary 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); Gillian 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

⁸In 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

⁹There 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 must "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.

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 rescission (June 14, 2005), or when Plaintiff claims she first received a reply to her notice of rescission (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. Hulson, 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 distress 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." Holtzschelter 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 Robertson 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 ("SCUTPA"), §§ 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.

c. 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 fraud¹¹ with particularity. Fed. R. Civ. P. 9(b); Pearlstone 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.

¹¹To 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

¹²To 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 frivolous¹³ 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

¹³Plaintiff 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.

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

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, 2011³, 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.*)

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.) Owen 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. Davv*, 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 or 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 AltSource.

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.

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Attorneys for Defendants
LaSalle Bank National Association and
Allisource 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)
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EXHIBIT B

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.

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*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

¹Pretrial 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.

²LaSalle 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.

³On 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 mortgage⁴ 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

⁴It 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).

⁵In 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 AltSource 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.* Fla. 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.

⁶It 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 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 judgment⁷ 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. See 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

⁷Summary 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

⁸In 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

⁹There 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 must "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.

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(c). Whether the alleged TILA violation occurred at closing (October 6, 2004), when Plaintiff mailed the notice of rescission (June 14, 2005), or when Plaintiff claims she first received a reply to her notice of rescission (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 distress suffered by the plaintiff was "severe" so that "no reasonable man could be expected to endure it."

Id., at 778 (quoting Vicire 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 Robertson 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 ("SCUTPA"), §§ 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. 1955)). 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.

c. 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 fraud¹¹ with particularity. Fed. R. Civ. P. 9(b); Pearlstone 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.

¹¹To 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

¹²To 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.

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.

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.)

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

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 frivolous¹³ 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

¹³Plaintiff 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.

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

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. Markari, 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, 2011³, 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.)

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.) Owen 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 Owen. (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. Scymour
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,	)	Civil Action No. <u>3:13-cv-03481-MBS-SVH</u>
	)	
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.	)	

**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 its 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

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(c)(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. 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, 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.

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
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*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,	)	Civil Action No. <u>3:13-cv-03481-MBS-SVH</u>
	)	
Plaintiff,	)	
	)	CERTIFICATE OF SERVICE
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.	)	

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
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Bishopville, South Carolina 29010
*Attorney for Defendant Capell and
Lee County Planning and Zoning*

s/Sean A. O'Connor
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EXHIBIT C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Laura Toney,	)	
	)	
Plaintiff,	)	Civil Action No. 3:11-1686-MBS-JRM
	)	
v.	)	
	)	
LaSalle Bank National Association	)	REPORT AND RECOMMENDATION
Trustee for Lehman Brothers	)	
Structured Asset Investment Loan	)	
Trust Sail 2005, Ocwen Federal	)	
Bank, also known as Altisource	)	
Homes,	)	
	)	
Defendants.	)	
	)	

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;

¹See 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.

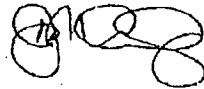
Manning v. Hunt, 119 F.3d 254, 263 (4th Cir.1997); Hughes Network Sys., Inc. v. InterDigital Comm'n Corp., 17 F.3d 691, 693 (4th Cir.1994); North Carolina State Ports Auth. v. Dart Containerline Co., Ltd., 592 F.2d 749 (4th Cir.1979); Blackwelder Furniture Co. v. Scilig Manufacturing Co., 550 F.2d 189 (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).

EXHIBIT D

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

Laura Toney,	)	C.A. No. 3:11-cv-1686-MBS
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	ORDER AND OPINION
LaSalle Bank National Association	)	
Trustee for Lehman Brothers Secured	)	
Asset Investment Loan Trust Sail 2005,	)	
Ocwen Federal Bank, a/k/a Altisource	)	
Homes,	)	
	)	
	)	
Defendants.	)	

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 judicata 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

STATE OF SOUTH CAROLINA
COUNTY OF LEE

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
Case No.: 2013-CP-31-00321

Laura Toney,

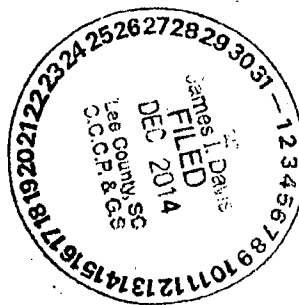
Plaintiff,

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.

CERTIFICATE OF SERVICE

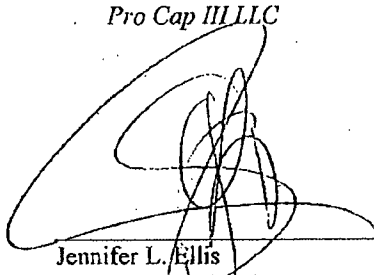


The undersigned states that on November 24, 2014, she caused a true and correct copy of *Defendants LaSalle Bank National Association's and Altisource Homes' Response to Plaintiff's Motion for Default, Second Amended Motion to Dismiss Against Plaintiff and Motion for Sanctions Against Plaintiff* to be served upon the parties as indicated below by placing same in the U.S. Mail, proper postage prepaid, 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.
Post Office Drawer 11889
Columbia, South Carolina 29211-1889
*Attorneys for Defendant US Bank Cust for
Pro Cap III LLC*

Paul M. Fata, Esq.
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Bishopville, South Carolina 29010
*Attorney for Defendant Capell and
Lee County Planning and Zoning*


Jennifer L. Ellis
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STATE OF SOUTH CAROLINA

COUNTY OF

IN THE COURT OF COMMON PLEAS

Laura Toney

Plaintiff(s)

CIVIL ACTION COVERSHEET

2013-CP - 31- 321

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)

(Please Print)

Submitted By: Laura Toney, Pro Se
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Certified as a True Copy
James A. Brown
Clerk of Court 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)
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SCCA / 234 (01/2011)

Page 1 of 3

- ☐ Breach of Contract (140) 20 CP
☐ Other (199) ☐ 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)
☐ SCDOJ (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

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

Submitting Party Signature:

Sama Toney

Date: 12-8-14

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, 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.

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 SCRCF 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.

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), SCRCF, 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. Intedged 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.

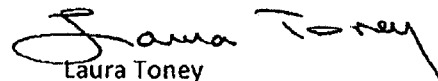
In this case, the trial court held that because "there appears . . . to be no reasonable basis for [Hulsey's] assumption that the [thirty] day time to file an answer starts completely anew upon remand[,] . . . no good cause has been demonstrated" While we appreciate the trial court did not have the benefit 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 Hulseley's explanation of default and specifically found it unreasonable. They found that the record supports the finding that Hulseley'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
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Bishopville, SC 29010
(803) 459-6006

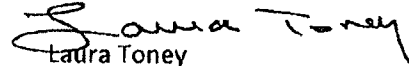
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Pro Capital Investors
50 South 16th Street, Suite 1950
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C/O Haynsworth Sinkler and boyd
P.O. Box 11889
Columbia, SC 2211-1899

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.


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Defendant(s)

(Please Print)

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

CIVIL ACTION COVERSHEET

2013-CP - 31- 321

FILED 02 2014

WITNESSED
FILED
CLERK OF COURT
LEE COUNTY, SC

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Telephone #:

Fax #:

Other:

E-mail:

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SCCA / 234 (01/2011)

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IN THE STATE OF SOUTH CAROLINA

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COUNTY OF LEE

PLEAS

CASE NUMBER: 2013-CP-31-0321

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Plaintiff,

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Capell, Lee County Treasure and
Lee County Planning and Zoning

Defendants.

**MOTION TO STRIKE DEFENDANT'S PRO CAPITAL INVESTOR'S ANSWER
TO COMPLAINT AND MOTION TO STRIKE ALL DOCUMENTS AND
FILINGS FROM FEDERAL COURT**

Pursuant to Rule 12(f) of the SCRCF, the Plaintiff respectfully requests that the Defendant, Pro Capital Motion to Dismiss is denied with prejudice and an Order to Strike the Defendant's Motion to Dismiss AND Motion to Strike all documents and filings from Federal Court with prejudice and the Plaintiff's Default is granted 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 on 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.

STATEMENT OF CASE

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

☐ Breach of Contract (140)	20 -CP-	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)	☐ Notice/ File Med Mal (230)	☐ Personal Injury (350)	☒ Possession (450)
	☐ Other (299)	☐ Wrongful Death (360)	☐ Building Code Violation (460)
		☐ Other (399)	☒ Other (499) Quiet Title and Conversion
Inmate Petitions	Judgments/Settlements	Administrative Law/Relief	Appeals
☐ PCR (500)	☐ Death Settlement (700)	☐ Reinstatement Driver's License (800)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Foreign Judgment (710)	☐ Judicial Review (810)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Magistrate's Judgment (720)	☐ Relief (820)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Minor Settlement (730)	☐ Permanent Injunction (830)	☐ Municipal (930)
	☐ Transcript Judgment (740)	☐ Forfeiture-Petition (840)	☐ Probate Court (940)
	☐ Lis Pendens (750)	☐ Forfeiture-Consent Order (850)	☐ SCDOT (950)
	☐ Transfer of Structured Settlement Payment Rights Application (760)	☐ Other (899)	☐ Worker's Comp (960)
	☐ Other (799)		☐ Zoning Board (970)
			☐ Public Service Commission (990)
Special/Complex /Other			☐ Employment Security Comm (991)
☐ Environmental (600)	☐ Pharmaceuticals (630)		☐ Other (999)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)		
☐ Medical (620)	☐ Out-of State Depositions (650)		
☐ Other (699)	☐ Motion to Quash Subpoena in an Out-of-County Action (660)		
	☐ Sexual Predator (510)		

Submitting Party Signature:

James Toney

Date: 12-8-14

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, 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.

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. • •**

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 defecated 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."
13. 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 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.

14. Pro Capital Investors was 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. There was no Motion for An Enlargement of Time filed with the Court. 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.

16. Pro Capital never filed an answer in State court until December 2, 2014, was is (271) days late without the consent of Court.

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. The time for filing notice of intent to appeal is jurisdictional and may not be extended by consent or order.

17. 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.

18. 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.
19. 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.

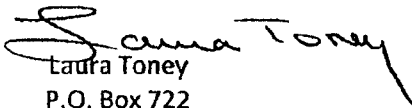
In this case at bar, although the Supreme Court had not yet issued the Sundown opinion, the trial court nonetheless addressed Hulsey's explanation of default and specifically found it unreasonable. They found that the record supports the finding that Husley's explanation for default is unreasonable. 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."

20. In this case, Pro Capital Investors claims the Plaintiff misidentified their name and address. The Plaintiff is enclosing the registration that was recorded in the Lee County Treasurer's Office on Pro Capital for the tax sale in 2013. As the Court will see, Pro capital is not being honest to the Court.

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

December 8, 2014


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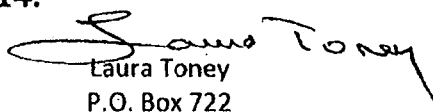
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50 South 16th Street, Suite 1950
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C/O Haynsworth Sinkler and boyd
P.O. Box 11889
Columbia, SC 2211-1899

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 and MOTION TO DECLARE ALL DOCUMENTS FILED IN FEDERAL COURT NULL AND VOID** to the Defendants below via United States Postal Service on December 8, 2014.


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STATE OF SOUTH CAROLINA

COUNTY OF LEE

Laura Toney,

PLAINTIFF

-vs-

LaSalle Bank National Association,
as TrusteeFor Registered Holders of
Structured Assets Securities Corporation,
Structured AssetInvestment 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

MOTION FOR SUMMARY JUDGMENT
PURSUANT TO S.C. R. C. P. Rule 56

YOU WILL PLEASE TAKE NOTICE that the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, by and through its undersigned counsel, will move before this Court on the tenth day after filing of this Motion or as soon thereafter as it may be heard for an Order granting Summary Judgment in the above captioned case.

The Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, base their Motion on the following:

1. That service was never completed in this case and therefore the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning are not properly before the Court.

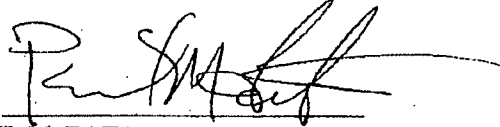
2. That the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, at all times have been exercising their administrative duties and have taken no

action detrimental to the Plaintiff. Therefore the Defendants, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning, request summary judgment on all issues.

STUCKEY, FATA AND SEGARS, LLC

Bishopville, S.C.

December 17, 2014

BY: 

PAUL M. FATA
ATTORNEY FOR DEFENDANTS,
WAYNE CAPELL, LEE COUNTY
TREASURER, & LEE COUNTY PLANNING
AND ZONING,
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.

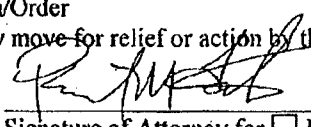
LaSalle Bank National Association, et al

Defendant.

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

CASE NO.: 2013-CP-31-321

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: Pro Se, Bar No. _____ Address: _____ Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: Paul M. Fata, Bar No. 0001966 Address: _____ Post Office Drawer 568, Bishopville, SC 29010 Phone: (803) 484-5409 Fax (803) 484-9239 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: Motion for Summary Judgment 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 12/17/14 Date submitted	
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$ _____ ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ 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, SCRPC) ☐ 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 Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____	

SCCA 233 (11/2003)

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 DEFENDANTS MR. WAYNE CAPELL, LEE COUNTY
TREASURER AND LEE COUNTY PLANNING AND ZONING FOR INSUFFICIENCY
OF SERVICE OF PROCESS**

Pursuant to Rule 12(f) of the FRCP, the Plaintiff respectfully requests that Mr. Wayne Capell, Lee County Treasurer, and Lee County Planning and Zoning are stricken 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 have waived any of the defenses under Rule 12(b).
4. The Defendants are attempting to file Motion 12 for Insufficiency of Service of Process.

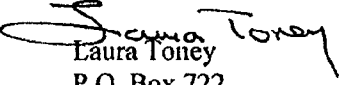
Rule 12 of the SCRCF states:

How Presented. 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.

5. The Defendants have waived any defenses under Rules 12. Generally, "a failure to plead an affirmative defense is deemed a waiver of the right to assert it." *Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002). However, because the aim of this pleading requirement is to avoid surprise defenses, *see* Rule 8(c), SCRCP note, many courts allow the assertion of affirmative defenses despite a technical failure to comply with the initial pleading requirements where the defense is timely raised to the trial court without resulting in unfair surprise to the opposing party. *See Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 612 (4th Cir. 1999), *abrogated on other grounds by Dessert Palace Inc. v. Costai*, 539 U.S. 90 (2003); and *Floyd v. Ohio Gen. Ins. Co.*, 701 F.Supp. 1177, 1187 (D.S.C. 1988). *See also Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 404 S.E.2d 200 (1991

For the above reasons, the Plaintiff respectfully requests that the Defendants' Motion 12 for Insufficiency of Service of Process is denied.

December 23, 2014


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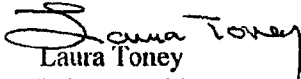
CERTIFICATE OF SERVICE

The Plaintiff certifies that she mailed a copy of the Motion to Strike to the below Defendants addressed as below via United States Postal Service on December 23, 2014.

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4000 Faber Place
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Laura Toney
P.O. Box 722
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29010

STATE OF SOUTH CAROLINA

COUNTY OF LEE

Laura Toney,

Plaintiff,

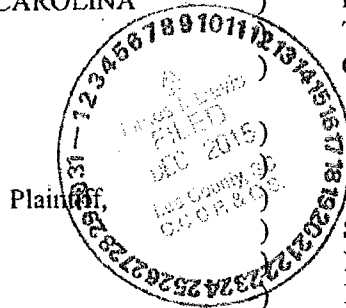
v.

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, Altisource Homes, Pro
Capital Investors, Wayne Capell, Lee
County Treasurer and Lee County
Planning and Zoning,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

Civil Action No.: 2013-CP-31-00321



**SUPPLEMENTAL MEMORANDUM
IN OPPOSITION TO
PLAINTIFF'S MOTION
FOR DEFAULT JUDGMENT**

INTRODUCTION

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 "Defendant")¹, by and through its undersigned counsel, and hereby files the herein Supplemental Memorandum In Opposition To Plaintiff's Motion For Default Judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed the Summons and Complaint in this action on November 13, 2013. (See

¹ This Defendant is 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."

Lee County Public Index.) Defendant removed the case to the United States District Court for the District of South Carolina, Columbia Division, on December 13, 2013. Defendant then filed in U.S. District Court a *Motion to Dismiss for Failure to State a Claim* on December 20, 2013. See PACER, Case No. 3:13-cv-03481-MBS-SVH. Defendant filed in U.S. District Court an *Amended Motion to Dismiss and Motion for Sanctions* (hereinafter "the Motion") on January 20, 2014. See PACER. This motion 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.²

Defendant's Motion to Dismiss was not heard or ruled upon and remained pending when the United States District Court remanded the case on August 5, 2014. Defendant's Motion 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

² "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.)

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 Defendants 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 (see Lee County Public Index) and was removed on December 13, 2013 (see PACER). Based upon these dates, even if the Complaint was served on the same day it was filed, removal was timely. Plaintiff was apparently under the mistaken impression that a removal to federal court is required to be filed within 21 days, perhaps because an answer in federal court is due 21 days after service. Plaintiff is incorrect. Defendants had 30 days to remove. See 28 U.S.C. § 1446(b). It is clear and obvious that removal was timely and the Court should therefore soundly reject this argument.

Plaintiff also argued that Defendants LaSalle Bank and Altisource defaulted by failing to re-file their motion to dismiss in state court following remand. There is no South Carolina authority (state or federal) addressing this specific issue, but the authority in all other jurisdictions that have addressed it appears to be unanimous in holding that a motion to dismiss pending in federal court is not required to be refiled 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. This black letter rule has been followed in several jurisdictions across the country, as reflected in the decisions excerpted below. Currently, and going back as far as 1948, there are

no jurisdictions which 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 have 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 Natl. Bank v. First Natl. 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 unanimous and uncontradicted rule, as illustrated by the several authorities cited herein, Plaintiff's argument that Defendant should be held in default for not re-filing in state court its motion to dismiss which was timely and properly filed in federal court must necessarily fail. Therefore Plaintiff's motion for default judgment should be denied. The facts and procedural history of this case as well as the significant weight of persuasive case law directly on point compel that fair and just result.

(SIGNATURE ON FOLLOWING PAGE)

Laura Toney v. LaSalle Bank National Association, etc., et al.
2013-CP-31-00321
SUPPLEMENTAL MEMORANDUM
IN OPPOSITION TO PLAINTIFF'S MOTION
FOR DEFAULT JUDGMENT

FINKEL LAW FIRM LLC



Sean A. O'Connor (SC Bar No. 68382)
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North Charleston, South Carolina 29405
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soconnor@finkellaw.com

*Attorneys for Defendants
LaSalle Bank National Association
and Altisource Homes*

December 1, 2015

STATE OF SOUTH CAROLINA

COUNTY OF LEE

Laura Toney,

Plaintiff

-vs-

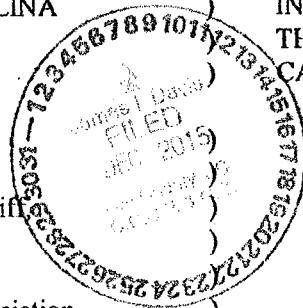
LaSalle Bank National Association
As Trustee for the Registered Holders
Of Structured Asset Securities
Corporation, Structured Asset Investment
Loan Trust, Mortgage Pass-Through
Certificates, Series 2004-11, Altisource
Homes, Pro Capital Investors, Wayne
Capell, Lee County Treasurer and
Lee County Planning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

Defendants.

IN THE COURT OF COMMON PLEAS

THIRD JUDICIAL CIRCUIT

CASE NO.: 2013-CP-31-00321

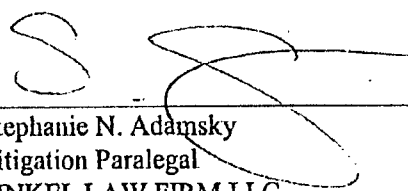


CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of December, 2015 I served a true and exact copy of the *Supplemental Memorandum in Opposition to Plaintiff's Motion for Default Judgment*, via U.S. Mail, proper postage prepaid, on the following individuals addressed as follows:

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

Paul M. Fata, Esq.
Post Office Drawer 568
Bishopville, South Carolina 29010
*Attorney for Defendant Capell and
Lee County Planning and Zoning*


Stephanie N. Adamsky
Litigation Paralegal
FINKEL LAW FIRM LLC
4000 Faber Place Drive | Suite 450
North Charleston, South Carolina 29405
T: 843-577-5460

STATE OF SOUTH CAROLINA

COUNTY OF LEE

LAURA TONEY,

Plaintiff,

Vs.

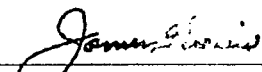
LASALLE BANK NATIONAL ASSOC., ETAL,
Defendant.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION: 2013-CP-31-321

NOTICE OF HEARING

A hearing has been set in the above entitled action on March 31, 2016 at 9:30 a.m. at the Lee County Courthouse. You are hereby notified to be present at that time.

Date: March 9, 2016


Clerk of Court

cc: Laura Toney
Paul Fata
Sean O'Connor

PLEASE NOTE:

THE TIME AND DATE FOR THE ABOVE HEARING HAS BEEN CHANGED TO WEDNESDAY, MARCH 30,
2016 at 12:00 pm.




Clerk of Court

IN THE STATE OF SOUTH CAROLINA
COUNTY OF LEE

IN THE COURT OF COMMON PLEAS

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

Defendants.

**MEMORANDUM IN SUPPORT OF THE PLAINTIFF'S MOTION FOR DEFAULT AND
OPPOSITION TO THE DEFENDANT'S MOTION TO DISMISS**

AND

MOTION FOR SANCTIONS UNDER RULE 11

Pursuant to rule 11 of the South Carolina Rules of civil Procedure, the Plaintiff move for an order awarding sanctions against the Defendants and their counsels. The basis for this motion is that the Defendants have no legal grounds for continuing prosecution of Defendants' frivolous claims in this lawsuit. Further, the lawsuit and continuation thereof were continued in bad faith.

RULE 11 OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE

Rule 11 states in pertinent part as follows:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper, that to the best of his knowledge, information and belief there is good ground to support it....If a pleading, motion, or other paper is signed in violation of the rule, the court, upon motion or its own initiative, may impose upon the person who signed it, a represented party, or both an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses occurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

Under Rule 11, "a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments." *Ex parte Gregory*, 378 S.C. 430, 437, 663, S.E. 2d 46, 50 (2008) (affirming Judge Diane Goodstein's award of more than \$27,000 in attorneys' fees and expenses in defending suit and pursuing sanction). The sanction may include an order to pay reasonable costs and attorneys' fees incurred by the party defending either a frivolous action or an action brought in bad faith whether or not there are grounds to support it. Further, if appropriate under the facts of the case, the Court may order the party and/or his attorney to pay a monetary penalty to the defending party. Id; see also

Runyon v. Wright. 332 S.C. 15, 18-10, 471 S.E. ed 160, 161-62 (1996) (affirming award of attorneys' fee and additional monetary penalty under rule 11).

The criteria for rule 11 motions are essentially the same as for sanctions under the South Carolina Frivolous Civil Proceedings Act((FCPA) See In re Beard, 359 S.C. 351, 597 S.E. 2d 835 Ct. app. 2005) (denying sanctions under Rule 11 because prior to filing lawsuit, plaintiff's attorney had sought and received advice from law school professor, who supported the grounds upon which the claims were based).

The FCPA allows for sanctions to be awarded when frivolous proceedings are initiated and continued after a case is dismissed. The Act calls for the Court to issue sanctions if the Court finds by a preponderance of evidence that a party or attorney failed to comply with one of the following conditions:

1. a reasonable attorney in the same circumstance would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or renewal of existing law;
2. a reasonable attorney in the same circumstance would believe that the procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party; or
3. a reasonable attorney in the same circumstance would believe that the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper

discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based;

4. Unless the court finds by a preponderance of the evidence that an attorney, party, or pro se litigant engaged in advancing a frivolous claim or defense, the attorney, party, or pro se litigant shall not be sanctioned.

S.C. Code Ann 15-36-10(C)(1)(2)(2010).

In this case, sanctions are warranted because Defendants have no facts to support any of the causes of actions because of untimely filings.

Count 1 Misrepresentation to the Courts

1. 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 on **December 20, 2013**. According to Federal rule the Defendants had (20) days to timely file an answer. Federal Court remanded the case back to State Court for Lack of Subject Matter Jurisdiction on August 8, 2014.

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.

The Defendants is misleading the Court in saying that the Plaintiff claims that the Removal was untimely. The Plaintiff never mentioned the Removal being untimely,

but the the Defendants' Answer was untimely.

Now the Defendants 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 file in State Court constitutes fraud on this Court.

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 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.

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.

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). LaSalle Bank A/K/A AltisourceHomes answer in State Court is (277) days late.

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.

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.

1. 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.

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 affirms that prior to filing the motion, the movant has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion.

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."

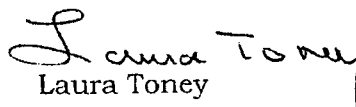
The Plaintiff affirms that prior to filing this motion she has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion. The Plaintiff certifies that consultation would serve no useful purpose.

Conclusion

For the above stated reasons, Plaintiff continuation of this suit is frivolous and without legal merit. The Plaintiff affirms under rule 11 that the Defendants were given (21) days to discontinue their frivolous claims before filing.

WHEREFORE, the Plaintiff ask for the Court to find that the Defendants and/or their counsels had no grounds for the continuation of the above captioned lawsuit, and award the Plaintiff the relief that was prayed for in the initial complaint and the cost of this actions and additional monetary penalty as the Court deems appropriate.

May ¹⁴~~17~~, 2016


Laura Toney

P.O. Box 722

Bishopville, SC 29010

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

Defendants.

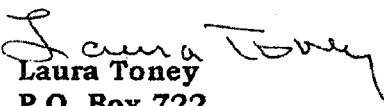
Certificate of Service

I, Laura Toney, certifies that she mailed the **MEMORANDUM IN SUPPORT OF THE PLAINTIFF'S MOTION FOR DEFAULT AND OPPOSITION TO THE DEFENDANT'S MOTION TO DISMISS AND MOTION FOR SANCTIONS UNDER RULE 11** by email and United States Postal Service on May 18th, 2016 and May 17, 2016 (Email) to the Defendants addressed as follows:

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

Judge Clifton Newman
P.O. Box 516
Kingstree, SC 29556-0516


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,

Case: 2013-CP-31-0321

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.

SECOND MOTION TO RECUSE

Now comes the above named, Laura Toney, who moves to recuse Judge Clifton Newman from the above entitled matter under 28 USCS Sec. 455, and Marshall v Jerrico Inc., 446 US 238, 242, 100 S.Ct. 1610, 64 L. Ed. 2D 182 (1980) and Canon 3 of the South Carolina Rules of Professional Conduct.

"The neutrality requirement helps to guarantee that life, liberty, or property will not

be taken on the basis of an erroneous or distorted conception of the facts or the law."

The above is applicable to this court by application of Article VI of the United States Constitution and Stone v Powell, 428 US 465, 483 n. 35, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976).

"According to Congress, U.S. Supreme Court case law and South Carolina canons of judicial ethics, a judge must bow out of hearing any case in which his or her impartiality might reasonably be questioned. The South Carolina Canons of Judicial Conduct say that judges must avoid all impropriety and appearance of impropriety."

"The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

It is believed that Judge Newman has engaged in ex parte communications with the attorneys for the defendants. Information was mailed to Judge Newman on September 5, 2015, pertaining to the case. The Plaintiff did not receive this information. These documents were totally irrelevant to the case. The purpose of mailing these documents was to undermine the Plaintiff as well as to gain an unfair advantage. The Plaintiff was mailed the letter, but not the documents.

Judge Newman has refused to acknowledge the conflict of interest on the part of

Stuckey, Fata, and Segars. Mr. Paul Fata admitted in court that he represented me and my husband throughout several years. Mr. Fata did not follow the Rules of Professional Conduct in securing my informed consent. Judge Newman received the Application and Motion for Conflict of Interest in October 2015, and has totally disregarded it.

Judge Newman has refused to acknowledge the Unauthorized Practice of Law by Mr. Sean O'Connor and Mississippi lawyers who have given legal advice to Mr. O'Connor proven by the email that was presented in court. Mr. O'Connor has also filed Mr. Jake Adams and Mr. C. Lee Lott, III names with court documents in Lee County. Neither one of these lawyer has a license to practice law in South Carolina. **Only the South Carolina Supreme Court has the authority to determined what constitutes Unauthorized Practice of Law. This complaint should have been immediately referred to the South Carolina Supreme Court. Judge Newman has abuse his authority as a circuit judge.**

According to Canon 3:

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct contained in Rule 407, SCACR, should take appropriate action. A judge having knowledge* that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.

The above mentioned Judge has deliberately violated the litigant's personal liberties and/or has wantonly refused to provide due process and equal protection to her before the court or has behaved in a manner inconsistent with that which is needed for full, fair, impartial hearings. Judge Newman communicated to the Plaintiff on November 30, 2015, in a very hostile and unprofessional tone during the hearing.

According to the email by Mr. Sean O'Connor received on December 2, 2015, Judge Newman directed him to submit to the Court a Memorandum of Law to support his arguments. Judge Newman did not grant the Plaintiff, Laura Toney, the same privilege. The Plaintiff is pro se and does not have a law degree, but is highly educated with college and other advanced degrees and soon will be a psychologist. The plaintiff is also a veteran teacher of 25 years. With that being said, the Plaintiff feels that she did not get the same respect as the attorneys for the defendants.

There was no structure during the hearing on November 30, 2015. The Plaintiff felt that Judge Newman lacked the competence or knowledge of the rules to make a fair decision.

The Plaintiff has filed a grievance on Judge Clifton Newman and the Defendants in this case. The Plaintiff has also requested an investigation into several activities involving misconduct which is another reason for the recusal of Judge Newman.

Judge Clifton Newman has also violated the Plaintiff's privacy by asking her in open court the nature of her illness after being taken to the emergency room by the EMS on Monday, November 30, 2015. Judge Newman also ordered the Plaintiff back to Court on December 1, 2015 and December 3, 2015, after the case was continued during her illness to explain a doctor's excuse. The Plaintiff had to be transported back to the emergency room while in court. The Plaintiff felt harrassed by Judge Newman.

Judge Newman has exhibited a lack of respect for the rights of the Plaintiff. My medical condition was not a subject for open court. The Plaintiff felt violated and was very offended to be asked a question that violated her privacy. It is incomprehensible that a Judge would exhibit that kind of behavior because of the Privacy Act (**HIPAA**) which is a federal offense. Judge Newman already had a legitimate written excuse from the hospital that should have sufficed. The Plaintiff feels that this was unprofessional, illegal and unethical. The Plaintiff feels that Judge Newman's actions were wonton with malice and were a total disregard for the rights of the Plaintiff or the laws of South Carolina, Federal Laws and the United States Constitution.

The United States Constitution guarantees an unbiased Judge who will always provide litigants with full protection of ALL RIGHTS. Therefore, Petitioner respectfully demands said Judge Newman recuse himself in light of experiences of unethical and/or illegal conduct or conduct which gives Plaintiff good reason to believe the above Judge cannot hear the above case in a fair and impartial manner. **Judge Newman also has given the Plaintiff the impression that he does not possess the knowledge or competence of the pertinent laws and rules pertaining to this case. This was**

exhibited by allowing Mr. Sean O'Connor to mislead the Court several times with irrelevant materials and representations that had nothing to do with the present case. Had Judge Newman possess the knowledge and competence, the hearing on November 30, 2015, would have been over in less than (30) minutes. The Plaintiff deserves a judge who has knowledge of the applicable rules and can apply them properly and who is not misled by the defendants unethical strategies.

The Plaintiff has suffered enormous emotional and physical distress as a result of the hearings on November 30, 2015, December 1, 2015, when the Plaintiff was required to report to court knowing that she was ill proven by a doctor's excuse. Again, On December 3, 2015, the Plaintiff was ordered to court after the case was continued to explain her medical reasons after a legitimate medical excuse was submitted to the court. The Plaintiff collapsed and had to be transported to the emergency room as a result of this again.

According to 28 U.S. Code § 455 - Disqualification of justice, judge, or magistrate judge.

Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b)He shall also disqualify himself in the following circumstances:

- (1)**Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
- (2)**Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
- (3)** Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion

concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

Judge Newman, presided in similar case on March of 2007, in Lee County. The case number was 2007-CP-31-66 which is another grounds for disqualification which proves that he has previous knowledge of this case. Judge Newman had the responsibility to recuse himself at the beginning of this hearing because of his prior knowledge and participation in a similar case with LaSalle Bank v. Laura Toney which involved the same property.

Judge Newman is violation of Code of Conduct-Canon 3

According to Canon 3 (E)(1a)of the Code of Professional Ethics,

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.

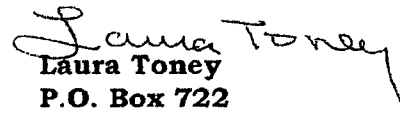
(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of disputed evidentiary facts concerning the proceeding;

The litigant is entitled to have her case decided by a judge who can approach the case in an objective and impartial manner, and a judge who possess personal knowledge of evidentiary facts that are in dispute in the case may not be able to meet the criterion. When a judge acquires this kind of knowledge, both federal and state authorities, as well as the Code of Judicial Conduct

prescribe disqualification. Canon 3(C)(1)

For the aforementioned reasons, the Plaintiff respectfully requests the recusal of Judge Clifton Newman in this case.

May ¹⁹~~17~~, 2016


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

CC: Enclosures

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

CERTIFICATE OF MAILING

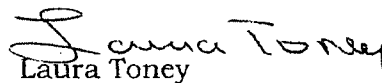
I, Laura Toney, certifies that she mailed a copy of the Motion to Resuse via United States Postal Service on May 18, 2016, to the names and addresses below:

The Honorable Clifton Newman
P O Box 516
Kingstree, SC 29556-0516

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

May ¹⁹ 17, 2016


Laura Toney
P.O. Box 722
Bishopville, SC 29010



SEAN A. O'CONNOR, ESQ.
SOCONNOR@FINKELLAW.COM

REPLY TO:
CHARLESTON LITIGATION

July 20, 2016

VIA REGULAR U.S. MAIL AND EMAIL

The Honorable Clifton Newman
Circuit Judge
Post Office Box 516
Kingstree, SC 29556-0516

Re: Laura Toney 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, Altisource Homes, Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning
Civil Action No.: 2013-CP-31-00321
Our File No.: 52310.44666

Dear Judge Newman:

I am in receipt via email of Plaintiff's Motion to Reconsider the Court's *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*, filed July 11, 2016. Plaintiff's emailed Motion to Reconsider reflects a date of July 20, 2016.

My client, 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") respectfully urges this Court to summarily deny Defendant's Motion without conducting a hearing. A trial judge is not required to conduct a hearing on a motion under Rule 59(e), SCRPC. "Under Rule 59(f), SCRPC, a Rule 59(e) motion may be heard in the discretion of the court and be determined on the briefs filed by the parties without oral argument." Pollard v. County of Florence, 314 S.C. 397, 444 S.E.2d 534 (Ct. App. 1994).

The issues addressed in the Court's July 11, 2016 Order were argued before your Honor in Lee County on March 30, 2016 as well as at length at a prior hearing on the same motions on November 30, 2015, at which time Plaintiff left the courthouse during a lunch break and without leave of the Court failed to return for the resumption of the hearing. Since the time the instant action was filed in November 2013, Plaintiff has submitted multiple and repetitive filings to the Court in support of her position. She has also been given several opportunities to appear before the Court and orally argue her position in person, although it must be noted that when hearings have been scheduled, Plaintiff has a

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Post Office Box 1799 (29202)
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Tel: (803) 765-2935
Fax: (803) 252-0786

CHARLESTON
Litigation, Real Estate & REO
4000 Faber Place Drive, Suite 450
Post Office Box 41489 (29423)
North Charleston, SC 29405
Tel: (843) 577-5460
Fax: (843) 577-5135

CHARLESTON
Foreclosure
4000 Faber Place Drive, Suite 450
Post Office Box 71727 (29415)
North Charleston, SC 29405
Tel: (843) 577-5460
Fax: (843) 725-0015

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lengthy and notorious history of avoiding coming to Court and instead seeking last-minute continuances under suspicious circumstances and without credible grounds, reflecting a tendency of untoward, disingenuous and abusive conduct aimed at causing delay and preventing expeditious adjudication of this dispute.

Plaintiff's Motion to Reconsider raises no new arguments. Instead it is nothing more than an attempt to relitigate the same issues that were properly decided by this Court after due and thorough consideration pursuant to the binding precedent of this state. It must also be noted that these same arguments by Plaintiff have been repeatedly 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 was filed on March 9, 2007. As reflected in court records, Plaintiff has continued to assert the same claims and allegations that the subject foreclosure was somehow improper, although those claims have been 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.

In light of these considerations, in the event a hearing is held on this Motion to Reconsider, U.S. Bank shall seek attorneys' fees and sanctions against Plaintiff.

The five numbered points contained in Plaintiff's Motion to reconsider were each addressed in thorough detail in the Court's July 11, 2016 Order, in the following particulars:

1. The Court's July 11, 2016 Order reflects that in accordance with the Civil Motions Pilot Program, Order No. 2015-09-10-01 of the S.C. Supreme Court, the Court properly exercised its discretion to rule on the pending motions based on the information before it, and that all filings and submissions by the parties, including those by Plaintiff, were received and were duly and carefully considered. The court further noted that it properly exercised its discretion to proceed with the hearing at the scheduled date and time, March 30, 2016, with the parties whose attorneys were present in court at that duly noticed date and time, that Plaintiff's absence was not excused, and that Plaintiff did not file a motion for a continuance.

2. The Court's July 11, 2016 Order reflects that the Court thoughtfully and carefully considered Plaintiff's motion for recusal. Pursuant to the applicable Canons of the Judicial Code of Conduct and the decisional law of this state, there was no credible basis whatsoever for any claim by Plaintiff of impartiality or conflict on the part of the trial judge. Therefore the decision to deny Plaintiff's motion for recusal was sound, proper and lawful.

3. The Court's July 11, 2016 Order explicitly stated that all motions by Plaintiff were denied with prejudice. The July 11, 2016 Order therefore necessarily included and

denied with prejudice the "Rule 11" motion that Plaintiff refers to in her Motion to Reconsider as well as any and all other motions by Plaintiff.

4. Plaintiff's assertion regarding Attorney Fata had been previously brought before the court by a motion she raised for the first time at the hearing on November 30, 2015, requesting that Attorneys O'Connor and Fata be disqualified for alleged "ethical reasons." Plaintiff orally argued her position at length on that date. The Court denied Plaintiff's motion for disqualification of Defendants' counsel and subsequently executed and caused to be filed a written Order detailing that ruling, which Order was filed on February 4, 2016. No motion under Rule 59 SCRCP was filed by Plaintiff following that Order. This issue is therefore conclusively disposed of and ended.

5. Plaintiff once again posits that Defendant U.S. Bank defaulted in this action. Once again, the Court soundly rejects this flawed and erroneous assertion by Plaintiff. The Complaint was filed on November 13, 2013 and was removed by U.S. Bank on December 13, 2013, thus removal was timely under 28 U.S.C. § 1446(b). U.S. Bank 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]. That motion was a timely filed responsive pleading under Rule 81(c)(2)(C) FRCP, as a motion to dismiss is recognized as a valid responsive pleading and a defense within the meaning of Rule 12(a) of both the Federal Rules of Civil Procedure and the South Carolina Rules of Civil Procedure. U.S. Bank's Motion to Dismiss had not been heard or ruled upon and remained pending when the U.S. District Court remanded the case on August 5, 2014. Defendant's motion therefore remained pending and was properly before the state court up until the time it was heard and ultimately granted via this Court's Order of July 11, 2016. Further, it is clear that U.S. Bank did not default by not immediately refiling its motion to dismiss in state court following remand. To the contrary, the authority in all other jurisdictions to have addressed that issue is unanimous in holding that a motion to dismiss pending in federal court is not required to be refiled in state court upon remand.

I have enclosed for your Honor's consideration a proposed order denying Plaintiff's Motion to Reconsider.

If you require any further information or anything else from my end, please contact me at your convenience.

*The Honorable Clifton Newman
Residing Judge, Third Circuit
July 20, 2016
Page 4*

With kind personal regards, we are

Yours very truly,

FINKEL LAW FIRM LLC


Sean A. O'Connor

SAO:
Enclosure

cc: Laura Toney
Paul M. Fata, Esq.

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IN THE STATE OF SOUTH CAROLINA
PLEAS

IN THE COURT OF COMMON

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

Defendants.



Certified as a True Copy
James I. Davis
Clerk of Court of Common Pleas,
Lee County, South Carolina

**MOTION FOR RECONSIDERATION
59(E)**

The Plaintiff, Laura Toney, respectfully requests reconsideration of the Order filed by Judge Newman on July 11, 2016, for the following:

1. The Plaintiff was in the hospital for days during the hearing for a serious illness and notified the court during the hearing on March 30, 2016.
2. The Plaintiff has informed Judge Newman about his previous knowledge in this case and has requested his recusal, but he refused. Judge Newman presided over this case in 2007, and had previous knowledge and continued to preside violating the Code of Professional Conduct.

3. There is a Motion to Dismiss and a Rule 11 pending in this case that has not been ruled on.
4. Mr. Paul Fata has also violated the Code of Professional Conduct in his Conflict of Interest that was reported to the Commission on Lawyer Conduct.
5. The Defendant failed to file a timely Answer in State or Federal Court. 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 on **December 20, 2013**. According to Federal rule the Defendants had (20) days to timely file an answer. Federal Court remanded the case back to State Court for Lack of Subject Matter Jurisdiction on August 8, 2014. 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. The Defendants is misleading the Court in saying that the Plaintiff claims that the Removal was untimely. The Plaintiff never mentioned the Removal being untimely, but the the Defendants' Answer was untimely.

For the above reasons, the Plaintiff is requesting reconsideration of the Order filed on July 11, 2016, and a new trial is granted.

July 20, 2016

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

CERTIFICATE OF SERVICE

The Plaintiff certifies that she mailed a copy of the Motion for Reconsideration on July 20, 2016, via United States Postal Service addressed as follows:

**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**

**Judge Clifton Newman
P.O. Box 516
Kingstree, SC 29556-0516**

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

STATE OF SOUTH CAROLINA

COUNTY *Lee*

Laura Toney, Plaintiff

vs.

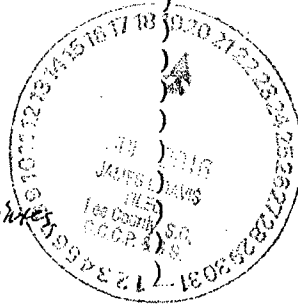
LaSalle Bank National Association
Defendant.

IN THE CIRCUIT COURT FOR THE
JUDICIAL CIRCUIT

CERTIFICATE OF EXEMPTION
FROM ADR

DOCKET NO.

2007-CP-31-66



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 or prohibition;
- ☐ this action is appellate in nature;
- ☐ this is a post-conviction relief matter;
- ☐ this is a contempt of court proceeding;
- ☐ this is a 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.

Joseph Henry P.C.
Plaintiff/Attorney(s) for Plaintiff(s)

Joseph Henry P.C.
1708-B Richmond Street
Columbia, S.C. 29201

LaSalle Bank National Association
Defendant/Attorney(s) for Defendant(s)

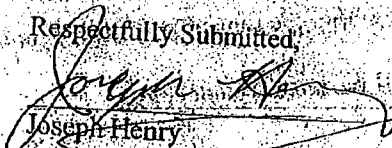
The Korn Law Firm
1300 Pickens Street
Columbia, S.C. 29201

Date: *March 22, 2007*

- letter. That more than twenty days have elapsed since the rescission was received by Defendant as evidenced by the return receipt and Defendant has not responded. That Defendant's failure to respond to the rescission notice nullified Defendant's security interest in the property thereby negating Defendant's right of foreclosure.
5. Bank has refused and continues to refuse to acknowledge the rescission of the loan transaction by Plaintiff and extinguishment of its security interest by operation of law, and the Plaintiff is informed and believes that Defendant has proceeded with this wrongful foreclosure action in further violation of the Truth In Lending and is liable to Plaintiff for damages to be determined by the court.
 6. Plaintiff is informed and believes that Defendants, in violation of Plaintiff's venue rights, moved the foreclosure proceedings to an improper foreign venue where neither Plaintiff resided nor the property was situated.
 7. That Plaintiff is informed and believes that the Defendant has sealed the court records of the proceedings and Plaintiff is unable to obtain copies of the relevant documentation relating to the foreclosure action.
 8. That sale of the property is imminent and will forever deprive Plaintiff of the rights granted to her by the Truth In Lending Act and will constitute an immediate and irreparable harm upon Plaintiff as she will be wrongfully deprived of valuable property rights.

WHEREFORE, the Plaintiff requests that the court enter a temporary restraining order against the Defendant and those persons acting with or on behalf of Defendant, and set a hearing within ten days of the issuance of the Temporary Restraining Order, and after hearing the evidence, issue a permanent injunction during the pendency of this action.

Respectfully Submitted,

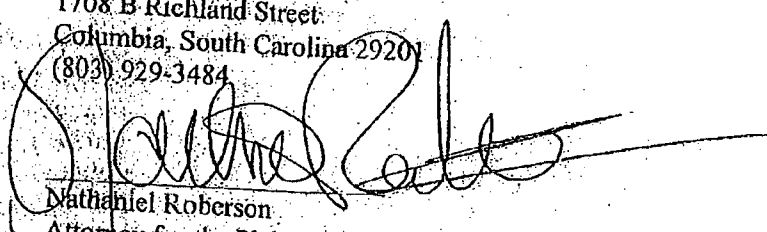

Joseph Henry

Attorney for the Plaintiff

1708 B Richland Street

Columbia, South Carolina 29201

(803) 929-3484


Nathaniel Roberson

Attorney for the Plaintiff

1708 Richland Street

Columbia, S.C. 29201

(803) 252-4449

Columbia, South Carolina
March 22, 2007

STATE OF SOUTH CAROLINA)
COUNTY OF LEE)

IN THE COURT FOR THE THIRD
JUDICIAL CIRCUIT

Laura Toney,
PLAINTIFF,

COMPLAINT

v.

LaSalle Bank National Association,
As Trustee for the registered holders)
of Structured Asset Investment Loan)
Trust, Mortgage Pass-Through)
Certificates, Series 2004-11)
DEFENDANT(S).)

CIVIL CASE NO.: 07- CP-31-66

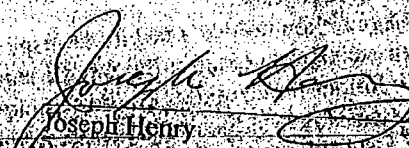
Now comes the Plaintiff, Laura Toney, who will show unto the court as follows:

1. That the Plaintiff, Laura 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 LaSalle Bank National Association, is a corporation organizing and existing by virtue of the laws of a State other than South Carolina and the United States of America.
3. That on or about October 6, 2004, Defendant refinanced Plaintiff's mortgage on her home located in the County of Lee, State of South Carolina.
4. That during the closing on Plaintiff's loan, Plaintiff was not provided with the disclosures mandated by the federal Truth In Lending Act.
5. That Defendant's failure to provide Plaintiff with the necessary disclosures is a material violation of the federal Truth In Lending Act.
6. That the disclosures which were not provided include but are not limited to the choice of attorney notification, settlement statement, copy of Note and Mortgage, etc...
7. That a lender's failure to provide these disclosures triggers a three (3) year Right of Rescission for the borrower.
8. That pursuant to the Right of Rescission contained in the Truth In Lending Act, Plaintiff sent, by certified letter return receipt requested, a Notice of Rescission

Preliminary Injunction and a Permanent Injunction and set a date as soon as possible for a hearing on the Temporary Restraining Order.

- II. That the court permanently enjoins LaSalle Bank National Association and /or others acting with or on behalf of the bank from seeking foreclosure and sale of Plaintiff's property.
- III. For reasonable attorney's fees and cost for the bringing of this action.
- IV. Order that LaSalle Bank National Association and/or those persons acting with or on behalf of the bank be temporarily enjoined and restrained from prosecuting and permanently enjoined and restrained from any acts in furtherance of the foreclosure and sale of Plaintiff's property.

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


Joseph Henry
Attorney for the Plaintiff
1708 B. Richland Street
Columbia, S.C. 29201
803-929-3484


Nathaniel Roberson
Attorney for the Plaintiff
1708 Richland Street
Columbia, S.C. 29201
803-252-4449

Columbia, South Carolina
March 22, 2007

June 14, 2005

P.O. Box 722
Bishopville, SC 29010

Owen Federal Bank FSB
P.O. Box 24737
West Palm Beach, Florida 33416-4737

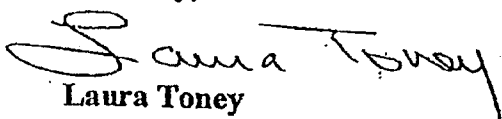
RE: Loan Number: 0040789935/ Laura Toney/ 251-11-6990
Property Location: 729 Chatmon Street, Bishopville, SC

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

PS Form 38

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

2. Article Number
(Transfer from service label)

A. Signature
X  ☐ 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

PS Form 38

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.

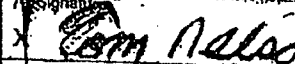
1. Article Addressed to:

Owen Federal Bank
Resolution Dept.
12650 Ingenuity Dr.
Orlando, Florida
32826

2. Article Number
(Transfer from service label)

7004 2510 0006 1747 2314

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X  ☐ 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

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

DA



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

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(S),

IN THE COURT OF COMMON PLEAS

AFFIDAVIT OF MICHAEL MAY

C/A NO:2005-CP-31-169

F25-02718

PERSONALLY appeared before me, the undersigned, who first being duly sworn,
deposes and says:

My name is Michael May and I am an attorney licensed to practice in the State of South Carolina. My area of practice is real estate closings. I performed a real estate closing for Laura Toney on October 6, 2004 for the purpose of refinancing the debt encumbering her property located at 729 Chatman Street, Bishopville, SC. The disbursement date for the refinance was October 12, 2004. A copy of the HUD Settlement Statement showing the disbursement of the loan proceeds is attached as Exhibit "A".

I personally attended and conducted the closing. For the convenience of the customer Laura Toney, the closing was conducted at the office of the mortgage broker, LAB Financial Services at 1833 Holman Road, Sumter, SC. Laura Toney attended the closing and I verified her identity through her Drivers License. A copy of the Drivers License is attached as Exhibit "AA".

I reviewed and explained with Laura Toney the documents that needed to be executed to complete the loan closing. I specifically reviewed and explained the Good Faith Estimate of Charges with Laura Toney and provided her a copy of the document at closing. I personally witnessed Laura Toney sign the Good Faith Estimate of Charges acknowledging that she had received a complete copy of the document. A copy of the Good Faith Estimate of Charges signed by Laura Toney is attached as Exhibit "B".

I specifically reviewed and explained the Truth in Lending Disclosure Statement with Laura Toney and provided her a copy of the document at closing. I personally witnessed Laura Toney sign the Truth in Lending Disclosure Statement acknowledging that she had received a

STATE OF SOUTH CAROLINA
COUNTY OF LEE

Laura Toney,

PLAINTIFF,

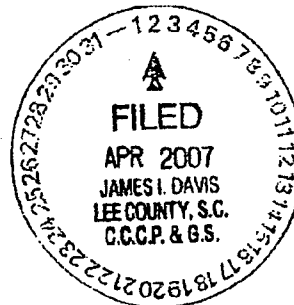
vs.

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.

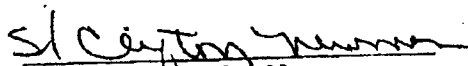
As to the contention in this action that the foreclosure is a separate matter, Rule 12(b) S.C.R.C.P. provides that every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto. 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.


The Honorable Clifton Newman
Presiding Judge 3rd Judicial Circuit

Williamsburg, South Carolina

April 2, 2007

Year: 2007

LASALLE BANK NATIONAL ASSOCIATION VS. TONEY

3

1 (Plaintiff's Exhibit Numbers One through Eight were
2 marked into the record.)

3 MR. MURRELL: If it please the court, this matter is
4 a foreclosure action pertaining to certain real
5 property located in Lee County, South Carolina.
6 The case was referred to the Honorable Judge
7 Coffey as Special Referee due to an earlier
8 order of recusal by the Lee County Master-In-
9 Equity. The case arises by virtue of a loan as
10 to certain real property. As far as today's
11 hearing, there should appear in the record a
12 notice of hearing dated January 24, 2007, which
13 afforded notice of today's hearing to the
14 attorney for Ms. Toney Jay David Weeks,
15 Esquire, and I would submit a copy of that as
16 Plaintiff's Exhibit One into evidence. I have
17 also ... would also advise the court as to two
18 previous bankruptcy filings by the debtor
19 insofar as they would have any impact upon this
20 action. The first case being Case Number 2006-
21 5381-BD, which was filed November 27th of 2006,
22 which state a previous hearing in this matter.
23 And I would ask for the court to take judicial
24 notice of that case, as well as all filings
25 therein, and specifically would submit into

1 evidence as Plaintiff's Exhibit Two Schedule B
2 from the debtor, Laura Toney's, Chapter 13 Plan
3 which affirmatively states under oath Schedule
4 B, Item 21, that there were no refunds,
5 counterclaims or set-offs in existence and
6 would submit to the court under the doctrine of
7 judicial estoppel she is precluded from
8 asserting any counterclaims in this action due
9 to an adjudication in a prior action. I have
10 also made the court aware that a second
11 bankruptcy was filed in this matter. I'm
12 sorry, the second bankruptcy was actually the
13 one that I just cited. There was a previous
14 one as 2006-4333. Both bankruptcy actions have
15 been dismissed by order of the court, and there
16 is no stay in effect. And under the new
17 bankruptcy rules, there was no stay in effect
18 as to the second case filing. As appears in
19 the court record, there was a complaint filed
20 which set forth a cause of action for
21 foreclosure. There was an answer and
22 counterclaims asserted by the defendant. And
23 I have submitted both through filing with the
24 court, as well as here today, affidavits in
25 support of the motion for summary judgment,

1 including the affidavit of the mortgage broker,
2 Latea Benjamin. And attached thereto is a copy
3 of the attorney and insurance preference
4 checklist signed by Ms. Toney, as well as the
5 contemporaneous notes indicating that Ms. Toney
6 did select the attorney of her own choosing at
7 the time that she applied for the loan. I've
8 also submitted into evidence, both in terms of
9 filing, as well as here today, a affidavit on
10 behalf of my client, Michelle Jones, as
11 Plaintiff's Exhibit Four setting forth the debt
12 herein. I would ask leave of the court to
13 update those figures with any further
14 advancements they may have performed. Let me
15 run through the exhibits list. The notice of
16 hearing is Number One. The schedule of
17 personal property from the bankruptcy filing is
18 Exhibit Number Two. The affidavit of Latea
19 Benjamin has been submitted as Plaintiff's
20 Exhibit Number Three. And the affidavit on
21 behalf of the plaintiff by Michelle Jones is
22 Plaintiff's Exhibit Number Four. As
23 Plaintiff's Exhibit Number Five, I would submit
24 a copy of the adjustable rate note which sets
25 forth the terms of this particular loan.

1 That's Plaintiff's Exhibit Five. I would
 2 submit as Plaintiff's Exhibit Six, as well as
 3 ask the court to take judicial notice as a
 4 matter of public record in Lee County, the
 5 original mortgage which was filed in Book 361
 6 at Page 79. I would also ask the court to take
 7 judicial notice and submit as Plaintiff's
 8 Exhibit Seven a copy of the assignment of
 9 mortgage whereby the security instrument was
 10 assigned unto the plaintiff in this action. I
 11 have also shown to the court a filed copy of
 12 the closing attorney, Michael Mays', affidavit
 13 which sets forth, among other particulars, that
 14 the defendant was afforded the good faith
 15 estimate at the time of closing. And I would
 16 submit into evidence as Plaintiff's Exhibit
 17 Eight a signed copy of the HUD settlement
 18 statement signed by the defendant. I would ask
 19 leave of court to submit a updated and current
 20 attorney's fee affidavit. And that is the
 21 plaintiff's case, Your Honor.

22 JUDGE COFFEY: Okay. We'll accept all those exhibits
 23 into evidence and I will be glad to accept an
 24 affidavit as to your attorney's fees. And do
 25 you have a proposed order prepared for the

Transcript of Proceeding March 27, 2007

1.

1 (WHEREUPON, ON MARCH 27, 2007 THE FOLLOWING
2 PROCEEDINGS WERE HELD:)

3 THE COURT: ALL RIGHT. WE'RE HERE ON THE MATTER OF
4 LASALLE NATIONAL BANK NATIONAL ASSOCIATION VERSUS LAURA
5 TONEY -- LAURA TONEY. THIS IS PURSUANT TO AN ORDER THAT I
6 SIGNED A FEW DAYS AGO GRANTING TEMPORARY RESTRAINING ORDER
7 AND THE ORDER INDICATING A HEARING TODAY AT 10 A.M.

8 MR. HENRY?

9 MR. HENRY: GOOD MORNING, YOUR HONOR.

10 THE COURT: GOOD MORNING.

11 MR. HENRY: MAY IT PLEASE THE COURT.

12 THE COURT: YES, SIR.

13 MR. HENRY: JOSEPH HENRY AND NATHANIEL ROBERSON ON
14 BEHALF OF MS. TONEY. THIS IS A MATTER IN WHICH WE ARE
15 SEEKING TO HAVE THE SALE OF MS. TONEY'S RESIDENCE HALTED.
16 THERE IS A PENDING ORDER FOR SALE PURSUANT TO A
17 FORECLOSURE ACTION THAT WAS BROUGHT BY MR. MURRELL AND THE
18 KORN LAW FIRM ON BEHALF OF LASALLE BANK. LASALLE
19 REFINANCED A LOAN ON MS. TONEY'S HOME BACK IN OCTOBER. I
20 BEG THE COURT'S INDULGENCE FOR A MOMENT. IT WAS OCTOBER 6
21 OF 2004, YOUR HONOR, I BELIEVE, AND AS A RESULT OF SOME
22 FAILURES ON THE PART OF THE BANK ACCORDING TO MY CLIENT TO
23 DELIVER TO HER THE REQUIRED DISCLOSURES PURSUANT TO THE
24 FEDERAL TRUTH IN LENDING ACT SHE SENT TO THE BANK A NOTICE
25 THAT SHE WAS EXERCISING HER RIGHTS OF RESCISSION ON THAT

1 LOAN PURSUANT TO THE TRUTH IN LENDING ACT SECTION 15 USC
2 1635. THE BANK HAD -- AS A RESULT OF RECEIVING THAT
3 NOTICE THE BANK WAS REQUIRED TO TAKE CERTAIN DEFINITIVE
4 ACTS WITHIN A 20-DAY TIME PERIOD FROM THE DATE OF RECEIPT.
5 WE HAVE A CERTIFIED LETTER THAT WAS SENT TO THE BANK.
6 THERE IS A DATE ON THIS THAT THE BANK RECEIVED IT, AND IT
7 WAS SIGNED BY MR. TOM NELSON, AND ACCORDING TO MS. TONEY
8 THERE HAS NEVER BEEN A RESPONSE FROM THE BANK.

9 THE IMPORTANCE OF THAT, YOUR HONOR, IS THIS. THE
10 FEDERAL TRUTH IN LENDING ACT SAYS THAT IF THE CREDITOR
11 RECEIVES A NOTICE AND DOES NOT RESPOND WITHIN THE
12 PRESCRIBED TIME THAT CREDITOR LOSES THE SECURITY INTEREST
13 THAT THE CREDITOR HAS IN THE FILE. THAT IS IMPORTANT
14 BECAUSE AT THE POINT THAT THE BANK FILED THIS FORECLOSURE
15 ACTION IT HAD MORE THAN 20 DAYS HAD ELAPSED SINCE THE BANK
16 RECEIVED MS. TONEY'S RESCISSION LETTER, AND THERE'S BEEN
17 NO RESPONSE FROM THE BANK DURING THE PRESCRIBED 20-DAY
18 TIMEFRAME. THEREFORE, THE BANK'S SECURITY INTEREST IN
19 THAT PROPERTY IS VOIDED AT THAT POINT. ONCE THE BANK'S
20 SECURITY INTEREST IS VOIDED, THE BANK HAS NOTHING TO
21 FORECLOSE, AND I WOULD HAND UP A COPY OF THE RELEVANT
22 PROVISIONS OF THE ACT.

23 THE COURT: ALL RIGHT.

24 MR. MURRELL: YOUR HONOR, AS LONG AS THE COURT TAKES
25 JUDICIAL NOTICE OF THE ENTIRETY OF THE ACT I HAVE NO

1 OBJECTION.

2 THE COURT: ALL RIGHT.

3 MR. MURRELL: ALTHOUGH, I WOULD NOTE THIS MATTER HAS
4 BEEN PASSED UPON BY PREVIOUS ORDER OF THE COURT.

5 MR. HENRY: YOUR HONOR, WE'RE NOT AWARE OF THE COURT
6 HAVING THE AUTHORITY TO PASS UPON AN ISSUE THAT WAS NOT
7 PROPERLY BROUGHT BEFORE THE COURT'S ATTENTION. THIS
8 MATTER -- THERE WAS A REQUIRED RESPONSE FROM THE CREDITOR
9 WITHIN 20 DAYS. THAT WAS NOT DONE. THERE WAS NOTHING FOR
10 THE COURT TO PASS UPON. EVERYTHING HAPPENED BY OPERATION
11 OF LAW FROM THAT POINT. THERE WAS NOTHING FOR THE COURT
12 TO ACTUALLY RULE ON IN THAT ISSUE. THE COURT HAD MOVED IT
13 WAS IRRELEVANT TO ANY COURT PROCEEDINGS.

14 ONCE THE 20-DAY TIMEFRAME PASSED THE ONLY RELEVANCE
15 OF IT IS THE ENFORCEMENT OF THE RESCISSION. THERE IS NO
16 RULING THAT THE COURT HAD TO MAKE TO CAUSE THE RESCISSION
17 TO TAKE EFFECT. THE RESCISSION IS EFFECTIVE PURSUANT TO
18 THE LAW. THERE IS NOTHING THAT HAD TO BE DONE IN
19 FURTHERANCE OF THE RESCISSION RIGHT BEING EXERCISED. ALL
20 THE CREDITOR NEEDED IS NOTICE FROM THE DEBTOR. ONCE THE
21 CREDITOR RECEIVED THAT NOTICE, THAT RESCISSION IS IN
22 EFFECT, AND IF THE CREDITOR FAILS TO RESPOND THAT
23 TERMINATES THE CREDITOR'S RIGHT OF HAVING ANY KIND OF
24 SECURITY IN THE PROPERTY UPON WHICH TO FORECLOSE.

25 THE ONLY THING THAT THE CREDITOR DID IS IGNORE THE

1 RESCISSION, TRIED TO PROCEED WITH THE FORECLOSURE WHICH
2 WAS AN IMPROPER PROCEEDING AT THAT POINT BECAUSE THERE WAS
3 NOTHING FOR THEM TO FORECLOSE ON. THEY HAD RECEIVED THE
4 NOTICE. THEIR RIGHTS TO THE PROPERTY HAD BEEN TERMINATED.
5 THERE WAS NOTHING FOR THEM TO FORECLOSE ON. THEY WERE
6 FORESTALLED FROM THE FORECLOSURE SIMPLY BY VIRTUE OF THE
7 FACT OF RECEIVING THAT RESCISSION NOTICE AND FAILING TO
8 RESPOND.

9 THEY HAD AFFIRMATIVE DUTIES UNDER THE TRUTH IN
10 LENDING ACT ONCE THEY RECEIVE THE RESCISSION. THEY FAILED
11 TO CARRY OUT THE AFFIRMATIVE DUTIES THEREBY LOSING THEIR
12 SECURITY INTEREST AND THEREBY LOSING THE RIGHT OF
13 FORECLOSURE, AND THAT'S REALLY WHAT THE PROCEEDING IS ALL
14 ABOUT.

15 THE COURT: ALL RIGHT.

16 MR. HENRY: THANK YOU.

17 THE COURT: ALL RIGHT. MR. MURRELL?

18 MR. MURRELL: YOUR HONOR, IF I COULD HAND UP A SHORT
19 RETURN WHICH I PREPARED UPON RECEIVING THIS NOTICE ON
20 MONDAY MORNING, AND, OF COURSE, I HAVE EXPRESSED TO THE
21 COURT MY OBJECTION TO THE EX-PARTE'ING OF THE APPLICATION
22 AND THE ORDER PRESENTED BOTH IN TERMS OF DUE PROCESS AND
23 IN TERMS OF --

24 THE COURT: MR. MURRELL, ANYTHING THAT YOU'VE DONE
25 OVER THE PHONE THAT'S NOT A PART OF THE RECORD NEEDS TO BE

1 AND WOULD HAND UP A COPY OF THE ORDER DATED FEBRUARY 26 OF
2 WHICH I ONLY HAVE ONE COPY WHICH MAKES A SPECIFIC FINDING
3 THAT MS. TONEY FILED HER BANKRUPTCY CASE IN BAD FAITH AND
4 WAS SUBSEQUENTLY BARRED FROM ANY FURTHER REFILINGS IN THE
5 SPACE OF ONE YEAR. I WOULD SUBMIT THAT IN THE RECORD.

6 YOUR HONOR, THE RIGHT OF RESCISSION TO WHICH
7 MR. HENRY ALLUDES IS AN EXPANDED AND ENHANCED RIGHT THAT
8 ONLY APPLIES IF THERE HAS BEEN NO DISCLOSURE MADE AS
9 REQUIRED AT THE TIME OF HEARING, AND, OF COURSE, I WOULD
10 ASK YOUR HONOR TO TAKE JUDICIAL NOTICE OF THE FILINGS IN
11 THE CASE IN CHIEF -- LASALLE BANK VERSUS LAURA TONEY,
12 2005-CP-31-169 -- WHEREIN THE COURT MADE A SPECIFIC
13 FINDING AS TO THESE ISSUES. I WOULD ASK YOUR HONOR TO
14 LOOK AT THE ANSWER WHICH ALSO CONTAINED COUNTERCLAIMS,
15 ALTHOUGH IT WASN'T STYLED AS SUCH BY WHICH SHE
16 SPECIFICALLY ALLEGES, PARAGRAPH 19, THAT THE PLAINTIFFS
17 HAD THE DUTY -- THE DEFENDANT HAD THE DUTY OF DISCLOSING
18 TRUE AND ACCURATE INFORMATION --

19 THE COURT: MR. MURRELL?

20 MR. MURRELL: YES, YOUR HONOR?

21 THE COURT: CAN YOU KEEP UP?

22 THE COURT REPORTER: NO.

23 MR. MURRELL: I'LL BE HAPPY TO SLOW DOWN, YOUR HONOR.

24 PARAGRAPH 19 --

25 THE COURT: LET ME FIND WHERE YOU ARE. PARAGRAPH 19

1 OF THE?

2 MR. MURRELL: OF THE ANSWER FILED BY MS. TONEY.

3 THE COURT: HER ANSWER?

4 MR. MURRELL: YES, YOUR HONOR. THE MIDDLE OF THE
5 SECOND PAGE IT HAS COUNTERCLAIM ALTHOUGH IT DOESN'T HAVE A
6 SUMMONS AND IT'S NOT STYLED AS A COUNTERCLAIM ON THE
7 PLEADING ITSELF.

8 THE COURT: ALL RIGHT. YES, SIR.

9 MR. MURRELL: NINETEEN -- THAT THE PLAINTIFFS OWED
10 THE DEFENDANT THE DUTY OF DISCLOSING TRUE AND ACCURATE
11 INFORMATION REGARDING THE TRANSACTION OF THIS MATTER
12 PURSUANT TO THE TRUTH IN LENDING LAWS. PARAGRAPH 20 --
13 THAT THE PLAINTIFFS FAILED TO PROVIDE A GOOD FAITH
14 ESTIMATE OF THE PROPERTY IN ISSUE.

15 (WHEREUPON, THE COURT REPORTER SPEAKS WITH MR.
16 MURRELL.)

17 MR. MURRELL: THE FOLLOWING PARAGRAPH, YOUR HONOR,
18 PARAGRAPH 20, ALLEGES THAT THE PLAINTIFF FAILED TO PROVIDE
19 A GOOD FAITH ESTIMATE OF THE PROPERTY AT ISSUE, AND THEN
20 THE FOLLOWING PARAGRAPH 21 ALLEGES THAT SHE WAS NOT
21 PROVIDED HER OPPORTUNITY TO SELECT HER REPRESENTATIVE OF
22 HER CHOICE AT CLOSING, DURING CLOSING, AND THEN PARAGRAPH
23 21, THAT THE DEFENDANT FORWARDED A LETTER OF RESCISSION
24 DATED JUNE 12, 2005.

25 SO, YOUR HONOR, IT'S APPARENT THAT ALL THESE ISSUES

1 WERE RAISED IN THE FORECLOSURE CASE IN CHIEF. I WOULD
2 ALSO ASK YOUR HONOR TO TAKE JUDICIAL NOTICE OF THE
3 SUBSEQUENT FORECLOSURE DECREE WHICH MAKES SPECIFIC
4 FINDINGS ON THESE ISSUES AS WELL AS THE DOCUMENTS AND
5 EXHIBITS WHICH HAVE BEEN FILED OF RECORD UPON WHICH ITS
6 FINDINGS ARE BASED. SPECIFICALLY, THE AFFIDAVIT OF THE
7 CLOSING ATTORNEY MICHAEL MAY WHO STATED UNDER OATH THAT
8 THOSE DOCUMENTS HAD BEEN PROVIDED AND A COPY OF THE
9 ACKNOWLEDGEMENT OF THOSE DOCUMENTS SIGNED BY MS. TONEY WAS
10 ATTACHED TO HIS AFFIDAVIT.

11 THE COURT: WHICH EXHIBIT IS THAT?

12 MR. MURRELL: LET ME HAND THAT UP TO YOUR HONOR. IT
13 WAS FILED AND SERVED UPON OPPOSING COUNSEL WELL IN ADVANCE
14 OF HEARING.

15 THE COURT: OPPOSING COUNSEL AS IN?

16 MR. MURRELL: OPPOSING COUNSEL MR. DAVID WEEKS WHO IS
17 REPRESENTING MS. TONEY IN THE CASE IN CHIEF.

18 THE COURT: ALL RIGHT.

19 MR. MURRELL: JUST ONE SECOND, YOUR HONOR. I AM
20 PROVIDING A COPY OF MR. MAY'S AFFIDAVIT, FILED AFFIDAVIT
21 TO OPPOSE, TO MR. HENRY, AND LET ME OBTAIN A COPY FOR YOU
22 AS WELL. THEREFORE, THERE WAS NO DOUBT BASED UPON THE
23 EVIDENCE PRESENTED AT HEARING THAT THOSE DOCUMENTS WERE
24 PROVIDED TO MS. TONEY AT CLOSING, AND SHE WAS ONLY
25 ENTITLED TO THE STANDARD THREE-DAY RIGHT OF RESCISSION

1 WHICH SHE SIGNED A COPY OF AND WHICH SHE DID NOT EXERCISE
2 IN THAT TIME PERIOD.

3 YOUR HONOR, IN THIS CASE MS. TONEY MADE APPROXIMATELY
4 THREE PAYMENTS BEFORE SHE QUIT MAKING HER PAYMENTS AND
5 SOME YEARS LATER ATTEMPTED TO RESCIND THE LOAN. IT WAS
6 WELL OUTSIDE OF THE TIME PROVIDED FOR UNDER THE FEDERAL
7 RULES, THE FEDERAL LAW, AND THE COURT MADE A SPECIFIC
8 FINDING AS TO THAT POINT IN THE FORECLOSURE DECREE. THE
9 DECREE WHICH WAS FILED ON MARCH 15, 2007 IS RES JUDICATA
10 AS TO THAT MATTER, AND MS. TONEY CANNOT NOW FILE A NEW
11 ACTION AND ATTEMPT TO RELITIGATE THE ISSUES WHICH WERE
12 SPECIFICALLY HEARD.

13 JUST AS IMPORTANTLY, YOUR HONOR, AND ALSO SUBMITTED
14 IN TO THE COURT RECORD AS EXHIBIT NO. 2 IS A COPY OF HER
15 SCHEDULE B IN HER THIRD BANKRUPTCY FILING WHICH UNDER ITEM
16 21 SPECIFICALLY REQUIRES MS. TONEY TO DECLARE ANY
17 CONTINGENT AND UNLIQUIDATED CLAIMS OF EVERY NATURE
18 INCLUDING TAX REFUNDS, COUNTERCLAIMS TO THE DEBTOR, AND
19 SET-OFF CLAIMS. MS. TONEY AFFIRMATIVELY STATED UNDER OATH
20 THAT SHE HAD NO SUCH CLAIMS TO DECLARE, AND, CERTAINLY,
21 SHE DID NOT RAISE ANY OF THESE ISSUES IN THE BANKRUPTCY
22 COURT WHEREBY THE TRUSTEE COULD HAVE MADE A DETERMINATION
23 IF, IN FACT, HER FINANCIAL SITUATION WAS WHOLLY DIFFERENT
24 FROM WHAT SHE WAS CLAIMING IN HER FILES.

25 SHE CANNOT TAKE ONE STANCE IN BANKRUPTCY COURT AND

1 SEEK THE PROTECTION OF BANKRUPTCY COURT FOUR TIMES AND
2 THEN COME INTO THIS COURT AND SEEK A -- TAKE AN OPPOSITE
3 STANCE. SHE IS JUDICIALLY ESTOPPED FROM DOING THAT, AND
4 THAT WAS ONE OF THE BASES UPON WHICH THE PRIOR COURT
5 ENTERED ITS DECISION. AS I SAID, THEY NOT ONLY FOUND THAT
6 PROCEDURALLY BUT ALSO SUBSTANTIVELY UNDER THE AFFIDAVIT OF
7 THE CLOSING ATTORNEY AS WELL AS THE MORTGAGE BROKER
8 LETITIA BENJAMIN WHO HAD ATTACHED TO HER AFFIDAVIT A COPY
9 OF THE EXECUTED ATTORNEY PREFERENCE SELECTION EXECUTED BY
10 MS. TONEY AT THE TIME SHE APPLIED FOR HER LOAN
11 APPLICATION.

12 SO, YOUR HONOR, WITH THIS MATTER HAVING BEEN FULLY
13 LITIGATED AND PLEAD BY PRIOR -- IN A PRIOR JUDICIAL
14 PROCEEDING, I WOULD ASK YOUR HONOR TO RESCIND THIS ORDER
15 AND ANY FURTHER PROCEEDING BE HELD BEFORE THE APPROPRIATE
16 HEARING OFFICER WHO HAS BEEN PROVIDED REQUISITE AUTHORITY
17 TO HEARING THIS CASE UNDER ORDER OF JUDGE THOMAS COOPER OF
18 THE CIRCUIT COURT.

19 THE COURT: ALL RIGHT. MR. HENRY?

20 MR. HENRY: BRIEFLY IN RESPONSE, YOUR HONOR.

21 THE COURT: WELL, BEFORE YOU RESPOND, LET ME RAISE --
22 MR. MURRELL, IN REVIEW OF THE FILE I NOTICE THERE ARE
23 DUPLICATE ORDERS OF REFERENCES IN THE FILE.

24 MR. MURRELL: THAT'S CORRECT, YOUR HONOR. THIS
25 MATTER WAS INITIALLY REFERRED MANDATORILY TO JUDGE

1 MASTER-IN-EQUITY OUTSIDE OF THIS COUNTY, YOUR HONOR, IT
2 WOULD BE OUR POSITION THAT THE MASTER-IN-EQUITY IN -- THE
3 MASTER-IN-EQUITY IN LEE COUNTY DID NOT HAVE A CONFLICT
4 BECAUSE HE WAS NOT IN A POSITION WHERE HE HAD REPRESENTED
5 MS. TONEY ON ANY MATTERS RELATED TO THIS FORECLOSURE, NOR
6 WAS HE IN ANY POSITION TO REPRESENT EITHER SIDE OF THIS
7 ISSUE. HIS ONLY DUTY WOULD HAVE BEEN A DISCLOSURE OF HIS
8 PRIOR REPRESENTATION, AND AT THIS POINT THERE WOULD HAVE
9 BEEN A DETERMINATION AS TO WHETHER HE WOULD BE A PERSON
10 WHO COULD MAKE A DECISION UNBIASED IN THIS CASE. THERE
11 WAS REALLY NO ACTIVE CONFLICT. HE WAS NOT IN A
12 REPRESENTATIVE CAPACITY OF EITHER PARTY, NOR REPRESENTED
13 MS. TONEY IN REFERENCE TO ANY ISSUE RELATED TO A
14 FORECLOSURE TO MY KNOWLEDGE.

15 THEREFORE, HE SHOULD HAVE HEARD THIS MATTER IN THE
16 COUNTY WHERE THE PROPERTY IS SITUATED AND WHERE MS. TONEY
17 LIVED, AND IF THE MATTER WENT OUTSIDE OF THE COUNTY IT
18 SHOULD HAVE GONE OUT TO SUMTER COUNTY OR FLORENCE WHICH
19 WAS CLOSER WHICH WOULD BE IN KEEPING WITH THE STATUTORY
20 REQUIREMENT THAT THE VENUE CHANGE TO THE NEXT ADJOINING
21 COUNTY. WE'RE NOT IN THE NEXT ADJOINING COUNTY WHEN WE GO
22 ALL OF THE WAY DOWN TO MANNING. THEREFORE, THAT ORDER OF
23 REFERENCE WE BELIEVE WAS INAPPROPRIATE.

24 SECONDLY, THE ISSUE RELATING TO THE RESCISSION WE DO
25 NOT BELIEVE WAS A MATTER THAT HAD TO BE LITIGATED -- HAD

1 TO BE LITIGATED IN THE COURT BECAUSE RESCISSION OPERATES
2 PURSUANT TO THE STATUTE. THE STATUTE SAYS RESCISSION IS
3 AUTOMATIC ONCE THE PERSON SENDS NOTICE. WE HAVE NOTHING
4 IN THE RECORD THAT SHOWS THAT THE CREDITOR EVER RESPONDED
5 TO THE RESCISSION NOTICE, AND THAT'S WHAT TRIGGERS THE
6 FORFEITURE OF THE CREDITOR'S RIGHT TO FORECLOSE. ONCE THE
7 NOTICE IS GIVEN, THE CREDITOR HAS AFFIRMATIVE DUTIES
8 PURSUANT TO THE STATUTE THAT THEY HAVE TO EXERCISE WITHIN
9 20 DAYS. THAT'S CLEAR-CUT. THERE IS NO AMBIGUOUSNESS.
10 THERE IS NOTHING TO BE DETERMINED. THE COURT HAS NO --
11 THERE WAS NOTHING FOR THE COURT TO DO WITH THAT EXCEPT
12 ENFORCE THE RESCISSION RIGHTS.

13 FURTHERMORE, MS. TONEY'S POSITION IS THAT SHE NEVER
14 RECEIVED THOSE DISCLOSURES THAT WERE PUT IN THE LETTER OF
15 RESCISSION.

16 THE COURT: WHAT DISCLOSURES ARE YOU TALKING ABOUT?

17 MR. HENRY: THE DISCLOSURES FOR THE CHOICE OF
18 ATTORNEYS.

19 THE COURT: SHE SIGNED THE -- SHE SIGNED THAT.

20 MR. HENRY: THERE IS CASELAW THAT SAYS EVEN WHEN
21 THAT'S THE CASE THERE'S ONLY THE PRESUMPTION THAT IT WAS
22 SENT. FURTHERMORE --

23 THE COURT: WAIT A MINUTE NOW. SHE HAD A LAWYER AT
24 THE CLOSING. THEY HAVE ALL OF THE LOAN FOLKS WHO
25 PARTICIPATE IN THE CLOSING, AND THEY PROVIDED THESE

1 DOCUMENTS SAYING THAT SHE SIGNED THEM SELECTING THE
2 ATTORNEY OF HER PREFERENCE, AND YOU TAKE THE POSITION THAT
3 NONE OF THIS HAPPENED?

4 MR. HENRY: ON THE DAY OF THE CLOSING, YOUR HONOR,
5 THAT MAY HAVE BEEN THE CASE, BUT THERE WAS NOT A PRIOR
6 DETERMINATION THAT SHE HAD. SHE'S SUPPOSED TO RECEIVE A
7 CLOSING PACKET PRIOR TO THE DAY OF THE CLOSING. THAT
8 NEVER HAPPENED.

9 THE COURT: HOW DO I KNOW THAT?

10 MR. HENRY: THERE WAS NOTHING IN THE RECORD
11 INDICATING THAT. THOSE ARE COPIES THAT SHE RECEIVED AT
12 THE CLOSING ON THE DAY OF THE CLOSING. THOSE ARE NOT
13 DOCUMENTS THAT WERE FORWARDED TO HER PRIOR TO THE CLOSING
14 WHICH WOULD GIVE HER THE OPPORTUNITY TO EXERCISE AN
15 INFORMED DECISION WHICH IS WHAT THE TRUTH IN LENDING ACT
16 REQUIRES. THE DOCUMENT IS SIGNED 10/6/04. THERE IS
17 NOTHING THAT SHOWS SHE RECEIVED THIS DOCUMENT PRIOR TO THE
18 DATE OF CLOSING. THEREIN LIES A VIOLATION, AND ONCE THE
19 VIOLATION OCCURS YOU HAVE THE THREE-YEAR TIMEFRAME IN
20 WHICH TO EXERCISE YOUR RIGHT OF RESCISSION WHICH IS
21 EXACTLY WHAT MS. TONEY DID. THE RECORD IS DEVOID OF ANY
22 EVIDENCE OF ANY RESPONSE FROM THE CREDITOR ONCE THAT
23 LETTER WAS SENT.

24 THE COURT: YOU'RE SAYING IF YOU HAVE A LOAN CLOSING
25 AND IF YOU DON'T GET THE CLOSING PAPERS A DAY BEFORE THE

1 CLOSING YOU CAN CANCEL THE LOAN WITHIN THREE YEARS?

2 MR. HENRY: THAT'S CORRECT, YOUR HONOR.

3 THE COURT: AND WHAT PROVISION OF WHAT YOU HANDED UP
4 TO ME SAYS THAT?

5 MR. HENRY: THIS IS A CASE THAT INTERPRETS THE TRUTH
6 IN LENDING ACT. I'LL HAND THAT UP AS SOON AS OPPOSING
7 COUNSEL HAS HAD AN OPPORTUNITY TO LOOK AT IT.

8 THE COURT: IT INTERPRETS WHAT PROVISION OF THE -- IT
9 INTERPRETS WHAT YOU HANDED UP TO ME?

10 MR. HENRY: IT IS THE RIGHT OF RESCISSION OF THE
11 TRUTH IN LENDING ACT.

12 MR. MURRELL: YOUR HONOR, IN THIS CASE IT APPEARS
13 THAT THE RIGHT OF RESCISSION WAS EXERCISED WITHIN TWO
14 DAYS, NOT THREE, AND, AGAIN, IN THIS CASE THEY'RE ALLEGING
15 AN EXPANDED RIGHT OF RESCISSION BEING NOT PROVIDED THE
16 DOCUMENTS AT ALL.

17 THE COURT: ALL RIGHT.

18 MR. MURRELL: AND I WOULD NOTE THAT HER DRIVER'S
19 LICENSE IS ATTACHED --

20 THE COURT: ALL RIGHT. MR. HENRY HAS THE FLOOR RIGHT
21 NOW. I'LL BE HAPPY TO HEAR FROM YOU WHEN IT'S YOUR TURN.

22 MR. MURRELL: THANK YOU, YOUR HONOR.

23 THE COURT: GO AHEAD.

24 MR. HENRY: THE CASELAW SAYS THAT THE PACKET HAS TO
25 BE A FULL AND COMPLETE PACKET OF ALL DISCLOSURE. SHE HAS

1 TO HAVE THE OPPORTUNITY TO REVIEW THOSE DISCLOSURES PRIOR
2 TO MAKING HER DECISION ON THE DAY OF CLOSING. IF SHE
3 RECEIVES THE DOCUMENTS ON THE DAY OF THE CLOSING SHE'S IN
4 THE MIDDLE OF THE TRANSACTION AT THE TIME THE DISCLOSURE
5 THE BEING MADE. THAT WAS INEFFECTIVE DISCLOSURE. SHE HAS
6 NOT HAD TIME TO READ THOSE DISCLOSURES, TO ANALYZE THOSE
7 DISCLOSURES, AND MAKE A DETERMINATION AS TO WHETHER OR NOT
8 SHE AGREES WITH EVERYTHING IN IT. SHE MAY WANT A
9 DIFFERENT ATTORNEY, BUT AT THE DAY OF THE CLOSING THAT'S
10 PRETTY HARD TO COME UP WITH. THE AVERAGE PERSON WHO GOES
11 INTO A CLOSING IS NOT GOING TO KNOW THAT THEY HAVE THAT
12 RIGHT. SO, THAT'S WHY THE FEDERAL TRUTH IN LENDING ACT
13 WAS ENACTED TO ALLOW THE CONSUMER TO EXERCISE AN INFORMED
14 DECISION. I BEG THE COURT'S INDULGENCE ONE MOMENT.

15 FURTHER, YOUR HONOR, ONCE THE LETTER OF RESCISSION IS
16 SENT, THE CREDITOR HAS TO RAISE ANY DEFENSES THAT IT HAS
17 TO THE RESCISSION AT THAT TIME. FAILURE TO DO SO IN THE
18 EXPIRATION OF 20 DAYS PUTS THEM IN STATUTORY DEFAULT.
19 THEY DON'T HAVE RIGHT TO RAISE THOSE ISSUES NOW. THIS
20 FORECLOSURE ACTION IS WELL AFTER THE 20-DAY EXPIRATION.
21 THEREFORE, THE ALLEGED ALLEGATION THAT WE DEALT WITH THIS
22 IN BANKRUPTCY COURT IS IMMATERIAL AND IRRELEVANT TO THESE
23 PROCEEDINGS. IT WAS IRRELEVANT ON THE BANKRUPTCY
24 PROCEEDING.

25 THE COURT: WHAT IS YOUR RESPONSE TO MR. MURRELL'S

1 ARGUMENT THAT NONE OF WHAT YOU'RE SAYING APPLIES WHERE
2 THERE IS A THREE-DAY RIGHT OF RESCISSION AND THE BORROWER
3 HAS BEEN GIVEN THAT NOTICE AND ELECTED NOT TO RESCIND AND
4 HAS AFFIRMED THE ACCEPTANCE OF IT BY MAKING PAYMENTS?

5 MR. HENRY: FAILURE TO GIVE THE NOTICES THAT ARE
6 REQUIRED AND GIVING THE TIME FOR THE PERSON TO REVIEW IS A
7 VIOLATION, AND THAT'S THE POSITION THAT WE TAKE THAT EVEN
8 IF MR. MURRELL HAS SOMETHING THAT SHOWS SHE RECEIVED IT ON
9 THE DAY OF CLOSING, THAT'S IMMATERIAL. WHAT MR. MURRELL'S
10 CLIENT FAILED TO DO IS TO ACT PURSUANT TO THE STATUTE OF
11 THE TRUTH IN LENDING ACT. THE TRUTH IN LENDING ACT SAYS
12 YOU HAVE 20 DAYS ONCE YOU RECEIVED A LETTER OF RESCISSION.
13 THEY RECEIVED A LETTER OF RESCISSION. I DON'T CARE WHAT
14 THEY DID AFTER THAT. THE FAILURE TO RESPOND TO THAT
15 LETTER OF RESCISSION, THOSE FACTS HAVE BEEN DISTINGUISHED.
16 SO, THEY CAN COME IN HERE AND TRY TO PRESENT THAT AS A
17 JUSTIFICATION AFTER THE FACT, YOUR HONOR, BUT THAT
18 JUSTIFICATION IS WITHOUT MERIT.

19 THE COURT: WHAT PART OF THIS CASE SAYS WHAT YOU'RE
20 NOW SAYING?

21 MR. HENRY: I'M SORRY?

22 THE COURT: WHAT PART OF THIS CASE THAT YOU HANDED UP
23 TO ME SAYS WHAT YOU'RE NOW SAYING?

24 MR. HENRY: THE CASE -- THERE'S SOME OTHER RESEARCH
25 THAT I'VE DONE, YOUR HONOR, THAT TALKS ABOUT RESCISSION --

1 THE COURT: ALL RIGHT. SO, THE VIOLATION HERE IS
2 THAT THEY ONLY GAVE HER TWO DAYS INSTEAD OF THREE?

3 MR. HENRY: THAT'S CORRECT.

4 THE COURT: SO, HOW DOES THAT APPLY TO THIS
5 PARTICULAR CASE INVOLVING MS. TONEY?

6 MR. HENRY: WELL, YOUR HONOR, THE ACT WAS PRETTY
7 SPECIFIC AS TO HOW -- THE ACT WAS PRETTY SPECIFIC. IF
8 YOU'LL LOOK AT THE LANGUAGE OF THE ACT ITSELF IT SAYS THAT
9 IT EXPIRES THREE YEARS AFTER CONSUMMATION THAT A PERSON'S
10 RIGHT OF RESCISSION --

11 THE COURT: EXPIRES --

12 MR. HENRY: -- EXPIRES THREE YEARS AFTER CONSUMMATION
13 OF THE TRANSACTION. FURTHER, THERE IS CASELAW THAT SAYS
14 THAT A PERSON WHO HAS A -- WHO HAS BEEN FORECLOSED BUT IS
15 STILL WITHIN THE RIGHT OF RECOUPMENT PERIOD WHICH IS THE
16 ONE YEAR FOLLOWING THE FORECLOSURE AND FORECLOSURE SALE
17 THEY CAN STILL EXERCISE THE RIGHT OF RESCISSION EVEN THEN.
18 SO, THE RIGHT OF RESCISSION IS NOT STAYED BY THE
19 FORECLOSURE SALE. IF YOU HAVE A ONE-YEAR RIGHT OF
20 RECOUPMENT, YOU CAN EXERCISE YOUR RIGHT OF RESCISSION EVEN
21 DURING THAT PERIOD. IT IS A VERY CONSUMER FRIENDLY ACT
22 YOUR HONOR.

23 THE COURT: WHAT IF SHE WAS GIVEN THE THREE-DAY RIGHT
24 OF RESCISSION AND ACKNOWLEDGED THAT SHE HAD THE THREE DAY
25 -- TO MIDNIGHT OF THE THIRD DAY TO RESCIND AND SHE DIDN'T

1 DO IT, SHE DIDN'T EXERCISE THAT RIGHT?

2 MR. HENRY: IF YOU ARE GIVEN THAT ACT AT CLOSING,
3 YOUR HONOR, THAT'S NOT EFFECTIVE NOTICE.

4 THE COURT: YOU'RE SUPPOSED TO BE GIVEN THAT --

5 MR. HENRY: YOU HAVE A RIGHT --

6 THE COURT: YOU'RE SUPPOSED TO BE GIVEN THAT BEFORE
7 THE CLOSING?

8 MR. HENRY: YOU'RE SUPPOSED TO RECEIVE THE CLOSING
9 PACKET A FEW DAYS BEFORE CLOSING. YOU'RE NOT SUPPOSED TO
10 COME TO THE CLOSING AND HAVE ALL OF THESE DOCUMENTS SHOVED
11 UNDER YOUR NOSE AND BE ASKED TO EXERCISE AN INFORMED
12 DECISION ON THE DAY OF CLOSING.

13 THE COURT: WELL, YOU HAVE THREE DAYS FOLLOWING THE
14 CLOSING, I THOUGHT.

15 MR. HENRY: THREE DAYS FOLLOWING THE CLOSING, YES,
16 THAT'S CORRECT, IF YOU WANT TO EXERCISE IT WITHIN THE
17 THREE-DAY TIMEFRAME, YES, BUT IF THEY FAIL TO GIVE IT TO
18 YOU IN TIME TO MAKE A INFORMED DECISION IT EXTENDS YOU TO
19 THREE YEARS. AND IN THIS CASE --

20 THE COURT: SPECIFICALLY, WHAT LAW SAYS THAT?

21 MR. HENRY: I'M SORRY?

22 THE COURT: WHICH PROVISION OF WHAT LAW SAYS THAT YOU
23 HAVE WHATEVER YOU'RE TELLING ME NOW?

24 MR. HENRY: I BEG THE COURT'S INDULGENCE. YOUR
25 HONOR, SECTION F, SUBSECTION F, OF THE TRUTH IN LENDING

1 ACT WHICH IS ON THE SECOND PAGE OF WHAT I HANDED UP, IT
2 READS AS FOLLOWS: TIME LIMIT FOR EXERCISE OF RIGHT. AN
3 OBLIGOR'S RIGHT OF RESCISSION SHALL EXPIRE THREE YEARS
4 AFTER THE DATE OF CONSUMMATION OF THE TRANSACTION OR UPON
5 THE SALE OF THE PROPERTY WHICHEVER OCCURS FIRST. SO, SHE
6 HAD THREE YEARS IN WHICH THE EXERCISE HER RIGHTS AND
7 ACTUALLY GOES BEYOND THAT IF SHE'S FORECLOSED OR SHE'S IN
8 A RECOUPMENT PERIOD. SHE HAS ANOTHER YEAR.

9 THE COURT: WELL, YOU READ IT SAYS NOTWITHSTANDING
10 THE FACT THAT THE INFORMATION AND FORMS REQUIRED OF THIS
11 SECTION OR ANY OTHER DISCLOSURES REQUIREMENT OF THIS PART
12 HAS NOT BEEN DELIVERED TO THE OBLIGOR. I MEAN, YOU'RE
13 SAYING THAT EVEN IF SHE'S GIVEN THE THREE-DAY RIGHT --
14 NOTICE OF RIGHT OF RESCISSION SHE STILL HAS THREE YEARS OR
15 SHE HAS THREE YEARS ONLY IF THEY DIDN'T GIVE HER THE
16 THREE-DAY RIGHT OF RESCISSION?

17 MR. HENRY: I'M SORRY, YOUR HONOR. I DIDN'T QUITE
18 HEAR THE LAST PART.

19 THE COURT: IT SEEMS THAT YOU'RE TELLING ME THAT IF
20 ANY LOAN THAT A PERSON TAKES OUT THEY HAVE THREE YEARS TO
21 CANCEL IT.

22 MR. HENRY: THAT WOULD BE MY READING, YOUR HONOR, IF
23 THEY'RE NOT PROVIDED THE PROPER DISCLOSURE LETTER.

24 THE COURT: IF NOT PROVIDED WITH WHAT DISCLOSURE
25 LETTER?



Lee County Third Judicial Circuit Public Index



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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	ROA00887	
Lasalle Bank National Association	Exhibit/Filing of Exhibits	Filing		07/20/2016-15:02		

**IN THE STATE OF SOUTH CAROLINA
PLEAS**

IN THE COURT OF COMMON

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

Defendants.

**AMENDED MOTION FOR RECONSIDERATION
59(E)**

The Plaintiff, Laura Toney, respectfully requests reconsideration of the Order
filed by Judge Newman on July 11, 2016, for the following:

1. The Plaintiff was in the hospital for days during the hearing for a serious illness and notified the court during the hearing on March 30, 2016. The hearing held on March 30, 2016, constitutes an Exparte Hearing.

Canon 3(g) of the South Carolina Code of Judicial Conduct states that: A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate,

permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that: (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided: (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

2. The Plaintiff has informed Judge Newman about his previous knowledge in this case and has requested his recusal, but he refused. Judge Newman presided over this case in 2007, and had previous knowledge and continued to preside violating the Code of Professional Conduct.
3. There is a Motion to Dismiss and a Rule 11 pending in this case that has not been ruled on.
4. Mr. Paul Fata has also violated the Code of Professional Conduct in his Conflict of Interest that was reported to the Commission on Lawyer Conduct.
5. The Defendant failed to file a timely Answer in State or Federal Court. 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 on **December 20, 2013**. According to Federal rule the Defendants had

(20) days to timely file an answer. Federal Court remanded the case back to State Court for Lack of Subject Matter Jurisdiction on August 8, 2014. 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. The Defendants is misleading the Court in saying that the Plaintiff claims that the Removal was untimely. The Plaintiff never mentioned the Removal being untimely, but the the Defendants' Answer was untimely.

6. **The Proposed Order E Filed to Judge Newman by Mr. Sean O'Conner constitutes an Exparte Communication with the Court. The Plaintiff is unable to E file or receive any E File communication. The Defendant is in violation of Rule 5(b)(3) which states: (b)(3) Service of Proposed Orders and Other Papers.** Any party providing a proposed order, proposed findings of fact or conclusions of law, or proposed judgment or other paper to the court for its consideration in any pending matter shall serve the same on all counsel of record at the same time and by the same means.
7. Also, Ms. Elizabeth Gunby communicated in an Exparte communication with Mr. Sean O'Connor on May 2, 2016, when she requested from Mr. O'Connor a Proposed Order via email. This communication was not provided to me by Ms. Gunby, but later by Mr. O'Connor.
8. **Canon 3 of the SCRPC states: (7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.* A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:**

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law* applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

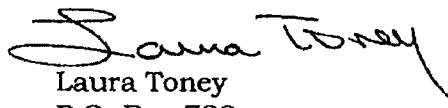
(c) A judge may consult with court personnel* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law* to do so.

For the above reasons, the Plaintiff is requesting reconsideration of the Order filed on July 11, 2016, and a new trial is granted.

July 25, 2016


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

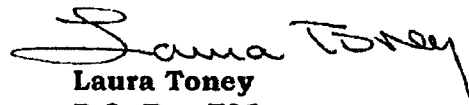
CERTIFICATE OF SERVICE

The Plaintiff certifies that she mailed a copy of the Amended Motion for Reconsideration on July 25, 2016, via United States Postal Service addressed as follows:

**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**

**Judge Clifton Newman
P.O. Box 516
Kingstree, SC 29556-0516**


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

September 19, 2016

P.O. Box 722
Bishopville, SC 29010

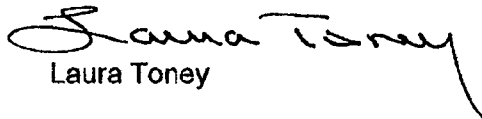
The Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Dear Sir or Madam:

Enclosed please find the Notice of Appeal. I am also enclosing the \$100.00 filing fee.

Thank you for your attention in this matter.

Sincerely,


Laura Toney

CC: CC: 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

Judge Clifton Newman
P.O. Box 516
Kingstree, SC 29556-0516

NOTICE OF APPEAL

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

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.

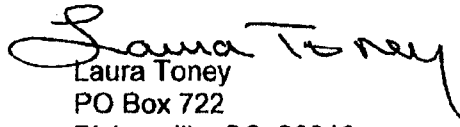
NOTICE OF APPEAL

The Appellant, Laura Toney, respectfully appeals the Order of the Honorable Clifton Newman dated July 11, 2016, and Motion for Reconsideration dated August 26, 2016.

CC: 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

Judge Clifton Newman
P.O. Box 516
Kingstree, SC 29556-051


Laura Toney
PO Box 722
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(803) 459-6006

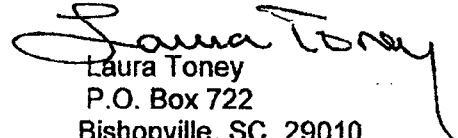
CERTIFICATE OF SERVICE

This is to certify that I, Laura Toney mailed a copy of the Notice of Appeal to the following on September 19, 2016, via United States Postal Service:

CC: 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

Judge Clifton Newman
P.O. Box 516
Kingstree, SC 29556-0516


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

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

Appellant Case Number: 2016-001-989

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.**

CORRECTED APPELLANT'S INITIAL BRIEF

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Statement of Issue on Appeal.....1

Statement of the Case the.....

Arguments

1. **Because the Appellant did not receive a Letter of Acceleration, the foreclosure did not follow the foreclosure laws of South Carolina.**
2. **Because the attorney committed fraud on the court, the Appellant should have been granted a new trial.**
3. **Because the attorney for the Respondents did not enter an Order of Appearance, the case should have been dismissed.**
4. **Because the Appellant did not get an opportunity to present her case, her due process was violated.**

Conclusion.....

Certificate of Counsel

TABLES OF AUTHORITIES

Sundown (South Carolina State Supreme Court

Limehouse v. Husley

Limehouse v. Hulsey, 744 SE 2d 566 – 2013 - SC: Supreme Court

Limehouse v. Hulsey, 723 SE 2d 211 – 2011 - SC: Court Of Appeals

South Carolina law (Section 1-23-360

Canon 3(g) of the South Carolina Code of Judicial Conduct

Rule 3.3(d) SCRPC

In re Arabia, 283 Kan. 851, 156 P.3d 652 (2007)

Iowa Supreme Court Attorney Disciplinary Bd. v. Gottschalk, 729 N.W.2d 812 (Iowa

2007);

Reciprocal Discipline of Page, 326 Or. 572, 955 P.2d 239 (1998);

Matter of Black, 262 Kan. 825, 941 P.2d 1380 (1997).

28 U.S.C. § 1441(a

In State v. Columbia Ry., Gas & Elec., 112 S.C. 528, 537, 100 S.E. 355, 357

(1919

Rule 81 of the SCRCP

12(a), SCRC

RULE 1.7: CONFLICT OF INTEREST

STANDARD OF REVIEW

The Appellant filed a complaint on the Defendants on 13, 2013, in State Court.

The Defendants were served on November 13, 2013. The

Respondent, LaSalle Bank filed a Notice of Removal to Federal Court on

December 13, 2013, which was on the 30th day after receipt of service. The

Defendants time to answer in Federal Court was 20 days which made his

answer untimely in Federal Court (17 Days Late). The Defendants filed a late

answer in Federal Court on November 20, 2013. The Defendants filed an

Amended Answer on December 20, 2013. Pursuant to Rule 15 of the FRCP, you

have 21 days to file an Amended Answer without permission from the Court.

The Respondents did not file for an Enlargement of Time to file a late answer.

The Respondent, LaSalle Bank, never answered the complaint in State Court

until December 1, 2014, after a Default Judgment was filed by the Appellant.

The Respondent, LaSalle Bank, filed a Second Amended Answer in State Court

on December 1, 2014, which is the first answer filed in State Court which was

untimely without requesting an enlargement of time or permission from the

Court.

Judge Pieper in *Lawton Limehouse, Sr., Respondent, v. Paul H. Hulsey and*

The Hulsey Litigation Group, LLC, Petitioners. analyzed the threshold

question of when the "30" day time period for the defendants to file an answer

began to run and what effect the removal of the case and its subsequent

remand had on that time period." Noting that this issue was a matter of first

impression in this state, Judge Pieper ruled that any unexpired portion of the

thirty-day time period to answer was tolled during the time the case was removed to federal court. Therefore, Hulsey had until August 5, 2006, to file an Answer to the Complaint. Judge Pieper found it unnecessary to decide whether Hulsey was entitled to five additional days for mailing pursuant to Rule 6(e), SCRCF because Hulsey's Answer was filed twenty-four days outside of the tolled time frame. Accordingly, Judge Pieper found the entry of default was proper. 11 He further ruled that "there was no good reason presented by the thereby who is not in default for failure to appear, and shall make a note in the case file or docket sheet of the mailing. Such mailing shall not be necessary to parties who have already received notice. Such mailing is sufficient notice for all purposes for which notice of the entry of an order or judgment is required by these rules; but any party may in addition serve a notice of entry on any other party in the manner provided in Rule 5 for the service of such papers. Because Hulsey removed the case fourteen days after he was served, Judge Pieper found Hulsey had sixteen days following the remand order to file his Answer. In support of his method of time computation, Judge Pieper relied on *Cotton v. Federal Land Bank of Columbia*, 269 S.E.2d 422 (Ga. 1980), and *Dauenhauer v. defendants* for their failure to file a timely answer other than attorney confusion about the deadline for when an answer was due." Judge Pieper found "no reasonable basis for defense counsel's assumption that the 30 day time to file answer starts completely anew upon remand from the federal court." Thus, Judge Pieper declined to set aside the entry of default. The majority of the Court of Appeals affirmed Judge Pieper's decision, finding there

was no authority in this state to support Hulsey's position that a removing party is entitled to a fresh thirty days to answer a Complaint upon remand. Limehouse, 397 S.C. at 68-69, 723 S.E.2d at 221-22. After reviewing state and federal rules of procedure,¹² the majority declined to adopt a new rule that extended the time for filing beyond the thirty-day limit. Id. at 69, 723 S.E.2d at 222. Although there is authority from other jurisdictions to support Hulsey's claim that the time for filing began anew after the case was properly remanded to state court,¹³ we agree with the Court of Appeals and decline to adopt such a rule. As previously discussed, once the case was removed to federal court, the state court's jurisdiction was suspended or held in abeyance until the case was properly remanded. When the state court resumed jurisdiction, it had a duty "to Superior Court In and For Sonoma County, 307 P.2d 724 (Cal. Ct. App. 1957), wherein the appellate courts tolled the time for filing during removal. ¹² The majority considered Rule 12(a), SCRCP (stating, "A defendant shall serve his answer within 30 days after the service of the complaint upon him"), and Fed. R. Civ. P. 81(c)(2) (providing a defendant twenty-one days to file an Answer after a civil action is removed from a state court). ¹³ See Ark. R. Civ. P. 12(a)(3) (West 2013) (providing an adverse party with thirty days from receipt of notice that the remand order was filed in state court to file an Answer); Cal. Code Civ. Proc. § 430.90 (West 2013) (providing thirty days from the state court's receipt of the order of remand to file an Answer); Iowa Code Ann. § 1.441(7) (West 2013) (providing that the time for pleadings shall begin anew after a remand order is filed in the state court); N.C. Gen. Stat. Ann. § 1A-1, Rule 12(a)(2)

(West 2013) (providing thirty days to file an Answer from the date a remand order is filed in the state court); Tex. R. Civ. P. 237a (West 2013) (providing fifteen days to file an answer after notice that a remand order was filed in state court). proceed as though no removal had been attempted." *State v. Columbia Ry., Gas & Elec. Co.*, 112 S.C. 528, 537, 100 S.E. 355, 357 (1919). Thus, the time for filing an Answer was tolled until the state court resumed jurisdiction. Notably, other jurisdictions have reached a similar conclusion. See *Lucky Friday Silver-Lead Mines Co. v. Atlas Mining Co.*, 395 P.2d 477, 480 (Idaho 1964) ("While the cause is before the Federal court, the state court has no jurisdiction or authority to receive any pleadings in the cause nor can it issue any orders concerning the cause. . . . Thus the period of time the cause is before the Federal court, cannot be considered in computing the time within which the appellant had to appear and plead to the cause."); *Peoples Trust & Sav. Bank v. Humphrey*, 451 N.E.2d 1104, 1109 (Ind. Ct. App. 1983) (finding removal of action to federal court tolled ten-day time limit to apply for change of venue and stating that "tolling the time period eliminates uncertainty, preserves the status quo, and is easily applied"); *Jatczyszyn v. Marcal Paper Mills, Inc.*, 27 A.3d 213 (N.J. Super. Ct. App. Div. 2011) (concluding that discovery period established by state court rules is tolled during the time a motion to remand is pending before the federal court); see also *Gen. Elec. Credit Corp. v. Smith*, 484 So. 2d 75 (Fla. Dist. Ct. App. 1986) (holding that time for filing appeal was tolled during period when case was removed to federal court); *Hartlein v. Illinois Power Co.*, 601 N.E.2d 720 (Ill. 1992) (finding

removal of action to federal court tolled time limit on petition for leave to appeal circuit court's grant of preliminary injunction). Based on the foregoing, we hold that removal of a state court case to federal court tolls the time period for filing responsive pleading

STATEMENT OF THE CASE

LaSalle Bank

Laura Toney filed a complaint on the Defendants on November 13, 2013, in State Court. The Defendants were served on November 13, 2013. The Defendant, LaSalle Bank filed a Notice of Removal to Federal Court on December 13, 2013, which was on the 30th day after receipt of service. The Defendants time to answer in Federal Court was 20 days which made his answer untimely in Federal Court (17 Days Late). The Defendants filed a late answer in Federal Court on November 20, 2013. The Defendants filed an Amended Answer on December 20, 2013. Pursuant to Rule 15 of the FRCP, you have 21 days to file an Amended Answer without permission from the Court. He did not filed for an Enlargement of Time to file a late answer. The Defendant never answered the complaint in State Court until December 1, 2014, after a Default Judgment was filed by the Plaintiff. The Defendant filed a Second Amended Answer in State Court on December 1, 2014, which is the first answer filed in State Court which was untimely without requesting an enlargement of time or permission from the Court.

LaSalle Bank filed its first answer in Federal Court December 20, 2013.

An Amended Answer was filed in Federal Court on January 20 , 2014.

A Second Amended Answer was filed in State Court on December 1, 2014.

La Salle Bank never filed a first answer in State Court and is attempting to file a Second Amended Answer in State Court. Federal jurisdiction ended after the case was remanded back to State Court. The Defendant, LaSalle Bank also failed to get the consent of all of the Defendants before removal.

The Honorable Margaret Seymour remanded the case back to State Court on August 4, 2014, stating that the Defendants' case did not have any merit.

Mr. Finkel has stated that the Plaintiff misidentified the Defendant, LaSalle Bank. Mr. Finkel has included "US Bank" as the correct name. After research and

verification, it was discovered that US Bank is a "Trustee" and has no authority or liability in this litigation.

Mr. Finkel is also attempting to use Federal documents in State Court. Federal jurisdiction ended after the case was remanded.

The Plaintiff has filed Motions to Strike the Defendants' untimely answers.

Lee County Treasurer and Lee County Planning and Zoning

The Defendants, Lee County Treasurer and Lee County Planning and Zoning were served on November 13, 2013, and failed to answer within the mandatory time in State Court or Federal Court. The Defendants, Lee County Treasurer and Lee County Planning and Zoning answered in State Court on December 20, 2013, a Motion 12B(6) which was untimely. They did not file an answer in Federal Court until January 6, 2014, which was also untimely.

The Plaintiff filed an answer to Lee County on December 10, 2013, in State Court.

The Defendants, Lee County Treasurer and Lee County Planning and Zoning also filed another Motion 12 stating "Insufficient Service." This motion is null and void because of the answer Motion 12(b)6 that was filed on December 20, 2013. They have waived any rights to file another Motion 12 being that this was not claimed in the Motion 12(b)6 on December 20, 2013.

Mr. Fata's Firm has represented me and my family in numerous legal manners. His firm deeded the original lot (14) to me from my husband, Milton Toney. His firm also wrote our Last Will and Testament and other real estate transactions which constitutes "Conflict of Interest."

The Commission on Lawyer Conduct has reprimanded Mr. Paul Fata for Conflict of Interest and still continued to preside in this case.

ARGUMENTS

I. DID THE TRIAL JUDGE ERR IN HOLDING AN EXPARTE HEARING WHEN THE PLAINTIFF WAS ADMITTED INTO THE HOSPITAL FOR A SERIOUS ILLNESS AND NOTIFIED THE COURTS?

The Appellant was admitted into the hospital for a serious illness and informed the Court. (r.) The Court continued with the hearing in the absence of the Appellant. (r.)

Historically, "ex parte communication" has described communication between legal counsel and the court when opposing counsel is not present. Individuals unhappy with a public official's action are now using the term to describe any communication that excludes any interested party, suggesting all such communications are improper.

Whether an "ex parte" communication with a public official is prohibited typically depends on whether the official is engaged in a legislative or quasi-judicial process. South Carolina law (Section 1-23-360) states, members or employees of an agency "assigned to *render a decision or to make findings of fact and conclusions of law in a contested case* shall not communicate, directly or indirectly, in

connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or its representative, except upon notice and opportunity for all parties to participate." (Emphasis added)

Likewise, Rule 6(b) of the Model Rules of Parliamentary Proceedings of South Carolina provides: "When conducting a *quasi-judicial* hearing, county council takes on the role of an impartial trier of fact in a dispute involving the legal rights of one or more parties

Further, council members must base their decisions on the evidence presented at the hearing and must not discuss the case beforehand or be influenced by the opinions of others who are not a part of the proceedings." (Emphasis added) Both state law and the model rules address situations where the public official is acting in a quasi-judicial role. What if a public official is performing a legislative function? The South Carolina Supreme Court has not stated directly and conclusively that "ex parte" communications with public officials are permissible in all matters involving legislative functions. However, most courts that have dealt with this issue have permitted it. In 2002, a Tennessee court explained why "ex parte" communications are treated differently depending upon

the official's role. "In judicial and administrative proceedings, the litigants are entitled to the cold neutrality of an impartial tribunal. . . . The same cannot be said for the legislative arena. . . . Members of legislative bodies are not acting like judges when they consider a proposed change in an existing zoning ordinance. . . . They listen to their constituents; they test the wind; they try to please as many people as possible consistent with the constitution and good conscience. They are not to be condemned for doing so. That is their job." Prohibiting "ex parte" communications in matters traditionally considered to be within the legislative function, such as rezoning, continues to be raised and tested in the courts. Some courts have prohibited "ex parte" contacts if a council is considering a site-specific rezoning. They ruled this situation is more quasi-judicial than legislative in nature. Canon 3(g) of the South Carolina Code of Judicial Conduct states that :A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided: (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond. This canon creates the following directives for judges in considering *ex-parte* requests: 1) judges cannot have *ex-parte* communications that deal with substantive issues; 2) judges can have *ex-parte* communications that deal with scheduling or administrative issues or emergencies that are not substantive; 3) judges can only have *ex-parte* communications that deal with scheduling or administrative issues or emergencies that are not substantive if the judge a) reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex-parte* communication; b) makes provision promptly to notify all other parties of the substance of the *ex-parte* communication and; c) allows an opportunity to respond. Perhaps the most important rule regarding *ex-parte*

requests is the ethical obligation created by Rule 3.3(d) SCRPC: "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, *whether or not the facts are adverse*" (emphasis added). This rule creates an ethical obligation for counsel seeking *ex-parte* relief to provide the court all material facts known to the lawyer, not just the material facts that support the client's request. While no reported South Carolina case involves an attorney's failure to comply with this rule, attorneys in other states have been subjected to discipline based on violation of this rule. See *e.g.*, *In re Arabia*, 283 Kan. 851, 156 P.3d 652 (2007); *Iowa Supreme Court Attorney Disciplinary Bd. v. Gottschalk*, 729 N.W.2d 812 (Iowa 2007); *Reciprocal Discipline of Page*, 326 Or. 572, 955 P.2d 239 (1998); *Matter of Black*, 262 Kan. 825, 941 P.2d 1380 (1997).

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. 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. 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). Public officials can be sued for a variety of reasons, ranging from land use decisions to denying or revoking a license. Increasingly, plaintiffs are alleging "ex parte communications" to support their lawsuits. They are claiming these communications show a lack of impartiality and fairness in the official's decision making process.

II. DID THE TRIAL JUDGE ERR IN RULING THAT THE DEFENDANT DID NOT HAVE TO FILE IN STATE COURT AFTER REMAND EVEN IF THE DEFENDANT DID NOT FILE A TIMELY ANSWER IN STATE OR FEDERAL C DID THE TRIAL JUDGE ERR IN HOLDING AN EXPARTE HEARING WHEN THE PLAINTIFF WAS ADMITTED INTO THE HOSPITAL FOR A SERIOUS ILLNESS AND NOTIFIED THE COURTS?

The Plaintiff was suffering from heart related illness during the course of this action and notified the court that she was admitted into the hospital for days.(r.) The trial court denied my request to continue the hearing and proceeded to rule in the case.(r.)

The Defendants LaSalle Bank and AltiSourceHomes were served the Complaint on November 14, 2014, and had (30) days to answer. (r.) The Defendants filed a Summary Judgment on December 20, 2013, which was not timely filed. 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.(r.)

Rule 81 of the SCRCF 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.

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, Hulseley 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, Hulseley 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

3. (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
4. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 5. (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 6. (2) the representation is not prohibited by law;
 7. (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 8. (4) each affected client gives informed consent, confirmed in writing.

CONCLUSION

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 without filing an answer in State Court. 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, and also stated that the Respondent's case did not have any merit. According to *Limehouse v. Husley*, the Respondents did not file a timely response to the complaint in State Court.

The Appellant is respectfully requesting that the Default Judgment is granted the Appellant is granted the relief prayed for in her original complaint.

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), SCRCF, 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.

III. DID THE TRIAL JUDGE ERR IN ALLOWING THE ATTORNEY FOR THE RESPONDENTS TO CONTINUE REPRESENTATION AFTER THE COURT WAS NOTIFIED THAT THE ATTORNEY WAS REPRIMANDED BY THE COMMISSION ON LAWYER CONDUCT FOR CONFLICT OF INTEREST?

The attorney for the Defendants, Lee County has served as the Appellant's attorney for several years on numerous occasions. The Appellant filed a complaint with the Commission on Lawyer Conduct and Mr. Paul Fata was reprimanded, but still continued to represent the Defendants.

RULE 1.7: CONFLICT OF INTEREST

1. (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 2. (1) the representation of one client will be directly adverse to another client; or

IN SOUTH CAROLINA COURT OF APPEALS

APPEAL FROM LEE COUNTY

The Honorable Clifton Newman
Circuit Court Judge

CASE NUMBER: 2013-CP-31-0321

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.**

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

1. Complaint by the Plaintiff
2. Removal Notice by LaSalle Bank
3. LaSalle Bank's Answer in Federal Court
4. Pro Capital Investors' Answer in Federal Court
5. Lee County Answer in State Court Motion12(b)6

6. Plaintiff's Reply to Lee County Answer in State Court
7. Lee County Answer in Federal Court
8. The Honorable Margaret Seymour's Order
9. Magistrate Shiva Hodges Report and Recommendation
10. The Plaintiff's Affidavit of Default
11. Lee County 2nd Answer in State Court
12. LaSalle Bank's Answer in State Court
13. Plaintiff Motions to Strike Defendants' Answer in State Court
14. Statement from US Bank
15. Sundown Case
16. Pro Capital Pre Registration Form for Tax Sale
17. Commission on Lawyer Conduct Complaint
18. Commission on Lawyer Conduct Response
19. Hospital Statement of Appellant's stay In the Hospital during hearing.
20. Emails to the Court verifying that the Appellant was in the hospital during hearing on March 30, 2016.

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

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**

CERTIFICATE OF COUNSEL

The undersigned certifies that this Initial Brief complies with Rules 211(b), SCACR.


Laura Toney

P.O. Box 722

Bishopville, SC 29010

(803) 459-6006

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

Appellant Case Number: 2016-001-989

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.**

CERTIFICATE OF MAILING

The Appellant, Laura Toney, certifies that she mailed a copy of the Corrected Appellant's Initial Brief and Designation of Matter on March 15, 2017, via United States Postal Service to the following addressed as follows:

**Finkel Law Firm, LLC
P.O. Box 41489**

**4000 Faber Place
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Charleston, SC 29405**

**Stuckey, Fata, & Segars, LLC
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Bishopville, SC 29010**

**Judge Clifton Newman
P.O. Box 516
Kingstree, SC 29556-0516**

Laura Toney
Laura Toney
P.O. Box 722
Bishopville, SC
29010

STATE OF SOUTH CAROLINA)
COUNTY OF LEE)

COURT OF COMMON PLEAS

LAURA TONEY)
PLAINTIFF,)

v.)

TRANSCRIPT OF RECORD
09-CP-21-267

LASALLE BANK NATIONAL,)
ET. AL.,)

DEFENDANT.)

November 30, 2015
December 1, 2015
Bishopville, South Carolina

BEFORE :

THE HONORABLE CLIFTON B. NEWMAN, JUDGE

APPEARANCES:

LAURA TONEY, ESQ.
Pro Se Plaintiff

SEAN A. O'CONNOR, ESQ.
JOHN T. SYKES, ESQ.
PAUL M. FATA, ESQ.
GLENN CAPELL, ESQ.
Attorneys for the Defendants

FRANCES B. RAY, RPR
Circuit Court Reporter

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1 THE COURT: This is the case of Tony
2 versus LaSalle Bank, etc., or et. al. I'll have
3 everybody identify themselves for the record.

4 MR. O'CONNOR: My name is Sean O'Connor
5 with Finkel Law Firm representing the defendants
6 which are styled in the complaint as LaSalle Bank
7 National Association and Altisource Homes, Your
8 Honor.

9 MR. CAPELL: And I represent -- Glynn
10 Capell -- Lee County, treasurer of Lee County,
11 Planning and Zoning. Technically those, that ought
12 to be changed to Lee County but that's for another
13 day.

14 MR. SYKES: Your Honor, John Tom Sykes
15 with Walker, Deas, Haynesworth, Sinkler Boyd. I'm
16 here representing U.S. Bank as custodian Procapital,
17 LLC, which is incorrectly identified in the
18 complaint as Procapital Investors.

19 MS. TONEY: Good afternoon. I'm Laura
20 Toney. I'm the plaintiff in this case.

21 THE COURT: All right. Ms. Toney, your
22 motion, you may proceed. Your motions.

23 MS. TONEY: Yes, sir. I just submitted a
24 motion to disqualify Mr. Paul Fata and Mr. Sean
25 O'Connor in this action. Mr. Fata has represented

1 me and my family for years. As a matter of fact,
2 the property that's in litigation now, he deeded
3 that property from my husband to me. And when I
4 looked into the court records, it was discovered
5 that Mr. Fata's office sold that same property in
6 foreclosure sale. Mr. Fata has written my will.
7 Mr. Fata went back, as his attorney's office, his
8 firm, did a title search for me. I mean, numerous
9 occasions where Stuckey, Fata, and Segars, the law
10 firm has represented me. Your Honor, I have tried
11 to communicate with Mr. Fata. I've written him at
12 least two or three letters letting him know about
13 the conflict. He did not agree to cooperate with
14 me. I will tell you today, sir, I have filed a
15 complaint with the South Carolina Bar Association.
16 I have communicated with the office of disciplinary
17 counsel. I was told by South Carolina Bar that the
18 Attorney General's Office might have to be called in
19 because with this conflict he was supposed to have
20 gotten consent from me in order to represent someone
21 that was adversary. Even though Mr. Fata, I know
22 he's a solicitor, he represents the City, he does
23 private practice; and like I say, he's represented
24 me and my family for years. And then I reached out
25 to him, being that he is an attorney he should have

1 had enough ethics to come to me and talk to me about
2 it because according to the Code of Professional
3 Conduct rule 1.7 he was supposed to have gotten
4 consent from me in order to continue this case for
5 Lee County treasurer of Lee County Planning and
6 Zoning.

7 Also, Your Honor, Mr. O'Connor, Mr.
8 O'Connor has submitted documents to almost every
9 judge in the circuit court, even Judge Goodstein,
10 documents that were not supplied to me and none of
11 those documents have anything to do with the present
12 case. It was his way to gain advantage over me by
13 submitting this case, or submitting these documents
14 to the court in advance so he can get an unfair
15 advantage. Also, Your Honor, I found out through
16 looking through the records and I have reported
17 Mr. Sean O'Connor also to the South Carolina Bar
18 Association, I found that he's guilty of
19 unauthorized practice of law. I have documentation
20 that he communicated with a Jake Adams out of
21 Mississippi who was doing his work. I think he
22 inadvertently, he inadvertently filed this in Lee
23 County courts. I have an email to verify that, that
24 a Jake Adams out of Jackson, Mississippi, a law firm
25 was doing his work. Now I further investigated the

1 fact that Mr. Jake Adams is not licensed in the
2 State of South Carolina. I know the procedure he
3 was supposed to have gone through the South Carolina
4 supreme court and gotten permission doing an
5 application and gotten permission to practice law so
6 I, too, had reported that particular activity to the
7 South Carolina Bar Association, the Office of
8 Disciplinary Counsel. It's a felony, unauthorized
9 practice of law; it's a felony in the State of South
10 Carolina. Mr. O'Connor has done everything that I
11 can think of to undermine me in this case.

12 Now also, Your Honor, when he submitted
13 these documents to you, he submitted his documents
14 to Judge Manning, Judge James. He even tried to get
15 Judge James to continue the case after Judge James
16 recused himself. He submitted these documents to
17 Judge Goodstein, Judge Cothran, almost every judge
18 in the circuit court now. I was not provided these
19 documents. But one document he did not supply to
20 the court and that was the final order of Judge
21 Seymour in federal court which she told him his case
22 didn't have any merit. He intentionally left that
23 order out in order to mislead the courts.
24 Everything that he has submitted -- now he submitted
25 another email to you the Wednesday before

1 Thanksgiving, late afternoon. I didn't see those
2 documents until then even though almost every judge
3 in circuits court saw those documents except me.
4 When I looked it was nothing there that had anything
5 to do with previous case. He was talking about a
6 previous case and that's only going to be his
7 argument today, something that's already been ruled
8 on truth and lending. My case is something
9 different than what he's gonna present to you today.
10 He didn't present the order from Judge Seymour, that
11 final order, so that's misrepresentation. When
12 you're gonna submit documents to the court
13 pertaining to a case, you don't take it upon
14 yourself to submit the documents that you want to
15 submit in order to mislead the court, you submit all
16 the documents so the judge can make an informed
17 decision and that's what he has done.

18 Mr. Fata, like I said, I've written
19 letters. I have it here, the letters that I've
20 written, Judge, I mean Mr. Fata. This is only one
21 of the letters that I've written him and I'm not
22 gonna waste your time just reading it out, but it
23 was filed. I said, as you know the Lee County
24 Planning and Zoning and Mr. Wayne Capell are
25 defendants in a lawsuit in federal court in which

1 you are representing them.

2 Mr. Fata also, as you know, I have a
3 requested a conference with you and Mr. Capell in
4 hopes of resolving this matter but you failed to
5 respond to my request. Mr. Fata, your own office
6 has provided services to me on several occasions,
7 preparation of my last will and testament, real
8 estate matters, the same real estate. Your Honor.
9 I don't want to keep saying the same thing over and
10 over, but this piece of real estate was deeded to me
11 by my husband; Mr. Fata prepared the deed. Low and
12 behold, this piece of property went into
13 foreclosure. Mr. Fata's law firm sold the property
14 in the foreclosure. Then he went back to the firm
15 and did a title search for me. I have documents up
16 here I can submit to the courts, and he also did my
17 last will. I have a contract where I hired the
18 Stuckey Fata and Segars law firm to do work for me.
19 I have receipts where I paid them. The only thing I
20 wanted to do is sit down and communicate with him.
21 This case escalated to this level because his lack
22 of cooperation with me. He refused to cooperate
23 with me. And like I said, being an attorney he was
24 supposed to have gotten informed consent from me in
25 order to pursue this. And who knows I'm not gonna

1 -- he never did give me enough respect being I guess
2 I'm pro se to even come and ask me is it okay for me
3 to represent these people. Even though he's
4 represented, like I said, I've said this repeatedly,
5 me and my family for years, over 30, 40 years,
6 numerous. This is just some of it, and to me that's
7 a conflict of interest.

8 Mr. Sean O'Connor, I have an email, Your
9 Honor from Mr. Jake Adams. Mr. James Adams is an
10 attorney in Jackson, Mississippi. I think this
11 email was inadvertently placed in the file, but I
12 went through my file here in the Clerk's Office and
13 this is what Mr. Jake Adams' email to Mr. Sean
14 O'Connor. "I'll be the contact on this case. It is
15 my understanding that the case was remanded, was
16 remanded, and we are waiting a ruling on a motion to
17 dismiss. Would you please send me a copy of that
18 motion and any accompanying memorandum or reply? Is
19 there a hearing set for the motion? Should we try
20 to set the motion for a hearing? If you could, send
21 me a copy of the motion for default that she filed.
22 I will draft a response that directs the court to
23 dismiss the case, a motion to dismiss. Also, are
24 there any pending discovery deadlines local rules
25 that limit the time to conduct discovery in this

1 matter?" And like I said, Jakes Adams is an
2 attorney with Baker Donelson Bearmon Caldwell out of
3 Jackson, Mississippi. Now a few days after that,
4 low and behold this motion was filed. Now this is
5 the only email that I think he inadvertently filed.
6 I think he was emailing Mr. Davis and somehow he got
7 this attached to the email that he was emailing
8 Mr. Davis, the Clerk of Court here in Lee County.
9 But I think if the state Attorney General's
10 Office were to investigate it, they will find out
11 there were several emails between Mr. O'Connor and
12 Jake Adams from Jackson, Mississippi, who was doing
13 his legal work.

14 THE COURT: Is that pertaining to this
15 case or some other case?

16 MS. TONEY: This case, yes, sir. And this
17 firm, Your Honor, I went on the internet, I went on
18 the internet. This law firm specializes in
19 disposing, I don't want to say -- I didn't ask your
20 permission to come to the Bench. This firm
21 specializes in disposing cases before they reach
22 trial.

23 THE COURT: The Bench is up here. That's
24 just a rail. The Bench is right here.

25 MS. TONEY: Yes, sir, I don't want to

1 disrespect you.

2 THE COURT: You got a free reign although
3 the Bench is all the way up here.

4 MS. TONEY: Yes, sir, yeah. But like I
5 said, this firm specializes in disposing cases
6 before they reach trial. Now I checked the records.
7 There's no application for Mr. Jake Adams to
8 practice law in the state of South Carolina. Here
9 is...

10 THE COURT: All right, Sheryl.

11 (Document is tendered to the Court.)

12 MS. TONEY: And your Honor, I was shocked
13 when I read that, and he was communicating
14 something. Now the South Carolina Supreme Court has
15 the authority to decide what constitutes
16 unauthorized practice of law, but it goes beyond the
17 courtroom giving legal advice, preparing documents
18 in this case. This email verifies the fact that Mr.
19 Jakes Adams prepared his documents. And Your Honor,
20 I don't know if this is within your jurisdiction,
21 but I would like someone to subpoena all the emails
22 between Mr. Jake Adams and Mr. Sean O'Connor to see
23 the degree of Mr. Jake Adams' participation in this
24 trial. Like I say, Mr. Jake Adams does not have a
25 license to practice law in the state of South

1 Carolina. The only thing he had to do was apply to
2 supreme court. That's all he had to do, apply to
3 the supreme court, fill out an application --

4 THE COURT: This is a complaint against
5 Jack Adams at this point?

6 MS. TONEY: And Mr. Sean O'Connor because
7 they were interacting, they were exchanging emails.
8 And I really believe that Mr. Sean O'Connor
9 committed unauthorized practice of law. Now being
10 an attorney -- I'm not a lawyer, Your Honor, I'm pro
11 se, but I've never seen so much unethical conduct on
12 the part of officers of the court. Maybe because
13 I'm pro se they think I don't know any better, but
14 I'm very resourceful. Now I've asked the South
15 Carolina Bar Association to do an investigation. I
16 was told that the Attorney General's Office might be
17 called in. This will go to the Commission on Lawyer
18 Conduct, and I don't know what the re-- what I'm
19 asking, Your Honor, please, sir, until this is dealt
20 with 'cause I want to make sure that I get fair
21 treatment in this case. Mr. O'Connor never did file
22 an answer in state court, and he's coming in here
23 pleading with the intelligence of this court knowing
24 that he didn't file an answer in state court. If
25 you see the case law, the order by supreme court

1 Limehouse versus Hussey I think, it's an order from
2 the supreme court, and it outlines the method that
3 you been remanded back to state court. He removed
4 this case on ---

5 THE COURT: I tried that case in
6 Charleston Limehouse.

7 MS. TONEY: Yes, sir.

8 THE COURT: Upon remand.

9 MS. TONEY: Yes, sir. He removed this
10 case on the 30th day, Your Honor. He went and took
11 30th day, removed this case to federal court. Then
12 he went judge shopping, but I guess it didn't work
13 out. He removed it on the 30th day without filing
14 in state court; it was remanded back to state court.
15 Now he didn't supply that order to you all. He
16 supplied the other old stuff that did not have
17 anything to do with this case. Now I have the order
18 from Judge Seymour that said his case didn't have
19 any merit. He completely left that order out. Then
20 when he -- it was remanded back August 4th, 2014; he
21 still didn't file an answer. He didn't file an
22 answer. To me, I'm not an attorney, even though I
23 have missed a deadline; but as soon as it had been
24 remanded I would have ran down to the courthouse at
25 least, filed, if I hadn't done it I would have asked

1 the courts for their permission. I would have given
2 the courts enough respect to say, I'm late, I'm
3 sorry, may I file a late answer. Then he's using
4 this motion 12 that he filed 17 days late. And Your
5 Honor, when he filed 30 days, when he removed this
6 case on the 30th date it was too late for him to
7 file in federal court because he had 20 days to file
8 in federal court. So he was 17 days late and he
9 filed it in federal court. I can say more, but I
10 don't want to say what I'm thinking because he got
11 away with this before. And then when it was
12 remanded he filed his first pleading in state court.
13 I think it was like almost 300 days later. And then
14 Your Honor, he's trying to get the state court to
15 rule on a federal motion. Federal court lost its
16 jurisdiction when it remanded it back to state
17 court; but still, he's still playing with the
18 intelligence of the court saying that those federal
19 motions, those federal motions have jurisdiction in
20 state court and they don't. When this case was
21 remanded back to state court he was supposed to
22 start filing documents in state court instead of
23 bringing in all these documents which Judge Seymour
24 had already ruled on anyway. That's why he didn't
25 give the courts that order because he didn't want

1 you all to know exactly what Judge Seymour said in
2 her order so he conveniently left it out.

3 Your Honor, I'm asking you, I'm pleading
4 with you, please let them do their investigation on
5 the unauthorized practice of law on the part of
6 Mr. Sean O'Connor and Mr. Jake Adams out of Jackson,
7 Mississippi, Mr. Paul Fata who I reached out
8 repeatedly to try to communicate with but he didn't
9 want to give me any respect, I'm pro se. Now also,
10 Your Honor, Mr. Parker here from Procapital, we
11 didn't agree on everything; but as far as the
12 evidence and professionalism I have no problems with
13 him. And that's why, with your permission sir, I
14 would like to grant him a stipulation of dismissal
15 from this case with your permission, sir. I think
16 you have a stipulation already typed up because they
17 came in on the end. Procapital bought this house in
18 a tax sale and Procapital returned the money back to
19 the treasurer department, and I don't think it's
20 fair for them to have to go through what the other
21 people are going through because they came in at the
22 end with your permission, sir. I might be saying
23 the same thing over and over, Your Honor.

24 THE COURT: Let's let someone else have
25 the opportunity to talk if you're saying the same

1 thing over and over.

2 MS. TONEY: Yes, sir.

3 THE COURT: All right, okay. Okay. We'll
4 move on to the other side.

5 Yes, sir, Mr. O'Connor.

6 MR. O'CONNOR: Thank you, Your Honor, if
7 it please the Court. As I stated, my name is Sean
8 O'Connor, I represent --- the defendants have been
9 named in the complaint incorrectly as the South
10 National Association, Altisource Homes. Your Honor,
11 it's very useful and significant to briefly go
12 through the procedural chronology of the case. We
13 did finally, we --- when I say "we", on behalf of
14 defendants LaSalle Bank and Altisource --- we finally
15 removed the case from U.S. District Court on
16 December 13th of 2013. Seven days later which was
17 also timely, filed a motion to dismiss for failure
18 to state a claim. That was on December 20, 2013.
19 That was attached as exhibit A to the materials that
20 I supplied to Your Honor before the hearing which by
21 the way, just to briefly address one of the various
22 unsupported allegations Ms. Toney made, every judge
23 we've been trying to get these motions heard for a
24 very long time, Your Honor. We appreciate you
25 trying to work us in and schedule them, but they

1 were scheduled to be heard a couple of times before,
2 once by Judge Goodstein and then Judge James
3 couldn't hear them because of conflict he had. And
4 Judge Manning, we were trying to get him to work us
5 in another term he was here. Each time we thought
6 that there might be a chance that the motions might
7 be heard, Your Honor. I took the initiative to send
8 a copy of all of the materials related to my motions
9 to all of those presiding judges, Your Honor
10 included. In each one of those I have a, right
11 there on the letter a copy, CC to Mr. Fata and
12 Mr. Thomas Parker, Parker Barnes, and also to
13 Ms. Laura Toney. She's the first party named as a
14 CC. And in fact, every time that I tried to email
15 those same materials I also copied Ms. Tony; so
16 among the various assertions she's made, that is one
17 of the many that is blatantly false and has no
18 merits.

19 MS. TONEY: May I object to something?

20 MR. O'CONNOR: Your Honor, I did not
21 interrupt her so I would ask that you please --

22 MS. TONEY: Sir, he sent me a letter. He
23 didn't send me --

24 MR. O'CONNOR: Your Honor, I object to her
25 interrupting my argument.

1 THE COURT: You may proceed.

2 MR. O'CONNOR: So, as I stated, getting
3 back to the procedural chronology, Your Honor, we
4 did — it's right there in the record in the US
5 District Court we filed a motion to dismiss for
6 failure to state a claim. That motion has never
7 been heard and it remains pending, has been pending,
8 Your Honor, since December 20th of 2013. That comes
9 with remand within the case remand to state court.
10 Everything comes with it, that motion included. And
11 so we actually filed an amended motion January 20th,
12 2014, pre-remand while the case was still in federal
13 court so both of those — actually it's the amended
14 version it's pending so each of those motions is
15 recognized under the rules of civil procedure. The
16 South Carolina Civil Rules of Civil Procedure as a
17 responsive motion. That's under rule 12(b)(4),
18 12(b)(5) and (b)(6). That motion has remained
19 pending while the case was remanded on August 5 of
20 2014 with US District Court not having ruled on that
21 motion; and therefore, it remains pending today as
22 properly before this court. My original motion
23 filed December 13 of 2013 and amended version filed
24 January 20 of 2014 was filed some ten months before
25 the plaintiff filed her motion for default which was

1 September 25 of 2014, Your Honor. So I would submit
2 that that's the first and easiest issue for Your
3 Honor to address. To the extent that Ms. Tony would
4 allege or assert that any of the defendants that I
5 represent in this case are in default, like I said,
6 my motion to dismiss which was a valid responsive
7 pleading was filed in December of 2013, has been
8 pending for almost two years and predated her filing
9 of the motion to default by many months, by many
10 months, and so that motion has no basis and no merit
11 whatsoever, but on to the merits of the motions that
12 are before the court filed by my clients, Your
13 Honor.

14 THE COURT: Do you wish to respond to her
15 motion?

16 MR. O'CONNOR: The part about the ethics
17 piece, Your Honor?

18 THE COURT: Well, if you have no response
19 I'll move on to Mr. Fata. She has filed a motion to
20 disqualify counsel.

21 MR. O'CONNOR: Oh, yes, sir, I'm happy to
22 respond to that. There's absolutely no conflict of
23 anything that I have done, Your Honor. She went on
24 it some length about an attorney that I work with by
25 the name of Jack Adams. He is an attorney as she

1 stated at a law firm in Mississippi. They are the
2 national counsel for my client Altisource and that's
3 who I report in this case. Mr. Adams has not filed
4 a pleading. He has not appeared in this court. He
5 has not sought to appear in this court. He is
6 simply an attorney that monitors my work and who I
7 report to, which is perfectly proper. I don't know
8 how she got a hold of that email, but there was
9 nothing about it that was untruth or improper. It
10 was basically him telling me, I'm assigning you the
11 case and we're gonna work together on a brief and
12 try to get her lawsuit dismissed and was asking me
13 about the status of the procedural aspects of the
14 case, and so I don't know where she's going with any
15 of that. There's absolutely nothing untrue or
16 improper or unethical.

17 THE COURT: Ms. Toney, have a seat. We
18 don't have -- it's not a debate. Just have a seat.

19 Go ahead, sir.

20 MR. O'CONNOR: So at any rate, to the
21 extent that she's alleged anything improper by
22 Mr. Adams, he's not done anything improper. I've
23 not done anything improper by simply filing what I
24 have filed in this case and by working with a
25 supervised attorney that's also worked for my

1 client. There's absolutely nothing improper about
2 that whatsoever. And there's nothing that I have
3 done, like I said, I did already respond to her
4 unsupported allegations that I've committed some
5 kind of pro se communication; I have not. It's
6 absolutely in black and white in my file that, as
7 would be expected, every single communication that I
8 made with all of the judges that have been in some
9 way touched this case, I've copied her on every
10 single one of them including my written
11 correspondence and my emails so to the extent that
12 she has raised this motion today to qualify, to
13 disqualify myself from representing my clients, it
14 ought to be denied. And to the extent that she is
15 asking that my client Bates stamp placed in default
16 and also has no merits since we filed motion to
17 dismiss in December of 2013 which has been pending
18 since then and has not been heard.

19 THE COURT: That will address the issue
20 that no answer is required while a motion such
21 motion is pending?

22 MR. O'CONNOR: Yes, sir, it's not. The
23 motion a motion under 12(b) 45 and 46 is recognized
24 under that South Carolina Rules of Civil Procedure
25 as responsive pleading and a defense within the

1 meaning of those rules. In fact, Your Honor, those
2 defenses must be pled or waived. I'm quoting -- I'm
3 sorry, can I continue?

4 THE COURT: Sir?

5 MR. O'CONNOR: Yes, sir, I thought you had
6 said something. Every defense in law or fact to a
7 cause of action any pleading whether claim,
8 counterclaim, crossclaim, third party claim shall be
9 asserted in responsive pleading thereto if one is
10 required except for the following defense made the
11 option pleader to be made by motion and it goes
12 through all of the various defenses that must be
13 made by motion including, four, insufficiency of
14 process; five, insufficiency of service of process
15 but from which we've alleged, and 12(b)(6) which is
16 failure to state facts sufficient to constitute a
17 cause of action. All three of those were properly
18 made by motion. It's a proper substitute for an
19 answer if timely made, which it was; and like I
20 said, it was made on December 13 of 2013, has not
21 been heard or ruled on. And in fact, the rules go
22 on to say that until that motion is heard and ruled
23 on you don't have to file an answer. You have a
24 time period to file the answer --

25 THE COURT: That was my question.

1 Mr. Segars did a title search for her for two
2 hundred dollars in 2009, and it was specific, the
3 contract was specifically for title examination
4 only. And I guess it was for, yeah, it was for this
5 piece of property but, and for which Ms. Toney paid
6 two hundred dollars. She also forgot that I
7 represented her one time when her house was
8 vandalized back before all this, her husband was
9 still alive. I also represented a bank in Camden on
10 a claim and delivery that was heard by -- I can't
11 think of the judge's name down in Kingstree. If
12 you'd help me with that. I can't think of his name
13 off the --

14 THE CLERK: Judge Shuler.

15 MR. FATA: Judge Shuler, it was Judge
16 Shuler. And but anyway, yes, it's true, we
17 represented her, represented her, her family and so
18 forth, on finite things. She did not retain us,
19 does not pay us a retainer fee. She would come in
20 for her or one family member would come in for a
21 specific thing, she would pay us, and we would do
22 that and that ended the representation of her.

23 THE COURT: You're her lawyer forever.

24 MR. FATA: No, sir, I'm not her lawyer
25 forever and neither is Mr. Segars, even though we

1 have done things for her in the past. You know, I
2 ---

3 THE COURT: Under rule 1.9, just addresses
4 the issue, she's not your current client, she's a
5 former client.

6 MR. FATA: Former client, that's correct.

7 THE COURT: In rule 1.9 in the duties of
8 former client it addresses the question or the issue
9 that a lawyer shall not knowingly represent a person
10 in the same or substantially related matter in which
11 the firm with which this lawyer formerly represented
12 a client. So the pending matter as opposed to
13 whatever you previously represented her on
14 concerning will address the issue as to whether or
15 not it's the same or substantially related to the
16 matter that you previously represent the clients,
17 number one. And then the second, B, under 1.9
18 addresses, says the lawyer formerly represented the
19 client shall not thereafter use information related
20 to the representation to the disadvantage of the
21 former client.

22 MR. FATA: And none of what we've done for
23 her in the past has anything to do with my
24 representation of the county regarding these issues.
25 She's ---

1 MR. O'CONNOR: Yes, sir.

2 THE COURT: You said the rules go on.
3 Tell me the rule that goes on to say that, the rule
4 that goes on to say that.

5 MR. O'CONNOR: If you will bear with me a
6 moment, Your Honor.

7 (Pause.)

8 MR. O'CONNOR: It's under rule 12(a), Your
9 Honor. It says if the court denies the motion or
10 postpones its disposition until trial on the merits,
11 the responsive pleading shall be served within 15
12 days after notice of the court's action. So while
13 the motion is still pending, the party that timely
14 filed it does not have to file an answer until the
15 court either (a) rules on the motion, or B, decides
16 to just wait until trial. At that point once you
17 receive written notice of that as stated in the
18 rule, you have 15 days to file an answer. So if
19 Your Honor would choose to, you know, deny the
20 motions that I have filed and pending since December
21 of 2013, then I will have 15 days to file answer.

22 THE COURT: So a short response to my
23 question is that a rule, 12(a) provides that a
24 defendant shall serve an answer to a complaint
25 within 30 days after the service of the complaint

1 upon him or her. Then further in 12(a) it goes on
2 to say that the service of a motion permitted under
3 this rule alters these period of times as follows,
4 including if the court denies the motion response to
5 be served within 15 days, etc. as the court sets it
6 some other time.

7 MR. O'CONNOR: Yes, sir, that's correct.

8 THE COURT: All right. Okay, so let me
9 hear from Mr. Fata.

10 MR. FATA: Your Honor, it is true that my
11 firm has represented Ms. Toney in the past. Her
12 mother. I even taught her brother in high school.
13 However, all that has been for single transactions
14 such as a deed in 1993 -- or excuse me, 1992,
15 another deed in, I think it was 1993. Mr. Segars,
16 my partner, did a will for Ms. Toney in 1995.
17 Mr. Segars also placed a bid at foreclosure sale for
18 this piece of property in 2005. Let me tell you how
19 that works. ERV Biddings, a bidding service in the
20 state, and they will send us on the Friday before
21 Tuesday of the sale, or Monday sale, the list of
22 bids they want us to place bids on and that's it.
23 That's the only thing that Mr. Segars had to do with
24 this. We did not sell the property; we entered a
25 bid. The last thing I see in here that we did was

1 THE COURT: So your preparing a will or
2 dead or handling some other ancillary matter has no
3 bearing on whether or not she defaulted on a loan?

4 MR. FATA: That's correct, Your Honor.
5 And I don't know who did the loan for her, we did
6 not do it.

7 THE COURT: And you didn't represent her
8 in any matters in relation to?

9 MR. FATA: To this transaction?

10 THE COURT: This transaction.

11 MR. FATA: No, sir, I did not.

12 THE COURT: And you do not believe there's
13 a problem under rule 1.9 or any other rule regarding
14 conflict?

15 MR. FATA: That's correct.

16 THE COURT: All right.

17 MR. FATA: Now as far as discussing this
18 case with her, she had an appointment to come to my
19 office to discuss the matter, and she called and
20 canceled the appointment and informed my secretary
21 that she would call and reschedule. I've not heard
22 from her since. But it's, you know, obviously I'll
23 be happy to talk to her about it, but she canceled
24 the appointment, never rescheduled.

25 THE COURT: All right, good.

1 Counsel, where do you stand in all this?

2 MR. SYKES: Your Honor, we have really
3 nothing to say regarding the motion to disqualify.
4 My client Procapital as well as Mr. Park and myself
5 who represent Procapital are not part of that
6 motion; however, we did file a motion to dismiss
7 back in December of 2014. That motion was based on
8 the fact that Procapital was merely the tax sale
9 bidder. The tax sale was subsequently set aside.
10 We have been in discussions with Mr. Tony regarding
11 this fact. Procapital owns no interest in the
12 property. They have -- nor have they ever had
13 interest in the property because they were merely
14 the bidder at the property.

15 THE COURT: You said the tax sale was set
16 aside?

17 MR. SYKES: Yes, Your Honor.

18 THE COURT: Okay.

19 MR. SYKES: And so that is in the
20 attachment to our motion to dismiss this case, Your
21 Honor. And it was set aside by consent of all
22 parties. I can provide you a copy of our motion.

23 THE COURT: All right.

24 MR. SYKES: The exhibit is attached that
25 shows the, that the motion was set aside.

1 THE COURT: Ms. Toney, I don't listen to
2 people in the order that they wish to speak. I
3 listen to people in the order in which I want to
4 hear them so it serves no useful purpose to raise
5 your hand like you're in church or a meeting. I
6 will recognize who I want to hear from and right now
7 I'm hearing from counsel.

8 Go ahead, sir.

9 MR. SYKES: Thank you, Your Honor. So
10 that's our motion to dismiss. We served that,
11 copied that on Ms. Toney. Extent I have discussions
12 with her, cordial discussions regarding that, and
13 our status in this case. In fact, we have no
14 interest in the property so we filed a motion
15 pursuant to 12(b)(6) as well as 12(b)(5) because
16 we've not properly served yet. She actually served
17 our former custodian of Procapitol in Philadelphia.
18 Irrespective to all of that she has consented to
19 enter in a stipulation of dismissal.

20 THE COURT: So you want your client to be
21 out of the case and you're ready to go?

22 MR. SYKES: Yes, Your Honor, and Ms. Toney
23 has indicated as well during discussions that she's
24 willing to sign a stipulation of dismissal.

25 THE COURT: Is that correct, Ms. Toney?

1 MS. TONEY: May I speak, sir?

2 THE COURT: I just asked you a question.
3 Is that correct?

4 MS. TONEY: Yes, sir, I granted them the
5 dismissal. May I say something else please, sir?

6 THE COURT: All right. Anything else from
7 then?

8 MR. SYKES: Your Honor, if she wants to
9 execute it right here we can do three original
10 copies. I can go and get this thing filed and we'll
11 be good to go.

12 THE COURT: All right, pass that on.

13 (Document tendered to Ms. Toney.)

14 MR. SYKES: If Your Honor doesn't mind
15 I'll take it down to the Clerk of Court or we can
16 file it right here.

17 (Pause.)

18 THE COURT: I have a question to Mr. Fata.
19 When was, when under what circumstances was the tax
20 sale set aside?

21 MR. FATA: The tax sale was set aside by
22 agreement of the parties. It was consent and I've
23 got a copy we circulated. I'll just hand up a copy
24 of the, circulated it.

25 (Document tendered to the Court.)

1 THE COURT: Well, I'll sort of ask it
2 again this way, was that before or after the motions
3 were filed?

4 MR. FATA: It was after the lawsuit was
5 filed.

6 THE COURT: After the lawsuit was filed.

7 MR. FATA: Yes, sir.

8 THE COURT: So that's after all the
9 motions filed?

10 MR. FATA: After all motions and
11 everything was filed the tax sale was set aside.
12 October 31st, 2014, \$20,000 was, was sent to US Bank
13 representing the amount of bid.

14 THE COURT: All right, so that clears
15 Mr — tell me your name again.

16 MR. SYKES: Thomas Sykes, Your Honor.

17 THE COURT: Sykes?

18 MR. SYKES: Yes, sir.

19 THE COURT: That clears you up. Do you
20 have an extra copy of that stipulation so I can look
21 at it?

22 MR. SYKES: I gave it to the clerk, Your
23 Honor.

24 THE COURT: All right, I'll get a copy
25 from her.

1 MR. SYKES: Great.

2 THE COURT: So you're good to go.

3 MR. SYKES: Thank you, Your Honor.

4 THE COURT: Go ahead, Ms. Toney.

5 MS. TONEY: Your Honor, in reference to
6 the motion 12, the law does stipulate that they can
7 file a motion 12 in lieu of an answer; but this
8 motion 12 was filed 17 days late, 47 days, not
9 within 30 days.

10 THE COURT: Within 30 days of what?

11 MS. TONEY: Within 30 days of him
12 receiving the Complaint.

13 THE COURT: And how did he receive the
14 Complaint?

15 MS. TONEY: Certified mail. I have all
16 that with me where they signed for it, certified
17 return receipts.

18 THE COURT: All right. It was filed and
19 served on what date?

20 Mr. O'Connor.

21 MS. TONEY: The Complaint was filed 2013.
22 The Complaint was filed November 13th of 2013.

23 THE COURT: All right. And when was the
24 motion filed?

25 MS. TONEY: The motion was filed 17 days

1 late. It was removed December 13th, and it was
2 filed 17 days after that so it was filed 17 days
3 late in February. That's the part that ---

4 THE COURT: Late on the basis that it was
5 in federal court ---

6 MS. TONEY: Yes, sir.

7 THE COURT: ---when the answer was filed?

8 MS. TONEY: The motion 12 was never filed
9 in state court; it was filed in federal court. And
10 it was filed 17 days late in federal court. Really,
11 sir, in federal court we have 20 days to file, not
12 30 days, but he did not remove this case until the
13 30th day. He removed this case on the 30th day. It
14 was filed 13th, removed it on November 13th, 2013.
15 He removed it December 13th, 2013. Then he filed --
16 that's 30 days so that's 30 days late. I mean, ten
17 days too late to file in federal court. Then he
18 filed 7 days after that which meant he was 17 days
19 late filing in federal court.

20 THE COURT: All right, let me hear Mr.
21 O'Connor's response to what you just said.

22 MR. O'CONNOR: Yes, sir. I now only have
23 one copy of this. This is a printout of the docket
24 for federal court. I'm going to ask to hand this to
25 up to the Court. Can I approach, Your Honor?

1 THE COURT: Yes, sir.

2 MS. TONEY: Your Honor, what this is is a
3 printout of the Pacer from the, when the case was in
4 U.S. district court, and it reflects on there that,
5 and that these are the first things that happened in
6 the case so it's right up there at the top meaning
7 that it shows that the case was removed on
8 December 13 and was -- a motion to dismiss was filed
9 7 days later on December 2013. That comports with
10 federal rules, Your Honor. The rule says if you
11 remove a case you get 7 days after that to file your
12 motion to dismiss. That's exactly what we did.

13 THE COURT: All right. Well, she said you
14 removed it late and that I guess the federal court
15 shouldn't have accepted it or?

16 MR. O'CONNOR: It's hard for me to follow
17 that argument or that reasoning, but that was not --
18 the case was remanded, but that was not an issue in
19 the motion to remand.

20 THE COURT: I think she must be saying
21 that the, if you have 20 days to answer in federal
22 court if you do a removal you must remove it within
23 20 days and not 30 days. I'm --

24 MR. O'CONNOR: It's 30 days to remove.

25 THE COURT: Thirty days to remove?

1 MR. O'CONNOR: Yes, sir.

2 THE COURT: Not 20 days. I don't practice
3 in, I never practiced in federal court so.

4 MR. O'CONNOR: Yes, sir.

5 THE COURT: So I'm just repeating what you
6 all are telling me.

7 MR. O'CONNOR: Yes, sir.

8 THE COURT: So you disagree with her
9 statement?

10 MR. O'CONNOR: If a case is filed in state
11 court you have 30 days to answer; but on that same
12 30th day you might, you may also remove the case in
13 federal court. You're not under the 21 day federal
14 court answer rule because the case isn't pending in
15 federal court.

16 THE COURT: You're in the state rule?

17 MR. O'CONNOR: That's right. You're in
18 the state rule. And then once you remove the case I
19 believe it's federal rule (a)(1) says that you get
20 seven more days to file your motion to dismiss or
21 answer, whichever you choose to do.

22 THE COURT: And you filed a motion to
23 dismiss?

24 MR. O'CONNOR: Yes, sir, Your Honor.

25 THE COURT: Then it was remanded back to

1 state court.

2 MR. O'CONNOR: Some number of months
3 later, yes, sir.

4 THE COURT: And then so what's pending
5 before me is, and then you simultaneously filed a
6 motion to dismiss in state court while the federal
7 motion was —

8 MR. O'CONNOR: Actually —

9 THE COURT: —pending?

10 MR. O'CONNOR: No, the federal motion
11 carries over, remains pending, and I actually for
12 quite a while was just waiting for it to get put on
13 the docket in state court. I called the Clerk's
14 Office and they said, we don't have a copy of that,
15 and so I went ahead and sent it, you know. And then
16 at that point they put it on the docket, but it's
17 the same motion I mean.

18 THE COURT: So obviously if you file a
19 pleading in federal court, you filed a — you remove
20 the federal court, then within seven days file a
21 motion to dismiss under the rule 12.

22 MR. O'CONNOR: Yes, sir.

23 THE COURT: And then the federal court
24 remands it to state court. They remand everything
25 including all pending motions?

1 MR. O'CONNOR: Yes, sir, Your Honor.

2 THE COURT: And the -- and it's timely
3 filed according to the federal rules then it's
4 timely, then the State rules as well?

5 MR. O'CONNOR: Yes, sir, Your Honor.

6 THE COURT: Because the federal court has
7 the jurisdiction under the rules.

8 MR. O'CONNOR: Until it remands and then
9 that jurisdiction transfers, but there's no new,
10 there's no new deadline. You don't have to hurry up
11 and run and file your same motions that you already
12 filed.

13 THE COURT: So Ms. Toney reading and
14 citing the Limestone v. Hussey, or the lawyer in
15 Charleston, what was his name? Hussey. And of
16 course, that is the case where it was remanded legal
17 malpractice case that Limestone sued a lawyer from
18 Ness Motley Hussey. They filed for removal and was
19 remanded and the state court judge said that they
20 did not file the answer, an answer timely after it
21 was remanded, and so then they got a large default
22 judgment. Then it went up to the Supreme Court and
23 in the Supreme Court the defense lawyer says, well,
24 really it wasn't properly remanded because upon
25 remand they did not use the seal of federal court in

1 remanding so, therefore, they were not in default so
2 then they were able to answer. Then I did the trial
3 after it came back up for trial, and it went from
4 the ten million dollar defense verdict on one and
5 six million -- plaintiff's verdict on one and six
6 million on the other to a defense verdict so.

7 MR. O'CONNOR: Yes, sir.

8 THE COURT: That was the end of the whole
9 thing after many, many, many years of going back and
10 forth so I'm familiar with --

11 MR. O'CONNOR: Yes, sir.

12 THE COURT: I'm familiar with everything
13 that's being argued because I spent over a week in
14 Charleston doing this trial. But the applicability
15 of what Ms. Toney is arguing under this case, what's
16 your response to that?

17 MR. O'CONNOR: It's distinguishable, Your
18 Honor, and I live in Charleston so I followed that
19 trial very closely and I appreciate Your Honor's
20 handling it the way you did, but it's not the same
21 facts, it's not the same procedural situation. That
22 was not a case where someone had timely filed a
23 motion to dismiss in federal court and was just
24 waiting for it to be heard as is the case here.
25 That was a case where, you know, it was remanded and

1 that's when the clock started ticking for that to
2 answer. That hadn't happened to me yet because the
3 case has already been, remanded but before that I
4 already timely filed a motion to dismiss which has
5 been pending all this time.

6 THE COURT: So your motion to dismiss was
7 filed before it was remanded or after?

8 MR. O'CONNOR: It was filed timely after
9 remand which is seven days under rule 81, Your
10 Honor.

11 THE COURT: Under South Carolina rule?

12 MR. O'CONNOR: No, rule, federal rule says
13 if you -- once you timely remove on that 30th day
14 you have another seven days to file either an answer
15 or motion to dismiss. And that governs the deadline
16 for when my motion to dismiss in federal court was
17 filed, which it was, it was filed on that seventh
18 day deadline.

19 THE COURT: Your position is you don't
20 have to refile a motion to dismiss in state court?

21 MR. O'CONNOR: No, sir, there's no
22 authority for that anywhere.

23 THE COURT: But you filed it anyway?

24 MR. O'CONNOR: The reason I sent them a
25 copy is because I was trying to get it heard and I

1 found out, I called the Clerk's Office and I said
2 when are y'all gonna put that on the roster to have
3 it heard and they said, we don't have a copy of it
4 and I said, well, I'll send you one and then they
5 filed it then.

6 THE COURT: Well, so you're saying there's
7 no authority for the requirement of re-filing a
8 motion in state court after a federal court has
9 remanded the case because your argument is when they
10 remanded it, they remanded everything in the file
11 including all the filings?

12 MR. O'CONNOR: Yes, sir, and there's no
13 authority that there is, that you have a new
14 deadline that even though I have timely filed a
15 motion to dismiss that somehow because of remand I
16 would be re-exposed to default. I mean, that
17 doesn't exist anywhere in the law.

18 THE COURT: So in Limestone they remanded
19 it before the timeline before answering. I mean,
20 they removed it before the timeline before answering
21 it, that was remanded. And the issue was whether
22 the answer was filed within -- well, basically the
23 issue was, I think they removed it say on the 13th
24 day.

25 MS. TONEY: Yes.

1 THE COURT: They removed it from state
2 court to federal court after they had the case sit
3 13 days; and then when the federal court remanded it
4 back to state court, they filed the answer saying
5 within 20 days, 25 days. And the argument, the
6 question was whether or not if you had 13 days with
7 which remanded, does those 13 days count toward your
8 30 days.

9 MR. O'CONNOR: Yes, sir.

10 THE COURT: Judge Ness said that 13 days
11 counted toward the 30 days so they only had
12 remanding 17 days sand they filed this on the 20th
13 day so therefore they were in default?

14 MR. O'CONNOR: Yes, sir. And what makes
15 that distinguishable is there was no responsive
16 pleading that was timely filed as was done here. I
17 mean, if that had been the case they would have been
18 able to say I already filed responsive pleading, you
19 know, timely under the rules which is what I did.

20 THE COURT: Well, they filed a timely,
21 they filed a responsive pleading but they didn't add
22 up all the days that they filed within 30 days.

23 MR. O'CONNOR: Right, and that's what's
24 different from this case. In this case there's no
25 dispute that on December 20th, 2013, I timely filed

1 a motion to dismiss, that's not disputed.

2 THE COURT: And so the -- I don't know
3 whether the supreme court definitively answered the
4 question as to how to add up those 30 days, I don't
5 remember, but we got the Hood law firm and he
6 figured out that, well, we didn't, they didn't stamp
7 it so it was unofficially remanded so you still have
8 plenty of time. Ms. Toney has a paper there that
9 purportedly answers all the questions.

10 Go ahead, yes, ma'am.

11 MS. TONEY: I have a copy of the
12 particular case, Your Honor.

13 THE COURT: Of what?

14 MS. TONEY: May I hand it over?

15 THE COURT: A copy of a case?

16 MS. TONEY: A copy of the case.

17 THE COURT: We have every case in the
18 state right on computer here.

19 MS. TONEY: I know you do. But Your
20 Honor, he moved his case --

21 THE COURT: And we're going to lunch in
22 about ten minutes. We got to be back at 2:30 for
23 that jury so I'm --

24 MS. TONEY: Yes, sir, he --

25 THE COURT: I don't know how we're going

1 to tend to you all and deal with our jury. We might
2 have to hear some more. What y'all have to say
3 after when we get back.

4 Yes, ma'am.

5 MS. TONEY: He removed this case on the
6 30th day which left him no time in state court to
7 file. In this case it was removed I think on the
8 13th day and it allowed them 17 extra days.

9 THE COURT: He said he doesn't have to --
10 under the rule he didn't have to file an answer
11 because he's filed a motion.

12 MS. TONEY: Yes, sir.

13 THE COURT: Which has to be ruled on.

14 MS. TONEY: Yes, sir, but that was 17 days
15 late in federal court. He didn't file a timely
16 motion 12 because it was late in federal court.

17 THE COURT: Well, he handed all this to me
18 that says that he filed it timely and federal court
19 didn't say it was untimely.

20 MS. TONEY: He was untimely. He filed 17
21 days late. In federal court you have 20 days to
22 file. Now if he has filed an answer in state
23 court ---

24 THE COURT: You have 20 days to file an
25 answer, but you have 30 days ---

1 MS. TONEY: In state court.

2 THE COURT: ---to remove.

3 MS. TONEY: Yes, sir, and ---

4 THE COURT: So he said that since he
5 removed it, then he filed, that the state rules
6 apply, not federal rules apply. And then he filed
7 the motion to dismiss under the state rule.

8 MS. TONEY: Yes, sir, he ---

9 THE COURT: I mean the federal rule.

10 MS. TONEY: Yes, sir. He removed it on
11 the 30th day and left him no time to file in state
12 court because he didn't file an answer in state
13 court.

14 THE COURT: And he's saying until I rule
15 on whether or not the case should be dismissed he
16 doesn't have to file an answer at all because the
17 motion is the responsive pleading that delays need
18 to file an answer until after I rule on the motion
19 to dismiss because if I grant the motion to dismiss,
20 then he doesn't need to file an answer because the
21 case will be gone.

22 Now, first of all, on these motions to
23 disqualify, I deny both motions. Any issues
24 regarding the administrative role of a lawyer in
25 representing a client, I mean, the administrative

1 role of the Supreme Court or disciplinary counsel in
2 dealing with professional responsibility of lawyers,
3 those are separate issues from the representation of
4 clients. So if someone is, has committed some kind
5 of disciplinary act, then we have a separate body to
6 deal with that. Now all of that sometimes come what
7 the judge does, but the burden is on the moving
8 party part to prove that opposing party should be
9 disqualified, and the courts have held that because
10 disqualification is a drastic remedy, the courts
11 must avoid overly mechanical adherence to
12 disciplinary cannons at the expense of a litigant's
13 right to freely choose their clients such as the
14 Bank's right to freely choose Mr. O'Connor and the
15 County's right to freely choose Mr. Fata to
16 represent them in a particular matter. And the
17 Court must be mindful of the party who's seeking to
18 get them removed, that the possibility of misuse of
19 a disqualifications motion for a strategic reasons
20 so the Court has to be mindful of what would be the
21 motive of seeking to have someone disqualified.

22 Now Mr. Fata obviously cannot, if he was
23 perhaps handling a bankruptcy case in charge of
24 managing all the funds of yours and knew all the
25 intricacies of every bill and financial situation

1 and financial state and this and that, then maybe
2 that would be another issue. But in small
3 communities, the fact that someone draws up a will
4 or deed for someone doesn't mean that they can never
5 handle a case that's adverse to the person they
6 previously represented. And Mr. O'Connor clearly,
7 the email that was shown to me is communication
8 between, you know, corporate counsel and local
9 counsel or national counsel, local counsel, it does
10 not present any conflict and I deny both motions to
11 disqualify counsel.

12 Now, not solely on the issue of whether or
13 not counsel, the pro se litigant try to remove
14 counsel for strategic reasons but the courts must be
15 mindful of the possibility of misuse of the motion
16 for strategic reasons whether to create a delay or
17 to avoid any matter being heard on the matters. So
18 I deny those motions. That means, I don't know how
19 many other motions you may have or if all of your
20 motions are related solely to try to get them kicked
21 out of the case, but I'm denying the motions to kick
22 them off the case. I think then that that means of
23 motion themselves are what's still pending unless
24 I'm supposed to determine that motion shouldn't be
25 heard or maybe -- well, I'll hear them all in

1 connection with the motion for default. Is that
2 another motion pending?

3 MS. TONEY: Yes, sir.

4 THE COURT: To hold the other side in
5 default? So that's ---

6 MS. TONEY: Your Honor.

7 THE COURT: I have to shift into trying to
8 figure out the interconnection between the federal
9 rules and the civil, state rules, and all of that so
10 I mean, I'll have to study that in contemplation of
11 whether or not the motions themselves are
12 meritorious. Is there anything else I'm supposed to
13 hear on the default issue?

14 MR. O'CONNOR: Your Honor, our motions are
15 motions to dismiss the Complaint so, you know, and I
16 filed in opposition to her motion to default and so
17 I've addressed that to some extent already but
18 that's all I have. My motion to dismiss has not yet
19 been heard.

20 THE COURT: Mr. Fata.

21 MR. FATA: Your Honor, we have a motion
22 12(b)(6). Also, we have a motion for summary
23 judgment that needs to be heard. We filed
24 affidavits and served them on Ms. Toney from the
25 treasurer and tax, or tax collector and the tax

1 assessor.

2 THE COURT: What's the basis of your
3 motion?

4 MR. FATA: For?

5 THE COURT: The summary judgment.

6 MR. FATA: Well, first of all, the
7 County, the County was not properly served. You
8 can't serve the tax collector. You can't serve the
9 Planning and Zoning person. So there was no service
10 process to begin with. And that's rule 4 ---

11 THE COURT: Who did she serve?

12 MR. FATA: She gave it to the treasurer
13 who is also tax collector, and she gave it to
14 Ms. Samuel who is the zoning and planning person.

15 THE COURT: And the rules provide she
16 should have done what?

17 MR. FATA: She should have served it upon
18 the chief executive officer or the clerk thereof
19 which would have been at the time of this I think
20 administrator was Allen Motkins and our clerk
21 counsel is Julie Atkinson. She served neither
22 party. So technically we're really not before the
23 court; however, out of abundance of caution I filed
24 a 12(b) (6) motion and I also filed an answer
25 alleging several defenses which I can address in

1 summary judgment that are set out in the affidavits.

2 THE COURT: I'm just trying to get a
3 glimpse of what it is. I thought I had a handle on
4 this until you all told me the tax sale was vacated
5 by consent.

6 MR. FATA: It was.

7 THE COURT: So what's, what's the basis
8 for your motion?

9 MR. FATA: Well, paragraph or allegation
10 ten of her complaint alleges that the tax collector
11 -- or she calls it the treasurer so that's
12 technically in this capacity as the tax collector --
13 prevented the sale of delinquent property in 2012.
14 Delinquent tax sale would actually have been in
15 2013. And she also alleges that the tax assessor
16 mis-mapped the property, which they did. What was
17 foreclosed was -- and it's all set out in the
18 affidavit of the tax assessor. Let me get that out
19 so I can go... Tax map number 30-2-44 was mapped by
20 the tax assessor and it included block 11, 10, 11,
21 12, and 14, which was incorrectly mapped. Only lot
22 14 was foreclosed.

23 THE COURT: So you're agreeing that it was
24 incorrectly mapped.

25 MR. FATA: Incorrectly mapped in the tax

1 assessor's office.

2 THE COURT: All right.

3 MR. FATA: Absolutely, we agree it was
4 incorrect, the tax map was wrong. Ms. Toney brought
5 that to the attention of the tax collector who had
6 advertised that tax map designation for delinquent
7 taxes so he had advertised lots 10, 11, 12, and 14
8 for delinquent taxes.

9 THE COURT: So is that part of why you all
10 agreed to vacate the sale or is that something new?

11 MR. FATA: No, sir, that's a long story.

12 THE COURT: Okay, well, ---

13 MR. FATA: Anyway ---

14 THE COURT: Well, wait a minute, hold your
15 point there. I don't know that -- obviously we have
16 to go to lunch and I'm not just trying to get a
17 short understanding. That sounds a little more
18 complicated getting the short end of the stick.

19 MR. FATA: It is a little more
20 complicated. The affidavits are on file and it's --
21 and the only thing she had alleged is that the
22 County mis-mapped the property, and of course, under
23 the rules under the tort claims act, the County is
24 not liable for errors in assessing property. And I
25 had it out. I got everything jumbled up; I don't

1 know what I did with the -- I had the statute out
2 Judge, I apologize for losing it. Here it is.
3 15-78-60, exemptions to waiver of immunity
4 subsection 11, assessment or collection of taxes or
5 special assessments or enforcement of tax law.

6 THE COURT: They can't be held liable for.

7 MR. FATA: Cannot be held liable, and
8 that's what she alleges we did.

9 THE COURT: All right. So I've got yours
10 then. That's tells me what I need to know for the
11 moment from your perspective. And why are you
12 trying to get your notes out?

13 MR. O'CONNOR: Your Honor, very briefly,
14 this is an effort to re-litigate the 2005
15 foreclosure action which has been ruled upon,
16 adjudicated, and ended, not for the second time but
17 actually for the third time. This same property,
18 729 Chapman Street in Bishopville, was the subject
19 of a 2005 foreclosure action, 2005-CP-31 at 169. It
20 was --

21 THE COURT: Okay. I read all of that.
22 It's foreclosed on, appealed --

23 MR. O'CONNOR: South Carolina.

24 THE COURT: --federal court, state court,
25 saying that it's been foreclosed on so res judicata,

1 we shouldn't be doing it all over again.

2 MR. O'CONNOR: Res judicata and collateral
3 estoppel, yes, sir.

4 THE COURT: All right, so we're going to
5 lunch now to give you time to figure out your
6 response, and we'll get you all a few more minutes
7 and get back at 2:30 before we start with the jury.

8 MS. TONEY: Your Honor.

9 THE COURT: Yes, ma'am.

10 MS. TONEY: These are different causes.

11 This is a tax ---

12 THE COURT: You'll get ---

13 MS. TONEY: There's ---

14 THE COURT: When we come back at 2:30 you
15 can give me an argument, but we haven't had lunch
16 yet.

17 MS. TONEY: And also ---

18 THE COURT: I haven't had breakfast yet or
19 lunch. I got to get something to eat. My brain is
20 gone. We'll hear you when we get back. You'll have
21 time to get your argument down more concisely.

22 MR. FATA: What time do we come back,
23 Judge?

24 THE COURT: At 2:30. The same time the
25 jury is coming back. We're going to hear from you

1 all before dealing with them.

2 (Whereupon, a lunch break was taken.)

3 THE COURT: Where's Ms. Toney?

4 (There was no response.)

5 THE COURT: All right, we'll start with
6 the jury folks then.

7 (Break in these proceedings.)

8 (WHEREUPON, counsel approached the
9 Bench for an off-the-record discussion.)

10 THE COURT: Whatever happened to Ms.
11 Toney?

12 MR. FATA: I do not know. I just asked
13 the clerk. I thought it was clear we would be here
14 at 2:30.

15 THE COURT: Yeah, I told her to be here at
16 2:30. She just left, huh? So how do we handle that
17 kind of case, Mr. Fata?

18 MR. FATA: Well, I would move that you
19 grant my motion for summary judgment.

20 MR. O'CONNOR: I would move you grant my
21 motion to dismiss, Your Honor.

22 THE COURT: I don't know what to say. I
23 mean, I can get Mr. Fata back on a moment's notice,
24 but Mr. O'Connor is all the way in Charleston.

25 MR. O'CONNOR: I feel we'd be prejudiced

1 to have to come back another time, Your Honor.

2 THE COURT: Well, we're not worried about
3 being prejudiced. I mean she, you know, I'll hear
4 the case. I want to hear the full case and be done
5 with it, but you know, I don't know what's up with
6 her.

7 What happened to her, Ms. Sheryl?

8 (Clerk approached the Bench for an off-the-record
9 discussion.)

10 THE COURT: We took a lunch break and she
11 disappeared on us.

12 MR. FATA: Judge, I don't know what to
13 tell you. I would like for you to do my motion,
14 grant my motion. Sometimes that cost more trouble
15 than it's worth.

16 THE COURT: Mr. O'Connor, I'd like for you
17 to brief that issue on the issue of, if you remove a
18 case from state court to federal court and file a
19 motion to dismiss for lack of, I mean a 12(b) motion
20 in federal court, when the case is remanded to state
21 court that you do not have to file pleadings to
22 preserve the motion, to timely file pleadings to
23 preserve the issue. I need to have that issue
24 briefed a little bit.

25 MR. O'CONNOR: Yes, sir.

1 THE COURT: By you. And then assuming you
2 prevail on that, then I would like to have a
3 proposed order from both sides on the summary
4 judgment so whatever, or motion to dismiss.

5 MR. FATA: I made both, Judge, and I made
6 12(b)(6) in the beginning. I answered and I made
7 summary judgment supported by affidavits.

8 THE COURT: You didn't make the res
9 judicata argument, or did you?

10 MR. FATA: Well ---

11 THE COURT: Or collateral estoppel?

12 MR. FATA: As far as I'm concerned I set
13 up as a defense, but we weren't in this case before.
14 The case that she has against -- what's the other
15 name of the bank is?

16 MR. O'CONNOR: South Bank.

17 MR. FATA: South Bank. We don't have any,
18 anything to do with it.

19 THE COURT: Okay. All right, you can send
20 me a proposed order as well, separate proposed
21 orders. We'll address them all. We'll address that
22 federal court. You said there's no authority saying
23 you can't do it; but you seemingly need something to
24 say that you can.

25 MR. O'CONNOR: I'll be happy to address

1 it.

2 THE COURT: You can -- they're the one
3 that grabbed the door. He's ---

4 MR. O'CONNOR: I'm fairly confident that
5 you can't be re-exposed to a default situation when
6 you've already filed a motion for dismiss and
7 haven't ruled.

8 THE COURT: But we're in a different
9 court, I don't know about all that. I need to --
10 it's, you know, that's why you need to brief it so
11 I'll ---

12 MR. O'CONNOR: Yes, sir.

13 THE COURT: All right, very good.

14 MR. O'CONNOR: Thank you, Your Honor.

15 (Court on was adjourned and resumed
16 on December 1, 2015.)

17 THE COURT: Okay. Ms. Tony, you didn't
18 come back yesterday, what happened?

19 MS. TONEY: I started feeling kind of
20 strange and funny, shortness of breath. I went to
21 Health South to get my blood pressure checked and my
22 blood pressure was 194 over 147. Heart rate was ---

23 THE COURT: Did you have other matters
24 that you wanted to argue on the motion that was
25 made, was ---

1 MS. TONEY: I didn't ---

2 THE COURT: Pardon?

3 MS. TONEY: I didn't understand.

4 THE COURT: Did you have more that you
5 wanted to say before I ruled on those issues?

6 MS. TONEY: Yes, sir, I still have, I have
7 three more motions.

8 THE COURT: Three more motions?

9 MS. TONEY: Yes, sir.

10 THE COURT: All right. I'm gonna
11 reschedule those for Thursday morning at 9:00,
12 9 a.m. Thursday morning.

13 MS. TONEY: Okay.

14 THE COURT: We'll see you then.

15 MS. TONEY: Okay. May I please, sir,
16 that's the only copy that I have.

17 THE CLERK: I'll make her a copy of
18 that.

19 THE COURT: She'll give you the original.
20 We'll see you Thursday at 9.

21 MS. TONEY: Okay, thank you.

22 (Court was adjourned and resumed on December 1,
23 2015.)

24 THE COURT: Okay, Ms. Tony, you didn't
25 come back yesterday, what happened?

1 MS. TONEY: I started feeling kind of
2 strange and funny and shortness of breath. I went
3 to Health South to get my blood pressure checked and
4 my blood pressure was 194 over 147 and my heart rate
5 was —

6 THE COURT: Did you have other matters
7 that you wanted to argue on the motion that was made
8 was —

9 MS. TONEY: Pardon?

10 THE COURT: Pardon?

11 MS. TONEY: I didn't understand.

12 THE COURT: Did you have more that you
13 wanted to say before I ruled on those issues?

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15 three more motions.

16 THE COURT: Three more motions?

17 MS. TONEY: Yes, sir.

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19 reschedule those for Thursday morning at 9:00,
20 9 a.m. Thursday morning.

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24 that's the only copy that I have.

25 THE CLERK: I'll make her a copy of that.

1 THE COURT: She'll give you the original.
2 We'll see you Thursday at 9.

3 MS. TONEY: Okay, thank you.
4

5 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *
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C E R T I F I C A T E O F R E P O R T E R

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE }

I, FRANCES B. RAY, Registered Professional Reporter (RPR), court reporter for the State of South Carolina, Third Judicial Circuit, do hereby certify that the foregoing proceeding is a stenographic report and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

I further certify that I am neither counsel for, nor related to nor employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South Carolina, this 3rd day of January, 2017.

Frances B. Ray

FRANCES B. RAY, RPR

1 STATE OF SOUTH CAROLINA)

2 COUNTY OF LEE)

COURT OF COMMON PLEAS
2013CP3100321

3
4 Laura Toney,)

5 Plaintiff,)

6 vs.)

TRANSCRIPT OF RECORD

7 LaSalle Bank National
8 Association, et al.,)

9 Defendant.)

March 30, 2016
Bishopville, South Carolina

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11
12
13 B E F O R E:

14 THE HONORABLE CLIFTON B. NEWMAN, JUDGE.
15

16
17 A P P E A R A N C E S:

18
19 SEAN A. O'CONNOR, ESQ.
20 Attorney for the Defendants LaSalle Bank and
Altisource Homes
21 PAUL M. FATA, ESQ.
Attorney for the Defendant Lee County
22
23
24

25 DEBORAH M. McCURDY, RPR
Official Court Reporter

1 INDEX OF WITNESSES

2
3
4 (WHEREUPON, no witnesses were called
5 during these proceedings.)
6
7
8
9

10 EXHIBITS

11
12
13 (WHEREUPON, no exhibits were introduced
14 during these proceedings.)
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1 MARCH 30, 2016

2 THE COURT: I sent out a notice of hearing --
3 the clerk sent a notice of hearing and schedule.
4 And Mr. O'Connor said he had a conflict with the
5 hearing being on tomorrow, and so the hearing was
6 moved until today. And the clerk sent out a notice
7 rescheduling it for today.

8 We got a letter from Ms. Toney saying that she
9 couldn't be available Monday, Tuesday, or
10 Wednesday, and that the hearing should not be set
11 at the convenience of Mr. O'Connor's personal
12 vacation schedule. She didn't specify anything as
13 to why she would not be available Monday, Tuesday,
14 or Wednesday. Then so no response was given to
15 those e-mails.

16 And then today, we've gotten a few e-mails
17 from her saying she's -- first, she was at the
18 hospital or going to the hospital, and now she is
19 in the hospital, she said. And the Court is here
20 ready to proceed and to hear anything anyone has to
21 say pursuant to these issues.

22 Mr. O'Connor?

23 MR. O'CONNOR: Yes, sir, Your Honor. If it
24 please the Court? I guess I'll start first.

25 THE COURT: All right.

1 MR. O'CONNOR: There are a series of motions
2 that are pending that -- and we would ask that Your
3 Honor take them all up and dispose of everything
4 that is pending today. I guess the first one that
5 I will address -- and this is the one that we
6 haven't briefed -- and that is that my clients are
7 in -- we oppose the motion to have Your Honor
8 recuse himself from the case.

9 I don't know if you got -- that is something
10 that you were planning to take up today, but to the
11 extent that you are or wish to hear from me on
12 behalf of my clients as to that motion, we oppose
13 it on the grounds that, you know, it hasn't been
14 supported and we have not heard anything from
15 Ms. Toney, the moving party, that would suggest
16 that that is a valid or appropriate motion.

17 I respectfully, to her and to the Court, would
18 suggest that it is consistent and it is in line
19 with what we see as a pattern by Ms. Toney of
20 filings that lack merit, that are designed and
21 intended to extend out this process and to take
22 advantage of the court system and do everyone
23 involved a disservice by expending resources and
24 causing inordinate delays.

25 So we think that that's a fair

1 characterization of that particular motion, that it
2 lacks merit, and that it should be denied, and that
3 Your Honor should continue to preside over the case
4 and retain jurisdiction over it until its final
5 disposition at the trial court level.

6 And I'd be happy to address anything further
7 if Your Honor has any questions or needs to hear
8 anything further about that, or if you'd like to
9 hear from Mr. Fata about that motion.

10 THE COURT: Mr. Fata?

11 MR. FATA: Your Honor, I agree with Mr.
12 O'Connor. I don't think any reason has been
13 articulated for you to recuse yourself, and, of
14 course, I cannot think of any reason. So we join
15 Mr. O'Connor in opposition to that motion.

16 THE COURT: All right. Well, as I read the
17 motion by Ms. Toney, of course that is a motion to
18 recuse based on the fact that some years ago I also
19 presided over another foreclosure case in which she
20 was the Defendant. And those are the only reasons
21 stated in the motion that I can think of. And I
22 don't believe the fact that a judge has presided
23 over a previous case involving the same parties
24 merits a recusal.

25 Of course, Judge James in this case recused

1 himself based on having, I think, some involvement
2 with Ms. Toney prior to him becoming a judge. I
3 have presided over many matters involving the same
4 party over a period of time. And the fact that I
5 might have previously presided over a case
6 involving the party does not give rise to the
7 grounds of recusal. So I deny her motion for
8 recusal.

9 The issue of whether or not the whole thing
10 should proceed in Ms. Toney's absence is one I'm
11 happy to hear from everybody on. Of course, the
12 last time we had this hearing scheduled and we
13 began the hearing, during lunchtime the parties
14 were to return, and either Ms. Toney didn't return
15 or had a panic attack, or something, goes to the
16 hospital, and she never came back.

17 I had a hospital person to come -- a clinic
18 person to come, not a hospital, a clinic person to
19 come to try to inquire as to whether or not they
20 were of the opinion that Ms. Toney had a real
21 disability.

22 And I think the lady from the clinic was very
23 apologetic about writing something. She didn't
24 know what she was getting into, and she said she
25 would never write such a clinic note again without

1 having a legitimate belief to believe that they
2 were disabled. And I believe she stated that on
3 the record that she was -- she wasn't on the
4 record, okay. Well, I had her come here to explain
5 why she would write a note to say someone is
6 disabled from coming to court, in effect. And she
7 said it wasn't her intent, that she would never do
8 that again. So that was a local clinic.

9 Now, we have a female -- after Ms. Toney said
10 she was going to be unavailable, I guess due to
11 previous commitments, without specifying what those
12 commitments were, and having not being successful
13 with that, we got these e-mails today saying she
14 has been admitted to the hospital and the impact it
15 would have on proceeding in her absence.

16 I will be glad to hear from you all on that.

17 MR. O'CONNOR: Thank you, Your Honor. If it
18 please the Court, I'll address that first.

19 I would note for the record -- and this is
20 something that I've mentioned in at least one
21 filing, the most recent being my supplemental
22 memorandum that I e-filed earlier this week -- and
23 that is that in addition to today's absence and
24 claim of some type of medical issue, coupled with
25 the incident on November 30, which Your Honor just

1 described, it is also worthy of note that a similar
2 circumstance occurred even a third earlier time in
3 this same case. And it is at Page 7 of my
4 supplemental memorandum.

5 I describe that where, on February 13 of 2015,
6 more than a year ago, these same motions had been
7 scheduled to be heard here in this courtroom. And
8 two days before that, Ms. Toney contacted Lee
9 County Clerk's Office by letter dated February 11
10 and requested a continuance on the basis that she
11 was under a doctor's care for illness, an
12 unspecified illness, and asked that the hearing
13 would be continued, and it was continued.

14 And so without making any characterization or
15 giving any subjective opinion about the merits of
16 her claim that she has, you know, these sudden
17 medical maladies, I would just observe that it has
18 happened a number of times, evidently continues to
19 happen, and so I think that the Court can draw its
20 own conclusions as to whether that is valid and
21 should be received as legitimate and truthful, or
22 if it fits a pattern of manipulation and abuse and
23 essentially just employing tactics aimed at delay
24 and frustrating the Court's and the Defendant's
25 efforts to have these motions heard.

1 And I know that -- you know, this case was
2 filed in 2013 and we have been trying ever since
3 then to get these motions heard. And the reason
4 they haven't been -- although there have been some
5 other factors, including the recusal of Judge James
6 and the fact that they don't have court here in
7 Bishopville very often, but much of it has been
8 these delays brought about by Ms. Toney's claims of
9 sudden illness. But I also note that these sudden
10 illnesses have not prevented her from, you know, a
11 volume of filings, a relentless and constant and
12 very heavy volume of filings, so she is somehow
13 able to find the energy and the capability and the
14 wherewithal to do that, yet when it comes time to
15 go to court and have the motions heard, then
16 suddenly, conveniently, she is not able to appear.

17 And so with that, Your Honor, I'm very weary
18 of the idea that -- you know, I would expect that
19 if there is a ruling adverse to Ms. Toney, that
20 this is going to be appealed and such. And I don't
21 want my clients to be put in a position to where
22 she is not able to have her day in court, but my
23 suggestion to the Court as to that -- and, of
24 course, it is entirely up to Your Honor in your
25 discretion, but that she be allowed to respond in

1 writing to any arguments that are made today and
2 any rulings that Your Honor might make, and that
3 maybe will protect her position and, from my
4 clients' perspective, would serve to undermine any
5 argument that she might make -- which I fully
6 expect she would -- that she was prevented from
7 being able to be heard today.

8 So to sum up our position, we definitely would
9 like the hearing to go forward. I'd like to be
10 able to argue all the motions today and have Your
11 Honor either rule on them or, at the very least,
12 take them under advisement to give Ms. Toney an
13 opportunity to respond.

14 But what we do not think should happen, given
15 the history and the totality of the circumstances,
16 is for there to be another continuance based on her
17 e-mails today.

18 I would point out something that I know Your
19 Honor is already aware of, and that is that her
20 e-mails today do not constitute a formal motion.

21 As I understand the procedure, as Your Honor
22 described it, you know, her written filings, if
23 they were that, to the Court that she was
24 unavailable Monday, Tuesday, and Wednesday of this
25 week, my understanding of that is that that was a

1 motion for a continuance, or at least it was
2 considered as such, and that that has been denied
3 because she did not support it with anything real
4 that constituted a conflict. So that is one thing.

5 But as to the e-mails of today, Your Honor, I
6 would respectfully submit that those be determined
7 to be not a formal motion and that they cannot be
8 considered as a basis to continue this.

9 However, again, protecting my clients, I would
10 want her to have the opportunity to respond so that
11 at least she will not be able to utilize that to
12 say that these were improper rulings -- if they
13 would be adverse to her, these would be improper
14 rulings because she was not able to appear and have
15 her day in court as to these motions.

16 And so shall I let Mr. Fata weigh in on that
17 one before we move on to the next?

18 THE COURT: Yes, sir.

19 MR. O'CONNOR: Thank you.

20 MR. FATA: Your Honor, I agree, it appears
21 that every time she has got -- Ms. Toney has court,
22 every time court is scheduled, she comes down with
23 some sort of condition. Based upon what we saw
24 last time in court and your interview of the
25 physician who had given her that excuse --

1 THE COURT: She was a technician of some sort.

2 MR. FATA: Technician. -- you would surmise
3 that she is probably malingering today. Because I
4 believe if I was hospitalized prior to coming to a
5 hearing, I could have a doctor e-mail something
6 saying what the diagnosis is and why I'm there, not
7 that I'm there. But, being Pro Se, she might not
8 have thought about that.

9 So I agree with Mr. O'Connor that I would like
10 for the hearing to go forward today. She can order
11 a transcript. And one day after she reads the
12 transcript, she can have an opportunity to respond
13 to whatever is brought up today.

14 THE COURT: All right. Well, I deny the
15 motion for continuance based on what appears to be
16 a pattern of abuse by Ms. Toney and attempting to
17 prevent the Court from hearing this matter. Also,
18 based on her failure to show good cause for a
19 continuance and comply with Rule 40(i) of the Rules
20 of Civil Procedure. So the motion for a
21 continuance is denied. That is the motion -- she
22 e-mailed a motion for continuance and protective
23 order. Both are denied. And the e-mails today
24 requesting -- verbally requesting -- a
25 continuance -- not verbally, but through e-mail,

1 that motion is denied as well. There is no showing
2 per Rule 40(i), no good cause has been shown per
3 that rule.

4 MR. O'CONNOR: Thank you, Your Honor. If it
5 please the Court, the way I believe it makes most
6 sense, I've got two motions that my clients, who
7 have been characterized in the pleadings as LaSalle
8 Bank and Altisource Homes, are seeking a ruling
9 from Your Honor.

10 And that is that Ms. Toney has filed a motion
11 to put those parties into default, and those same
12 parties have before the Court a motion to dismiss
13 Ms. Toney's lawsuit in its entirety.

14 So I would suggest to Your Honor and request
15 that the most logical way to proceed is to address
16 the default first, so I'd like to do that, if that
17 please the Court.

18 THE COURT: All right.

19 MR. O'CONNOR: So, Your Honor, with respect to
20 the motion for default by Ms. Toney, it would be
21 useful to briefly describe the timeline that is
22 relevant.

23 And that is that the Plaintiff filed the
24 summons and complaint in this action on November 13
25 of 2013. It was timely removed to the United

1 States District Court for the District of South
2 Carolina on the 30th day, which is proper under the
3 U.S. Code, and that was on December 13 of 2013.

4 And this is all part of the public record on Pacer.

5 And so then under Rule 81 of the Federal Rules
6 of Civil Procedure, which were, you know, governing
7 at that time with the case having been removed, the
8 Defendants then filed a motion to -- the Defendants
9 being my client, LaSalle Bank and Altisource --
10 filed a motion to dismiss in U.S. District Court on
11 December 20th, 2013. And that is proper under Rule
12 81(2)(c)(2) of the Federal Rules of Civil
13 Procedure. And that is the timeline that is
14 applicable that makes it clear that two key points
15 that refute what Ms. Toney is arguing in her effort
16 to put my clients in default. She claimed that the
17 removal was untimely. It was. And she claimed
18 that our responsive pleading was not timely. It
19 was. And both of those are part of the record in
20 the U.S. District Court on Pacer.

21 And a couple of other things that are highly
22 relevant to that issue, Your Honor, are that Ms.
23 Toney claims that we're in default because we
24 didn't file an answer. That is wrong because --
25 and I've got that. I filed a memo on this very

1 issue. In fact, 'if Your Honor will recall, on
2 November 30th, 2015, you had instructed me, you
3 said, Mr. O'Connor, please submit to me a
4 supplemental memorandum on the issue of default,
5 which I did. And that was filed the next day,
6 actually on December 1 of 2015. And so I'm
7 referring actually to what I wrote in that motion.

8 And on Page 2 of that motion, I've got a
9 footnote numbered Footnote 2, and I highlighted
10 some language at the very bottom of the footnote
11 which comes directly from Rule 12(b) of the South
12 Carolina Rules of Civil Procedure, which is at
13 issue in this motion for default by Ms. Toney. And
14 that bold-faced language that I emphasized there
15 states:

16 A motion making any of these defenses
17 shall be made before pleading if a
18 further pleading is permitted.

19 So, right there, that indicates right in Rule
20 12 that if you're going to file a motion to
21 dismiss, that's got to be filed before you even
22 file an answer.

23 And then you couple that, Your Honor, with the
24 language under Rule 12(b)(4) -- and this is the
25 same in both the Federal Rules of Civil Procedure

1 and the South Carolina Rules of Civil Procedure,
2 which describes and explains what the requirement
3 is of filing an answer once you have a motion to
4 dismiss pending -- and that language, Your Honor,
5 has been quoted in my memo, but I also sent an
6 e-mail to Your Honor the following day, on
7 December 2. And even though that was an e-mail, I
8 made that part of the record by including that as
9 an exhibit to the supplemental memorandum that I
10 e-filed earlier this week.

11 So, you know, in reading straight from Rule
12 12, 12(b)(4), it states -- the subject line of that
13 subsection says, Effect of a motion. And I quote:

14 Unless the Court sets a different time,
15 serving a motion under this rule alters
16 these periods as follows.

17 And I would submit to the Court that "these
18 periods" refers to, you know, when you have to file
19 your answer.

20 And then under 12(b)(4), Subsection (a)
21 states, and I quote:

22 If the Court denies the motion or
23 postpones its disposition until trial,
24 the responsive pleading must be served
25 within 14 days after notice of the

1 Court's action.

2 So what that stands for, Your Honor, and there
3 is no contrary authority, if you've got a motion to
4 dismiss pending that hasn't yet been ruled on, you
5 don't have to file an answer. You just don't.
6 Like if you deny my motion, I've got to file one in
7 14 days. But even though it has been all the way
8 since 2013, under the rules, both Federal Rules of
9 Civil Procedure and South Carolina Rules of Civil
10 Procedure, and further removal timeline, there was
11 never an obligation and still is not an obligation
12 for my clients to have ever filed an answer in this
13 case. And there will not be an obligation until
14 and unless Your Honor were to deny our motion under
15 Rule 12(b). So that's that part of it.

16 THE COURT: To deny your motion to dismiss --
17 to deny -- which motion are you asking me to deny?

18 MR. O'CONNOR: Yes, sir. In this argument,
19 I'm arguing that you should deny Ms. Toney's motion
20 to put my clients into default -- oh, oh, you're
21 asking which -- denial of which motion. Yes, sir,
22 like if you were to -- as to my motion to dismiss,
23 if you were to rule in favor of Ms. Toney and deny
24 my motion to dismiss, that would trigger for the
25 first time an obligation that I file an answer on

1 behalf of my clients within 14 days of my receiving
2 notice of your denial of my motion to dismiss.

3 THE COURT: So tell me again what motion you
4 have pending that stays or requires an answer.

5 MR. CONNELL: Yes, sir. I must not have
6 explained that well enough for you to understand.
7 So, yes, sir.

8 I've got a motion to dismiss, which, again,
9 that language in Rule 12(b) that I highlighted on
10 Page 2 of my motion addressing the default issues
11 that I filed December 1 of 2015, it says:

12 A motion made with any of these defenses
13 shall be made before pleading if further
14 pleading is permitted.

15 Essentially, a motion to dismiss is a
16 responsive pleading that stays the obligation to
17 file an answer.

18 And then, again, Rule 12(b)(4) of both the
19 federal rules, which were applicable before remand,
20 and now the state court rules, which are now
21 applicable, they both read the same, and it says:

22 Effect of a motion. Unless the Court
23 sets a different time, serving a motion
24 under these rules alters these periods.

25 And, again, these periods of -- what is up

1 above that is where it says you have to file an
2 answer in 30 days, so the periods are altered. And
3 what Subsection (a) of 12(b)(4) states, that if the
4 Court denies the motion -- because what's not said
5 there is if the Court grants the motion, then
6 you're done and, you know, her complaint is
7 dismissed. But it says that:

8 If the Court denies the motion to
9 dismiss or postpones its disposition
10 until trial, the responsive pleading
11 must be served within 14 days of notice
12 of the Court's action.

13 So the way that reads and has been interpreted
14 is that if you have got a motion to dismiss
15 pending, there is not any obligation to also file
16 an answer. And that is because it wouldn't make
17 sense -- Subsection 12(b)(4)(a) would not make
18 sense if you also had to require an answer
19 because -- or if you also had to file an answer,
20 because it is telling you that you do not have to
21 file one until and unless the Court either denies
22 your motion to dismiss or holds it over until
23 trial. And then if that happens, then you've got
24 14 days to file. Does that make sense?

25 THE COURT: After being a member of the bar

1 for 40 years, I understand the rule.

2 MR. O'CONNOR: Yes, sir.

3 THE COURT: The question is what motion to --
4 what motion -- pending motions were you referring
5 to? And you are referring to your motion to
6 dismiss her --

7 MR. O'CONNOR: Her complaint in its entirety
8 against my clients, yes, sir.

9 THE COURT: Based on what? Not a long speech,
10 but based on what?

11 MR. O'CONNOR: Okay. I hadn't gotten to that
12 yet because I was going to address --

13 THE COURT: That's not my question that I
14 asked you, and you went back to reading.

15 MR. O'CONNOR: Oh, I'm sorry. I misunderstood
16 you.

17 THE COURT: What motion do you have pending?
18 You have a motion to dismiss based on what?

19 MR. O'CONNOR: Oh, yes, sir. Yes, sir. I
20 apologize. I misunderstood your question.

21 THE COURT: I mean, the lawsuit itself -- I'm
22 coming out of criminal court in Camden, so I've
23 got -- you know, I didn't spend all night thinking
24 about this case.

25 MR. O'CONNOR: Yes, sir. Yes, sir. I

1 apologize for confusing you. That's my fault
2 entirely.

3 THE COURT: I'm not confused. I'm good.

4 MR. O'CONNOR: Okay.

5 THE COURT: Did you file -- did you initiate
6 the lawsuit or Ms. Toney?

7 MR. O'CONNOR: Ms. Toney initiated the lawsuit
8 on November 13 of 2013.

9 THE COURT: She filed a lawsuit and you filed
10 a motion to dismiss?

11 MR. O'CONNOR: Yes, in federal court, yes,
12 sir.

13 THE COURT: In federal court?

14 MR. O'CONNOR: Yes, sir.

15 THE COURT: And federal court has ruled on the
16 motion to dismiss?

17 MR. O'CONNOR: No, sir, never has. The
18 federal court remanded the case. And an argument
19 that Ms. Toney has made -- and I addressed this in
20 my default brief as well -- without any support,
21 she has made the argument that somehow I had an
22 obligation to somehow file something in this court
23 in order to keep my clients out of default.

24 That obligation does not exist and there is --
25 I put authority in my brief that covers that. You

1 know, we did eventually file that amended motion
2 because I wanted to cite all the state authority,
3 but my point is, and what has been argued in the
4 brief per Your Honor's request and direction, is
5 that there is no obligation for me to have refiled
6 anything in this court in order to stay out of
7 default. In other words, if I filed it in federal
8 court timely, which the record --

9 THE COURT: And the reason I requested that is
10 I'm a state court judge.

11 MR. O'CONNOR: Yes, sir.

12 THE COURT: And I don't spend my time
13 researching federal law.

14 MR. O'CONNOR: Yes, sir.

15 THE COURT: There's no state authority on the
16 point you are talking about, as far as I know.

17 MR. O'CONNOR: Yes, sir, there is -- in my
18 brief on default, I provided Your Honor some
19 substantial authorities that have not been
20 contradicted. And those are at Pages 4 through 6
21 of the brief that I filed December 1 of 2015.

22 THE COURT: You say it is citing state --
23 South Carolina state court authority?

24 MR. O'CONNOR: No, sir, they are not. There
25 is not any South Carolina state court authority

1 directly --

2 THE COURT: I just said that. That's the
3 reason I requested that you brief it because
4 there's no South Carolina state authority --

5 MR. O'CONNOR: Yes, sir.

6 THE COURT: -- that we can look to for a quick
7 answer to this question.

8 MR. O'CONNOR: Yes, sir, I agree and I
9 acknowledge that. I would simply argue on that
10 point that these authorities -- and there are a
11 number of them -- other states and other federal
12 jurisdictions are directly on point as to this
13 narrow issue, which is if you file a timely motion
14 to dismiss in state court and then the case gets
15 remanded, do you have to file something again in
16 state court to keep yourself out of default, and
17 all these courts have said no.

18 THE COURT: Well, there may be state authority
19 following this case, it is just unfortunate that it
20 might be with a self-represented litigant who is in
21 the hospital at the time the case is argued in
22 court.

23 MR. O'CONNOR: Yes, sir. Thank you, Your
24 Honor. So shall I move on to --

25 THE COURT: Yes, sir, go ahead.

1 MR. O'CONNOR: Move on to my motion to
2 dismiss? Yes, sir, Your Honor. So our motion to
3 dismiss is based on res judicata and failure to
4 state a claim.

5 And the res judicata argument is very simple,
6 Your Honor. There are three elements from the
7 doctrine of res judicata to be applicable. It has
8 got to be a final judgment on the merits of a prior
9 suit, an identity of the cause of action in both
10 the earlier and later suit, and the identity of the
11 parties or their privies in the two suits. So all
12 three of those elements, Your Honor, are certainly
13 applicable here.

14 First, this Court has already -- this case has
15 already been dismissed by the trial court in this
16 very jurisdiction, the Court of Common Pleas for
17 Lee County, way back in 2007. That went up to the
18 Court of Appeals and up to the South Carolina
19 Supreme Court, and my clients prevailed.

20 THE COURT: Give me a brief summary of that.

21 MR. O'CONNOR: Yes, sir. The property was a
22 foreclosure action that was initiated by my clients
23 on 729 Chatham Street here in Bishopville. My
24 clients prevailed at the trial court and the
25 property was sold. And Ms. Toney appealed that to

1 the South Carolina Court of Appeals. The South
2 Carolina Court of Appeals affirmed the trial court.
3 And then she appealed that to the South Carolina
4 Supreme Court, and the South Carolina Supreme Court
5 denied cert.

6 THE COURT: So why are we still here about
7 this case?

8 MR. O'CONNOR: Well, I would respectfully
9 submit, Your Honor, it is because Ms. Toney
10 continues to file the same case over and over
11 again. Because that doesn't even describe the full
12 procedural history. While her position for cert
13 was before the South Carolina Supreme Court, she
14 went and filed essentially the same arguments in a
15 suit in U.S. District Court. The magistrate judge,
16 Joseph McCrorey, filed a report of recommendation
17 rejecting all her claims and dismissing the suit.
18 That was adopted in full by Judge Margaret
19 Seymour's order dismissing the lawsuit. This was
20 around 2011, 2012. She appealed that to the Fourth
21 Circuit U.S. Court of Appeals, which affirmed the
22 trial court. And then she appealed -- then she
23 applied for a writ of certiorari to the U.S.
24 Supreme Court in Washington, D.C. And while that
25 petition for cert was pending is when she filed the

1 suit that we're here on today, Your Honor.

2 And so this case has been going on since 2005,
3 and it has been adjudicated unfavorable to
4 Ms. Toney in all respects and all aspects since
5 2007. And everything that has gone on since then,
6 both in the federal system and now back again in
7 the state court system, has been a continuous
8 relitigation of those same issues over and over
9 again for some nine years.

10 THE COURT: Well, why did it take -- why is it
11 taking nine years to complete a foreclosure? Is
12 that what y'all --

13 MR. O'CONNOR: No, sir, the foreclosure has
14 been completed. This is just a lawsuit that Ms.
15 Toney filed -- so is the one in federal court -- so
16 we have to defend these, but it is about the same
17 --

18 THE COURT: The property is now gone?

19 MR. O'CONNOR: It has been sold, Your Honor.

20 THE COURT: She is upset that you took her
21 property and is suing stemming from that?

22 MR. O'CONNOR: Evidently, Your Honor, yes,
23 sir.

24 So the suit in the U.S. District Court, as
25 well as the suit we're here on today, are just

1 lawsuits that she just went ahead and filed as a
2 Plaintiff against these parties.

3 THE COURT: Well, let me hear from Mr. Fata a
4 little bit, and then I'll come back to you.

5 MR. O'CONNOR: Yes, sir.

6 THE COURT: He likes to put things in
7 perspective.

8 MR. FATA: Thank you, Your Honor.

9 Your Honor, Lee County was not a party -- or
10 not Lee County, but the treasurer and the planning
11 and zoning division were not parties to this
12 original action. This thing was pending for a
13 number of years and went up to the U.S. Supreme
14 Court, and Lee County had nothing to do with it.

15 It was not until the action -- this action was
16 filed in November of 2013 that Lee County -- the
17 Lee County Treasurer and the Lee County Planning
18 and Zoning I guess Department were added as
19 parties. And so we're new to the ballgame.

20 And, of course, we have -- we were -- the suit
21 was filed November 13, 2013. The County was never
22 properly served. Of course, the parties are
23 improper. But Ms. Toney hand-delivered the summons
24 and complaint to Wayne Capell, the treasurer, and I
25 don't know who she delivered it to in planning and

1 zoning, but she said she hand-delivered it to them.

2 And, of course, part of our motion for summary
3 judgment is that according to Rule 4(6), service on
4 governmental entities, subdivisions, you have to
5 serve the chief executive officer or the clerk.
6 The county administrator or, I'm assuming, the
7 clerk of counsel neither have been served with
8 this. And when this was brought to Ms. Toney's
9 attention through the motions, she never has
10 reserved or attempted to reserve anyone.

11 So, technically, I don't think the treasurer
12 and the planning and zoning officials are before
13 the court. But out of an abundance of caution, I
14 filed a 12(b) motion requesting that the case be
15 dismissed because reading the complaint, the only
16 time she talks about the treasurer and the planning
17 and zoning official is in Subparagraph 10 where she
18 says that the county improperly mapped her track of
19 land, Lot 14. And I can go into at that. And the
20 treasurer, tax collector, and the tax assessor
21 filed affidavits. And I can go into that and
22 explain what the county did and how the county
23 hasn't done anything that would cause any damage to
24 her.

25 THE COURT: Well, while you're standing, I see

1 back in this file something called: Application
2 and Notice of Conflict of Interest, Violation of
3 Canon 1.7.

4 I assume that that's still pending before me,
5 both -- or not the -- I don't know if the
6 application is -- or I consider that to be a
7 motion -- but she's trying to get you kicked off
8 the case?

9 MR. FATA: Right. And she has also filed that
10 with the ethics committee. And it is true that --

11 THE COURT: Yes, that is -- so I ruled on --

12 MR. FATA: I think you ruled on that and said
13 that there wasn't a conflict, but I can address
14 that if you wish.

15 THE COURT: No, sir, I just wanted to be sure
16 that you are still in the clear as far as being on
17 the case or whether I need to rule any more on
18 that.

19 MR. FATA: No, sir. Like any small town firm,
20 both me and my partner have done deeds, wills,
21 various things of that nature, which have nothing
22 to do with this property and would not have given
23 us any undue advantage or would not have gained any
24 information that would be used to the detriment of
25 Ms. Toney in this matter, and I think Your Honor

1 ruled on that, along with Mr. O'Connor's, the
2 motion against him to recuse himself.

3 THE COURT: All right. Well, I grant the
4 motion to dismiss -- or grant the motion for
5 summary judgment. You filed it as a motion for
6 summary judgment?

7 MR. FATA: I later filed a motion for summary
8 judgment, and based on the fact that they weren't
9 served, also that -- even if we are properly before
10 the court, 58-78-60, Subparagraph 11, the state or
11 the applicable subdivisions have not waived their
12 immunity when it comes to assessments -- or
13 collection of taxes or special assessments or
14 enforcement of tax laws. So, you know -- and we
15 subsequently filed an answer reserving all rights
16 under our 12(b) motion just out of an abundance of
17 caution.

18 THE COURT: All right. Well, I grant the
19 motion as to your parties for all the reasons as
20 stated. And if you will prepare an order on that.

21 MR. FATA: Yes, sir, I will.

22 THE COURT: On your parties. And then we'll
23 go back to Mr. O'Connor's argument he was making.

24 MR. O'CONNOR: Thank you, Your Honor. I was
25 almost finished. And I'll address the reference to

1 res judicata, and that has been fully litigated,
2 and then if Your Honor has any questions about my
3 12(b)(6) motion or about the default issue.

4 But, you know, just very briefly, Your Honor,
5 this is all black letter law, the elements of res
6 judicata and final judgment has been entered on the
7 merits against the Plaintiff, which that has
8 happened. And as I went through in response to
9 Your Honor's question about the procedural history,
10 not only has it been fully litigated on the merits
11 against the Plaintiff, but it has happened twice,
12 once in state court and once in federal court, all
13 the way through to the top level of both of those
14 systems. So that element certainly has been
15 satisfied.

16 The second element of res judicata is that the
17 allegations contained in the complaint must stem
18 from the same set of facts that gave rise to the
19 Plaintiff's claim for relief in the prior cases.

20 Of course that has been satisfied because part
21 of this entire dispute since 2005 in all three of
22 the actions that Ms. Toney has filed is the issue
23 of my clients' entitlement to foreclose on the
24 property at 729 Chatham Street and Ms. Toney's
25 attempt to prevent that foreclosure. That is what

1 all three of those lawsuits, including the one that
2 is before the court today, have been about. And
3 so, you know, that is what her complaint is
4 premised on, is "her belief" -- and I'm quoting
5 from her complaint at Paragraph 3 -- "Her belief
6 that the foreclosure of the Plaintiff's property
7 was an illegal action." That's what she alleges.

8 And so that makes out the second element,
9 which is that we're talking about the same set of
10 facts:

11 And the third element of the res judicata
12 doctrine, Your Honor, is that the parties in the
13 case are the same as the prior cases. And that's
14 true, too. Ms. Toney is a party, as are my two
15 clients, LaSalle Bank and Altisource, LaSalle Bank
16 being the lienholder and Altisource being the loan
17 servicer.

18 And so the additional element, that is not one
19 of the numbered elements but which appears in all
20 the cases, is that the matter must have been raised
21 and fully litigated. In other words, it can't be
22 something where the earlier actions were dismissed
23 on some procedural grounds and not fully litigated.

24 And, of course, that additional element has
25 also been satisfied, Your Honor, because this case,

1 when it was in the state court system the first
2 time around starting in '05 was fully litigated at
3 the trial court level. She had an opportunity to
4 make filings and appear and do anything that she
5 wanted to do, say anything she wanted to say. And
6 that was decided against Ms. Toney and in favor of
7 my clients at the proper levels. She took it all
8 the way up to South Carolina Supremes. Her
9 arguments were rejected.

10 And so all of these issues have been fully and
11 fairly raised and litigated, Your Honor. And so
12 that fully satisfies, we contend, the doctrine of
13 res judicata.

14 And I would just respectfully submit, Your
15 Honor, that I think that there are probably not
16 that many cases around that are such an example of
17 res judicata as this one where we've had basically
18 nine years of litigation over the same issues over
19 and over and over again.

20 And so we also contend, alternatively --
21 although we submit that it is not necessary for the
22 Court to consider this, but we also respectfully
23 contend that her complaint failed to state a claim
24 upon which relief can be granted under Rule
25 12(b)(6). And so that not only is she barred by

1 res judicata, but that she failed to state a claim.
2 She can't possibly state a valid claim when she has
3 basically just asserting that it is a wrongful
4 illegal foreclosure, and that she is completely
5 precluded from raising that issue because it has
6 already been litigated. So the two things kind of
7 dovetail together, but we believe that
8 alternatively, and in addition, that her complaint
9 ought to be dismissed under Rule 12(b)(6) as well,
10 in addition to the res judicata.

11 And then --

12 THE COURT: Well, the issue of whether or not
13 the complaint is drafted sufficiently to state a
14 claim upon which relief is to be granted, the Court
15 looks solely to the four corners of the complaint,
16 not to the ancillary facts, and all that. So that
17 is denied on that basis.

18 So the -- you are still in the game.

19 MR. O'CONNOR: Yes, sir.

20 THE COURT: Looking at the complaint,
21 unless -- and I just glanced through the complaint,
22 but the complaint itself, unless it is so
23 contradictory there is no way to conclude that
24 relief can be granted, she has in there and seeking
25 to have the property transferred back to her, shows

1 the reasons, and all that. So if all that is true,
2 then it can't be granted. But looking at the four
3 corners of the complaint, I cannot dismiss it on
4 that basis.

5 MR. O'CONNOR: Yes, sir. So in light of that
6 ruling, then we would simply contend that res
7 judicata is directly applicable and all the
8 elements have been made out and that those are not
9 in any kind of reasonable dispute. And therefore
10 the complaint should be dismissed on res judicata
11 grounds.

12 Which it should be noted, Judge Seymour did
13 the exact same thing. You know, based on the state
14 court result of the 2005 action and the fact that
15 it was fully litigated all the way up to South
16 Carolina Supreme Court, Judge Seymour in her
17 dismissal of Ms. Toney's 2011 suit in U.S. District
18 Court, stated -- and I quote from that order of
19 Judge Seymour:

20 Final judgment has been entered on the
21 merits against the Plaintiff in at least
22 two prior civil actions, LaSalle Bank v.
23 Laura Toney, 2005-CP-31-169, and Laura
24 Toney v. Ocwen Federal Bank, Case Number
25 2010-CP-31-180.

1 And so we would just respectfully submit that
2 res judicata is and remains applicable, and that
3 that would be a basis to dismiss the case.

4 THE COURT: All right. Mr. Fata, anything
5 else? You're done, or you have something else as
6 well?

7 MR. FATA: We were going to ask for some
8 attorney's fees. The county has incurred \$5,549 in
9 attorney's fees to date. And we would just --

10 THE COURT: What would be your basis for being
11 entitled --

12 MR. FATA: Frivolous lawsuit. The fact that
13 the initial -- all the allegations against
14 Mr. O'Connor's clients are res judicata and what
15 she alleges against Lee County is nothing. I mean,
16 it is not -- even if -- and if the county did
17 mismatch their tax map, it didn't cause any problems
18 for her. And as soon as she brought that
19 information to the county's attention, they
20 corrected it.

21 THE COURT: So did you raise that in your
22 pleadings, that frivolous lawsuit --

23 MR. FATA: I filed an amended answer out of an
24 abundance of caution preserving my rights under a
25 12(b)(6) motion. And I said -- I did, under

1 Allegation 23, we believe it is a frivolous cause
2 of action for which Defendants have incurred costs
3 and expenses, and we requested that we be
4 reimbursed for that.

5 THE COURT: I agree that it is a frivolous
6 matter and I grant attorney's fees to the county on
7 the county's claim.

8 With regard to Mr. O'Connor's claim, I grant
9 the motion to dismiss based on res judicata and the
10 other arguments that you have made.

11 Additionally, I want the record to reflect
12 that this matter -- we heard part of the matter
13 already in denying her motion to disqualify
14 counsel. In the process of hearing that, most of
15 the matters raised today were raised in her
16 presence while she was here and -- the day that she
17 opted not to come back after lunch.

18 Additionally, in the third circuit, there is a
19 pilot program in which judges can hear motions
20 without a hearing, spearheaded to avoid having
21 hearings that clog up the docket and having the
22 docket clogged up with files where the Court should
23 be able to review pleadings and make a
24 determination on the issues.

25 Certainly, giving the parties an opportunity

1 to be heard, and I have heard them, and this matter
2 does not fit squarely in any category. We have had
3 a hearing in her presence. We have had a
4 substantial amount of documents and pleadings filed
5 raising various arguments. And the Court, in fact,
6 could have ruled on all of this without a hearing
7 and be in compliance with the pilot project program
8 that is in existence in the third circuit. But we
9 have given Ms. Toney an opportunity to appear to
10 raise anything she had not raised in her motions
11 which she has filed, which she, in effect, argued
12 during preliminary -- or during the period of time
13 that I heard arguments here -- was it
14 November 30th?

15 MR. FATA: Yes, Your Honor.

16 THE COURT: -- November 30th. So in preparing
17 the order, I would also like reference to be made
18 to the hearing with her present and also the pilot
19 program permitting the Court to decide matters
20 without a hearing, and in addition to the denial of
21 the motion for a continuance and the abuse --
22 pattern of abuse in seeking to avoid court
23 hearings. Mr. Fata can do a separate order as to
24 his issues.

25 With regard to your suggestion, Mr. O'Connor,

1 that Ms. Toney be given an opportunity to respond
2 in writing to or to comment on any proposed order
3 or submit anything additionally in writing that she
4 would like to submit, you can include that in the
5 order as well.

6 I'm not going to give her any opportunity for
7 a rehearing because today is the day for the
8 hearing, but I will allow her to submit anything
9 additionally in writing provided it is submitted
10 within 15 days of receipt of the proposed order to
11 submit anything else that she -- in writing that
12 she wants the Court to consider be submitted by
13 filing it with the Clerk of Court and serving the
14 parties and serving the Court by U.S. mail. I know
15 we have e-filing now in existence in this circuit.
16 Self-represented litigants, I believe, are exempt
17 from e-filing. Am I right, Ms. Cheryl?

18 THE CLERK: Yes, sir.

19 THE COURT: So she is self-represented today,
20 so she would not e-file. I think I noticed some of
21 your documents were e-filed. Since a
22 self-represented litigant is involved, she can mail
23 whatever she wants to provide by U.S. mail.

24 MR. O'CONNOR: Two more quick things for
25 clarification, Your Honor. Is Your Honor inclined

1 to make a ruling on her motion for default against
2 my clients?

3 THE COURT: Yes. Her motion for default is
4 denied. Whereas, the -- a number of interesting
5 issues were raised in her motion. I think
6 ultimately the analysis given by -- Mr. O'Connor is
7 on point in, you know, it is rather typical over
8 the years when someone files a motion to dismiss,
9 you don't have to file an answer until you get a
10 ruling on the motion to dismiss. Mr. Fata did that
11 for years -- or people against you did it for
12 years, filed a motion to dismiss and not file an
13 answer until you get a motion to dismiss, change of
14 venue, or whatever. However, that is typically not
15 a motion that is filed in another court. It
16 generally doesn't invoke a separate federal court
17 into the equation of figuring out the state answer
18 until you get a ruling on your motion. But I think
19 this way file an amended motion in the state court
20 as well.

21 MR. O'CONNOR: Yes, sir.

22 THE COURT: And I think that -- I know it
23 takes a little more analysis than we often hear,
24 but in the end you're right with what you're
25 arguing, and I deny your motion to dismiss -- or

1 motion for default rather.

2 MR. O'CONNOR: Thank you, Your Honor. One
3 last thing. On behalf of my clients, we also
4 sought in our amended motion here in state court
5 that the Plaintiff be sanctioned for repeated
6 filings. And we noted that -- and it is part of
7 the record because it has been filed as exhibits in
8 our filings in this court -- that Ms. Toney was
9 specifically warned by the U.S. Magistrate Judge
10 and by Judge Seymour that she would be sanctioned
11 in that court if she would continue to make
12 repeated filings as to the same issue involving the
13 foreclosure on 729 Chatham Street. So in Paragraph
14 11 of my amended motion, which was filed December 1
15 of 2014, we requested sanctions.

16 And so for that reason, I would ask for that
17 to be two things, Your Honor. One, that we be
18 awarded attorney's fees similar to the ones awarded
19 to Mr. Fata on behalf of the county. And then also
20 that an order be entered against her that she
21 must -- that any suit that she would file in the
22 future attacking that judgment or anything to do
23 with the foreclosure that concluded on 729 Chatham
24 Street in 2007 at the trial court level, that those
25 be reviewed and vetted by the Court before they

1 become a suit of record that has to be responded
2 to.

3 THE COURT: My view on that is that the issue
4 of awarding sanctions against her should be held
5 for another day. I think the attorney's fee
6 sanctions by the county I believe is one thing that
7 I'm prepared to rule on today, but the overall
8 sanctions against her based on repeated filings,
9 frivolous filings, abuse of filings, and the nature
10 and extent of what sanctions should be awarded, if
11 any, considering the long-going nature of this
12 litigation, I think it merits a hearing on a
13 subsequent day with Ms. Toney given some
14 opportunity to defend her position on the nature
15 and extent of any sanctions to be awarded.

16 So I will not defer any finality to the
17 litigation, but defer any finality on any
18 sanctions -- I guess I can do that -- until there
19 is some subsequent opportunity -- scheduling or
20 subsequent opportunity to be heard on what
21 sanctions should be awarded.

22 MR. O'CONNOR: So is it accurate to that
23 you're basically holding that in abeyance for the
24 time being?

25 THE COURT: Yes, sir.

1 MR. O'CONNOR: Thank you, Your Honor.

2 THE COURT: I'm holding in abeyance for it to
3 happen. It will have to be triggered by your
4 decision to come back here again to fight another
5 day with Ms. Toney.

6 MR. O'CONNOR: Yes.

7 THE COURT: But I don't want to delve into
8 that today because of the extensive -- potentially
9 extensive nature of it.

10 MR. O'CONNOR: Yes, sir. Thank you, Your
11 Honor. Nothing further.

12 MR. FATA: I just have one other thing.
13 Fifteen days that she has to file any writings
14 would be starting when?

15 THE COURT: After service.

16 MR. FATA: After service of the --

17 THE COURT: After service on her by U.S. mail.
18 The date -- well, service would be by the clerk.
19 You submit orders to me, I sign the orders, and
20 then the clerk mails them out. And the 15 days
21 would be from whatever the order says -- or mailing
22 by the clerk or --

23 MR. FATA: Generally, Judge, when I mail a
24 copy of the order to -- after it comes back, I mail
25 a copy of that. Or you just want to let the clerk

1 mail the copy?

2 THE COURT: Yes. I think the rules provide
3 that the clerk is to serve judgments on people. I
4 may make the lawyer do it, but in this case, I'll
5 have the clerk to do it.

6 THE CLERK: Since it's Pro Se, I'll send it
7 out anyway.

8 THE COURT: Okay. Very good. Anything else?

9 MR. O'CONNOR: No, sir, Your Honor. Thank
10 you.

11 MR. FATA: Thank you.

12 THE COURT: All right. Thank you all.

13 (WHEREUPON, the proceedings were concluded.)
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25 (END OF TRANSCRIPT)

1 CERTIFICATE OF REPORTER
2
34 STATE OF SOUTH CAROLINA)
5 COUNTY OF LEE)
6
78 I, Deborah M. McCurdy, Official Court Reporter for
9 the Fifth Judicial Circuit of the State of South
10 Carolina, do hereby certify that the foregoing is a
11 true, accurate and complete Transcript of Record of the
12 proceedings had and evidence introduced in the trial of
13 the captioned case, relative to appeal, in the Court of
14 Common Pleas for Lee County, South Carolina, on the 30th
15 day of March, 2016.16 I do further certify that I am neither of kin,
17 counsel nor interest to any party hereto.
18
1920 January 5, 2017
2122 s/Deborah M. McCurdy, RPR
23
2425 Deborah M. McCurdy, RPR
Fifth Circuit Court Reporter

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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

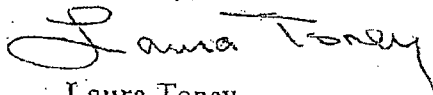
RE: Loan Number:0040789935/ Laura Toney/ 251-11-6990
Property Location: 729 Chatmon Street, Bishopville, SC

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

- 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

2. Article Number

(Transfer from service label)

PS Form 38

A. Signature

X

B. Received by (Printed Name)

JUN 16 2005

☐ Agent
☐ Addressee

C. Date of Delivery

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

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

2. Article Number

(Transfer from service label)

PS Form 3811, February 2004

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

B. Received by (Printed Name)

☐ Agent
☐ Addressee

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

7004 2510 0006 1747 2314

Domestic Return Receipt

102505-02-M-1540

UNITED STATES POSTAL SERVICE

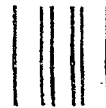


First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4 in this box •

Laura Toney
P.O. Box 722
Bishopville, SC
29610

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
29610

08





Remand of Toney v. LaSalle Bank National Association , et al your case

13-CP-31-321

Mary Deal to jdavis

08/05/2014 01:07 PM

From:

Mary Deal/SCD/04/USCOURTS

To:

jdavis@leecountysc.org

Attached please find a certified copy of the Order and Opinion remanding this case to your court that was entered by the Honorable Margaret B. Seymour on August 4, 2014. The parties responsible for supplementing your record with the filings that were made in this court. Please acknowledge receipt by reply to this email.



13cv3481 cert order.pdf



Mary E. Deal

Courtroom Deputy for Hon. Cameron McGowan Currie

and Hon. Margaret B. Seymour

Columbia, SC

(803) 253-3921

From: toneyl1956 <toneyl1956@yahoo.com>

Date: March 30, 2016 at 12:26:37 PM EDT

To: <Toneyl1956@yahoo.com>, Sean O'Connor <soconnor@FinkelLaw.com>, <cnewmanj@sccourts.org>, <paulmfata@sfslawfirm.com>

Subject: Fwd: Hearing today

Sent via the Samsung GALAXY S64 Active™, an AT&T 4G LTE smartphone

----- Original message -----

From: toneyl1956

Date: 03/30/2016 11:36 AM (GMT-05:00)

To: Sean O'Connor, "Newman, Clifton Law Clerk (Elizabeth Gunby)"

, toneyl1956@yahoo.com, paulmfata@sfslawfirm.com, cwatkins@leecountysc.org

Subject: Hearing today

I cannot attend the hearing today. I have been admitted into the hospital. I am at Carolina Pines Regional Medical Center in Hartsville, SC.

Thank you,
Laura Toney

I still have 3 pending motions. Please continue the hearing.

Sent via the Samsung Galaxy Note® 8.0, an AT&T 4G LTE tablet

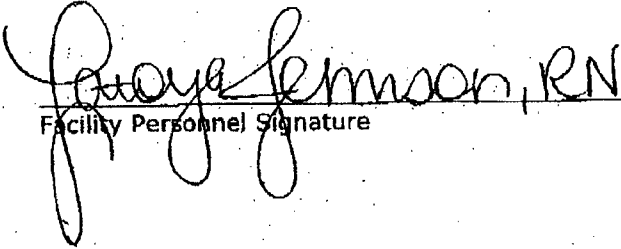


Date: 03/30/16
Acct Num: LA0200521367
Med Rec Num: L000046750
Name: LAURA TONEY
Location: 2 West
Primary Provider: Areephanthu, Abraham

Patient was treated in our facility on: 03/30/16

Patient may return to work/school on: 04/04/16

Restrictions: Pt was admitted on 03/30/16; discharged on 04/01/16


Facility Personnel Signature



The Supreme Court of South Carolina
COMMISSION ON LAWYER CONDUCT

Deborah S. McKeown
Commission Counsel

1220 Senate Street, Suite 305
Columbia, South Carolina 29201
Telephone: (803) 734-2037
Fax: (803) 734-0363

June 20, 2016

PERSONAL AND CONFIDENTIAL

Paul M. Fata, Esquire
Post Office Drawer 568
Bishopville, SC 29010

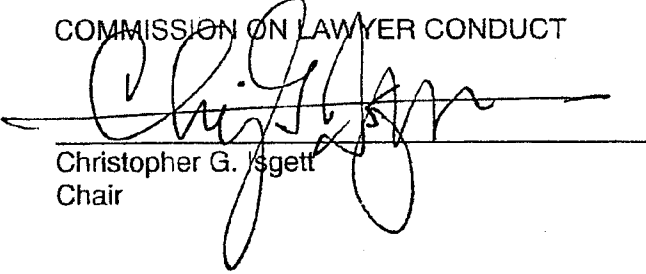
Re: LETTER OF CAUTION
Complainant: Laura Toney
ODC File Number: 16-DE-L-0073

Dear Mr. Fata:

An investigative panel of the Commission on Lawyer Conduct considered the above-referenced matter and determined that the imposition of a sanction was not warranted. The panel decided not to authorize the filing of formal charges against you, but, instead, to conclude this matter with the issuance of this Letter of Caution. We have determined that it would be beneficial if you gave greater attention to certain rules governing the professional conduct of lawyers.

Accordingly, you are cautioned that, as you perform future professional duties in your practice of law, you should be more careful to adhere to the requirements set out in the Rules of Professional Conduct, particularly those set out in Rules 1.9 and 1.10. The issuance of this letter of caution is not a sanction against you. The issuance of this letter of caution constitutes a final disposition of this matter.

COMMISSION ON LAWYER CONDUCT


Christopher G. Isgett
Chair

cc: Barbara M. Seymour
Assistant Disciplinary Counsel

11/07/13

BIDDER INFORMATION LIST

PAGE

CODE NAME

ADDRESS

PHONE 1

PHONE 2

PHONE 3

0012 US BANK CUST PC #111

50 S. 16TH ST., STE. 1950 856-751-2819
PHILADELPHIA PA 19102 0000

Mr. O'Connor

The above is how U.S. Bank registered for the
11/13 tax sale. They were the successful bidder of
Tax # 030-02-00-024-000 - LaSalle Bank National Assoc.

Lisa Baker



Press Releases

U.S. Bank Completes Acquisition of Securitization Trust Administration Business from Bank of America, N.A.

MINNEAPOLIS, Jan 04, 2011 (BUSINESS WIRE) --

U.S. Bancorp (NYSE: USB) announced today that its lead bank, U.S. Bank National Association, has completed the acquisition of the domestic and European-based securitization trust administration businesses of Bank of America, N.A. The transaction closed on December 30, 2010.

The completion of this transaction establishes U.S. Bank as a leader in the U.S. structured finance trust business and complements U.S. Bank's current market position in the U.S. corporate and municipal trust business. The transaction also establishes a presence in Europe with offices in Ireland and London, England, providing U.S. Bank Corporate Trust Services with an opportunity to expand its distribution and product offerings abroad.

Under the terms of the agreement, U.S. Bank Corporate Trust Services acquired approximately 2,153 active securitization and related transactions, more than 2.4 million residential mortgage files and 84,000 commercial files, and \$1.1 trillion in assets under administration. Additionally, the transaction provided U.S. Bank with approximately \$8 billion of related deposits at close.

After conversion, which is currently expected to be completed by the end of the third quarter of 2011, the acquired U.S. and European trust businesses will operate under the U.S. Bank trade name. U.S. Bank has successfully completed 18 corporate trust acquisitions over the past 20 years and the Company is committed to ensuring a smooth transition for its new customers.

U.S. Bank now has 50 corporate trust offices across the country and offers a complete line of trust services. U.S. Bank provides trustee, calculation agent and custodial services for mortgage-backed, asset-backed and CDO securitizations. U.S. Bank also serves as trustee and paying agent for the issuance of taxable and non-taxable securities, money market paying agent services and escrow services. U.S. Bank Corporate Trust Services is one of the highest ranked trustees in the areas of tax-exempt debt and new corporate bond issuances.

U.S. Bancorp, with \$291 billion in assets as of Sept. 30, 2010, is the parent company of U.S. Bank, the fifth largest commercial bank in the United States. The company operates 3,013 banking offices in 24 states and 5,323 ATMs and provides a comprehensive line of banking, brokerage, insurance, investment, mortgage, trust and payment services products to consumers, businesses and institutions. Visit U.S. Bancorp on the web at www.usbank.com.

Forward-looking Statements

The following information appears in accordance with the Private Securities Litigation Reform Act of 1995:

This press release contains forward-looking statements about U.S. Bancorp. Statements that are not historical or current facts, including statements about beliefs and expectations, are forward-looking statements and are based on the information available to, and assumptions and estimates made by, management as of the date made. These forward-looking statements cover, among other things, anticipated future revenue and expenses and the future plans and prospects of U.S. Bancorp. Forward-looking statements involve inherent risks and uncertainties, and important factors could cause actual results to differ materially from those anticipated. Global and domestic economies could fail to recover from the recent economic downturn or could experience another severe contraction, which could adversely affect U.S. Bancorp's revenues and the values of its assets and liabilities. Global financial markets could experience a recurrence of significant turbulence, which could reduce the availability of funding to certain financial institutions and lead to a tightening of credit, a reduction of business activity, and increased market volatility. Stress in the commercial real estate markets, as well as a delay or failure of recovery in the residential real estate markets, could cause additional credit losses and deterioration in asset values. In addition, U.S. Bancorp's business and financial performance is likely to be impacted by effects of recently enacted and future legislation and regulation. U.S. Bancorp's results could also be adversely affected by continued deterioration in general business and economic conditions; changes in interest rates; deterioration in the credit quality of its loan portfolios or in the value of the collateral securing those loans; deterioration in the value of securities held in its investment securities portfolio; legal and regulatory developments; increased competition from both banks and non-banks; changes in customer behavior and preferences; effects of mergers and acquisitions and related integration; effects of critical accounting policies and judgments; and management's ability to effectively manage credit risk, residual value risk, market risk, operational risk, interest rate risk and liquidity risk.

For discussion of these and other risks that may cause actual results to differ from expectations, refer to U.S. Bancorp's Annual Report on Form 10-K for the year ended December 31, 2009, on file with the Securities and Exchange Commission, including the sections entitled "Risk Factors" and "Corporate Risk Profile" contained in Exhibit 13, and all subsequent filings with the Securities and Exchange Commission under Sections 13(a), 13(c), 14 or 15(d) of the Securities Exchange Act of 1934. Forward-looking statements speak only as of the date they are made, and U.S. Bancorp undertakes no obligation to update them in light of new information or future events.

SOURCE: U.S. Bank

9/20/2017

U.S. Bancorp - Investor Relations - Press Releases

U.S. Bank

Steve Dale, Media Relations, 612-303-0784

Judith T. Murphy, Investor Relations, 612-303-0783

"Safe Harbor" Statement under the Private Securities Litigation Reform Act of 1995: Statements in this press release regarding U.S. Bancorp's business which are not historical facts are "forward-looking statements" that involve risks and uncertainties. For a discussion of such risks and uncertainties, which could cause actual results to differ from those contained in the forward-looking statements, see "Risk Factors" in the Company's Annual Report or Form 10-K for the most recently ended fiscal year.

Federal Deposit
Insurance Corporation

LaSalle Bank National Association (FDIC #: 15407)

Status: Inactive • Inactive as of October 17, 2008

LaSalle Bank National Association was merged or acquired without government assistance

Data as of: February 11, 2015

Overview	Locations	History	Identifications	Financials
N/A Bank Holding Company		Inactive as of October 17, 2008 LaSalle Bank National Association is no longer doing business under that name because it has been merged or acquired without government assistance. See the successor institution Bank of America, National Association (FDIC #: 3510)		
LaSalle Bank National Association Banking Institution		Established: October 10, 1936 FDIC Certificate #: 15407 Insured: October 10, 1936 Bank Charter Class: National Bank Headquarters: 135 South La Salle Street Chicago, IL 60603 Cook County		
N/A Branches (Offices)		Contact the FDIC about LaSalle Bank National Association or Bank of America, National Association		



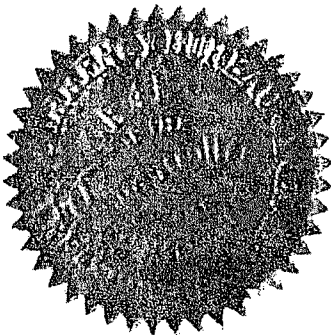
Comptroller of the Currency
Administrator of National Banks

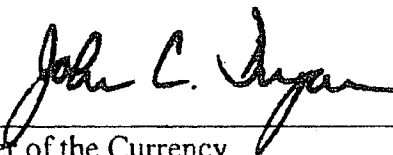
Washington, DC 20219

CERTIFICATE

I, John C. Dugan, Comptroller of the Currency, do hereby certify that the document hereto attached is a true and complete copy of the certificate recorded in this Office, evidencing the Merger of "LaSalle Bank National Association," Chicago, Illinois, and "LaSalle Bank Midwest National Association," Troy, Michigan with and into "Bank of America, National Association," Charlotte, North Carolina, (Charter No. 13044), effective October 17, 2008.

IN TESTIMONY WHERE OF, I have hereunto
subscribed my name and caused my seal of
office to be affixed to these presents at the
Treasury Department, in the City of Washington
and District of Columbia, this 23rd day, of
December, 2008.





Comptroller of the Currency



Comptroller of the Currency
Administrator of National Banks

Large Bank Licensing
Mail Stop 7-13
250 E Street, SW
Washington, DC 20219

October 17, 2008

Ms. Rhadi Thayu
Assistant General Counsel
Bank of America, National Association
40 W. 57th Street
New York, New York 10019

Re: Applications to merge LaSalle Business Credit, LLC, Chicago, Illinois with and into LaSalle Bank National Association, Chicago, Illinois, and upon consummation of that transaction, to merge LaSalle Bank National Association and LaSalle Bank Midwest National Association, Troy, Michigan, with and into Bank of America, National Association, Charlotte, North Carolina.

Application Control Numbers: 2008-ML-02-0006 and 2008-ML-12-0171

Dear Ms. Thayu:

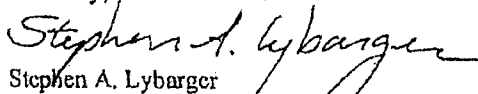
This letter is the official certification of the Office of the Comptroller of the Currency for LaSalle Business Credit, LLC, Chicago, Illinois to merge with and into LaSalle Bank National Association, Chicago, Illinois, effective October 16, 2008.

This is also the official certification of the Office of the Comptroller of the Currency for LaSalle Bank National Association, Chicago, Illinois, and LaSalle Bank Midwest National Association, Troy, Michigan to merge with and into Bank of America, National Association, Charlotte, North Carolina, effective October 17, 2008.

This letter is also the official authorization for Bank of America, National Association to operate the former main and branch offices of LaSalle Bank, National Association and LaSalle Bank, Midwest, National Association as branches of Bank of America, National Association.

If you have questions regarding this letter, please contact me at (202) 874-5294. Please reference the application control number in any correspondence.

Sincerely,


Stephen A. Lybarger
Large Bank Licensing Lead Expert

March 23, 2011

**OMNIBUS NOTICE OF RESIGNATION OF BANK OF AMERICA, N.A.
AS TRUSTEE OR INDENTURE TRUSTEE AND RELATED ANCILLARY TRUST ROLES**

To: The Parties listed on Schedule A

Re: The Transactions listed on Schedule 1 (each, a "Transaction")

Bank of America, N.A., a national banking association, as successor by merger to LaSalle Bank National Association, a national banking association ("Bank of America"), acts, not in its individual capacity, but solely as trustee or indenture trustee, as applicable (each, a "Trustee"), pursuant to the pooling and servicing agreement, trust agreement or indenture (each, an "Agreement") for each Transaction, and also acts as securities administrator, securities intermediary, supplemental interest trust trustee, paying agent, authenticating agent, registrar and in other similar trust administration capacities, as applicable (the "Ancillary Trust Roles") for each Transaction, under the related Agreement and other documents, agreements and instruments relating to each Transaction (together with the related Agreement, the "Transaction Documents").

In connection with the acquisition by U.S. Bank National Association, a national banking association ("U.S. Bank"), of substantially all of the corporate trust business of Bank of America, with respect to each Transaction, Bank of America hereby resigns, pursuant to the relevant provisions of the Agreements, as Trustee and from all Ancillary Trust Roles, effective as of the date U.S. Bank accepts appointment as successor thereto. As required by each Agreement, Bank of America will continue to perform its obligations as Trustee and in its Ancillary Trust Roles under the Transaction Documents with respect to the related Transaction until U.S. Bank accepts appointment as successor to Bank of America in all such capacities pursuant to the applicable provisions of such Agreement and all conditions precedent to such appointments have been satisfied.

With respect to each Transaction, this notice shall satisfy any notice requirements with respect to the resignation of the Trustee and from the Ancillary Trust Roles set forth in the related Agreement.

BANK OF AMERICA, N.A., a national banking
association, as successor by merger to
LaSalle Bank National Association, a national banking
association

Schedule A

Notice Parties

Depositor

GS Mortgage Securities Corp.
Attn: Principal Finance Group/Christopher M. Gething
85 Broad Street
New York, NY 10004

Securities Administrator and Master Servicer

Wells Fargo Bank, N.A.
9062 Old Annapolis Rd.
Columbia, MD 21045

Custodians:

Deutsche Bank National Trust Company
Attn: Mortgage Custody
1761 East St. Andrew Place
Santa Ana, CA 92705

J.P. Morgan Trust Co., N.A.
Attn: Custody Manager
2220 Chemsearch Boulevard
Suite 150
Irving, TX 75062

U.S. Bank National Association
Attn: Mark Hess
1133 Rankin Street
St. Paul, MN 55116

Bank of New York Mellon
Attn: Corporate Trust - Darrel Thompson
101 Barclay Street
7WEST
New York, NY 10286

Wells Fargo Bank, N.A.
Attn: Client Services Manager
1015 10th Ave SE
Minneapolis, MN 55414

Schedule A-1

Servicers:

Ocwen Loan Servicing, LLC
Attn: Secretary
1661 Worthington Road
Suite 100
West Palm Beach, FL 33409

Litton Loan Servicing, LP
Attn: Janice McClure
4828 Loop Central Drive
Houston, TX 77081

Select Portfolio Servicing, Inc.
Attn: General Counsel
3815 South West Temple
Salt Lake City, UT 84165

Rating Agencies:

Fitch, Inc.
One State Street Plaza
New York, NY 10004

Moody's Investors Service, Inc.
7 World Trade Center at
250 Greenwich Street
New York, NY 10007

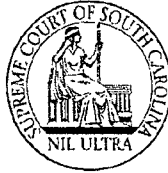
Standard & Poor's
Attn: Mortgage Surveillance Group
55 Water Street
New York, NY 10041

Schedule 1

Transactions:

GSAMP Trust Series 2005-AHL
GSAMP Series 2005-HE6
GSAMP 2006-HE3
GSAMP Trust 2006-HE4
GSAMP 2006-HE5
GSAMP Trust 2006-HE7
GSAMP Trust 2006-HE8
GSAMP 2007-HE1
GSAMP Trust 2007-HE2
GSAMP Trust 2007-NC1
GSAMP Series 2007-H1

Schedule I-1



The Supreme Court of South Carolina
COMMISSION ON LAWYER CONDUCT

Deborah S. McKeown
Commission Counsel

1220 Senate Street, Suite 305
Columbia, South Carolina 29201
Telephone: (803) 734-2037
Fax: (803) 734-0363

June 20, 2016

PERSONAL AND CONFIDENTIAL

Paul M. Fata, Esquire
Post Office Drawer 568
Bishopville, SC 29010

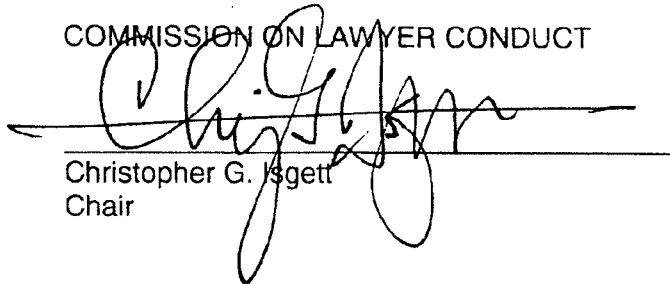
Re: LETTER OF CAUTION
Complainant: Laura Toney
ODC File Number: 16-DE-L-0073

Dear Mr. Fata:

An investigative panel of the Commission on Lawyer Conduct considered the above-referenced matter and determined that the imposition of a sanction was not warranted. The panel decided not to authorize the filing of formal charges against you, but, instead, to conclude this matter with the issuance of this Letter of Caution. We have determined that it would be beneficial if you gave greater attention to certain rules governing the professional conduct of lawyers.

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COMMISSION ON LAWYER CONDUCT



Christopher G. Isgett
Chair

cc: Barbara M. Seymour
Assistant Disciplinary Counsel

THE STATE OF SOUTH CAROLINA
IN SOUTH CAROLINA COURT OF APPEALS
APPEAL FROM LEE COUNTY

The Honorable Clifton Newman
Circuit Court Judge

RECEIVED
JAN 26 2018
SC Court of Appeals

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.**

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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