

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM FLORENCE COUNTY  
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

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Case No. 2014-CP-21-00916

Beneficial Financial I Inc., successor by merger to Beneficial Mortgage Co. of South Carolina, Appellant,

v.

Jon Windham, a/k/a Jon D. Windham; Frances Windham, a/k/a Frances C. Windham; and Jerry Coker, a/k/a Jerry L. Coker; Carolina Bank a/k/a Carolina Bank & Trust Co., The United States of America, by and through its agency, the Internal Revenue Service; and The Citizens Bank, Defendants,

Of whom Jon Windham a/k/a Jon D. Windham is the Respondent.

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Appellate Case No. 2017-001954

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RECORD ON APPEAL

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Rebecca K. Lindahl, Esq.  
Katten Muchin Rosenman LLP  
550 S. Tryon Street, Suite 2900  
Charlotte, NC 28202  
(704) 344-3141  
Attorney for Appellant

Penny Hays Cauley, Esq.  
Hays Cauley, P.C.  
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Florence, SC 29501  
(843) 665-1717  
Attorney for Respondent

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FILED

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

JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2014CP2100916

Beneficial Financial I Inc  
Richard L Farley

Beneficial Mortgage Co  
Of South Carolina  
DORIS POULOS CHARA  
CCCP & GS  
FLORENCE COUNTY, SC

Jon Windham  
Frances Windham  
Jerry Coker  
United States Of America

Jon D Windham  
Frances C Windham  
Jerry L Coker  
Internal Revenue Service

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for:  Plaintiff  Defendant  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Note: Title abstractors and researchers should refer to the official court order for judgment details.

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

Circuit Court Judge

Judge Code

9/11/2017

Date

CERTIFIED: A TRUE COPY  
*Doris Poulos Chara*  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

**For Clerk of Court Office Use Only**

This judgment was entered on **September 8, 2017**, and a copy mailed first class or placed in the appropriate attorney's box on **September 11, 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

**Nikole Deanna Haltiwanger** PO Box 11267 Columbia, SC  
29211-3200

**Rebecca Kinlein Lindahl** 550 S. Tryon St., Ste. 2900  
Charlotte, NC 28202-4213

**Richard L Farley** 550 S. Tryon St. Suite 2900 Charlotte, NC  
28202

**Gary Ivan Finklea** PO Box 1317 Florence, SC 29503-1317  
**Penny Hays Cauley** 1303 W. Evans Street Florence, SC  
29501

**Matthew J. Modica** 151 Meeting St., Ste. 200 Charleston, SC  
29401-2238

---

ATTORNEY(S) FOR THE PLAINTIFF(S)

---

ATTORNEY(S) FOR THE DEFENDANT(S)

*Doris P. O'Hara*

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Court Reporter

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Doris Poulos O'Hara - Clerk of Court

**Court Reporter:**

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

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

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

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STATE OF SOUTH CAROLINA )  
COUNTY OF FLORENCE )

IN THE COURT OF COMMON PLEAS )  
C/A NO: 2014-CP-21-916 )

Beneficial Financial I Inc., successor )  
by merger to Beneficial Mortgage Co. )  
of South Carolina, )

Plaintiff, )

vs. )

Jon Windham a/k/a Jon D. Windham, )  
Frances Windham a/k/a Frances C. )  
Windham, and Jerry Coker a/k/a )  
Jerry L. Coker, Carolina Bank a/k/a )  
Carolina Bank & Trust Co., The )  
United States of America, by and )  
through its agency, the Internal )  
Revenue Service, and The Citizens )  
Bank, )

Defendants. )

2017 SEP -8 PM 12: 48  
DORIS POULOS O'HARA  
CCCP & GS  
FLORENCE COUNTY, SC

FILED

ORDER

On August 31, 2017, the parties appeared before the Court and argument was heard on Defendant Jon Windham's motion for summary judgment. At the hearing, Plaintiff failed to overcome the facts and law set forth by Defendant. After reviewing the pleadings, affidavits on file, Defendant's brief, and arguments of counsel, the Court finds that there is no genuine issue of material fact in this matter and that summary judgment is due to be granted in Defendant's favor.

Therefore, it is hereby **Ordered, Adjudged and Decreed** as follows:

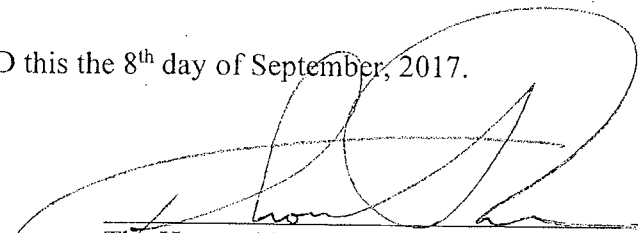
1. Summary Judgment is granted in Defendant's favor on his claim that Plaintiff violated the South Carolina Unfair Trade Practices Act, and that said

CERTIFIED: A TRUE COPY  
Doris Poulos O'Hara  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

violation was done willfully. As the Court has found that Plaintiff's violations of the South Carolina Unfair Trade Practices Act were willful, this Court orders that all damages attributed to said violations be trebled. Additionally, pursuant to the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-140, Plaintiff is liable to pay reasonable attorney's fees and costs to Defendant.

2. Summary Judgment is granted in Defendant's favor on his claim of fraud.
3. Summary Judgment is granted in Defendant's favor on his claim of negligent misrepresentation.
4. Summary Judgment is granted in Defendant's favor on his claim of intentional infliction of emotional distress.
5. Summary Judgment is granted in Defendant's favor on his claims of negligent and reckless training and supervision.
6. This matter will be brought to the jury on September 25, 2017, to determine damages.

AND IT IS SO ORDERED this the 8<sup>th</sup> day of September, 2017.

  
The Honorable Thomas A. Russo  
Presiding Judge, Twelfth Judicial Circuit

Florence, South Carolina

CERTIFIED: A TRUE COPY  
*Donna Harris O'Hara*  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

2017 SEP - 8 PM 12: 49  
DONNA HARRIS O'HARA  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, SC  
**FILED**

STATE OF SOUTH CAROLINA  
COUNTY OF FLORENCE

Beneficial Financial I Inc., successor by  
merger to Beneficial Mortgage Co. of South  
Carolina,

Plaintiff,

vs.

Jon Windham a/k/a Jon D. Windham,  
Frances Windham a/k/a Frances C.  
Windham, and Jerry Coker a/k/a Jerry L.  
Coker, Carolina Bank a/k/a Carolina Bank &  
Trust Co., The United States of America, by  
and through its agency, the Internal Revenue  
Service, and The Citizens Bank,

Defendant(s).

(File No. 4018.01014)

IN THE COURT OF COMMON PLEAS

C/A NO.: 2014-CP-21-

916

2014 APR 11 PM 12:21  
CONNIE REE-STEVENSON  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

FILED

**COMPLAINT**

FIRST CAUSE OF ACTION -  
Reformation of Deed and/or Mortgage

SECOND CAUSE OF ACTION -  
Foreclosure of Real Estate Mortgage

The Plaintiff above-named, complaining of the Defendants above named, herein alleges:

**GENERAL ALLEGATIONS**

1. This is an action for the foreclosure of a mortgage upon real estate in Florence County, South Carolina.
2. The Plaintiff is a corporation or other legal entity duly organized and existing under and by virtue of the laws of one of the States of The United States of America and is authorized to transact business in the State of South Carolina.
3. The Plaintiff is holder of or otherwise entitled to enforce the Note and Mortgage described hereafter and that are the subject of this action.
4. Some lien on or right, title, or interest in the real estate, the subject of this action, may be claimed by the Defendant(s) herein.
5. Based upon a search of the public records of Florence County, all persons or entities having an interest or lien or possible claim in or upon the mortgaged premises subordinate to the lien of the Plaintiff as of the date and time of the filing of the Lis Pendens herein have been made defendants.

CERTIFIED: A TRUE COPY

*Connie Ree-Steveson*

CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

6. The Defendant(s) herein described, if any, as judgment creditors, have by filing said judgments designated their attorney entering the judgment as their agent for service of process under the provisions of S.C. Code Ann. §15-35-840.

7. On or about June 25, 2002; Jon Windham a/k/a Jon D. Windham made, executed and delivered unto Beneficial Mortgage Co. of South Carolina a certain Note ("Note") in the principal sum of One Hundred Ninety One Thousand Nine Hundred Twelve and 51/100 (\$191,912.51) Dollars, with an interest rate of 11.112% per annum initially, payable in monthly installments of principal and interest of \$1,843.92 beginning July 25, 2002, a copy of which is attached hereto as Exhibit "A" and made a part hereof by reference.

8. In order to secure the payment of the Note according to the terms and conditions thereof, Jon D. Windham and Frances Windham a/k/a Frances C. Windham made, executed and delivered unto Beneficial Mortgage Co. of South Carolina a certain real estate mortgage ("Mortgage") covering the following described property:

All that certain piece, parcel or lot of land with improvements thereon, situate, lying and being in the County of Florence, State of South Carolina, in the Ebenzer Community containing approximately 1 1/2 acres and located on the Southwest side of the public road leading from Ebenzer to Wilson's Cross Road, said lot being almost rectangle in shape and commencing at a point on the South side of the above mentioned road where said lot intersects with a ditch on land formerly a part of the L.K. Blackmon Estate and running generally in a Southwesterly direction for a distance of 174.39 feet; thence in a Northwesterly direction for a distance of 413.93 feet; thence in a Northeasterly direction for a distance of 132.68 feet to the above public road and thence along the said public road 295.1 feet to an iron pin and thence 141.9 feet to the point of beginning. Said lot being known as Tract No. 5 on a plat made by Lind Lot being known as Tract No. 5 on a plat made by Lind Surveying Company as revised August 6, 1984. Said being identified by the Florence County Tax Assessor's Office as Map 74 Block 1 Parcel 026.

Being the same property conveyed from William S. Poston and Ronald B. Poston unto Jon D. Windham and Frances C. Windham by Deed dated February 4, 1992 and recorded February 6, 1992, in Deed Book A-356, at Page 552, in the Clerk of Court's Office for Florence County, South Carolina. Thereafter, Jon D. Windham and Frances C. Windham conveyed a portion of the subject property containing 0.50 of an acre unto Jerry Coker by deed dated August 3, 2002 and recorded August 5, 2002 in Deed Book A692 at Page 1284 and also by Corrective Deed dated July 27, 2009 and recorded August 17, 2009 in Deed Book B262 at Page 1498 in said Clerk of Court's Office.

TMS No. 00074-01-026 & 00074-01-211 (portion of)  
Property Address: 3790 & 3794 Southborough Road, Florence, SC 29501

9. The Mortgage was signed, witnessed and probated; thereafter the Mortgage was recorded in the public records of Florence County on June 28, 2002, in Book A687 at Page 1116, and re-recorded August 1, 2002 in Book A692 at Page 1. Thereafter, on March 12, 2007, Beneficial Mortgage Co. of South Carolina merged into Beneficial South Carolina, Inc.; thereafter, on or around December 31, 2009, Beneficial South Carolina, Inc. merged into Beneficial Financial I Inc. A copy of the Plaintiff's Mortgage is attached hereto as Exhibit "B" and made a part hereof by reference.

10. The Mortgage evidences and secures the repayment of money advanced by the Plaintiff, or its predecessor in interest, to, or on behalf of, the mortgagor(s) and constitutes a first mortgage lien on the mortgaged premises.

11. Thereafter, Jon D. Windham and Frances C. Windham conveyed a portion of the subject property containing 0.50 of an acre to Jerry Coker, which deed was recorded on August 5, 2002 in Deed Book A692 at Page 1284 and also by Corrective Deed recorded August 17, 2009 in Deed Book B262 at Page 1498; that Defendants, Jon Windham a/k/a Jon D. Windham, Frances Windham a/k/a Frances C. Windham, and Jerry Coker, are the owners and holders of record title to the real property hereinabove described as of the date of the filing of the Notice of Pendency to this action.

12. The hereinafter named Defendants may have some interest in or lien upon the property which is the subject of this action by virtue of the matter and issues herein below alleged. In the event there is a surplus from the foreclosure sale of the subject property, the validity, priority and amount of such lien or claim will be determined at a hearing subsequent to the sale, in accordance with Rule 71(c) SCRPC. These liens or interests are described as follows:

*Carolina Bank a/k/a Carolina Bank & Trust Co. by virtue of a mortgage given to it by Jerry Coker a/k/a Jerry L. Coker in the original principal amount of \$105,000.00, dated August 17, 2009, and recorded on August 21, 2009 in Book B263 at Page 1706. Any such interest in or lien upon the property is junior and subordinate to Plaintiff's mortgage.*

*The United States of America, by and through its agency, the Internal Revenue Service, by virtue of any liens of record, including, but not limited to:*

*a) A Notice of Federal Tax Lien against Jon D. Windham, Jons Automotive, Identifying No. 720165810, for delinquent taxes in the amount of \$21,258.00, said*

lien being dated November 10, 2010 and recorded on November 29, 2010 in Judgment Roll No. 56-445;

b} A Notice of Federal Tax Lien against Jon D. Windham, Jons Automotive, Identifying No. 827083711, for delinquent taxes in the amount of \$5,669.65, said lien being dated November 7, 2011 and recorded on November 16, 2011 in Judgment Roll No. 57-456; and

c} A Notice of Federal Tax Lien against Jon D. Windham, Jons Automotive, Identifying No. 840117812, for delinquent taxes in the amount of \$3,454.82, said lien being dated January 5, 2012 and recorded on January 17, 2012 in Judgment Roll No. 58-21.

Any such interest in or lien upon the said property is junior and subordinate to Plaintiff's mortgage.

The Citizens Bank by virtue of a judgment against Frances Windham, in the amount of \$713.57 dated October 25, 2012 and recorded on January 14, 2013 in Case No. 2013-CP-21-98. Any such interest in or lien upon the property is junior and subordinate to Plaintiff's mortgage.

13. The loan evidenced by the Note and Mortgage is not owned, securitized or guaranteed by Fannie Mae or Freddie Mac, and is not serviced by a servicer participating in the Home Affordable Modification Program (HAMP).

**FOR A FIRST CAUSE OF ACTION**  
**(Reformation of Deed and/or Mortgage)**

14. The Plaintiff incorporates the allegations of the preceding Paragraphs as if repeated verbatim.

15. Upon review of the loan origination documentation, and the deed and surveys of record, the Plaintiff is informed and believes that due to inadvertence or error, the legal description contained in the Mortgage does not reference the most recent recorded Plat prepared for Jon D. Windham and Frances C. Windham by Prosser Surveying Co., Inc. dated July 8, 1993 and recorded in Plat Book 49 at Page 272.

16. The Plaintiff is informed and believes that it is entitled to an Order reforming the deed and/or Mortgage to reflect the most recent recorded Plat prepared for Jon D. Windham and

Frances C. Windham by Prosser Surveying Co., Inc. dated July 8, 1993 and recorded in Plat Book 49 at Page 272 to the legal description contained in the Mortgage.

17. The legal description should read as follows:

All that certain piece, parcel or lot of land with improvements thereon, situate, lying and being in the County of Florence, State of South Carolina, in the Ebenzer Community containing approximately 1 1/2 acres and located on the Southwest side of the public road leading from Ebenzer to Wilson's Cross Road, said lot being almost rectangle in shape and commencing at a point on the South side of the above mentioned road where said lot intersects with a ditch on land formerly a part of the L.K. Blackmon Estate and running generally in a Southwesterly direction for a distance of 174.39 feet; thence in a Northwesterly direction for a distance of 413.93 feet; thence in a Northeasterly direction for a distance of 132.68 feet to the above public road and thence along the said public road 295.1 feet to an iron pin and thence 141.9 feet to the point of beginning. Said lot being known as Tract No. 5 on a plat made by Lind Lot being known as Tract No. 5 on a plat made by Lind Surveying Company as revised August 6, 1984. Said being identified by the Florence County Tax Assessor's Office as Map 74 Block 1 Parcel 026. Most recently shown on that certain Plat prepared for Jon D. Windham and Frances C. Windham by Prosser Surveying Co., Inc. dated July 8, 1993 and recorded in Plat Book 49 at Page 272.

Being the same property conveyed from William S. Poston and Ronald B. Poston unto Jon D. Windham and Frances C. Windham by Deed dated February 4, 1992 and recorded February 6, 1992, in Deed Book A-356, at Page 552, in the Clerk of Court's Office for Florence County, South Carolina. Thereafter, Jon D. Windham and Frances C. Windham conveyed a portion of the subject property containing 0.50 of an acre unto Jerry Coker by deed dated August 3, 2002 and recorded August 5, 2002 in Deed Book A692 at Page 1284 and also by Corrective Deed dated July 27, 2009 and recorded August 17, 2009 in Deed Book B262 at Page 1498 in said Clerk of Court's Office.

**FOR A SECOND CAUSE OF ACTION**  
**(Foreclosure of Mortgage)**

18. The Plaintiff incorporates the allegations of the preceding Paragraphs as if repeated verbatim.

19. With regard to the Note and/or Mortgage which are the subject matter of this suit, Plaintiff and its attorney have provided all applicable notices and rights to cure as required and otherwise have complied with all applicable Federal, State, and local statutes, laws, rules, regulations, orders or other government directives.

20. The installments of principal and interest which became due on July 29, 2012 have not been paid although demand for the payment thereof has been made and the Plaintiff, as

the holder of the Note and Mortgage, elects to and does declare the entire balance of said principal and interest due and payable at once, and that there is now due and owing and unpaid upon the said Note and Mortgage the sum of One Hundred Seventy Two Thousand Two Hundred Eighty Six and 28/100 (\$172,286.28) Dollars as of July 29, 2012, with a current rate of 11.1120% per annum from June 29, 2012, together with reasonable attorney's fees and the costs and disbursements of this action, plus all moneys, if any, advanced by the Plaintiff under the terms of the Note and Mortgage for the payment of ad valorem taxes and/or insurance premiums, property maintenance, and securing thereof or otherwise.

21. Pursuant to the terms of the Mortgage, Plaintiff has employed counsel to prosecute this action, and under the terms of the Note and Mortgage, Plaintiff's counsel is entitled to reasonable attorney's fees and costs of this action.

22. Plaintiff may be forced to pay sums for taxes, insurance and costs for securing the property, which sums, according to the terms of the Mortgage, should be added to the amount of the debt.

23. Plaintiff's right to a personal or deficiency judgment pursuant to S.C. Code Ann. §§29-3-650 and 29-3-660 is expressly demanded against Jon Windham a/k/a Jon D. Windham.

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

(1) Issue its Order reforming the Deed and/or Mortgage to reflect the most recent recorded Plat prepared for Jon D. Windham and Frances C. Windham by Prosser Surveying Co., Inc. dated July 8, 1993 and recorded in Plat Book 49 at Page 272 to the legal description contained in the Mortgage.

(2) Ascertain and determine the amount due upon the Note and Mortgage held or being enforced by Plaintiff together with attorney's fees and costs of this action.

(3) Declare Plaintiff's Mortgage a first mortgage lien on the subject property, and render judgment of foreclosure for the amount so found to be due and owing thereon, together with any taxes or insurance premiums which may be due, with a reasonable sum as attorney's fees, the costs of maintaining the property or securing and inspecting the property, if any, incurred as a result of this delinquency, and for the costs of this action.

(4) If necessary, appoint a Receiver to collect the rents, issues, profits or designated sums from the mortgagor(s), and/or the grantee(s) of the mortgagor(s), and/or tenant(s)

occupying or exercising control over the mortgaged premises and hold the same subject to the further order of this Court.

(5) Sell the mortgaged premises, bar any equity of redemption, and apply the proceeds of sale as follows:

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

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

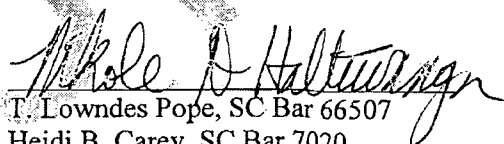
Third, to the distribution of any surplus pursuant to Rule 71, SCRPC.

(6) Issue an order directing the Sheriff of Florence County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the property should the same become necessary.

(7) Grant judgment against the Defendant Jon Windham a/k/a Jon D. Windham pursuant to S.C. Code Ann. §§29-3-650 and 29-3-660

(8) Order such other and further relief as may be just and proper.

RILEY POPE & LANEY, LLC



T. Lowndes Pope, SC Bar 66507

Heidi B. Carey, SC Bar 7020

Nikole D. Haltiwanger, SC Bar 70491

Damon C. Wlodarczyk, SC Bar 70460

Jayme L. Shy, SC Bar 81551

2838 Devine Street

Post Office Box 11412 (29211)

Columbia, South Carolina 29205

(803) 799-9993

Attorneys for Plaintiff

April 9, 2014  
Columbia, South Carolina

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

Jon Windham a/k/a Jon D. Windham  
3790 & 3794 Southborough Road, Florence, SC 29501  
File No. 4018.01014

1. Beneficial Financial I Inc., successor by merger to Beneficial Mortgage Co. of South Carolina is the Creditor to whom the debt is owed. Creditor has retained the law firm of Riley Pope & Laney, LLC, to collect the owed debt. Any written requests should be addressed to Riley Pope & Laney, LLC, Post Office Box 11412, Columbia, SC, 29211, (803) 799-9993 (Phone), (803) 239-1414 (Fax).
2. As of April 9, 2014, the total debt you owe is \$230,522.96. Because of interest, late charges, and other charges that continue to accrue from the date set forth above, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection. For further information, write or call as directed in Paragraph One (1) of this Notice.
3. Unless you, the Consumer, within thirty (30) days after the receipt of this Notice, disputes the debt or any portion of the debt set forth in Paragraph Two (2) of this Notice and further described in the Complaint attached hereto, the validity of the debt will be assumed to be valid by the Creditor's law firm, Riley Pope & Laney, LLC.
4. If you, the Consumer, notify Riley Pope & Laney, LLC, at the address set forth in Paragraph One (1) of this Notice in writing within thirty (30) days of the receipt of this Notice that the debt or any portion thereof is disputed, Riley Pope & Laney, LLC, will obtain a verification of the debt, and a copy of the verification will be mailed to the Consumer by Riley Pope & Laney, LLC.
5. If you, the Consumer, make a written request to Riley Pope & Laney, LLC within thirty (30) days of the receipt of this Notice, Riley Pope & Laney, LLC, will provide you, the Consumer, the name and address of the original Creditor, if different from the current Creditor.
6. This notice should not be construed as a thirty (30) day grace period. Creditor may pursue collection efforts immediately and not wait thirty (30) days.

**THIS IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION  
OBTAINED WILL BE USED FOR THAT PURPOSE.**

**LOAN REPAYMENT AND SECURITY AGREEMENT (Page 1 of 3)**

**LENDER (called "We", "Us", "Our")**  
 BENEFICIAL MORTGAGE CO. OF SOUTH CAROLINA  
 446 SECOND LOOP RD  
 PINWOOD VLG SHPG CTR  
 FLORENCE SC 29505

**BORROWERS (called "You", "Your")**  
 WINDHAM, JON  
 RedactedRedacted  
 3790 SOUTHBOROUGH RD  
 FLORENCE SC 29501

**LOAN NO:** Redacted

DATE OF LOAN 06/25/2002	FIRST PAYMENT DUE DATE 07/25/2002	OTHERS SAME DAY OF EACH MONTH	SCHEDULED MATURITY DATE 06/25/2032	CONTRACT RATE (per year) 11.112%
AMOUNT FINANCED \$ 177,988.85		PRINCIPAL \$ 191,912.51		
		POINTS \$ 13,913.68		
LIFE INS PREMIUM \$ NONE	DISABILITY INS PREMIUM \$ NONE			
RELI INS PREMIUM \$ NONE				
FIRST INSTALLMENT \$ 1,843.92	MONTHLY INSTALLMENT \$ 1,843.92		TERM PERIOD 380	

YOU ARE GIVING US A SECURITY INTEREST IN THE REAL ESTATE LOCATED AT THE ABOVE ADDRESS.

**REQUIRED INSURANCE.** You must obtain insurance for term of loan covering security for this loan as indicated by the word "YES" below, naming us as Loss Payee:

YES Title insurance on real estate security.  
 YES Hazard insurance on real estate security.

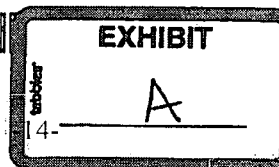
You may obtain any required insurance from anyone you choose and may assign any other policy of insurance you own to cover the security for this loan.  
 (See "Security" paragraph above for description of security to be insured.)

**NOTICE: THE FOLLOWING PAGES CONTAIN ADDITIONAL CONTRACT TERMS.**

04-15-02 RE SI  
 1ST MTG NO PPP



RedactedRedactedRedacted



ORIGINAL

SCB65251

LOAN REPAYMENT AND SECURITY AGREEMENT (Page 2 of 3)

**PAYMENT.** In return for your loan described below, you agree to pay us, the Principal and Interest computed at the Contract Rate (as stated on page one) and any monthly insurance premium, if elected. Principal is Amount Financed, plus Points. You shall pay us monthly payments, at our business address or other address given you. If more than one Borrower is named on page one, we may enforce this Contract against all, or any Borrowers, but not in a combined amount greater than the amount owed. Payments are applied in the following order: late charges, interest at the Contract Rate for the actual time outstanding, principal, and insurance. For any past due amounts, payments will be applied to the most delinquent monthly installment first, in the same order shown above, until all past due monthly installments are paid in full.

**DATE ON WHICH INTEREST BEGINS.** If you do not cancel this loan, the date on which Interest begins, payment dates, and effective date of insurance purchased are postponed by the number of days from this contract's date to date you receive this loan.

**ADJUSTMENT TO CONTRACT RATE.** The Contract Rate, as shown on page one, will decrease by one half of one percent (.50%) at the end of the 3rd year (36th month), the 4th year (48th month) and the 5th year (60th month) (collectively the "Rate Reduction"), if all payments are made within 30 days of their due date, and you have not filed a petition under the U.S. Bankruptcy Code during the months preceding the Rate Reduction. The Rate Reduction will take effect no later than the first payment due date following the 36th, 48th, and 60th month anniversary dates from the date of the contract. Even if the rate is decreased, the monthly payment will not be adjusted, thus the total loan amount will be paid in full sooner than the final payment due date shown on page one, assuming all payments are made on their due date. Notwithstanding anything to the contrary in this paragraph, if, before any Rate Reduction, any payment is made more than 30 days after the due date, or you have filed a petition under the U.S. Bankruptcy Code, you will not receive the Rate Reduction following such event.

**PAY-OUTS.** You agree to pay-outs of Amount Financed as shown on Truth-In-Lending disclosure form. If pay-outs change because loan closing is delayed, (a) you shall pay additional amounts due at closing, or (b) your cash or check will be reduced to cover additional pay-outs.

**PREPAYMENT.** You may prepay any or all of your loan at any time. If you fully prepay before final due date, the amount you owe will be reduced by unearned credit insurance charges, if any. The points are nonrefundable and fully earned when the loan is made.

**LATE CHARGE.** We will charge you a Late Charge if you do not pay any payment in full within 10 days after the due date. The Late Charge is equal to 5% of the unpaid monthly payment, up to a maximum of \$13.50. The minimum Late Charge is \$5.40.

**BAD CHECK CHARGE.** If you pay by a check which is returned for any reason, you will pay a bad check charge of \$25.00.

**FAILURE TO PAY.** If you don't pay on time, or if permitted in the event of default under the Real Estate Mortgage, (1) we will notify you of your right to bring your account up to date, and (2) if your account is not brought up to date in 20 days, we may sue you for the total amount you owe. If the Amount Financed stated on page one is over \$2,700 (or such higher amount as set by the Department of Consumer Affairs' Rules), you will also pay our reasonable attorney fees (not over 15% of amount owed), if the attorney is not our salaried employee.

**SECURITY.** You agree to give us a security interest in the real estate as described in the Mortgage/Deed of Trust.

**PROPERTY INSURANCE:**

**A. YOUR OBLIGATION TO INSURE.** You shall keep the structures located on the real property securing this loan insured against damage caused by fire and other physical hazards, name us as a loss payee and deliver to us a loss payable endorsement. If insurance covering the real property is cancelled or expires while the loan is outstanding and you do not reinstate the coverage, we may obtain, at our option, hazard insurance coverage protecting our interest in the real property as outlined below.

**B. LENDER'S RIGHT TO PLACE HAZARD INSURANCE.** You authorize us, at our option, to obtain coverage on the Property in an amount not greater than the outstanding balance of principal and interest on the loan or, if known to be less, the replacement value of the Property, in the event that you fail to maintain the required hazard insurance outlined above or fail to provide adequate proof of its existence. You authorize us to charge you for the costs of this insurance and add the insurance charges to your loan. The Insurance charges will be added to the unpaid balance of the loan which accrues interest at the Contract Rate. The addition of the insurance charges due might increase the amount of your final

**NOTICE: THE FOLLOWING PAGE CONTAINS ADDITIONAL CONTRACT TERMS.**

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LOAN REPAYMENT AND SECURITY AGREEMENT (Page 3 of 3)

installment. The cost of Lender placed hazard insurance might be higher than the cost of standard insurance protecting the property. The Lender placed insurance will not insure the contents of the property or provide liability coverage. The insurance might not be the lowest cost coverage of its type available and you agree that we have no obligation to obtain the lowest cost coverage. We or an affiliated company might receive some benefit from the placement of this insurance and you will be charged for the full cost of the premium without reduction for any such benefit. If at any time after we have obtained this insurance, you provide adequate proof that you have subsequently purchased the required coverage, we will cancel the coverage we obtained and credit any unearned premiums to your loan.

CREDIT REPORTING AND CUSTOMER INFORMATION PRACTICES. If you fail to fulfill the terms of your credit obligation, a negative report reflecting on your credit record may be submitted to a Credit Reporting Agency. You agree that the Department of Motor Vehicles (or your state's equivalent of such department) may release your residence address to us, should it become necessary to locate you. You agree that our supervisory personnel may listen to telephone calls between you and our representatives in order to evaluate the quality of our service to you. For more information regarding our privacy practices, please refer to our Privacy Statement, which is included with your loan documents.

INSURANCE. Optional credit insurance and any required insurance disclosures are attached to this Agreement and are incorporated herein by reference.

ALTERNATIVE DISPUTE RESOLUTION AND OTHER RIDERS. The terms of the Arbitration Agreement and any other Riders signed as part of this loan transaction are incorporated into this Agreement by reference.

APPLICABLE LAW. This loan is governed by the South Carolina Consumer Protection Code S.S. CODE ANN. Sections 37-1-101, et. seq.

YOU HAVE RECEIVED A COMPLETE COPY OF THIS AGREEMENT AND THE TRUTH-IN-LENDING DISCLOSURES.

BORROWERS:

*Jose W. Wood* (SEAL)

\_\_\_\_\_ (SEAL)

WITNESS:

\_\_\_\_\_ (SEAL)

*Dennis Atchiles*

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If box is checked, this mortgage secures future advances.

THIS MORTGAGE is made this 25TH day of JUNE 20 02, between the Mortgagor, JON D. WINDHAM AND FRANCES C. WINDHAM, NOT STATED.

(herein "Borrower"), and Mortgagee BENEVOLENT MORTGAGE CO. OF SOUTH CAROLINA a corporation organized and existing under the laws of DELAWARE whose address is 446 SECOND LOOP RD, PINWOOD VLG SHPG CTR, FLORENCE, SC 29505 (herein "Lender").

The following paragraph preceded by a checked box is applicable.

WHEREAS, Borrower is indebted to Lender in the principal sum of \$ 181,912.61 evidenced by Borrower's Loan Agreement dated JUNE 25, 2002 and any extensions or renewals thereof (including those pursuant to any Renegotiable Rate Agreement) (herein "Note"), providing for monthly installments of principal and interest, (including any adjustments in the amount of payments or the contract rate if that rate is variable), with the balance of the indebtedness, if not sooner paid, due and payable on JUNE 25, 2032;

WHEREAS, Borrower is indebted to Lender in the principal sum of \$ \_\_\_\_\_, or so much thereof as may be advanced pursuant to Borrower's Revolving Loan Agreement dated \_\_\_\_\_ and extensions and renewals thereof (herein "Note"), providing for monthly installments, and interest at the rate and under the terms specified in the Note, including any adjustments in the interest rate if that rate is variable, and providing for a credit limit stated in the principal sum above and an initial advance of \$ \_\_\_\_\_;

TO SECURE to Lender the repayment of (1) the indebtedness evidenced by the Note, with interest thereon, including any increases if the contract rate is variable; (2) future advances under any Revolving Loan Agreement; (3) the payment of all other sums, with interest thereon, advanced in accordance herewith to protect the security of this Mortgage; and (4) the performance of the covenants and agreements of Borrower herein contained, Borrower does hereby mortgage, grant and convey to Lender and Lender's successors and assigns the following described property located in the County of FLORENCE State of South Carolina:

ALL THAT CERTAIN PIECE, PARCEL OR LOT OF LAND WITH IMPROVEMENTS THEREON, SITUATE, LYING AND BEING IN THE COUNTY OF FLORENCE, STATE OF SOUTH CAROLINA, IN THE EBENEZER COMMUNITY CONTAINING APPROXIMATELY 1 1/2 ACRES AND LOCATED ON THE SOUTHWEST SIDE OF THE PUBLIC ROAD LEADING FROM EBENEZER TO WILSON'S CROSS ROAD, SAID LOT BEING ALMOST RECTANGLE IN SHAPE AND COMMENCING AT A POINT ON THE SOUTH SIDE OF THE ABOVE MENTIONED ROAD WHERE SAID LOT INTERSECTS WITH A DITCH ON LAND FORMERLY A PART OF THE L.K. BLACKMON ESTATE AND RUNNING GENERALLY IN A SOUTHWESTERLY DIRECTION FOR A DISTANCE OF 174.38 FEET; THENCE IN A NORTHWESTERLY DIRECTION FOR A DISTANCE OF 413.93 FEET; THENCE IN A NORTHEASTERLY DIRECTION FOR A DISTANCE OF 132.88 FEET TO THE ABOVE PUBLIC ROAD AND THENCE ALONG THE SAID PUBLIC ROAD 295.1 FEET TO AN IRON PIN AND THENCE 141.9 FEET TO THE POINT OF BEGINNING, SAID LOT BEING KNOWN AS TRACT NO. 6 ON A PLAT MADE BY LIND SURVEYING COMPANY AS REVISED AUGUST 6, 1984. SAID BEING IDENTIFIED BY THE FLORENCE COUNTY TAX ASSESSOR'S OFFICE AS MAP 74 BLOCK 1 PARCEL 026. BEING THE SAME PROPERTY CONVEYED FROM WILLIAM S. POSTON AND RONALD B. POSTON TO JON D. WINDHAM AND FRANCES C. WINDHAM BY DEED RECORDED 2-6-1992, IN BOOK A-356, AT PAGE 652, IN THE REGISTER'S OFFICE OF FLORENCE COUNTY, SOUTH CAROLINA. TAX MAP OR PARCEL ID NO.: 074-01-026

RECORDED  
10:30  
M 6/28/02  
BOOK 1687 PAGE 116  
CONNIE R. BELL  
C.C.C.P. FLORENCE COUNTY

FILED  
2002 JUN 28 10:30  
CONNIE R. BELL  
C.C.C.P. & DISTRICT  
FLORENCE COUNTY SC

Re-recorded  
FILED

2002 JUN 11 A 8:48  
CONNIE R. BELL  
C.C.C.P. & DISTRICT  
FLORENCE COUNTY SC

RE-RECORDED  
8:48 A M 8-1-02  
BOOK 1692 PAGE 1  
CONNIE R. BELL  
C.C.C.P. FLORENCE COUNTY

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TO HAVE AND TO HOLD such property unto Lender and Lender's successors and assigns, forever, together with all the improvements now or hereafter erected on the property, and all easements, rights, appurtenances, rents, royalties, mineral, oil and gas rights and profits, water rights and stock and all fixtures now or hereafter a part of the property. All replacements and additions shall be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

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

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

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

1. **Payment of Principal and Interest.** Borrower shall promptly pay when due the principal of and interest on the debt evidenced by the Note, including any variations resulting from changes in the Contract Rate.

2. **Funds for Taxes and Insurance.** Subject to applicable law and only if requested in writing by Lender, Borrower shall pay to Lender on the day monthly payments are due under the Note, until the Note is paid in full, a sum ("Funds") equal to one-twelfth of: (a) yearly taxes and assessments which may attain priority over this Security Instrument; (b) yearly leasehold payments or ground rents on the Property, if any; (c) yearly hazard insurance premiums; and (d) yearly mortgage insurance premiums, if any. These items are called "escrow items." Lender may estimate the Funds due on the basis of current data and reasonable estimates of future escrow items.

The Funds shall be held in an institution the deposits or accounts of which are insured or guaranteed by a federal or state agency (including Lender if Lender is such an institution). Lender shall apply the Funds to pay the escrow items. Lender may not charge for holding and applying the Funds, analyzing the account or verifying the escrow items, unless Lender pays Borrower interest on the Funds and applicable law permits Lender to make such a charge. Borrower and Lender may agree in writing that interest shall be paid on the Funds. Unless an agreement is made or applicable law requires interest to be paid, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds showing credits and debits to the Funds and the purpose for which each debit to the Funds was made. The Funds are pledged as additional security for the sums secured by this Security Instrument.

If the amount of the Funds held by Lender, together with the future monthly payments of Funds payable prior to the due dates of the escrow items, shall exceed the amount required to pay the escrow items when due, the excess shall be, at Borrower's option, either promptly repaid to Borrower or credited to Borrower on monthly payments of Funds. If the amount of the Funds held by Lender is not sufficient to pay the escrow items when due, Borrower shall pay to Lender any amount necessary to make up the deficiency in one or more payments as required by Lender.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender. If under paragraph 18 the Property is sold or acquired by Lender, Lender shall apply, no later than immediately prior to the sale of the Property or its acquisition by Lender, any Funds held by lender at the time of application as a credit against the sums secured by this Security Instrument.

3. **Application of Payments.** Unless applicable law or the Note provide otherwise, all payments received by Lender under paragraphs 1 and 2 shall be applied: first, to amounts payable under paragraph 2; second, to interest due; and last to the principal due.

4. **Charges; Liens.** Borrower shall pay all taxes, assessments, charges, fines and impositions attributable to the Property which may attain priority over this Security Instrument, and leasehold payments or ground rents, if any. Borrower shall pay these obligations in the manner provided in paragraph 2, or if not paid in that manner, Borrower shall pay them on time directly to the person owed payment. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this paragraph. If Borrower makes these payments directly, Borrower shall promptly furnish to Lender receipts evidencing the payments.

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

5. **Hazard Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards for which Lender require insurance. This insurance shall be maintained in the amounts and for the periods that the Lender requires. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's approval which shall not be unreasonably withheld.

All insurance policies and renewals shall be acceptable to Lender and shall include a standard mortgage clause. Lender shall have the right to hold the policies and renewals. If lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower.

Unless Lender and Borrower otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged, if the restoration or repair is not economically feasible and Lender's security would be lessened. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Borrower. If Borrower abandons the Property, or does not answer within 30 days a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may collect the insurance proceeds; Lender may use the proceeds to repair or restore the Property or to pay sums secured by this Security Instrument, whether or not then due. The 30-day period will begin when the notice is given.

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Unless Lender and Borrower otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of the monthly payments referred to in paragraphs 1 and 2 or change the amount of the payments. If under paragraph 18 the Property is acquired by Lender, Borrower's rights to any insurance policies and proceeds resulting from damage to the Property prior to the acquisition shall pass to Lender to the extent of the sums secured by this Security Instrument immediately prior to the acquisition.

**6. Preservation and Maintenance of Property; Leaseholds.** Borrower shall not destroy, damage or substantially change the Property, allow the Property to deteriorate or commit waste. If this Security Instrument is on a leasehold, Borrower shall comply with the provisions of the lease, and if Borrower acquires fee title to the Property, the leasehold and fee title shall not merge unless Lender agrees to the merger in writing.

**7. Protection of Lender's Rights in the Property; Mortgage Insurance.** If Borrower fails to perform the covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, probate, for condemnation or to enforce laws or regulations), then Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may include paying any sums secured by a lien which has priority over this Security Instrument, appearing in court, paying reasonable attorney's fees and entering on the Property to make repairs. Although Lender may take action under this paragraph 7, Lender does not have to do so.

Any amounts disbursed by Lender under this paragraph 7 shall become additional debt of Borrower secured by this Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

If Lender required mortgage insurance as a condition of making the loan secured by this Security Instrument, Borrower shall pay the premiums required to maintain the insurance in effect until such time as the requirement for the insurance terminates in accordance with Borrower's and Lender's written agreement or applicable law.

**8. Inspection.** Lender or its agent may make reasonable entries upon and inspections of the Property. Lender shall give Borrower notice at the time of or prior to an inspection specifying reasonable cause for the inspection.

**9. Condemnation.** The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of any part of the Property, or for conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender.

In the event of a total taking of the Property, the proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Borrower. In the event of a partial taking of the Property, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the taking, divided by (b) the fair market value of the Property immediately before the taking. Any balance shall be paid to Borrower.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the condemnor offers to make an award or settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the proceeds, at its option, either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due.

Unless Lender and Borrower otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of the monthly payments referred to in paragraphs 1 and 2 or change the amount of such payments.

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

**11. Successors and Assigns Bound; Joint and Several Liability; Co-signers.** The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower, subject to the provisions of paragraph 16. Borrower covenants and agreements shall be joint and several. Any Borrower who co-signs this Security Instrument, but does not execute the Note, (a) is co-signing this Security Instrument only to Mortgage, grant and convey that Borrower's interest in the Property under the terms of this Security Instrument, (b) is not personally obligated to pay the sums secured by this Security Instrument, and (c) agrees that Lender and any other Borrower may agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without that Borrower's consent.

**12. Loan Charges.** If the loan secured by this Security Instrument is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by, reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge under the Note.

**13. Legislation Affecting Lender's Rights.** If enactment or expiration of applicable laws has the effect of rendering any provision of the Note or this Security Instrument unenforceable according to its terms, Lender, at its option, may require immediate payment in full of all sums secured by this Security Instrument and may invoke any remedies permitted by paragraph 18. If Lender exercises this option, lender shall take the steps specified in the second paragraph of paragraph 16.

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

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15. **Governing Law; Severability.** The applicable law contained in the Note shall control. Where no applicable law is contained therein, this Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. In the event that any provisions or clause of this Security Instrument or the Note conflicts with applicable law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision. To this end the provisions of this Security Instrument and the Note are declared to be severable.

16. **Transfer of the Property or a Beneficial Interest in Borrower.** If all or any part of the Property or any interest in it is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by federal law as of the date of this Security Instrument.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is delivered or mailed within which Borrower may pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies by this Security Instrument without further notice or demand on Borrower.

17. **Borrower's Right to Reinstate.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earlier of: (a) 5 days (or such other period as applicable law may specify for reinstatement) before sale of the Property pursuant to any power of sale contained in this Security Instrument; or (b) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note had no acceleration occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees; and (d) takes such action as Lender may reasonably require to assure that the lien of this Security Instrument, Lender's rights in the Property and Borrower's obligations to pay the sums secured by this Security Instrument shall continue unchanged. Upon reinstatement by Borrower, this Security Instrument and the obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under paragraphs 13 or 16.

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

18. **Acceleration; Remedies.** Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under paragraphs 13 and 16 unless applicable law provides otherwise). The notice shall specify: (a) the default, (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph 18, including, but not limited to, reasonable attorney's fees and costs of title evidence, all of which shall be additional sums secured by this Security Instrument.

19. **Lender in Possession.** Upon acceleration under paragraph 18 or abandonment of the Property, Lender (by judicially appointed receiver) shall be entitled to enter upon, take possession of and manage the Property and to collect the rents of the Property including those past due. Any rents collected by lender or the receiver shall be applied first to payment of the costs of management of the Property and collection of rents, including, but not limited to, receiver's fees, premiums on receiver's bonds and reasonable attorneys' fees, and then to the sums secured by this Security Instrument.

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

21. **Waivers.** Borrower waives all rights of homestead exemption in the property. Borrower waives the right to assert any statute providing appraisal rights which may reduce any deficiency judgment obtained by Lender against Borrower in the event of foreclosure under this Security Instrument.

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

23. **Arbitration Rider to Note.** The Arbitration Rider attached to and made a part of the Note is hereby incorporated by reference and made a part of this Mortgage.

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REQUEST FOR NOTICE OF DEFAULT  
AND FORECLOSURE UNDER SUPERIOR  
MORTGAGES OR DEEDS OF TRUST

Borrower and Lender request the holder of any mortgage, deed of trust or other encumbrance with a lien which has priority over this Mortgage to give Notice to Lender, at Lender's address set forth on page one of this Mortgage, of any default under the superior encumbrance and of any sale or other foreclosure action.

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

Signed, sealed and delivered in the presence of:

<u>Dennis Nicholes</u>	<u>David Whitt</u>	(Seal)
-Witness	-Borrower	
<u>SAH</u>	<u>James Wendt</u>	(Seal)
-Witness	-Borrower	

ACKNOWLEDGEMENT OF WITNESS

STATE OF SOUTH CAROLINA, Florence County ss:

Before me personally appeared Dennis Nicholes and made oath that she saw the within named Borrower sign, seal, and as then act and deed, deliver the within written Mortgage; and that he/she with the other witness subscribed above witnessed the execution thereof.

Sworn before me this 25<sup>th</sup> day of June, 2002.

<u>SAH</u>	(Seal)	<u>Dennis Nicholes</u>
Notary Public for South Carolina		Witness

My Commission expires: **MY COMMISSION EXPIRES 12/17/2007**

(Space Below This Line For Recorder Data)

Return To:  
Records Processing Services  
577 Lamont Road  
Elmhurst, IL 60126

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STATE OF SOUTH CAROLINA )  
COUNTY OF FLORENCE )

IN THE COURT OF COMMON PLEAS )  
C/A NO: 2014-CP-21-916 )

Beneficial Financial I Inc., successor )  
by merger to Beneficial Mortgage Co. )  
of South Carolina, )

Plaintiff, )

vs. )

ANSWER AND )  
COUNTERCLAIMS )

Jon Windham a/k/a Jon D. Windham, )  
Frances Windham a/k/a Frances C. )  
Windham, and Jerry Coker a/k/a )  
Jerry L. Coker, Carolina Bank a/k/a )  
Carolina Bank & Trust Co., The )  
United States of America, by and )  
through its agency, the Internal )  
Revenue Service, and The Citizens )  
Bank, )

JURY TRIAL DEMANDED )

Defendants. )

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2014 MAR 12 AM 11:56  
CLERK OF COURT  
FLORENCE COUNTY, S.C.

ANSWER

Comes now the Defendant, Jon Windham a/k/a Jon D. Windham, answering the Complaint of the Plaintiff, who respectfully shows as follows:

1. Answering the allegations of Paragraph 1, the Defendant admits that this is a foreclosure action.
2. Responding to the allegations of Paragraph 2, the Defendant is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein.

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FLORENCE COUNTY, S.C.

3. Answering the allegations of Paragraph 3, Defendant denies the same. Defendant states that this foreclosure action was wrongfully brought and that his becoming behind on his account was only due to the actions of Plaintiff described herein. Defendant denies that Plaintiff is entitled to enforce any remedies under the note and mortgage as this is a wrongful foreclosure.
4. Answering the allegations of Paragraph 4, Defendant states that he has an interest in the real estate which is the subject of this action. Defendant states that Defendant Jerry Coker should have no interest in the property that was supposed to serve as security to the mortgage that is the subject of this action.
5. Responding to the allegations of Paragraph 5, Defendant states that he is without sufficient information to form an opinion as to the truth or the falsity of the allegations contained therein.
6. Responding to the allegations of Paragraph 6, Defendant states that he is without sufficient information to form an opinion as to the truth or the falsity of the allegations contained therein.
7. Answering the allegations of Paragraph 7, Defendant admits the same.
8. Answering the allegations of Paragraph 8, Defendant admits that a mortgage was delivered to Plaintiff. Defendant denies that the mortgage was to be secured by the entire 1.50 acres as set forth in the property description in Plaintiff's complaint. Rather, said mortgage was only secured by the 1.0 acre known as 3790 Southborough

Road, Florence, SC 29501.

9. Responding to the allegations of Paragraph 9, the Defendant is without sufficient knowledge to form a belief as to the truth or the falsity of the allegations contained therein. Defendant admits that Exhibit "B" appears to be a true copy of Plaintiff's mortgage and said document speaks for itself.
10. Answering the allegations of Paragraph 10, Defendant states that Exhibit "B" speaks for itself.
11. Answering the allegations of Paragraph 11, Defendant admits that he deeded 0.50 of an acre to Defendant Jerry Coker. Defendant denies that this 0.50 acre was to be security for the mortgage that is the subject of this action.
12. Paragraph 12 seeks admission or denial of third parties regarding their interest(s) in the property that is the subject of this action. Defendant cannot state with any certainty what legal interests his co-defendants may have in the property that is the subject of this action.
13. Responding to the allegations of Paragraph 13, Defendant is without sufficient knowledge to form a belief as to the truth or falsity of the allegations contained therein. Defendant denies that this loan is ineligible for modification as Plaintiff represented to Defendant that he would receive a loan modification after making six months of bi-monthly payments in the amount of \$1,000.00.
14. The Defendant incorporates his responses to Paragraphs 1-13 herein.

15. Responding to the allegations of Paragraph 15, Defendant is without sufficient knowledge to form a belief as to the truth or the falsity contained therein.
16. Answering the allegations of Paragraph 16, Defendant denies the same.
17. Answering the allegations of Paragraph 17, Defendant denies the same.
18. The Defendant incorporates his responses to Paragraphs 1-18 herein.
19. Paragraph 19 is a statement of law. As such, Defendant is unable to provide an admission or denial as to the allegations contained therein. To the extent that Defendant is capable of providing such a response, Defendant denies the same.
20. Answering the allegations of Paragraph 20, Defendant denies the same. Defendant has continuously made payments on his mortgage, even after Plaintiff wrongfully force-placed insurance on his home. Specifically, Defendant has made bi-monthly payments of \$1,000.00 since November, 2012. Each payment has been accepted by Plaintiff. In 2012, Plaintiff applied approximately 25% of Defendant's payments to the principal balance. Starting in 2013, Plaintiff applied all of Defendant's payments to alleged interest and fees. In or about July, 2013, Plaintiff unilaterally stopped taking payments out of Defendant's account.
21. Answering the allegations of Paragraph 21, Defendant denies that Plaintiff is entitled to any fees and costs in this matter.
22. Answering the allegations of Paragraph 22, Defendant denies that Plaintiff will have to pay any sum in this matter as Defendant made payments for taxes and insurance on

this property. Plaintiff wrongfully force-placed insurance on Defendant's property even though Plaintiff had knowledge that said property was already insured. Defendant denies that any amount should be added to the Mortgage and denies that Plaintiff is entitled to any recovery.

23. Paragraph 23 is a statement of law to which Defendant is incapable of making a response. To the extent a response is required, Defendant denies that Plaintiff is entitled to any recovery, including a personal or deficiency judgment.

**FIRST AFFIRMATIVE DEFENSE**

24. Defendant incorporates herein by reference the foregoing paragraphs of this Answer to the extent consistent with this defense, as well as all factual allegations set forth in Defendant's counterclaims.
25. The Plaintiff has unclean hands. Plaintiff continued to accept Defendant's payments through July, 2013, yet has brought this foreclosure action claiming that no payments have been made since July 29, 2012.
26. Additionally, Plaintiff unilaterally and wrongfully force-placed insurance on Defendant's property even though Defendant already maintained his own insurance. This force-placing raised Defendant's payment and began the process of Defendant's initial delinquency.
27. On or about April 17, 2014, Defendant contacted Plaintiff in an attempt to get this situation corrected. Defendant spoke to a representative of Plaintiff who stated that

a loan modification was probably Defendant's best option. Said representative indicated that she could see that Plaintiff had stopped Defendant's payments and said she would contact him on April 18, 2014 regarding a loan modification. Defendant never received a call back from this, or any, representative of Plaintiff and has been unable to contact the representative to which he spoke.

**SECOND AFFIRMATIVE DEFENSE**

28. Defendant incorporates herein by reference the foregoing paragraphs of this Answer to the extent consistent with this defense, as well as all factual allegations set forth in Defendant's counterclaims.
29. The Plaintiff is barred by the equitable doctrine of waiver.

**THIRD AFFIRMATIVE DEFENSE**

30. Defendant incorporates herein by reference the foregoing paragraphs of this Answer to the extent consistent with this defense, as well as all factual allegations set forth in Defendant's counterclaims.
31. The Plaintiff is barred by the equitable doctrine of estoppel.

**FOURTH AFFIRMATIVE DEFENSE**

32. Defendant incorporates herein by reference the foregoing paragraphs of this Answer to the extent consistent with this defense, as well as all factual allegations set forth in Defendant's counterclaims.
33. The Plaintiff lacks standing to pursue this action. Upon information and belief, the

loan that is the subject of this action has been securitized and placed into a trust with a party other than the Plaintiff and not a party to this action.

**FIFTH AFFIRMATIVE DEFENSE**

34. Defendant incorporates herein by reference the foregoing paragraphs of this Answer to the extent consistent with this defense, as well as all factual allegations set forth in Defendant's counterclaims.

35. The Plaintiff is not the proper party in interest to bring this action. Upon information and belief, the loan that is the subject of this action has been securitized and placed into a trust with a party other than the Plaintiff and not a party to this action.

**COUNTERCLAIMS FACTUAL ALLEGATIONS**

36. In 2002, Defendant mortgaged certain property and received the Note that is the subject of this action.

37. Defendant alerted the loan officer that the Note was only to be secured by a mortgage on one acre of Defendant's property, not the entire 1.5 acre lot.

38. Unbeknownst to Defendant, the Note that is the subject of this action was wrongfully secured by the entire 1.5 acre lot.

39. Defendant made his monthly payments on the mortgage in a timely fashion and maintained insurance on the property that is the subject of this action. Said insurance was purchased from State Farm Fire and Casualty Company.

40. In spite of Defendant maintaining his own insurance on the property that is the subject

of this action, Plaintiff wrongfully force-placed insurance on Defendant's property. The force-placing of insurance caused Defendant's payment to increase and also resulted in Defendant's payments to only be credited to the additional insurance cost rather than to the principal and interest due on the mortgage.

41. Defendant continued to attempt to make payments on the Note. Thereafter, Plaintiff represented to Defendant that if he were to make bi-monthly payments of \$1,000.00 on the loan for six months, he would be offered a loan modification. Defendant relied on the representations made by Plaintiff and agreed for Plaintiff to automatically debit his bank account two times per month for \$1,000.00 each time.
42. On or about October, 2012, Plaintiff automatically debited two \$1,000.00 payments on the Note from Defendant. Plaintiff applied a combined \$496.81 to principal and took the rest as "interest, insurance and other charges".
43. On or about November, 2012, Plaintiff automatically debited two more \$1,000.00 payments from Defendant. Plaintiff applied a combined \$501.06 to principal and took the rest as "interest, insurance and other charges".
44. On or about December, 2012, Plaintiff automatically debited a \$1,000.00 payment from Defendant. Plaintiff applied \$258.87 to principal and took the rest as "interest, insurance and other charges".
45. From January, 2013 until July, 2013, Defendant continued to have bi-monthly payments of \$1,000.00 debited from his account by Plaintiff. Each of these 14

payments were applied, in their entirety, to “interest, insurance and other charges”. Defendant never received any notice from Plaintiff regarding what or how it was determined or decided that the payments would all go to “interest, insurance and other charges” as said action violated the terms of the Note and Mortgage applicable to this loan.

46. After taking these payments without issue, Plaintiff abruptly stopped debiting Defendant’s account for its payments. Plaintiff sent no correspondence to Defendant alerting him to any change in payment status and Plaintiff had no issue in debiting the money from Defendant’s account, such as an overdraft or Defendant stopping payments to Plaintiff. Upon information and belief, Plaintiff stopped automatically debiting these payments so as it would not have to modify the loan that is the subject of this action, as was promised by Plaintiff.
47. Upon realizing that Plaintiff had stopped taking his payments out, Defendant called Plaintiff to inquire as to why the payments had stopped and to determine what steps could be taken to remedy this issue. The representative with which Defendant spoke suggested a loan modification. Plaintiff’s representative stated that she would call Defendant back the following day and begin the loan modification process.
48. Plaintiff never contacted Defendant regarding a loan modification after stating it would contact Defendant on the following day. Instead, Plaintiff elected to pursue foreclosure.

**COUNTERCLAIM COUNT ONE**  
**Violation of the South Carolina Unfair Trade Practices Act**

49. Defendant incorporates herein by reference the foregoing paragraphs of this Answer to the extent consistent with this cause of action.
50. The activities of the Plaintiff constitute “trade or commerce” as defined by South Carolina Code §39-5-10, *et. seq.* (As amended).
51. Plaintiff has engaged in conduct that violates the Unfair Trade Practices Act. Said conduct includes, but is not limited to, foreclosing on a tract of land which Plaintiff knows, or should know, was not to be secured by any mortgage between Plaintiff and Defendant; by force-placing insurance on Defendant’s property when Defendant already had insurance, causing Defendant’s monthly payment to increase; by taking monthly payments from Defendant and applying them all to alleged interest and fees; for unilaterally ceasing acceptance of payments from Defendant on his loan; and by refusing to offer Defendant a loan modification, even after stating it would do so.
52. The actions of the Plaintiff described above constitute unfair and deceptive acts and practices in the conduct of trade and commerce, as prohibited by the South Carolina Unfair Trade Practices Act, §39-5-10 *et.seq.* and are knowing and willful violations thereof.
53. Defendant would further show that the actions of the Plaintiff herein have a real and substantial potential for repetition and are a threat to the public interest.
54. Defendant has suffered an ascertainable loss due to the unlawful actions of the

Plaintiff and is entitled, under § 39-5-140, to recover actual damages in an amount to be proven at trial, treble said actual damages for the Plaintiff's knowing and willful behavior, and an award of reasonable attorney's fees and costs.

**COUNTERCLAIM COUNT TWO**  
**Intentional Infliction of Emotional Distress**

55. Defendant incorporates herein by reference the foregoing paragraphs of this Answer to the extent consistent with this cause of action.
56. The Plaintiff intentionally or recklessly inflicted severe emotional distress on Defendant, or should have been substantially certain that such distress would result from its conduct when it committed the above-alleged conduct. Said conduct was part of a conscious scheme of Plaintiff to take Defendant's home away from him after Plaintiff was the cause of the initial delinquency by wrongfully force-placing insurance on Defendant's home.
57. The conduct of the Plaintiff was extreme, outrageous, and exceeded the bounds of decency. The actions of the Plaintiff are the direct and sole reason that this foreclosure action has been brought, creating the risk that Defendant could lose his home.
58. The conduct of the Plaintiff must be regarded as utterly intolerable in a civilized society.
59. The actions of the Plaintiff caused Defendant to suffer severe emotional distress.
60. The distress suffered by Defendant was so severe that no reasonable person could be expected to endure it.

61. As a result of the Plaintiff's conduct, the Defendant has been made to suffer severe emotional distress, mental anguish, anxiety, and humiliation. Defendant is entitled to actual damages for the Plaintiff's intentional infliction of emotional distress as well as punitive damages.

**COUNTERCLAIM COUNT THREE**  
**Negligent Training and Supervision**

62. Defendant incorporates herein by reference the foregoing paragraphs of this Answer to the extent consistent with this cause of action.
63. Plaintiff knew or should have known of the conduct set forth herein which was directed at and visited upon Defendant.
64. Plaintiff knew or should have known that said conduct was improper and in violation of the laws of the State of South Carolina.
65. Plaintiff negligently failed to train and supervise its agents and employees in order to prevent said improper and unconscionable conduct.
66. Plaintiff negligently failed to train and supervise its agents and employees on the South Carolina Unfair Trade Practices Act.
67. As a result of the Plaintiff's negligence, Defendant suffered pecuniary losses, late charges on his mortgage, was forced to incur attorney's fees, and mental anguish, physical sickness and suffering, embarrassment and humiliation.

**COUNTERCLAIM COUNT FOUR**  
**Reckless and Wanton Training and Supervision**

68. Defendant incorporates herein by reference the foregoing paragraphs of this Answer to the extent consistent with this cause of action.
69. Plaintiff knew or should have known of the conduct set forth herein which was directed at and visited upon Defendant.
70. Plaintiff knew or should have known that said conduct was improper and in violation of the laws of the State of South Carolina.
71. Plaintiff recklessly and wantonly failed to train and supervise its agents and employees in order to prevent said improper and unconscionable conduct.
72. Plaintiff recklessly and wantonly failed to train and supervise its agents and employees on the South Carolina Unfair Trade Practices Act.
73. As a result of the Plaintiff's reckless and wanton conduct, Defendant suffered pecuniary losses, late charges on his mortgage, was forced to incur attorney's fees, and mental anguish, physical sickness and suffering, embarrassment and humiliation.

**COUNTERCLAIM COUNT FIVE**  
**Breach of the Implied Covenant of Good Faith and Fair Dealing**

74. Defendant incorporates herein by reference the foregoing paragraphs of this Answer to the extent consistent with this cause of action.
75. The loan that is the subject of this action is the byproduct of a contract between the Plaintiff and the Defendant.
76. In all contracts, there is an implied covenant of good faith and fair dealing.
77. The Plaintiff, and/or the Plaintiff's agents and/or employees, breached the implied

covenant of good faith and fair dealing by foreclosing on a tract of land which Plaintiff knows, or should know, was not to be secured by any mortgage between Plaintiff and Defendant; by force placing insurance on Defendant's property when Defendant already had insurance, causing Defendant's monthly payment to skyrocket; by taking monthly payments from Defendant and applying them all to interest and fees; for unilaterally ceasing acceptance of payments from Defendant on his loan; and by refusing to offer Defendant a loan modification, even after stating it would do so, so as Defendant could keep his home.

78. Due to this breach, the Plaintiff has caused Defendant to suffer actual, special and consequential damages. Therefore, the Plaintiff is liable to the Defendant for such damages.

**COUNTERCLAIM COUNT SIX**  
**Fraud**

79. Defendant incorporates herein by reference the foregoing paragraphs of this Answer to the extent consistent with this cause of action.
80. The Plaintiff expressly represented to the Defendant that his making of \$1,000.00 bi-monthly payments for six months on the loan that is the subject of this action would entitle him to a loan modification with Plaintiff.
81. The Plaintiff's representation was false. Plaintiff had no intention of modifying the loan that is the subject of this action and, upon realizing that Defendant had already made payments for more than the six months specified by Plaintiff to entitle him to

a loan modification, Plaintiff unilaterally ceased automatically debiting Defendant's account. Thereafter, when Defendant contacted Plaintiff to discuss a loan modification, Plaintiff's representative stated that she would call Plaintiff back to set this up, but she never did.

82. The Plaintiff's misrepresentation was material. The Plaintiff's representation would have been viewed by a reasonable person as significant and as having played a role in Defendant's decision to continue making \$1,000.00 bi-monthly payments instead of seeking a separate remedy, such as a new loan or a refinance.
83. The Plaintiff knew of the representation's falsity or recklessly disregarded the truth or falsity of the representation.
84. The Plaintiff intended for the Defendant to act on the misrepresentation.
85. The Defendant was not aware of the falsity of the Plaintiff's representation.
86. The Defendant relied on the truth of the Plaintiff's statement when making the payments requested by Plaintiff.
87. The Defendant had a right to rely on the Plaintiff's representation.
88. The Defendant has suffered injury and damages and is entitled to both actual damages and punitive damages for the Plaintiff's fraud.

**COUNTERCLAIM COUNT SEVEN**  
**Negligent Misrepresentation**

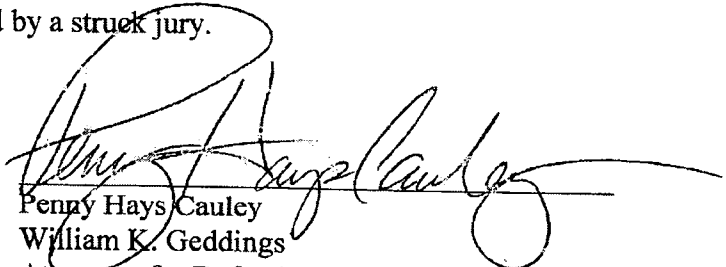
89. Defendant incorporates herein by reference the foregoing paragraphs of this Answer to the extent consistent with this cause of action.

90. The Plaintiff, by and through its agents and employees, made false representations to the Defendant.
91. Said statements made by the Plaintiff to the Defendant were made in the course of the Plaintiff's business and/or employment.
92. Plaintiff had a pecuniary interest in making the statements to the Defendant.
93. The Plaintiff owed a duty of care to see that truthful information was communicated to the Defendant regarding his loan and his prospective loan modification.
94. The Plaintiff breached that duty of care by failing to exercise due care and by negligently and fraudulently making false statements to the Defendant.
95. The Defendant justifiably relied upon the representations made by the Plaintiff by going through with the payments based upon the Plaintiff's representations that it would offer a loan modification to Defendant after he made six months of bi-monthly payments in the amount of \$1,000.00.
96. As a proximate result thereof, the Defendant suffered pecuniary losses including mental anguish, physical sickness and suffering, embarrassment and humiliation.

**WHEREFORE**, Defendant respectfully requests this Honorable Court:

- a. Dismiss the Plaintiff's Complaint with prejudice;
- b. Enter judgment in favor of Defendant on the Plaintiff's Complaint;
- c. Award Defendant attorney fees and costs incurred in the defense of this matter;

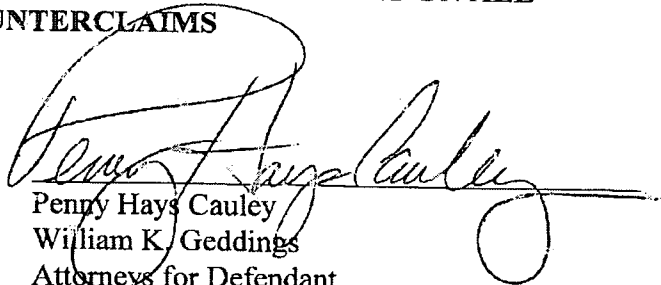
- d. Enter judgment in favor of Defendant on each and every counterclaim filed herein, to include actual, statutory, compensatory and punitive damages, attorneys' fees, and costs;
- e. For any such other relief as the Court may award at law or equity; and
- f. For this matter to be heard by a struck jury.



Penny Hays Cauley  
William K. Geddings  
Attorneys for Defendant

**Of Counsel:**  
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**DEFENDANT DEMANDS A TRIAL BY STRUCK JURY ON ALL  
COUNTERCLAIMS**

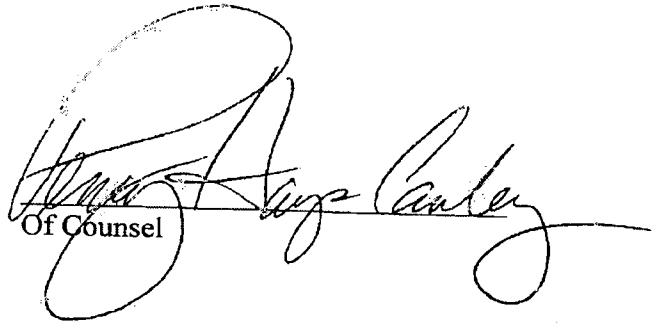


Penny Hays Cauley  
William K. Geddings  
Attorneys for Defendant

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above Answer and Counterclaim has been served upon all counsel herein via facsimile and by U.S. Mail, first-class postage prepaid and properly addressed on this the 12<sup>th</sup> day of May, 2014.

Riley Pope & Laney, LLC  
Nikole D. Haltiwanger  
P.O. Box 11412  
Columbia, SC 29211

  
Of Counsel

FILED  
2014 MAY 12 AM 11:55  
CLERK OF COURT  
FLORENCE COUNTY, S.C.

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*Claire Hal-Spearis*  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA  
COUNTY OF FLORENCE

IN THE COURT OF COMMON PLEAS  
TWELFTH JUDICIAL CIRCUIT  
C/A NO.: 2014-CP-21-00916

**Beneficial Financial I, Inc., successor by merger to Beneficial Mortgage Co. of South Carolina,**

**Plaintiff**

v.

**Jon Windham, a/k/a/ Jon D. Windham; Frances Windham, a/k/a Frances C. Windham; and Jerry Coker, a/k/a Jerry L. Coker; Carolina Bank, a/k/a Carolina Bank and Trust Co.; The United States of America, by and through its agency, the Internal Revenue Service; and The Citizens Bank**

**Defendants**

**MOTIONS TO DISMISS AND REPLY**

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CONNIE REEL-SHEARN  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

The plaintiff Beneficial Financial I, Inc. (“Beneficial”), by and through undersigned counsel, replies to the Counterclaims filed by the defendant Jon Windham (“Windham”) as follows:

**FIRST DEFENSE AND MOTION TO DISMISS**

Beneficial moves to dismiss Windham’s first counterclaim (Unfair Trade Practices Act) pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure because Windham has not stated facts sufficient to demonstrate that Beneficial committed an unfair or deceptive act.

**SECOND DEFENSE AND MOTION TO DISMISS**

Beneficial moves to dismiss Windham’s second counterclaim (Intentional Infliction of Emotional Distress) pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure

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*Connie Reel-Shearn*  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

because Windham has not stated facts sufficient to demonstrate that Beneficial committed an extreme or outrageous act that exceeded the bounds of decency.

**THIRD DEFENSE AND MOTION TO DISMISS**

Beneficial moves to dismiss Windham's third and fourth counterclaims (Negligent Training and Supervision and Reckless and Wanton Training and Supervision) pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure because any alleged harm caused by Beneficial's purported negligent or reckless hiring and supervision was neither foreseeable nor a proximate cause of Windham's injuries.

**FOURTH DEFENSE AND MOTION TO DISMISS**

Beneficial moves to dismiss Windham's fifth counterclaim (Breach of Contract and Good Faith and Fair Dealing) pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure because Beneficial was permitted to take the actions of which Windham complains pursuant to the terms of the Note and Mortgage and thus did not breach the covenant of good faith and fair dealing.

**FIFTH DEFENSE AND MOTION TO DISMISS**

Beneficial moves to dismiss Windham's sixth and seventh counterclaims (Fraud and Negligent Misrepresentation) pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure because Beneficial did not make any false representations to Windham, and to the extent Beneficial made any such representations, Windham's reliance on them was not reasonable.

**SIXTH DEFENSE AND MOTION TO DISMISS**

Beneficial moves to dismiss all of Windham's non-contractual counterclaims pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure because they are barred by the economic loss rule.

### SEVENTH DEFENSE AND REPLY

1-23. Paragraphs 1 through 23 are admissions and denials of Beneficial's allegations to which no reply is required. To the extent a reply is required, the allegations of Paragraphs 1 through 23 are denied.

24. Paragraph 24 does not require a reply. To the extent a reply is required, the allegations of Paragraph 24 are denied.

25-26. Paragraphs 25 and 26 are denied.

27. Replying to Paragraph 27, Beneficial admits that from time to time Windham contacted it regarding his account and potential loan modifications. Except as admitted, the allegations of Paragraph 27 are denied.

28. Paragraph 28 does not require a reply. To the extent a reply is required, the allegations of Paragraph 28 are denied.

29. Paragraph 29 is denied.

30. Paragraph 30 does not require a reply. To the extent a reply is required, the allegations of Paragraph 30 are denied.

31. Paragraph 31 is denied.

32. Paragraph 32 does not require a reply. To the extent a reply is required, the allegations of Paragraph 32 are denied.

33. Paragraph 33 is denied.

34. Paragraph 34 does not require a reply. To the extent a reply is required, the allegations of Paragraph 34 are denied.

35. Paragraph 35 is denied.

### COUNTERCLAIMS FACTUAL ALLEGATIONS

36. Replying to Paragraph 36, Beneficial admits that the Mortgage and Note that are the subject of this action are in writing and are the best evidence of their contents. Except as admitted, the allegations of Paragraph 36 are denied.

37. Replying to Paragraph 37, Beneficial admits that the Note and Mortgage are in writing and that each is the best evidence of its contents. Except as admitted, the allegations of Paragraph 37 are denied.

38. Replying to Paragraph 38, Beneficial admits that the Note is in writing and is the best evidence of its contents. Except as admitted, the allegations of Paragraph 38 are denied.

39. Replying to Paragraph 39, Beneficial admits that Windham made payments pursuant to the terms of the Note and Mortgage from time to time. Except as admitted, the allegations of Paragraph 39 are denied.

40. Replying to Paragraph 40, Beneficial admits that it force placed insurance on its collateral and charged Windham with the cost of force-placed insurance, as permitted by the loan documents. Except as admitted, the allegations of Paragraph 40 are denied.

41. Replying to the first sentence of Paragraph 41, Beneficial replies that it is without sufficient knowledge or information to form a belief as to Windham's attempts to make payments on the Note and thus denies the same. The second and third sentences of Paragraph 41 are denied.

42. Replying to Paragraph 42, Beneficial admits that Windham made two payments of \$1,000 in October 2012 and that Beneficial applied the payments in accordance with the terms of the Note and Mortgage. Except as admitted, the allegations of Paragraph 42 are denied.

43. Replying to Paragraph 43, Beneficial admits that Windham made two payments of \$1,000 in November 2012 and that Beneficial applied the payments in accordance with the terms of the Note and Mortgage. Except as admitted, the allegations of Paragraph 43 are denied.

44. Replying to Paragraph 44, Beneficial admits that Windham made a \$1,000 payment on or about December 6, 2012 and that Beneficial applied the payment in accordance with the terms of the Note and Mortgage. Except as admitted, the allegations of Paragraph 44 are denied.

45. Replying to Paragraph 45, Beneficial admits that Windham made some payments of \$1,000 between January and July 2013, and that Beneficial applied such payments in accordance with the terms of the Note and Mortgage. Except as admitted, the allegations of Paragraph 45 are denied.

46. Paragraph 46 is denied.

47. Replying to Paragraph 47, Beneficial admits that it spoke with Windham by phone from time to time regarding his account, and that Windham was provided opportunities to discuss loan modification. Except as admitted, the allegations of Paragraph 47 are denied.

48. Replying to Paragraph 48, Beneficial admits that it initiated the instant foreclosure action in accordance with the terms of the Note and Mortgage and applicable law. Except as admitted, the allegations of Paragraph 48 are denied.

**COUNTERCLAIM COUNT ONE**  
**(Violation of South Carolina Unfair Trade Practices Act)**

49. Paragraph 49 does not require a reply. To the extent a reply is required, the allegations of Paragraph 49 are denied.

50. Paragraph 50 is a legal conclusion to which no reply is required. To the extent a reply is required, the allegations of Paragraph 50 are denied.

**COUNTERCLAIM COUNT TWO**  
**(Intentional Infliction of Emotional Distress)**

51. Paragraph 51 does not require a reply. To the extent a reply is required, the allegations of Paragraph 51 are denied.

52-60. Paragraphs 52 through 60 are denied.

61. Beneficial is without sufficient knowledge or information to form a belief as to the truth or falsity of the first sentence of Paragraph 61 and thus denies the same. The second sentence of Paragraph 61 is denied.

**COUNTERCLAIM COUNT THREE**  
**(Negligent Training and Supervision)**

62. Paragraph 62 does not require a reply. To the extent a reply is required, the allegations of Paragraph 62 are denied.

63. Replying to Paragraph 63, Beneficial admits that it was aware of some of the facts set forth in Windham's counterclaims. Except as admitted, the allegations of Paragraph 63 are denied.

64-67. Paragraphs 64 through 67 are denied.

**COUNTERCLAIM COUNT FOUR**  
**(Reckless and Wanton Training and Supervision)**

68. Paragraph 68 does not require a reply. To the extent a reply is required, the allegations of Paragraph 68 are denied.

69. Replying to Paragraph 69, Beneficial admits that it was aware of some of the facts set forth in Windham's counterclaims. Except as admitted, the allegations of Paragraph 69 are denied.

70-73. Paragraphs 70 through 73 are denied.

**COUNTERCLAIM COUNT FIVE**  
**(Breach Of the Implied Covenant of Good Faith and Fair Dealing)**

74. Paragraph 74 does not require a reply. To the extent a reply is required, the allegations of Paragraph 74 are denied.

75. Replying to Paragraph 75, Beneficial admits that it is in a contractual relationship with Windham by virtue of the Note and Mortgage. Except as admitted, the allegations of Paragraph 75 are denied.

76. Paragraph 76 is a legal conclusion to which no reply is required. To the extent a reply is required, the allegations of Paragraph 76 are denied.

77-78. Paragraphs 77 and 78 are denied.

**COUNTERCLAIM COUNT SIX**  
**(Fraud)**

79. Paragraph 79 does not require a reply. To the extent a reply is required, the allegations of Paragraph 79 are denied.

80-88. Paragraphs 80 through 88 are denied.

**COUNTERCLAIM COUNT SEVEN**  
**(Negligent Misrepresentation)**

89. Paragraph 89 does not require a reply. To the extent a reply is required, the allegations of Paragraph 89 are denied.

90-92. Paragraphs 90 through 92 are denied.

93. Replying to Paragraph 93, Beneficial replies that its duties to Windham are set forth in the Note and Mortgage, which are in writing and the best evidence of their contents. Except as admitted, the allegations of Paragraph 93 are denied.

94-96. Paragraphs 94 through 96 are denied.

**EIGHTH DEFENSE**  
**(Laches)**

Windham's counterclaims are barred by the doctrine of laches.

**NINTH DEFENSE**  
**(Unclean Hands)**

Windham is not entitled to equitable remedies because he has unclean hands.

**TENTH DEFENSE**  
**(Good Faith and Reasonableness)**

Windham is not entitled to judgment for intentional infliction of emotional distress because Beneficial acted in good faith and in a reasonable manner.


**ELEVENTH DEFENSE**  
**(Comparative Negligence)**

To the extent that Windham has stated a claim for negligent misrepresentation, Windham is barred from recovery based upon Beneficial's alleged negligence because Windham's negligence is greater than Beneficial's. In the alternative, to the extent Windham's negligence is not greater than Beneficial's alleged negligence, Windham's recovery must be reduced in proportion to her negligence.

WHEREFORE, Beneficial respectfully requests that this Court enter an order:

- A. Dismissing Windham's counterclaims with prejudice;
- B. Taxing the costs of this action against Windham; and
- C. Awarding all other relief that the Court deems just and proper.

This the 16<sup>th</sup> day of July, 2014.



\_\_\_\_\_  
Rebecca K. Lindahl  
S.C. State Bar # 78495  
rebecca.lindahl@kattenlaw.com  
Richard L. Farley  
S.C. State Bar # 80011

[richard.farley@kattenlaw.com](mailto:richard.farley@kattenlaw.com)  
*Attorneys for Beneficial Financial I, Inc.*

**OF COUNSEL:**

**KATTEN MUCHIN ROSENMAN LLP**  
550 S. Tryon Street, Suite 2900  
Charlotte, NC 28202  
Telephone: 704-344-3141  
Facsimile: 704-344-2277

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the pleading or paper to which the certificate is attached was duly served in accordance with the provisions of Rule 5 of the South Carolina Rules of Civil Procedure to all parties or their attorney by the method indicated below, to the following address(es) or telefacsimile number(s):

**Penny Hays Cauley**  
**Hays Cauley, P.C.**  
**1303 W. Evans Street**  
**Florence, SC 29501**  
*Attorney for Jon Windham*

**Frances Windham,**  
**a/k/a Frances C. Windham**  
**1242 Strada Amore, Apt. 3**  
**Florence, SC 29501**

**Gary I. Finklea, Esq.**  
**Finklea Law Firm**  
**814 West Evans Street**  
**P.O. Box 1317**  
**Florence, SC 29503-1317**  
*Attorney for Jerry Coker*

**Eugene P. Warr, Jr. Esq.**  
**Lucas, Warr & White**  
**2917 West Palmetto Street**  
**Florence, SC 29501**  
*Attorney for Carolina Bank*

**Matthew J. Modica, Esq.**  
**Assistant US Attorney**  
**151 Meeting Street, Suite 200**  
**Charleston, SC 29402**

**Larry G. Reddeck, Esq.**  
**Nettles, Turbeville & Reddeck**  
**Post Office Box 699**  
**261 Kelley Street**  
**Lake City, SC 29560**

*Attorney for United States of America*

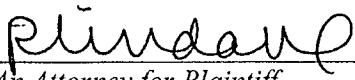
*Attorney for The Citizens Bank*

**Nikole D. Haltiwanger**  
**Riley Pope & Laney**  
**P.O. Box 11412**  
**Columbia, SC 29211**  
*Co-counsel for Beneficial Financial*

- by deposit thereof, enclosed in a post-paid, properly addressed wrapper, in a post office or an official depository under the exclusive care and custody of the United States Postal Service, to the address(es) set forth above.
- by hand delivery by handing it to each attorney or party or by leaving it at the attorney's office with a partner or employee at the office address(es) set forth above.
- by confirmed telefacsimile transmittal received at the telefacsimile number(s) set forth above on this date, as evidenced by a telefacsimile transaction report.
- by deposit with a designated delivery service authorized pursuant to 26 U.S.C. §7502(f)(2), to the address(es) set forth above, for which a delivery receipt will be obtained.

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 FLORENCE COUNTY SC  
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 Wanda Hal...  
 CLERK OF COURT CP & GS  
 FLORENCE COUNTY SC

This the 16<sup>th</sup> day of July, 2014.

  
An Attorney for Plaintiff

OF COUNSEL:

KATTEN MUCHIN ROSENMAN LLP  
550 S. Tryon Street, Suite 2900  
Charlotte, North Carolina 28202-4213  
(704) 444-2000 telephone  
(704) 444-2050 facsimile

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF FLORENCE	)	2014-CP-21-916
	)	
	)	
	)	
Beneficial Financial I, Inc.	)	)
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
Jon Windham	)	)
<u>DEFENDANT</u>	)	August 31, 2017
		Florence, South Carolina

B E F O R E:

THE HONORABLE THOMAS A. RUSSO, JUDGE.

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

REBECCA LINDAHL, ESQ.  
Attorney for the Plaintiff

PENNY HAYS CAULEY, ESQ.  
Attorney for the Plaintiff

KESHIA REED  
Official Court Reporter

I N D E X

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1 THE COURT: This is a motion for summary  
2 judgment; is that correct?

3 MS. CAULEY: Yes, Your Honor.

4 THE COURT: All right. I'll be happy to hear  
5 from you, ma'am.

6 MS. CAULEY: Thank you, Your Honor. This arises  
7 out of a foreclosure action wherein Mr. Windham has filed  
8 counterclaims against Beneficial regarding their force  
9 placement of insurance. Their unfair trade practices in  
10 force placing that insurance as well as telling him that  
11 if he made payments of a thousand dollars twice a month  
12 for six months, that upon receipt of that \$12,000 in  
13 payment to the offered loan modification. Mr. Windham  
14 complied making each and every payment and then Beneficial  
15 failed to offer him a loan modification, so we filed a  
16 motion to compel based on plaintiff's failure to  
17 repeatedly appear for deposition. And as a result of that  
18 motion to compel, the parties provided this court a  
19 consent order which you signed on July 9th -- June 2017  
20 sorry I can't read the stamp on here, but on June 9th  
21 wherein if they failed to appear for the deposition, that  
22 would result in plaintiff being prohibited from offering  
23 any testimony in support of their foreclosure action and  
24 also from offering any testimony in defense of  
25 Mr. Windham's counterclaims. Plaintiff did in fact fail

1 to appear at the noticed deposition and therefore we have  
2 filed this motion for summary judgment with -- for the  
3 Court to enter judgment on five of the six claims that we  
4 filed and allow just the issue of damages to go before the  
5 jury, which is currently set for September 25th.

6 THE COURT: All right.

7 MS. LINDAHL: Good morning, Your Honor. Becky  
8 Lindahl on behalf of the lender, much of that is correct.  
9 In the days leading up to the July 9th scheduled  
10 deposition, we were engaging in settlement negotiations  
11 and were very close to reaching a loan modification that  
12 would reduce Mr. Windham's interest rate on his mortgage  
13 by at least 6 percent. Although, we're still not quite in  
14 agreement on that percentage, it would also waive over  
15 hundred thousand dollars of unpaid and accrued interest  
16 and I believe at least \$10,000 of ancillary fees.

17 We agreed to take the deposition off because the  
18 settlement was so imminent. I started a federal jury  
19 trial the next day that went for -- that caused me to be  
20 out of the office and largely unavailable for the better  
21 part of seven weeks and so we have not yet consummated  
22 that settlement. I have a final call to get authority to  
23 get settlement terms for the loan modification as well as  
24 some other request that Mr. Windham had made scheduled for  
25 Wednesday, was unable to get that done this week because

1 of an employee out on leave, but they'll be back next  
2 week.

3 With respect to the claim themselves, we would  
4 just offer a defense that the allegations of unfair  
5 deceptive trade practices are essentially that the loan --  
6 the loan payments were applied per the loan contract or  
7 that there was a promise to modify the loan that was not  
8 kept. And there are a couple of cases on point that show  
9 that those are not unfair trade practices as a matter of  
10 law.

11 With respect to the contractual terms of the  
12 loan, although it's not technically binding on this court,  
13 the most helpful case is a bankruptcy court interpreting  
14 -- a bankruptcy court opinion interpreting South Carolina  
15 law called In Re Russo Chestnut 522 BR148. In that case,  
16 there are misapplications of loan payments and the Court  
17 said misapplication of a loan payment is a contractual  
18 issue and a breach of contract doesn't rise to the level  
19 of unfair trade practices.

20 There's also Bowman vs. Bank of America, which  
21 is -- it's unpublished 2016 Westlaw 894 3266, where the  
22 court -- the federal district court applying South  
23 Carolina law explains that failure to modify a loan is not  
24 an unfair trade practice. And then similarly Weber vs.  
25 Bank of America 2013 Westlaw 482 0446. But again, Your

1 Honor, it is our intention to consummate a settlement  
2 within the next several days.

3 THE COURT: It sounds to me what they're asking  
4 for is they don't want to settle it, they just want  
5 judgment in their favor.

6 MS. LINDAHL: I understand, Your Honor, that is  
7 what they're asking for.

8 THE COURT: I think you kind of completely  
9 ignored their argument just now, did you not?

10 MS. LINDAHL: Well, Your Honor, the cases that I  
11 cited show that even though the facts have been stipulated  
12 per the consent order, they still have to -- those facts  
13 still have to be under unfair trade practices as a matter  
14 law. And the cases that I just cited show that those  
15 facts don't rise to an unfair trade practices as a matter  
16 of law.

17 THE COURT: Okay.

18 MS. CAULEY: Our brief which sets forth the case  
19 law that we have relied upon with respect to the unfair  
20 trade practices claim clearly shows that we have met our  
21 burden. Your Honor, the actions of Beneficial in force  
22 placing -- wrongfully force-placing insurance on a  
23 consumer's home can be deemed an unfair trade practice.  
24 And specifically in this case Mr. Windham continually  
25 provided proof that he had insurance on his home and yet

1 they continued to add this force-placed insurance to his  
2 home which resulted in the monthly payment going up more  
3 than \$500 a month.

4 As a result of that, he was behind because when  
5 he continued to make his payment, the payment was applied  
6 to the insurance cost rather than the principle and  
7 interest which we've also set forth as being improper  
8 under the terms of the mortgage, but when they did that,  
9 then as the loan got further and further behind.  
10 Ultimately, it caused the foreclosure to be filed. And  
11 once the foreclosure was filed, Mr. Windham was no longer  
12 able to get his own homeowner's insurance. So as we sit  
13 today, the only insurance now is the forced place  
14 insurance which only protects Beneficial and offers no  
15 protection to Mr. Windham. So if a storm were to come,  
16 the only beneficiary of that forced placed insurance  
17 policy is Beneficial not Mr. Windham.

18 We've also made charges and allegations of fraud  
19 based on their representation to Mr. Windham that if you  
20 make these payments of a thousand dollars every two weeks,  
21 that upon completion of this trial loan modification  
22 payment program, we will offer you a final loan  
23 modification and he made those payments, Your Honor, and  
24 no loan modification was ever offered.

25 It's important to remember this case has been

1 pending since 2014. The activities that we are  
2 complaining of have been taking place since 2010. I mean,  
3 it's almost 2018 for all intents and purposes and this has  
4 been lingering now for more than three years. Mr. Windham  
5 has tried to resolve it. He's gone through the process of  
6 once they filed the foreclosure of requesting the loan  
7 modification and going through that process that they're  
8 required to do under the Supreme Court order and still now  
9 that we've gotten all the way here, they finally say,  
10 well, we want to do this, but, you know, they chose not to  
11 appear. There was no agreement for them not to appear at  
12 the deposition. I got an e-mail I'm not bringing my  
13 client for deposition.

14 THE COURT: How is that an agreement?

15 MS. LINDAHL: Your Honor, that is not what I  
16 recall happening. I recall speaking on the phone where we  
17 talked about how we were so close that you could call the  
18 court reporter off, that's what I recall, Your Honor. I  
19 don't recall sending an e-mail saying they're not coming.  
20 It's possible that I'm incorrect, but I do not recall  
21 that.

22 MS. CAULEY: The e-mail was we're not bringing a  
23 witness. We were in settlement negotiations, but there  
24 was no agreement to postpone. In fact, I said we need to  
25 know if you're coming and the response was we are not

1 bringing our witness, which is exactly why we got the  
2 consent order which is exactly why we filed this motion  
3 because that was in July. The deposition was set for  
4 July 10th. It is almost September, tomorrow is  
5 September 1st. I have -- we notified them of the hearing.  
6 We filed the motion for summary judgment. We provided  
7 them copies. No response whatsoever.

8 THE COURT: Why are you all ignoring this  
9 gentleman?

10 MS. LINDAHL: We're not ignoring it, Your Honor.

11 THE COURT: All right. You didn't show up for a  
12 deposition that you were ordered to show up for. Now, you  
13 say there was a miscommunication. All right, fine maybe  
14 there was a miscommunication. Those things should be put  
15 in writing. According to the defense, they got a  
16 writing -- an e-mail basically saying we're not coming and  
17 we're not bringing a witness.

18 MS. LINDAHL: And I will go back and look at my  
19 e-mail.

20 THE COURT: All right, so that occurs, right?  
21 That occurs back in July. And here we are at the end of  
22 August, they filed their motion. You know what their  
23 motion is about. You know all this. Why is no one giving  
24 them the courtesy of communication to maybe resolve this  
25 thing instead of coming here wasting my time today.

1 MS. LINDAHL: Your Honor, I agree that we ---

2 THE COURT: You're not handling the case, ma'am.  
3 Your firm is not handling the case properly.

4 MS. LINDAHL: I agree at this time, Your Honor,  
5 and that's why we're committed to getting it resolved in  
6 the next week.

7 THE COURT: No, ma'am. You should have had it  
8 resolved before now.

9 MS. LINDAHL: Yes, Your Honor.

10 THE COURT: I'm going to grant the motion.

11 MS. CAULEY: Thank you, Your Honor. Your Honor,  
12 would you prefer us to prepare an order?

13 THE COURT: You need to prepare an order and  
14 make sure that plaintiff gets a copy of that for their  
15 review.

16 MS. CAULEY: Yes, sir.

17 THE COURT: Okay.

18 END OF REQUESTED HEARING

19

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STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF FLORENCE ) C/A NO: 2014-CP-21-916  
) )  
Beneficial Financial I Inc., successor )  
by merger to Beneficial Mortgage Co. )  
of South Carolina, )  
) )  
Plaintiff, )  
) )  
vs. )  
) )  
Jon Windham a/k/a Jon D. Windham, )  
Frances Windham a/k/a Frances C. )  
Windham, and Jerry Coker a/k/a )  
Jerry L. Coker, Carolina Bank a/k/a )  
Carolina Bank & Trust Co., The )  
United States of America, by and )  
through its agency, the Internal )  
Revenue Service, and The Citizens )  
Bank, )  
) )  
Defendants. )

CERTIFIED: A TRUE COPY  
*Candice Reed Strickland*  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

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2016 OCT - 3 AM 11:53  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, SC

**DEFENDANT JON WINDHAM'S AND DEFENDANT JERRY COKER'S JOINT MOTION TO CONTINUE**

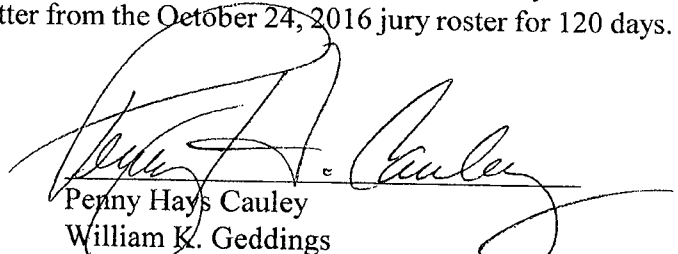
On or about September 27, 2016, the parties received notice that Defendants Windham and Coker's counterclaims are set for trial on the October 24, 2016 jury roster. Defendants Windham and Coker move for this Honorable Court to continue this matter from the October 24, 2016, jury roster and as grounds therefore state as follows:

1. Since the hearing on April 12, 2016, Defendant Windham has been requesting deposition dates for Plaintiff's Rule 30(b)(6) witness. On June 17, 2016, Defendant Windham again sent an email requesting dates for the Rule 30(b)(6) deposition. On June 21, 2016, Plaintiff's counsel responded that she would get us some dates as soon as she could. No response from Plaintiff's counsel was ever received.
2. On September 20, 2016, Defendant Coker's counsel sent an email to Plaintiff offering the following dates for Plaintiff's 30(b)(6) deposition: October 6, 11, 17, 19, 24, 25, 26, 27, 31; November 7, 10, 14, 15, 16, 17. In response, Plaintiff's counsel stated that she personally could not do any of the dates before October 17 or 27. She also

stated that she was out on November 7.

3. On September 27, 2016, when no further response had been received from Plaintiff, Defendant Windham noticed Plaintiff's Rule 30(b)(6) deposition for November 15, 2016, at 10:00 a.m.
4. Defendants Windham and Coker are entitled to this deposition testimony and in fact cannot fully adjudicate their counterclaims prior to this deposition being conducted.
5. The Plaintiff has been consulted regarding this motion to continue and has consented to this matter being continued.

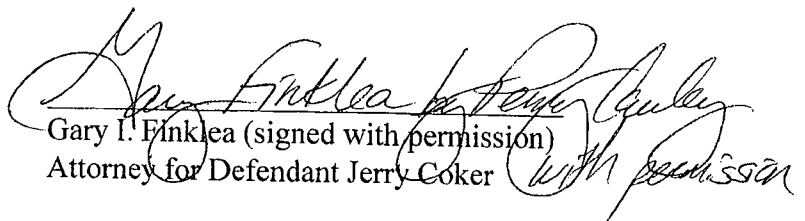
Wherefore, premises considered, Defendants Windham and Coker hereby move this Honorable Court to continue this matter from the October 24, 2016 jury roster for 120 days.



Penny Hays Cauley  
William K. Geddings  
Attorneys for Defendant Jon Windham

**Of Counsel:**

HAYS CAULEY, P.C.  
1303 W. Evans St.  
Florence, SC 29501  
Telephone: (843) 665-1717  
Facsimile: (843) 665-1718



Gary I. Finklea (signed with permission)  
Attorney for Defendant Jerry Coker *with permission*

**Of Counsel:**

FINKLEA LAW FIRM  
841 W. Evans St.  
Florence, SC 29501  
Telephone: (843) 317-4900  
Facsimile: (843) 317-4910

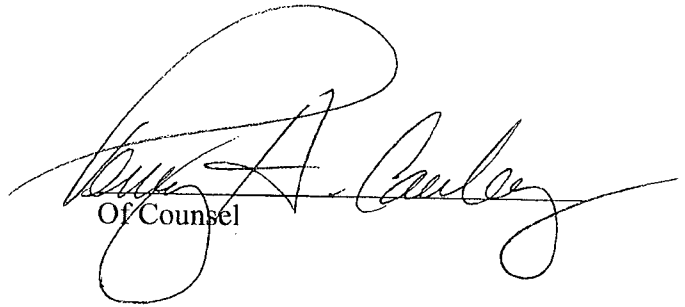
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above Motion to Continue has been served upon all counsel herein by U.S. Mail, first-class postage prepaid and properly addressed on this the 3<sup>rd</sup> day of October, 2016

Richard L. Farley, Esq.  
Rebecca K. Lindahl, Esq.  
Katten Muchin Rosenman LLP  
550 South Tryon Street, Suite 2900  
Charlotte, NC 28202

Eugene P. Warr, Jr.  
P.O. Box 188  
Lamar, SC 29069

CERTIFIED: A TRUE COPY  
*Cornie Reed Stegman*  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

  
Of Counsel

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CLERK OF COURT  
C.C.P. & G.S.  
FLORENCE COUNTY, SC

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF FLORENCE ) C/A NO: 2014-CP-21-916  
) )  
Beneficial Financial I Inc., successor )  
by merger to Beneficial Mortgage Co. )  
of South Carolina, )  
) )  
Plaintiff, )  
) )  
vs. )  
) )  
Jon Windham a/k/a Jon D. Windham, )  
Frances Windham a/k/a Frances C. )  
Windham, and Jerry Coker a/k/a )  
Jerry L. Coker, Carolina Bank a/k/a )  
Carolina Bank & Trust Co., The )  
United States of America, by and )  
through its agency, the Internal )  
Revenue Service, and The Citizens )  
Bank, )  
) )  
Defendants. )

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DORIS POULOS O'HARRA  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, SC

CERTIFIED: A TRUE COPY  
*Doris Poulos O'Hara*  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

**DEFENDANT JON WINDHAM'S MOTION TO COMPEL**

Comes now Defendant, Jon Windham, who files this Motion to Compel, and as grounds therefore states as follows:

1. On April 11, 2014, Plaintiff filed this action for foreclosure. Thereafter, on May 12, 2014, Defendant Windham filed his Answer and Counterclaims.
2. Defendant Windham issued Interrogatories and Requests for Production to Plaintiff on June 23, 2014. Plaintiff never responded to Defendant Windham's discovery requests. On October 13, 2014, Defendant Windham filed a Motion to Compel discovery responses with this Court.
3. On February 5, 2015, the day before the hearing on Defendant's Motion to Compel,

Plaintiff finally responded to Defendant Windham's discovery requests and provided Answers to Interrogatories and documentation. Large portions of the documents were redacted and the Interrogatories were not verified. Defendant Windham's counsel immediately notified Plaintiff's counsel of the deficiencies and requested that they be corrected. Counsel agreed to attempt to resolve the issues and agreed to move the Defendant Windham's Motion to Compel to the next roster. Thereafter, Plaintiff's counsel agreed to provide unredacted documents and amended answers to Interrogatories 1 and 2 on or before July 6, 2015.

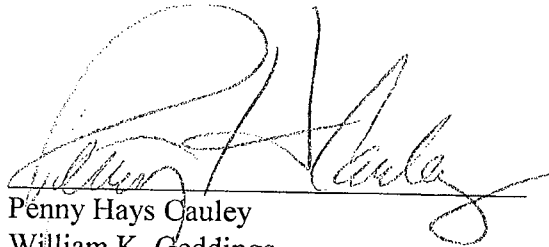
4. On March 5, 2015, Defendant Coker filed a Motion to Compel responses to specific discovery requests. On October 1, 2015, Defendant Coker filed a Motion for Summary Judgment, and then on October 16, 2015, filed a Motion to Amend so as to add counterclaims. Said Motions were set for hearing on the March 16, 2016 roster. On March 8, 2016, Plaintiff filed a Motion to Continue the hearing and the Motions were continued until the April 13, 2016 roster.
5. At the hearing on April 13, 2016, for Defendant Coker's Motion for Summary Judgment and Motion to Amend Answer and Counterclaims, counsel for Defendant Windham specifically requested Plaintiff to provide dates for a Rule 30(b)(6) deposition. For over five months counsel waited for Plaintiff to provide a date that was agreeable. When Plaintiff failed to respond to numerous dates proposed by counsel for Defendants, counsel for Defendant Windham noticed Plaintiff's deposition for November 15, 2016. Defendant Coker noticed Plaintiff's deposition for November 16, 2016.

6. On November 13, 2016, counsel for Plaintiff emailed Defendants counsel stating she was ill and would need to continue the depositions. As a condition to Defendants agreeing to continue the depositions, Plaintiff's counsel agreed to provide dates for the depositions prior to December 16, 2016. Unfortunately, Plaintiff never provided any dates for deposition.
7. On November 21, 2016, Defendant Windham was informed that Plaintiff had resolved co-defendant Jerry Coker's counterclaims. At that time, Plaintiff and Defendant Windham discussed setting mediation and Plaintiff sent a loan modification packet for Defendant Windham to complete and return.
8. Although an agreement was reached between Plaintiff and Defendant Coker, Plaintiff has not yet provided a signed settlement agreement to Defendant Coker, necessitating Coker to file a motion to enforce the settlement agreement. This pattern of non-responsiveness also pervades the litigation of the action against Defendant Windham and his counterclaims against Plaintiff.
9. From November, 2016 until February 22, 2017, Defendant Windham sent multiple emails to Plaintiff's counsel attempting to set mediation, to get new deposition dates, and to get updates on the status of the November, 2016 loan modification application. Defendant Windham received no response whatsoever from Plaintiff.
10. On February 22, 2017, Defendant Windham again re-noticed the deposition of Plaintiff, this time for April 20, 2017, and emailed same to Plaintiff's counsel.
11. On April 10, 2017, Defendant Windham's counsel emailed Plaintiff's counsel to confirm Plaintiff's appearance at the deposition. On April 13, 2017, Plaintiff stated

that April 20th would not work for Plaintiff's deposition. Thereafter, Plaintiff elected to not appear for the April 20, 2017 deposition. The only communication Defendant Windham has had from Plaintiff over this span was agreement to file a Motion to Continue the jury action that was scheduled on May 8, 2017.

12. As Plaintiff has refused to appear for a deposition and also refused to provide suitable dates for mediation in spite of numerous requests for same, Defendant Windham is forced to now involve this Honorable Court and humbly requests this Honorable Court to order Plaintiff to provide a list of dates from which Defendant Windham may choose to conduct a deposition of Plaintiff and mediate this matter. Defendant Windham also requests that Plaintiff be required to abide by the dates selected by Defendant Windham and that the Court order that failure to do so result in sanctions for Plaintiff.

WHEREFORE, premises considered, Defendant Windham humbly requests this Honorable Court to Order Plaintiff to immediately provide dates on which Defendant may conduct a deposition of Plaintiff within the next 45 days and also dates on which Plaintiff is available to mediate this matter within 90 days. Defendant humbly requests that Plaintiff be ordered to abide by the dates selected by Defendant Windham from this list. Finally, Defendant Windham requests attorneys fees for time spent in attempting to set the deposition and mediation, as well as preparing this motion.



Penny Hays Cauley  
William K. Geddings  
Attorneys for Defendant Jon Windham

**CERTIFICATE OF SERVICE**

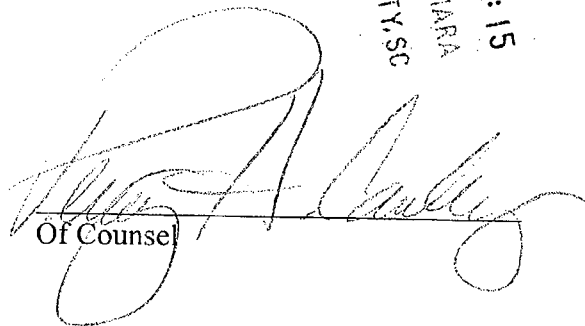
I hereby certify that a copy of the above motion has been served upon all counsel herein by U.S. Mail, first-class postage prepaid and properly addressed on this the 10<sup>th</sup> day of May, 2017.

Richard L. Farley, Esq.  
Rebecca K. Lindahl, Esq.  
Katten Muchin Rosenman LLP  
550 South Tryon Street, Suite 2900  
Charlotte, NC 28202

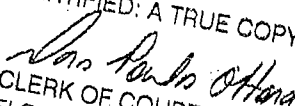
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Finklea Law Firm  
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Florence, SC 29503

Eugene P. Warr, Jr.  
P.O. Box 188  
Lamar, SC 29069

**FILED**  
2017 MAY 10 PM 12:15  
DORIS POULOS O'HARA  
CLERK C.C.P. & G.S.  
FLORENCE COUNTY, SC



Of Counsel

CERTIFIED: A TRUE COPY  
  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA )  
COUNTY OF FLORENCE )

IN THE COURT OF COMMON PLEAS )  
C/A NO: 2014-CP-21-916 )

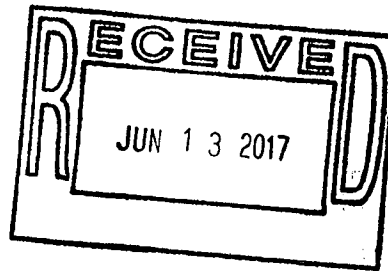
Beneficial Financial I Inc., successor )  
by merger to Beneficial Mortgage Co. )  
of South Carolina, )

Plaintiff, )

vs. )

Jon Windham a/k/a Jon D. Windham, )  
Frances Windham a/k/a Frances C. )  
Windham, and Jerry Coker a/k/a )  
Jerry L. Coker, Carolina Bank a/k/a )  
Carolina Bank & Trust Co., The )  
United States of America, by and )  
through its agency, the Internal )  
Revenue Service, and The Citizens )  
Bank, )

Defendants. )



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CLERK OF COURT  
FLORENCE COUNTY, S.C.

CONSENT ORDER ON DEFENDANT WINDHAM'S MOTION TO COMPEL

On May 10, 2017, Defendant Jon Windham filed a Motion to Compel Plaintiff to produce a Rule30(b)(6) witness for deposition and also provide dates for mediation. Following the filing of same, the parties have jointly consented to this Order.

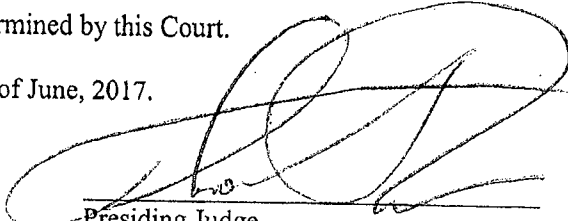
Therefore, it is hereby **Ordered, Adjudged and Decreed** as follows:

1. Plaintiff shall produce its Rule30(b)(6) witness for deposition on July 10, 2017, at the office of Defendant Windham's counsel. Failure to appear at this deposition will result in Plaintiff being prohibited from offering any testimony in support of Plaintiff's foreclosure action and also prohibit Plaintiff from offering any testimony in defense of Defendant Windham's counterclaims.

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*Shirley Paulina Ottana*  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

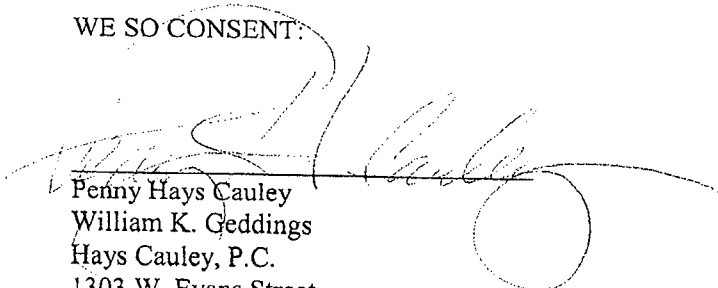
2. Plaintiff and Defendant Windham shall mediate this matter with Karl Folkens on or before September 30, 2017. Both parties shall appear in person for the mediation. Failure by the Plaintiff to appear at mediation shall result in further sanctions to be determined by this Court.

Done this the 9<sup>th</sup> day of June, 2017.

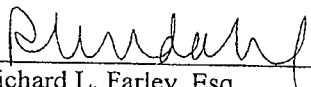


Presiding Judge

WE SO CONSENT:

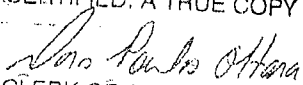


Penny Hays Cauley  
William K. Geddings  
Hays Cauley, P.C.  
1303 W. Evans Street  
Florence, SC 29501  
Attorneys for Defendant Jon Windham



Richard L. Farley, Esq.  
Rebecca K. Lindahl, Esq.  
Katten Muchin Rosenman LLP  
550 South Tryon Street, Suite 2900  
Charlotte, NC 28202  
Attorneys for Plaintiff

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FLORENCE COUNTY, S.C.

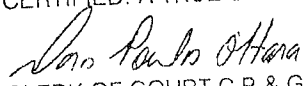
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CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF FLORENCE ) C/A NO: 2014-CP-21-916  
) )  
Beneficial Financial I Inc., successor )  
by merger to Beneficial Mortgage Co. )  
of South Carolina, )  
) )  
Plaintiff, )  
) )  
vs. )  
) )  
Jon Windham a/k/a Jon D. Windham, )  
Frances Windham a/k/a Frances C. )  
Windham, and Jerry Coker a/k/a )  
Jerry L. Coker, Carolina Bank a/k/a )  
Carolina Bank & Trust Co., The )  
United States of America, by and )  
through its agency, the Internal )  
Revenue Service, and The Citizens )  
Bank, )  
) )  
Defendants. )

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DORIS PAUL OS G'HARA  
CCCP & GS  
FLORENCE COUNTY, SC  
FILED

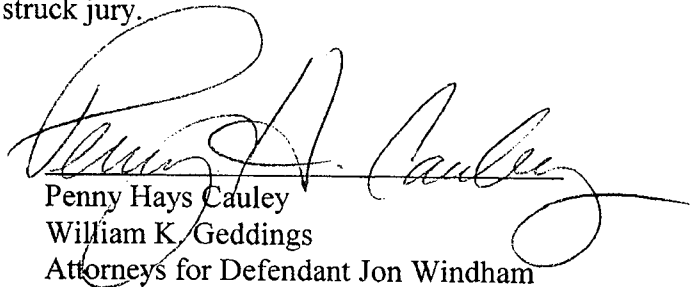
**DEFENDANT JON WINDHAM'S MOTION FOR SUMMARY JUDGMENT**

Comes now Defendant, Jon Windham, by and through the undersigned counsel, and respectfully moves this Honorable Court pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, that the Court grant judgment in the favor of Defendant on his counterclaims, and as cause wherefore will show that there is no genuine issue of material fact, as shown by the pleadings, the memorandum to be submitted in accordance with the South Carolina Rules of Civil Procedure, and the June 9, 2017 order of the Honorable Thomas Russo, which precludes Plaintiff from entering any evidence in defense of Defendant's counterclaims after Plaintiff elected to not appear by July 10, 2017 for deposition. Defendant Windham will further show that upon the basis of the undisputed

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FLORENCE COUNTY, S.C.

material facts appearing of record, Defendant Windham is entitled to summary judgment on his counterclaims as a matter of law.

WHEREFORE, premises considered, Defendant Windham humbly moves this Honorable Court to enter summary judgment in his favor on his counterclaims and to set the issue of damages for hearing before a struck jury.

  
Penny Hays Cauley  
William K. Geddings  
Attorneys for Defendant Jon Windham

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above motion has been served upon all counsel herein by U.S. Mail, first-class postage prepaid and properly addressed on this the 20th day of July, 2017.

Richard L. Farley, Esquire  
Rebecca K. Lindahl, Esquire  
Katten Muchin Rosenman LLP  
550 South Tryon Street, Suite 2900  
Charlotte, NC 28202

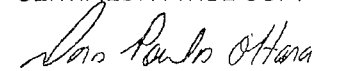
Gary Finklea, Esquire  
Finklea Law Firm  
P.O. Box 1317  
Florence, SC 29503

Eugene P. Warr, Jr., Esquire  
P.O. Box 188  
Lamar, SC 29069

**FILED**  
2017 JUL 26 AM 10:33  
DORIS PAUL OS O'HARA  
C.O.P. & G.S.  
FLORENCE COUNTY, SC

  
Of Counsel

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CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF FLORENCE ) C/A NO: 2014-CP-21-916  
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Plaintiff, )  
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Bank, )  
) )  
Defendants. )

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DORIS POULOS O'HARA  
C.C.P. & G.S.  
FLORENCE COUNTY, SC

FILED

**DEFENDANT JON WINDHAM'S MEMORANDUM IN SUPPORT OF  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Comes now Defendant, Jon Windham, by and through the undersigned counsel, and hereby submits this Memorandum in Support of Defendant Windham's Motion for Summary Judgment and states as follows:

**I. Statement of Undisputed Facts<sup>1</sup>**

---

<sup>1</sup> All facts set forth herein are undisputed as Plaintiff willfully and intentionally elected to disregard this Honorable Court's June 9, 2017 Order, after consenting to entry of same, and refused to appear for deposition by the date set forth therein. As a consequence, Plaintiff is not allowed to submit testimony in defense of Defendant's counterclaims. A copy of said Consent Order is attached hereto as Exhibit "A".

CERTIFIED: A TRUE COPY  
*Doris Poulos O'Hara*  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

1. Insurance was wrongfully force-placed upon Defendant Windham's property.
2. The force-placed insurance caused Defendant's monthly payment to greatly increase. Ultimately, Defendant's payment increased from \$1,843.92 to \$2,363.26 due to the wrongfully force placed insurance. Said increase was of such a nature as it became nearly impossible for Defendant to continue to make his payments. Nevertheless, Defendant continued to attempt to make his monthly payments.
3. Ultimately, Defendant was unable to maintain payments at the new, wrongfully increased amount. Defendant contacted Plaintiff and was told that he could make six bi-monthly payments of \$1,000.00 each. After making \$12,000.00 worth of payments, Plaintiff represented that Defendant would receive a loan modification.
4. In order to save his home and receive the loan modification, Defendant agreed to the bi-monthly payments and set up an automatic debit which would remove the agreed upon funds from his account.
5. Each payment was automatically removed from Defendant's checking account. After completing the required payments, Defendant was not offered a loan modification and, instead, Plaintiff unilaterally simply stopped debiting payments and did not provide Defendant with a loan modification or any notice as to the status of his loan.
6. Once Defendant noticed that Plaintiff had stopped debiting his account,

Defendant contacted Plaintiff and alerted Plaintiff that he had not received his loan modification. Plaintiff once again stated that a loan modification was Defendant's best offer and stated that it would contact him the following day with further information.

7. Plaintiff never contacted Defendant again and, instead, instituted this foreclosure action. The actions of Plaintiff were designed solely and specifically to wring every possible dollar out of Defendant, by and through fraudulent, deceptive, and unfair representations, all while Plaintiff had no intention of assisting Defendant, in any way, to keep his home. After Plaintiff had taken over \$12,000.00 from Defendant, Plaintiff still refused to provide a loan modification to Defendant and instituted this action.
8. Additionally, Plaintiff wrongfully applied Defendant's bi-monthly payments, applying each solely to interest and fees in contradiction of the payment application procedure set forth in the Note and Mortgage. Defendant received no notice of any change in the application of his payments.

## **II. Legal Standard**

Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Padgett v. South Carolina Ins. Reserve Fund*, 340 S.C. 250, 252 (S.C. Ct. App. 2000). Summary judgment is appropriate when it is clear that there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Miletic v. Wal-Mart Stores, Inc.*,

339 S.C. 327, 329-330 (S.C. Ct. App. 2000). In determining whether there are disputed issues of material fact on a motion for summary judgment, all inferences must be viewed in the light most favorable to the party opposing the motion; accordingly, summary judgment is inappropriate if facts are conflicting or inferences to be drawn from facts are doubtful. *Alston v. Blue Ridge Transfer Co.*, 308 S.C. 292, 294 (S.C. Ct. App. 1992). The courts have gone on to make it clear, that, while a party opposing a summary judgment cannot rest on mere allegations or denials in the pleadings,...” it is only necessary for the non-moving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied.” *Hill v. York County Sheriff's Dep't*, 313 S.C. 303, 308 (S.C. Ct. App. 1993). The scintilla of evidence rule was recently upheld in *Hancock v. Mid-South Management Company, Inc.*, 381 S.C. 326, 673 S.E. 2d 801 (S.C. 2009), in which the court held that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.

In the instant action, there are no genuine issues of material fact and Plaintiff is not able to produce any evidence in contradiction of the facts set forth by Defendant in his Complaint, his affidavit, and herein. The only issue before this Honorable Court is whether Defendant is entitled to judgment as a matter of law.

### III. Argument

- a. *Plaintiff's conduct clearly violates the South Carolina Unfair Trade Practices Act.*

“To recover in an action under the UTPA, the [Windham] must show: (1) [Beneficial] engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) [Windham] suffered monetary or property loss as a result of the [Beneficial]’s unfair or deceptive acts(s).” *Soberanis v. City Title Loan, LLC*, 2:16-4034-RMG, 2017 U.S. Dist. LEXIS 50114, \*20 (D.S.C. April 3, 2017) (quoting *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486, 498 (S.C. Ct. App. 2006)). An impact on the public interest may be shown if the acts or practices have the potential for repetition. *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 595 S.E.2d 461, 466 (S.C. 2004) (citing *Crary v. Djebelli*, 329 S.C. 385, 496 S.E.2d 21, 23 (S.C. 1998)). “The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts.” *Soberanis*, 2017 U.S. Dist. LEXIS 50114 at \*21, (quoting *Wright*, 640 S.E.2d at 501-02). “These two ways are not the only means for showing the potential for repetition or public impact, and each case must be evaluated on its own merits to determine what a plaintiff must show to satisfy the potential for repetition/public impact prong of the UTPA.” *Wright v. Craft*, 372 S.C. 1,31; 460 S.E.2d 486, 501 (Ct. App. 2006) (citing *Daisy Outdoor Adver. Co. v. Abbott*, 322 S.C. 489, 497; 473 S.E.2d 47, 51 (1996)). Ultimately, the public impact/public

interest prong of the UTPA must be determined on a case by case basis. *Sinclair & Assoc. of Greenville, LLC v. CresCom Bank*, 2:16-cv-00465-DCN, 2016 U.S. Dist. LEXIS 159340, \*6 (D.S.C. November 17, 2016).

i. Plaintiff Engaged in an Unfair or Deceptive Practice

The actions of Plaintiff were unequivocally unfair and deceptive. Plaintiff fraudulently and intentionally told Defendant to make bi-monthly \$1,000.00 payments and that, after so doing, Defendant would receive a loan modification. Plaintiff received each payment automatically and without issue. After the final payment was made, Defendant did not receive a loan modification nor did Plaintiff even offer to modify the loan. Instead, Plaintiff pocketed Defendant's money, never told Defendant that it had stopped accepting his payments, and ultimately instituted this foreclosure action instead of providing Defendant the opportunity to modify the loan. Plaintiff never had any intention to allow Defendant to modify the loan that is the subject of this action. Plaintiff only intended to wring every last penny out of a desperate individual who wanted to save his home.

\ Additionally, Plaintiff unfairly and wrongfully force-placed insurance on Defendant's property. Defendant had homeowner's insurance on the property, which had never lapsed. Plaintiff's forced placement of homeowner's insurance caused Defendant's payments to rise to an unsustainably high level and Plaintiff's failure to reimburse Defendant and re-establish Defendant's payments at the pre-error level were actions solely designed to force Defendant out of his home.

ii. The Actions of Plaintiff both Affect the Public Interest and are Potentially Repeatable.

The actions of Plaintiff were in line with its policies and procedures and there is a clear potential for repetition. Plaintiff services numerous loans in South Carolina, as well as across the country. Plaintiff has not asserted that its actions in this matter were, in any way, contrary to its policies and procedures. The actions of Plaintiff as related to Defendant were done under the authority of the same policies, procedures, and leadership that are in effect relating to every other loan managed, serviced, and/or written by Plaintiff<sup>2</sup>.

iii. Defendant Suffered an Ascertainable Loss Due to the Actions of Plaintiff.

Plaintiff's unfair and deceptive representations directly caused Defendant to make bi-monthly \$1,000.00 payments. Plaintiff's actions caused Defendant to lose \$12,000.00, clearly an ascertainable loss of money as required by the South Carolina Unfair Trade Practices Act. Plaintiff's actions also caused Defendant to make increased monthly payments after Plaintiff's wrongful forced placement of insurance. The wrongful forced placement of insurance caused Defendant's monthly payment to increase from \$1,843.92 in 2006 to \$2,363.62 in 2011. The wrongfully force-placed insurance caused Defendant's payment to increase a total of \$7,101.24. This increase does not take into account all interest that accrued on the new amount, all fees associated with the new amount, all late fees that were accrued

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<sup>2</sup> While Defendant has not been able to take testimony relating to this matter, an internet search reveals other consumers with exactly the same complaint as Defendant. *See e.g.* <http://m.ripoffreport.com/reports/hsbcbeneficial/brandon-florida-33510/hsbcbeneficial-hsbc-hfc-f-oreclosure-broken-agreement-broken-loan-modification-promise-1045841>, attached in pertinent part hereto as Exhibit "B".

by Defendant due to the wrongful forced placement, or the premium that Defendant was rightfully paying to for his own insurance. It was this wrongful force placement of insurance that directly gave rise to this foreclosure action and all costs associated therewith. When considering both the \$12,000.00 paid by Defendant as well as the increased monthly payments wrongfully required of Defendant, it is clear that Defendant has suffered an ascertainable loss due to the conduct of Plaintiff.

iv. Plaintiff's Violations of the South Carolina Unfair Trade Practices Act were Willful.

“In order to recover treble damages and attorney fees under the UTPA, [Windham] must demonstrate the acts causing the damages were willful.” *Glob. Prot. Corp. v. Halbersberg*, 503 S.E.2d 483, 487 (S.C. Ct. App. 1998). “[I]f, in the exercise of due diligence, a person of ordinary prudence engaged in trade or commerce could have ascertained that his conduct violates the Act, then such conduct is willful.” *Haley Nursery Co. v. Forrest*, 381 S.E.2d 906, 909 (S.C. 1989)(internal citation omitted). In this case, Plaintiff not only could have, but should have, ascertained that their conduct in taking \$12,000.00 from Defendant under the guise that it would provide a loan modification after receiving same and then refusing to provide said loan modification after receipt of the payments would violate the South Carolina Unfair Trade Practices Act. Accordingly, Plaintiff's violations of the South Carolina Unfair Trade Practices Act were willful.

Wherefore, premises considered Defendant requests this Honorable Court to enter summary judgment in Defendant's favor against Plaintiff for Plaintiff's violations of the

South Carolina Unfair Trade Practices Act. Defendant also asks that this Honorable Court to enter a ruling that Plaintiff's unfair trade practices were willfully undertaken and that Defendant is entitled to treble damages. S.C. Code Ann. §39-5-140. Finally, Defendant asks this Honorable Court to award attorneys' fees to Defendant pursuant to the South Carolina Unfair Trade Practices Act. *Id.*

*b. The Conduct of Plaintiff Amounts to Fraud*

“To state a cause of action for fraud, a plaintiff must allege (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) his intent that it should be acted upon by the person; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury.” *Chinners v. GE Capital Corp.*, No. 2:10-cv-0126-MBS, 2010 U.S. Dist. LEXIS 62272, at \*4-5 (D.S.C. June 22, 2010)(internal quotations omitted).

In the instant matter, Plaintiff represented to Defendant that, upon completion of the bi-monthly payments, Defendant would be offered a loan modification. Such a statement was false as Defendant completed said payments and was still not offered a loan modification. In fact, Defendant has never been offered a loan modification. Plaintiff's representation was material in that Defendant would not have provided Plaintiff with \$12,000.00 in payments after Plaintiff's force placement of insurance caused him to become behind if not for Plaintiff's express representation that these bi-monthly payments would lead to a loan modification which would allow Defendant to save his home. Plaintiff had complete knowledge of the falsity of its statement and never had any intention of offering Defendant

a loan modification. It was Plaintiff's intention that Defendant rely upon its representation and make \$12,000.00 in payments to Plaintiff, which is exactly what happened. Defendant was unaware as to the falsity of Plaintiff's statement as is again evidenced by Defendant making the requested payments. Defendant relied upon the truth of Plaintiff's statement and had a right to rely upon same. The actions of Plaintiff not only caused Defendant to lose \$12,000.00, but also caused Defendant to suffer severe mental and physical pain, suffering, emotional distress, sleeplessness, anxiety, humiliation, worry, and fear, all of which was related to Plaintiff's fraudulent representation as well as the foreclosure action initiated by Plaintiff after taking Defendant's \$12,000.00 and refusing to provide a loan modification.

Wherefore, premises considered, Defendant requests this Honorable Court to enter summary judgment in his favor on Defendant's fraud claim and allow the issue of damages to be submitted to a jury.

*c. The Conduct of Plaintiff Amounts to Negligent Misrepresentation*

"To state a claim for negligent misrepresentation, the plaintiff must allege that (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation." *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 320 S.C. 143, 154 (Ct. App. 1995). When making determinations as to the presence of a duty, South Carolina courts

have relied upon the Restatement (Second) of Torts, which sets forth that one “who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.” Restat 2d of Torts, § 552 (2nd 1979); *see ML-Lee Acquisition Fund, L.P.*, 320 S.C. at 158.

In the instant matter, it is clear that Plaintiff made a false representation to Defendant when Plaintiff represented to Defendant that making bi-monthly payments would result in Defendant being offered a loan modification. Plaintiff had a pecuniary interest in making such a statement: the sum total of all payments made by Defendant in response to Plaintiff’s representation. Plaintiff owed a duty of care to Defendant as Plaintiff’s false statements were made in the course of its business and made for the guidance of Defendant. Plaintiff breached its duty by making the false statement that Defendant would receive a loan modification after making \$12,000.00 in payments and then refusing to provide same after Defendant faithfully made said payments. Defendant’s reliance upon Plaintiff’s representation was justified as Plaintiff was the holder and/or servicer on the loan. Finally, Defendant suffered pecuniary loss due to the representation of Plaintiff as set forth herein.

Wherefore, premises considered, Defendant requests this Honorable Court enter summary judgment in his favor on his negligent misrepresentation claim.

*d. Plaintiff Intentionally Inflicted Emotional Distress upon Defendant*

Intentional Infliction of Emotional Distress requires a showing that “(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.” *Holtzscheiter v. Thomson Newspapers*, 306 S.C. 297, 302 (1991)(internal quotations omitted).

The conduct set forth in Defendant's Answer and herein clearly evidences that Plaintiff intentionally, willfully, and/or recklessly inflicted severe emotional distress upon Defendant. Plaintiff has engaged in a pattern of conduct that was wholly designed to steal money from Defendant and then, once Plaintiff had taken all that it could, began the process of stealing Defendant's home. Plaintiff's actions were done with complete and utter disregard as to Defendant and were the callous, calculated actions of an entity which has zero regard for its customers and is only concerned with the bottom line. The actions of Plaintiff are completely intolerable in a civilized community. No South Carolinian should live in fear of their mortgage holder or servicer, a fear that permeates through everything that a consumer encounters in a day. Losing one's home is a terrible and traumatic experience when said loss is “rightful”. To suffer through that experience due solely to the conduct of Plaintiff is unconscionable. The conduct of Plaintiff has caused Defendant to suffer severe emotional

distress, as set forth in his affidavit. *See* Exhibit “B”. Defendant’s emotional distress has been so severe that no citizen South Carolina or the United States of America should have to suffer the pains and torments happened upon Defendant due to the greed of Plaintiff.

Wherefore, premises considered, Defendant requests this Honorable Court to enter summary judgment in his favor on his Intentional Infliction of Emotional Distress claim.

*e. Plaintiff Negligently and/or Recklessly Failed to Properly Train and/or Supervise its Employees.*

When “an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring, supervising, or training the employee, or that the employer acted negligently in entrusting its employee with a tool that created an unreasonable risk of harm to the public.” *James v. Kelly Trucking Co.*, 377 S.C. 628, 631 (2008). In the instant matter, Plaintiff should have known that its failure to properly supervise the individuals to which it assigned Defendant’s loan could result in the conduct happened upon Defendant. Plaintiff’s ambivalence towards supervising its own employees to prevent the actions happened upon Defendant evidenced not only Plaintiff’s negligence, but it’s total recklessness in this matter. Plaintiff is aware that the subject of this action is Defendant’s home. Plaintiff is aware that it is repeatedly dealing with individuals throughout the United States and their homes. Instead, Plaintiffs’ negligently and recklessly refuse to provide ample supervision to its employees, causing the conduct happened upon Plaintiff to occur.

Wherefore, premises considered, Plaintiff requests this Honorable Court to enter

summary judgment in his favor on his negligent and reckless and wanton training and supervision claims.

**IV. Conclusion**

Defendant has set forth, by way of affidavit and this memorandum, clear violations of the above set forth claims. Pursuant to this Honorable Court's June 9, 2017 Order, Plaintiff is absolutely precluded from offering testimony in contradiction to the assertions set forth by Defendant. Therefore, summary judgment in Defendant's favor is due to be granted on the claims set forth herein. Defendant does not waive his rights to seek restitution by trial by jury on those claims set forth in his Answer which were not set forth herein. WHEREFORE, premises considered, Defendant Windham respectfully requests this Honorable Court to enter summary judgment in his favor on his counterclaims and to set the issue of damages for hearing before a struck jury.



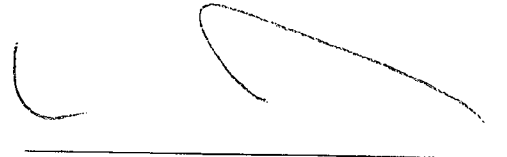
Penny Hays Cauley  
William K. Geddings  
Attorneys for Defendant Jon Windham

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above motion has been served upon all counsel herein by U.S. Mail, first-class postage prepaid and properly addressed on this the 18th day of August, 2017.

Richard L. Farley, Esquire  
Rebecca K. Lindahl, Esquire  
Katten Muchin Rosenman LLP  
550 South Tryon Street, Suite 2900  
Charlotte, NC 28202

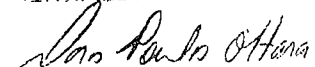
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Of Counsel

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DORIS POLLOS O'HARA  
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Defendants. )

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CONSENT ORDER ON DEFENDANT WINDHAM'S MOTION TO COMPEL

On May 10, 2017, Defendant Jon Windham filed a Motion to Compel Plaintiff to produce a Rule30(b)(6) witness for deposition and also provide dates for mediation. Following the filing of same, the parties have jointly consented to this Order.

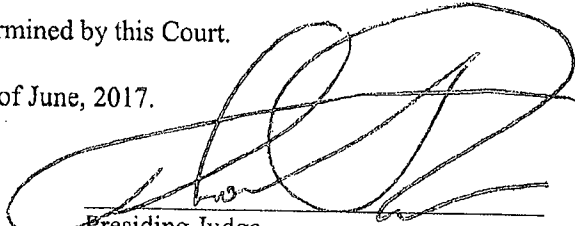
Therefore, it is hereby **Ordered, Adjudged and Decreed** as follows:

1. Plaintiff shall produce its Rule30(b)(6) witness for deposition on July 10, 2017, at the office of Defendant Windham's counsel. Failure to appear at this deposition will result in Plaintiff being prohibited from offering any testimony in support of Plaintiff's foreclosure action and also prohibit Plaintiff from offering any testimony in defense of Defendant Windham's counterclaims.

CERTIFIED: A TRUE COPY  
*[Signature]*  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

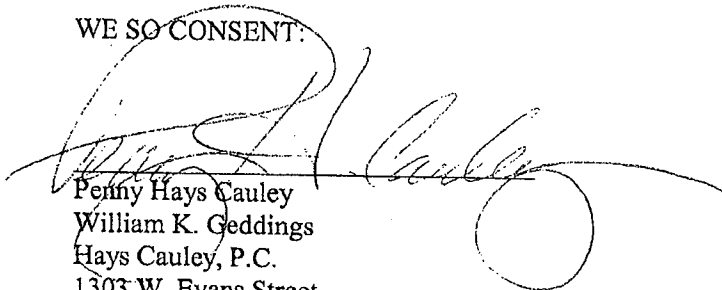
2. Plaintiff and Defendant Windham shall mediate this matter with Karl Folkens on or before September 30, 2017. Both parties shall appear in person for the mediation. Failure by the Plaintiff to appear at mediation shall result in further sanctions to be determined by this Court.

Done this the 9<sup>th</sup> day of June, 2017.

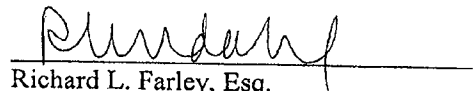


Presiding Judge

WE SO CONSENT:

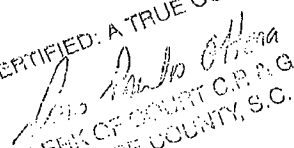


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FLORENCE COUNTY, S.C.

<b>STATE OF SOUTH CAROLINA</b>	)	<b>IN THE COURT OF COMMON PLEAS</b>
<b>COUNTY OF FLORENCE</b>	)	<b>C/A NO: 2014-CP-21-916</b>
	)	
<b>Beneficial Financial I Inc., successor</b>	)	
<b>by merger to Beneficial Mortgage Co.</b>	)	
<b>of South Carolina,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>vs.</b>	)	
	)	
<b>Jon Windham a/k/a Jon D. Windham,</b>	)	
<b>Frances Windham a/k/a Frances C.</b>	)	
<b>Windham, and Jerry Coker a/k/a</b>	)	
<b>Jerry L. Coker, Carolina Bank a/k/a</b>	)	
<b>Carolina Bank &amp; Trust Co., The</b>	)	
<b>United States of America, by and</b>	)	
<b>through its agency, the Internal</b>	)	
<b>Revenue Service, and The Citizens</b>	)	
<b>Bank,</b>	)	
	)	
<b>Defendants.</b>	)	

**AFFIDAVIT OF DEFENDANT JON WINDHAM**

Before me, the undersigned Notary Public, personally appeared **Jon Windham** and who by me first being duly sworn, deposes and says as follows:


1. Insurance was wrongfully force-placed on my property by Plaintiff. My homeowner's insurance was current and never lapsed. I repeatedly provided proof of my homeowner's insurance to Plaintiff but they still continued to force-place insurance.
2. The force-placed insurance caused my monthly payment to greatly increase.

This increase was of such a nature as it became nearly impossible for me to continue to make my mortgage payments. Nevertheless, as I did not want to lose my home, I continued to attempt to make my monthly payments.

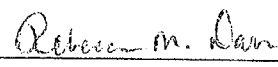
3. Ultimately, I was unable to maintain payments at the new, wrongfully increased amount. I contacted Plaintiff and was told that I could make six bi-monthly payments of \$1,000.00 each. I was told that after I paid \$12,000.00 worth of payments, I would receive a loan modification.
4. In order to save my home and receive the loan modification, I agreed to the bi-monthly payments and set up an automatic debit to automatically withdraw the agreed upon funds from my checking account.
5. Each payment was automatically removed from my checking account. After completing the required payments, I was not offered a loan modification and, instead, Plaintiff unilaterally simply stopped debiting my payments. Plaintiff never provided me with a loan modification or any notice as to the status of my loan.
6. Once I noticed that Plaintiff had stopped debiting my account, I contacted Plaintiff and alerted Plaintiff that I had not received my loan modification. Plaintiff once again stated that a loan modification was my best opportunity to save my home and stated that it would contact me the following day with further information.

7. Plaintiff never contacted me again and, instead, instituted this foreclosure action.
8. I have never been offered a loan modification from Plaintiff or any entity related to Plaintiff, even after filling out all of the paperwork for a modification while this foreclosure was pending.
9. Due to the actions of Plaintiff, I have spent the last three years suffering with the constant fear that my home was going to be taken away from me solely due to the unilateral and wrongful actions of Plaintiff. Prior to Plaintiff's filing of this action, I attempted throughout this process to both make my monthly payments, even after they were wrongfully increased by Plaintiff, and to receive a loan modification at great personal expense to myself. I have been thwarted at every turn, providing paperwork, money, and time to Plaintiff only to be misled, deceived, ignored, and foreclosed upon.
10. I have spent the last several years in emotional distress, dealing with anxiety, embarrassment, humiliation, and fear. I have also suffered physical distress, including loss of sleep, headaches, pain and suffering. All of these symptoms are directly the result of Plaintiff's wrongful conduct.

Further, affiant sayeth not,

  
Jon Windham

Sworn and subscribed before me on this the 18<sup>th</sup> day of August, 2017.

  
Notary Public for the State of South Carolina

My commission expires: 11-18-2018

CERTIFICATE OF COUNSEL

The undersigned counsel of record for the Appellant certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.  
April 24, 2018.



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Rebecca K. Lindahl, Esq.  
Attorney for Appellant

**RECEIVED**  
MAY 09 2018  
SC Court of Appeals