

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable R. Mikell Scarborough
Charleston County Master in Equity

Unpublished Opinion No. 2017-UP-344
Submitted April 3, 2017 – Filed August 9, 2017
Petition for Rehearing Denied November 17, 2017

Brent E. Bentrim Appellant

v.

Wells Fargo Bank, N.A. Respondent

Appellate Case Nos. 2014-002590 & 2015-000396

APPENDIX VOLUME IV

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APPELLATE CASE NO. 2014-002590

BRENT E. BENTRIM, ...Appellant

v.

WELLS FARGO BANK, N.A., ... Respondent

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On April 25, 2011, the Appellant Brent E. Bentrim (“Bentrim” or “Appellant”), a homeowner in Charleston County brought a *pro se* action against the Respondent, Wells Fargo Bank, NA (“Wells Fargo” or “Respondent”) asserting that Wells Fargo “engaged in fraudulent, deceptive and dishonest trade practices that are prohibited by statute and regulation in the servicing” of his loan. [R. 28-36]. The gravamen of Bentrim’s Complaint is that the Respondent’s debt collection and foreclosure activities were subject to the consumer protection laws of South Carolina which prohibit unfair and deceptive practices.

The same month – in April, 2011 – Respondent entered into a consent agreement with its federal regulator, the Office of the Comptroller of the Currency (“OCC”), wherein Wells Fargo admitted it was deficient in regards to mortgage loan servicing and foreclosures – to include filing foreclosure actions when accounts were current, as well as foreclosing without authority to do so. [R 1176-1210].

On December 13, 2011, Respondent moved to amend its Answer and assert a Counterclaim in which it defended its actions the successor by merger to the original Note payee, First Union National Bank (“FUNB”), claiming an “alleged loan contract as a complete bar and defense to this action.” [R.41-55]. Wells Fargo failed to attach a copy of the original Note. [*Id.*]. For well over a year, Wells Fargo refused to produce the original instrument or account for its whereabouts.

On December 10, 2013, in Wells Fargo’s Answer and Counterclaims to Bentrim’s Amended Complaint, Wells Fargo recognized the Note was not made in favor of the Respondent, but instead to FUNB. [R. 84-111]. Wells Fargo answered with affirmative defenses of holder and owner, i.e., a “self-servicer”, and Counterclaim. [*Id.*]

This case is not about the enforceability of the Appellant's obligations under the Note *per se*, but whether Respondent had the legal right to enforce the Note as its owner and holder after November 2006. Appellant contends that under South Carolina law, the production of the Note in January 2013 fails to prove Wells Fargo was in possession of the Note after November 2006 or that it has the right to enforce the Note now.

On March 12, 2002, Appellant executed *inter alia* a Negotiable Promissory Note ("Note") in the amount of \$182,700 for the First Union National Bank ("FUNB") ARM/HELOC payable to "First Union National Bank or order," along with a mortgage, a First Union Adjustable Rate Disclosure Statement and other closing documents. [R 1115]. This loan was (and remains) in **second** place on Appellant's home located at 10 Nicholson Street, Charleston, South Carolina 29407. [*Id.*]

Respondent's records show that Appellant's Note was sold on November 29, 2006 for \$174,504.20 to an unknown "pool" investor. The sale was not revealed to Appellant until late 2011. [R 1382]. The name of the purchaser was not revealed until 2014, immediately prior to the summary judgment hearing [R. 1294-1298]. The purported sale documents were not produced until 2015. [R. 1309-1318].

On September 5, 2007, Respondent filed a Summons and Complaint and *Lis Pendens* in its own name, case number 07-CP-10-3933, styled *Wachovia Bank, National Association successor by merger to First Union National Bank v Brent E Bentrim, et al.*, in which it specifically represented to the Court that it was the holder of the Note and otherwise averred to the Master in Equity that it had the sole and exclusive right to foreclose on the Note. [R. 706-738, ¶¶ 17, 18]. In the Fair Debt Collection Practices Notice appended

thereto, Respondent averred that it was the creditor to whom the debt is owed. [R. 714]. This case was dismissed on December 21, 2007. [R. 25].

Once again, on July 30, 2009, Respondent – in its own name – filed another Summons and Complaint and *Lis Pendens*, case number 09-CP-10-4700, styled *Wachovia Bank, National Association s/b/m to First Union National Bank v. Brent E. Bentrin, et al.* [R. 739-757]. Once again, Wachovia Bank stated that it was the holder of the Note. [R. 733 ¶ 13 – R. 744 ¶ 1] and otherwise averred to the Master in Equity that it had the sole and exclusive right to foreclose on the Note. [*Id.*]. In the Fair Debt Collection Practices Notice appended thereto, Wachovia Bank, N.A. again averred that it was the creditor to whom the debt is owed. [R. 746].

The 2009 Foreclosure case was dismissed by the Charleston County Master in Equity on July 7, 2010 under certain restrictions – one of which specifically required Respondent to provide Appellant with a calculated payoff prior to refilling a claim under the Note and mortgage. [R. 26]. At no time during the pendency of either the 2007 suit (07-CP-10-3933) or the 2009 suit (09-CP-10-4700) – or during the period between the two actions – did Respondent advise the Court that it did not own the Note.

Prior to the dismissal of the 2009 suit, Wachovia merged with Wells Fargo Bank, N.A. (“Wells Fargo”) effective March 20, 2010. Thereafter, Wells Fargo continued to assert that Bentrin was in default and even reported that there was a successful foreclosure against him.

Despite repeated attempts to work with Respondent, Appellant ultimately filed the instant action on April 25, 2011, alleging causes of action against Respondent for

mishandling his loan; fraudulent, unfair and deceptive conduct; improper debt collection practices; and misapplication of principle and interest. [R. 28-36].

Respondent answered on May 27, 2011 without filing a counterclaim. [R. 37-40]. Over six months later, on December 13, 2011, Respondent moved to amend its Answer to assert a Counterclaim for enforcement of the Note which was granted by the Charleston County Court of Common Pleas on April 25, 2012 and served May 8, 2012. [R. 41-54].

In the Counterclaim, Respondent asserts that the Note had been issued and delivered to it; that it had the right to foreclose because demand had been made allowing Bentrin the right to cure his default, and that Bentrin had failed to comply. [*Id.*]. Significantly, Respondent neither pled possession of the Note nor attached a copy to its Counterclaim. Bentrin timely replied the Counterclaim on September 11, 2012, denying the Note was payable to Wells Fargo, that any such demand was ever made, that he was in default or that Respondent was the holder. [*Id.*]

During this same time period, Respondent was sued by the Attorney General of South Carolina [along with 48 other Attorneys General and the United States government] for, among other things, Wells Fargo's unfair and deceptive practices under the South Carolina Consumer Protection Code by asserting 'holder' status in debt collection and foreclosure actions when it was not the holder. Respondent settled with the state for nearly \$30 million by entering into a Consent Order to avoid criminal prosecution. [R. 1211-1284].

In initial discovery requests to Wells Fargo served in 2011, Bentrin requested that Wells Fargo admit whether it had ever sold the Bentrin Note and/or had ever acted as a

“servicer;” Wells Fargo expressly denied both. [R. 441-443, ¶¶ 1, 2, 4, 6, 14; R. 445 ¶ 1]. Those discovery responses have never been supplemented.

At a hearing on October 5, 2011, when Appellant moved to compel production of the original Note, counsel for Wells Fargo argued that a copy would suffice because: “*This note is a portfolio note It’s not securitized - a securitized loan.*” [R. 763]. The Note produced by Wells Fargo was taken from the closing attorneys’ file, which Wells Fargo argued was sufficient in lieu of the original.

After additional demands were made for the original Note, on April 3, 2012, Wells Fargo submitted a Lost Note Affidavit (“LNA”) dated February 7, 2012 [R. 1285-1293] signed by Vice President Tracy M. Thomas as well as a “copy” [R. 1289-1282, 1139-1142] of the Note certified as a “*true, correct and substantial copy of the lost or destroyed Note.*” [R. 1287, ¶8]. No other documents or records were attached to the Affidavit. Affiant Thomas further stated “that Wells Fargo Bank, NA as successor by merger to Wachovia Bank, NA, successor by merger to First Union National Bank has not pledged, assigned, transferred, hypothecated or otherwise disposed of the Note.” [R. 1286 ¶ 5]. Thomas further testified that she had personal knowledge that Wells Fargo was the present holder and owner of the Note. [R. 1286 ¶6.C].

Ms. Thomas would later testify the original Note was purportedly found and returned to the Wells Fargo’s vault on February 27, 2012, [R. 852 p. 119:14] some six (6) weeks prior to providing Bentrin with the same [R. 1115-1118], and such discovery was not provided until February 2013! Ms. Thomas claimed that when the Note first arrived in the vault in 2002, a barcode was placed upon it and then was imaged into a system call CLPR. [R. 848 p. 104: 9-16]. Prior to January 2013, however, none of the “copies” of the

Note that were produced had a barcode in this or any previous litigation.

Wells Fargo also produced an ACLS History Card Report on November 8, 2011. [R. 1355-1414]. On November 29, 2006 an entry is clearly marked “Loan Sold to Pool” which contradicted the LNA. [R. 1382; R. 1286]. Despite evidence on the ACLS History Card print out to the contrary, Ms. Thomas testified repeatedly that the Bentrin Note was **never** sold but she then admitted to **never** even looking at Wachovia Bank NA’s servicing records contained in ACLS. [R. 840, p 72: 6-23].

This matter was referred to Judge Scarborough, Charleston County Master-In-Equity on or about November 13, 2012. [R. 23].

In March 2013, Wells Fargo admitted its conduct in regards to the 2009 action financially harmed Bentrin. [R. 1299-1305].

On December 10, 2013, the Respondent filed an Amended Answer and Counterclaim to assert “Wells Fargo Bank, successor by merger to Wachovia Bank, NA as successor by merger to First Union National Bank, *is now* the owner and holder of the Note and Mortgage and therefore is the real party in interest entitled to bring this action against Appellant.” [R. 84, 106 ¶ 172].

The evidence on the record from the LNA, however, was that Respondent lost an unstamped Note and that the Note had never been transferred, sold, etc. [R. 1286, ¶ 5]. In the 2007 and 2009 suits, Respondent was trying to enforce an unstamped Note, as a holder, via successor by merger to Wachovia Bank, NA – ignoring the evidence that the Bentrin Note was sold on November 26, 2006. [R. 706-738, 739-757, 1320-1350].

Assuming Wells Fargo’s assertion in its December 10, 2013 Amended Answer and Counterclaim that it “*is now the owner and holder of the Note and Mortgage*” is true, this

arguably constitutes an admission by Wells Fargo that it was not the owner and holder of the Note and Mortgage at the commencement of this action, nor during the 2007 and 2009 suits. [R. 106, ¶ 172].

After it filed the Amended Counterclaim, Wells Fargo then announced that it had located the Note. Significantly, the copy of the note attached to the LNA [R. 1289-1292], which Ms. Thomas certified as a “*true, correct and substantial copy of the lost or destroyed Note*” materially differed from the Note which Wells Fargo exhibited to the Court which had two barcodes on it. [R.1115-1118].

At a hearing on February 10, 2014, which largely focused on discovery that would prove or disprove a sale, counsel for Wells Fargo exhibited to the Master the original Note [R. 1115-1118] but was adamant that there was never a sale:

“...we say we never sold the Note. We were the owner and holder through First Union, Wachovia and Wells Fargo. I know they disagree with that, but that is our position.” [R. 895:8-11]

“Your Honor, as I have told [Appellant’s counsel], I can’t prove a negative.” [R.921:14-15]

“Your Honor, we have the original note There is no allonge to it. There is no assignment of the mortgage. We have the public record We’ve seen, you know, so there is no other evidence of a sale. And he’s like I want to see all the documents evidencing a sale because this says there’s a sale I have to have somebody explain what that is, but there are no other documents that I have relating to a sale because our position is there was not a sale We were always the owner and holder of the note ” [R.922:19 – R923:2]

The Court then made the following ruling, as established in the March 5, 2014

Order:

“Within (30) days of the hearing on this motion, WFB, NA shall produce all records in its possession, custody or control relating in any way to the sale, repurchase, transfer, assignment, delivery or hypothecation of the Notes or Mortgages associated with the subject loan to any third-party, including but

not limited to supporting documentation noted on the ACLS History Card at 11/29/06 and then the repurchase on 05/13/10.” [R. 15].

It bears repeating that the so-called “Original Note” is not identical to the prior versions presented to Appellant, further calling into question how Respondent could have been in possession of the “Original Note” prior to January, 2013. [[R.1115-1118; R. 1119-1142WF 223-226, R. 706-738, R 739-757, R.106].

When Appellant moved for sanctions for failure to comply with the March 5, 2014 Order, another hearing took place on April 28, 2014. Once again, counsel for Wells Fargo was adamant there was no sale:

“Your Honor, Wells Fargo and its predecessors have always been the holder of this Note. We got it. It hadn’t been endorsed. It hadn’t been sold to anybody ” [R. 965: 22-25]

“We sold a participation interest in the note, but the note itself was not sold. We’ve got it.”[Tr. 966:1-4]

“We believe and we intend to show Your Honor today that we in good faith produced everything Your Honor ordered.” [Tr. 967:11-12]

“As we’ve said, we have the original note. It’s not endorsed.” [R. 1015:5-6]

“There’s simply no standing to challenge whether or not, you know, the loan was sold, because that doesn’t have anything to do with Mr. Bentrim.” [Tr. 1015: 10-13]

“But a participation interest which is different than selling the note, was sold to The Money Store. And those are internal accounting documents that say sale when it’s really not a sale of the note and mortgage itself.” [Tr. R. 1025:7-11]

Based on these assurances, the Court declined to sanction Wells Fargo. The Court did make the following ruling from the bench, however:

“Now here is what I am going to do I am going to make Wells Fargo counsel here provide me with a full accounting. I want the whole record of

what has transpired on that account I will review it. I will do that, because that's what he's asking for " [R 1026.14]

On May 7, 2014, Wells Fargo's counsel submitted a letter enclosing the documents responsive to the Court's request for the full accounting. Importantly, Wells Fargo also included the Participation Interest Agreement with this explanation:

"As you are aware, the Court's March 5 Order (the "Order") requires Wells Fargo to produce records relating to the 'sale, repurchase, transfer, assignment, delivery or hypothecation of the Notes or Mortgages.' Wells Fargo believes that the referenced documents related to The Money Store are not responsive to the Order because they do not evidence a sale, repurchase, transfer, assignment delivery or hypothecation of the Note and Mortgage." [R. 1309-1310]

The next hearing was held June 9, 2014 on the parties' Cross-Motions for Summary Judgment and a Motion To Reconsider (alter or amend) a ruling in a discovery Order dated May 14, 2014 in which the Court held (in Section 5 thereof): *"Wells Fargo holds the original Note, and the Note is made payable to its predecessor in interest, First Union Nation Bank "* [R. 4]. Basically, Appellant argued that by stating Wells Fargo 'holds' the Note, the Court was ruling Wells Fargo was a holder, when it could not qualify for the same as a matter of law. [R. 148-151].

Five days prior to the June 9, 2014 hearing, Wells Fargo produced the affidavit of Wells Fargo vice president Matthew Wakefield which conceded that *"the beneficial interest of the Bentrim loan was sold for fair market value to TMS Service Corp, Inc. on or about November 29, 2006."* [R. 1294-1298]. Wells Fargo's counsel proceeded to argue at the hearing that there was no outright sale, but just an interest: *"Well, an interest in the Note was sold I think that is an important distinction."* [R. 1051, 2:3]. Significantly, Appellant submitted the Third Affidavit of Clifton Boddiford, CPA and the Second Affidavit of Casimira Kita which both conclusively established by expert testimony that

the Bentrin loan ultimately belonged to a Real Estate Mortgage Investment Conduit (“REMIC”) Trust identified as Pool 794. [R.1115-1116 and 1110-11102]. Additionally, Appellant filed a Supplemental Memorandum with exhibits on July 23, 2014. [R. 481-520].

The Master issued his Order on October 28, 2014. [R. 7-10]. In Section 4 he granted summary judgment on several causes of action and in Section 1, he specifically ruled that:

“Wells Fargo is the holder of the Note as a matter of law and a holder in due course of the Note as a matter of law. Further, even if Wells Fargo was not the holder, it would still qualify as a ‘person entitled to enforce’ as defined in S.C. Code Ann §36-3-301 [R..7]

Appellant filed a second Motion to Reconsider on November 13, 2014. [R. 521]. Due to the fact it was a motion to reconsider a ruling on a prior Motion to Reconsider, Appellant served the instant Appeal on November 28, 2014. [R. 122]. On November 13, 2014, Appellant also moved for reconsideration of Section 4 of the Order, which had not previously been reconsidered. [R. 591]. A hearing on Appellant’s Motion to Reconsider Section 4 of the October 28, 2014 Order was held on January 12, 2015. Appellant’s Motion was denied as evidenced in the Master’s January 26, 2015 Order. [R. 13]. In a second order of that same date, however, the Master did compel Wells Fargo to produce the records transmitted to the court for *in camera* review [R. 15]. Wells Fargo complied with the Order on February 3, 2014 by transmitting vault records [Sealed App. R 1433-1445], and on February 12, 2014 by sending an incomplete Participation Interest Agreement (incomplete due to the absence of the Exhibit which would prove if the Bentrin Loan was contemplated in the document). [Sealed App. R 1320-1350]. Appellant filed a Notice of Appeal with regards to this Order on or about March 2, 2015 [R. 121]. At a hearing on March 5, 2015, the Master declined to conduct any further action on the case. He did state:

"I think the whole thing is caught up in that holder language. It is or it is not." [R. 1097: 15-17]

The Court of Appeals consolidated these two appeals by an Order dated March 26, 2015.

STANDARD OF REVIEW

When reviewing motions for summary judgment the Court of Appeals applies the same standard that governs the trial court; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); Rule 56(c), SCRPC. In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). Under *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009), "the non-moving party is only required to submit a *mere scintilla* of evidence in order to withstand a motion for summary judgment."

STATEMENT OF ISSUES ON APPEAL

I. Is the Master's Order of October 28, 2014 governed by errors of law and/or are the genuine issues of material fact that would preclude summary judgment?

II. Is the holding of *Bank of America, N.A. v Draper*, 405 S.C 215, 746 S.E.2d 478 (Ct. App. 2013) sufficient under these facts and as a valid legal precedent to be an alternate sustaining ground for the Master's Order of October 28, 2014?

ARGUMENT I

***Bank of America v. Draper* Should Not Be Deemed Alternate Grounds to Affirm the Master.**

Throughout this case, Bentrin has consistently argued for the application of what *should* be a simple and universally-recognized principle: in order for a party to have standing to enforce a negotiable instrument in its own name, that party must be a holder or have the rights of a holder at the time it seeks enforcement. S.C. Code Ann. §§ 36-3-301; 36-1-201(20). Applying this principle, Bentrin contends that at the time Respondent brought the 2007 and 2009 foreclosure cases against him, Respondent *knew* it was not the holder of the Note, nor had the rights of a holder, but that in its court filings and proceedings Respondent nevertheless intentionally and deceptively claimed to be the owner and holder anyway – thereby misleading both the Court and Bentrin. In fact, Bentrin contends, at all relevant times Respondent was merely a loan servicer/collector – a status that Respondent went to great lengths to conceal.

Accordingly, Bentrin filed his first-party action against Respondent seeking to impose liability, *inter alia*, for Respondent's unfair, deceptive, fraudulent and anti-consumer conduct as a loan servicer arising out of both the 2007 and 2009 foreclosure proceedings. The gravamen of his suit, basically, is that a loan servicer cannot lie to South

Carolina courts and consumers and claim to be a “holder” and “owner” of negotiable instruments when it is not.

Bentrim has excellent cause to believe he is on solid ground, because in 2011 and 2012 Respondent admitted in consent orders entered into with the both the federal government and the South Carolina Attorney General, respectively, that it had committed unsafe, unsound and fraudulent loan servicing practices, in violation of South Carolina law, for precisely the same kind of loan servicing conduct. [R. 1176-1210, 1211-1284]. Along with other loan servicers, Wells Fargo paid millions and millions of dollars in fines and penalties, and promised both Congress and the State of South Carolina that it would clean up its act by reviewing all its foreclosure actions. [*Id.*].

As demonstrated by the facts outlined in the Statement of the Case above, Respondent has not changed its ways with respect to Bentrim. Unfortunately, Respondent’s conduct has been further compounded by the error of the Charleston County Master in Equity (“Master”) who ruled that not only has Wells Fargo enforcement rights on its current foreclosure counterclaim, but also held that Respondent the right to enforce in both 2007 and 2009 as well, thereby gutting a large part of Bentrim’s case. In section II of this brief, Appellant will show how the Master’s ruling is guided by errors of law.

But, in light of the Court of Appeals’ ability under Rule 220(c), SCACR to affirm under any reason appearing in the record on appeal, Bentrim must address the potential applicability of *Bank of America v. Draper*, 405 S.C 215, 746 S.E.2d 478 (Ct. App. 2013) *cert denied*. Even though the Master did not rely on *Draper* in the Order on appeal, Appellant believes Wells Fargo will argue *Draper*’s application as an additional, sustaining ground and that the Court of Appeals will be tempted to apply *Draper* in the instant case.

A. The Fundamental Error of *Draper*.

For the reasons set forth below, Appellant contends that not only should the Court of Appeals decline to extend *Draper* to the appeal at bar, but that it should overrule the case entirely. This is because there is a fatal flaw in *Draper*: while the *Draper* Court correctly cites S.C. Code Ann. §§ 36-3-301 and 36-3-120(21) as binding authority, **it completely ignores these statutes and uses inapplicable common law principles to override the UCC and/or change their definitions.** Had it properly restricted its analysis to these UCC Article 3 provisions, the *Draper* Court would have been compelled to reach the inescapable conclusion that:

(i) Bank of America's predecessor had negotiated the Note, by indorsement in blank, rendering it a bearer instrument. S.C. Code Ann. § 36-3-109(c); § 36-3-205(b) ("When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed"); *Schneider v Deutsche Bank Nat. Trust Co.*, 572 F.Appx. 185, 189-190 (4th Cir. 2014);

(ii) Because Bank of America was no longer in possession of the Note, it could never be the "holder" as a matter of law by the absence of possession; thus no matter what "evidence" was submitted, Bank of America was improperly allowed holder status under S.C. Code Ann. §§ 36-1-201(21), 36-3-201; 36-3-203(b); and

(iii) Because the original instrument was "missing" or "lost" despite having been negotiated in bearer form, Bank of America was required to prove why the Note was lost in order to prove its rights to enforce. S.C. Code Ann. §§ 36-3-309; 36-3-203(b).

Accordingly, the *Draper* Court should have reversed summary judgment and remanded the action for a complete overhaul. It didn't. Why? **Because the *Draper* Court fell into the classic error of confusing ownership (assignment) with delivery of possession (transfer/negotiation).** In order to achieve this result, the *Draper* Court relied on common law principles which it was precluded from doing under the doctrine of displacement. It also fundamentally altered UCC definitions which is absolutely forbidden. Finally, it ignored precedent directly on point that would have prevented the holding.

B. The *Draper* Court Disregards the Doctrine of Displacement.

Article 3 of the UCC governs actions to enforce negotiable instruments. *Swindler v. Swindler*, 355 S.C. 245, 251, 584 S.E.2d 438, 440-441 (Ct. App. 2003); S.C. Code Ann. § 36-3-102(b); *see also Midfirst Bank, SSB v. C.W. Haynes & Co, Inc.*, 893 F.Supp. 1304, 1312 n.3 (D.S.C. 1994). While the *Draper* Court never expressly spells out that the case involves a negotiable promissory note, that fact can be deduced by inference from its application of law. *Draper* 405 S.C. at 217, 746 S.E.2d at 489. Accordingly, the *Draper* Court was required to apply UCC Article 3 in its analysis. *Swindler*, 355 S.C. at 251, 584 S.E.2d at 440-441.

Our Supreme Court has repeatedly and unequivocally held that the doctrine of “displacement” applies in the context of the UCC. *Hitachi Electronic Devices (USA), Inc. v. Platinum Technologies, Inc.*, 366 S.C. 163, 170, 621 S.E.2d 38, 41 (2005); *Flavor-Inn, Inc. v. NCNB Nat’l Bank of S.C.*, 309 S.C. 508, 511, 424 S.E.2d 534, 536 (Ct. App. 1992)(citing *Equitable Life Assurance Society of U S v. Okey*, 812 F.2d 906, 908-909 (4th Cir. 1987)). Under the principle of displacement, “[o]nly where the UCC is incomplete does the common law provide applicable rules.” *Hitachi*, 366 S.C. at 170, 621 S.E.2d at 41.

The official comment to S.C. Code Ann. § 36-1-103 provides the underpinning for displacement when it succinctly states: “[t]herefore, while principles of common law and equity may supplement provisions of the Uniform Commercial Code, they may not be used to supplant its provisions, or the purposes and policies those provisions reflect, unless a specific provision of the Uniform Commercial Code provides otherwise. In the absence of such a provision, the Uniform Commercial Code preempts the principles of common law

and equity that are inconsistent with either its provisions or its purposes and policies.” See also S.C. Code Ann. § 36–1–103. Recently in *In Re Estate of Rider*, the Supreme Court further elaborated on displacement when it explained that “the UCC provisions were created to provide a uniform method of resolving issues in order to promote liquidity and finality, to be supplemented by (not thwarted by) the rules of agency and other applicable laws.” 407 S.C. 386, 398, 756 S.E.2d 136, 143 (2014)(citing with approval *Psak, Graziano, Piasecki & Whitelaw v Fleet National Bank*, 915 A.2d 42, 45 (N.J. 2007)(“the UCC displaces the common-law where reliance on the common law would thwart the purposes of the UCC”)). In the *Okey* case, *supra*, the Fourth Circuit Court of Appeals clearly elucidates that under South Carolina law, the principle of displacement directly applies in the context of Article 3. 812 F.2d at 908-909.

Turning back to *Draper*, we see that its analysis relies on the common law axiom that “an assignee stands in the shoes of its assignor” and the holding in *Ballou v. Young*, 42 S.C. 170, 176, 20 S.E. 84, 85 (1894)(“[t]he transfer of a note carries with it a mortgage given to secure payment of such note.”). *Draper* 405 S.C. at 220, 746 S.E.2d at 481. Both these concepts are based on ownership and are therefore displaced. **Ownership is irrelevant in determining enforcement rights under UCC Article 3.** Official Comment 1 to S.C. Code Ann §36-3-203 explains: “[t]he right to enforce an instrument and ownership of an instrument are two different concepts” and “[o]wnership rights in instruments may be determined by principles of the law of property, independent of Article 3, which do not depend on whether the instrument was transferred under Section 2-303.”

An instrument is a reified right to payment represented by the instrument itself. *Id.* For the *Draper* Court to establish enforcement based on common law ownership principles

is erroneous; enforceability is absolutely, comprehensively and irrevocably displaced by the UCC. See S.C. Code Ann. §§ 36-3-201 (“Negotiation”); 36-3-203 (“Transfer of Instrument; rights acquired by Transfer”); 36-3-301 (“Person Entitled to Enforce Instrument”); 36-3-302 (“Holder in Due Course”); 36-3-303 (“Value and Consideration”); 36-3-305 (“Defenses and Claims in Recoupment”); 36-1-201 (“General Definitions”); 36-3-103 (“Definitions [for Article 3]”).

These statutory sections, taken together, represent a complete structure for defining, analyzing and determining transfer, possession, delivery and enforceability of negotiability; as a whole, they displace, preempt and supplant the common law of assignment in the realm of UCC Article 3 enforcement. See S.C. Code Ann. § 36-1-103 and Official Comment; *Rider*, 407 S.C. at 398, 756 S.E.2d at 143; *Hitachi*, 366 S.C. at 170, 621 S.E.2d at 41; *Okey*, 812 F.2d at 908-909. Thus, by finding enforcement rights using the common law of ownership, *Draper* has completely disregarded the doctrine of displacement and thwarted the purpose of UCC Article 3. *Id.* The example of “X” and “Y” at the end of Official Comment 1 to S.C. Code Ann §36- 3-203 explains why.

Moreover, *Draper* ignores controlling precedent. The South Carolina Court of Appeals, in *Rosemond v. Campbell*, has previously rejected the application of ‘an assignee stands in the shoes of its assignor’ when a negotiable instrument is involved. 288 S.C. 516, 523, 343 S.E.2d 641, 645 (Ct. App. 1986)(“[t]he common law rule that an assignee has no greater rights than his assignor is subject to an important exception in the case of a negotiable instrument.”). *Rosemond* is still good law but its holding was disregarded in *Draper*. *Id.* Moreover, in *Northwestern Bank v. Neal*, 271 S.C. 544, 248 S.E. 2d 585 (1978), the South Carolina Supreme Court held *that a separate agreement may not be used*

to contradict the unambiguous terms of the note This is critical. Third parties may not contract to evade the requirements of UCC Article 3.

The *Draper* Court's error is further highlighted by its citation to S.C. Code Ann. § 36-3-203(b) for the proposition that an assignee transfers all rights to an assignor even in an Article 3 setting. See *Draper* 405 S.C. at 220, 746 S.E.2d at 481 ("transfer of an instrument vests in the transferee any rights the transferor had"). Transfer is a specifically defined term of art under the UCC that has nothing to do with ownership. S.C. Code Ann. §§ 36-3-103(b); 36-3-203. Transfer requires a voluntary delivery of *possession* of the instrument, not assignment of rights. *Id.* §§ 36-3-103(a); 36-1-201(15). Possession of the instrument moves the instrument under UCC Article 3. Ownership is totally irrelevant and likewise contractual rights have no application because assignment does not move possession – it simply conveys rights. For *Draper* to treat assignment and transfer as functionally equivalent thwarts the purpose of the UCC by ignoring the requirements of possession and delivery. *Hitachi*, 366 S.C. at 170, 621 S.E.2d at 41. The fact that a holder in due course receives more rights than the transferor only further illustrates the basic error in *Draper*, i.e. within the arena of negotiable instruments an assignor does not stand in the shoes of an assignee. S.C. Code Ann § 36-3-302; *Rosemond*, 288 S.C. at 523, 343 S.E.2d at 645.

Appellant would cite to the Virginia Supreme Court, which correctly states the law that an entity does not become a "holder" when it takes possession by mere assignment. *Yeskowski v. Crosby*, 253 Va. 148, 153, 480 S.E.2d 474, 476 (1997); *Strickler v. Marx*, 246 Va. 384, 389, 436 S.E.2d 447, 450 (1993); *Becker v Nat'l Bank & Trust Co.*, 222 Va. 716, 720, 284 S.E.2d 793, 795-96 (1981). To become a "holder" the entity must take possession

through indorsement and delivery. *Yeskolski v. Crosby*, 253 Va. 148, 153, 480 S.E.2d 474, 476 (1997); *Strickler v Marx*, 246 Va. 384, 389, 436 S.E.2d 447, 450 (1993); *Becker v. Nat'l Bank & Trust Co.*, 222 Va. 716, 720, 284 S.E.2d 793, 795-96 (1981). In *Becker*, the Virginia Supreme Court specifically articulated that when a bank received notes by mere assignment, not indorsement, the bank was not a “holder” and thus could not “negotiate” the notes. *Becker*, 222 Va. at 720, 284 S.E.2d at 795-796 (“[t]he UCC does not permit this sort of alteration of the meaning of the inviolable terms ‘due negotiation’ and ‘holder in due course’”). This ruling is consistent with the law of South Carolina. See S.C. Code Ann. § 36-3-203 Official Comment 1 (clearly establishing enforcement and ownership are separate and distinct concepts).

The *Draper* Court further violates the principle of displacement when it held that because a servicer has a “pecuniary interest” in a loan – arising out of “contractual rights” and duties – it has standing as a real party in interest in a UCC enforcement action. *Draper* 405 S.C. at 222, 746 S.E.2d at 482. For this proposition, *Draper* cites three U.S. Bankruptcy Courts’ opinions that found that a servicer had sufficient standing to move for **relief of the automatic stay** – *In Re Woodberry*, 383 B.R. 373, 379 (Bankr.D.S.C. 2008); *In re Neals*, 459 B.R. 612, 617 (Bankr.D.S.C. 2011) and *In Re Burette*, 2008 WL 8895361 (Bankr.D.S.C. 2008). These Bankruptcy cases are of no utility.

First, in each of these cases, the standing is conferred for the specific and limited purpose of seeking to lift the automatic stay in Bankruptcy Court – which is distinct from enforcing a negotiable instrument. In other words, they are limited to the realm of Bankruptcy or can be rationalized as allowable as “presentment” under S.C. Code Ann. § 36-3-501 [which can be made on behalf of a person entitled to enforce, as opposed to the

actual action for enforcement, which can only be made by the PETE]. See S.C. Code Ann. § 36-3-301; S.C. Code Ann §36- 3-203 Official Comment 1.

Second, because the Bankruptcy cases apparently fall into the same error of “contract/ownership = transfer/negotiation” they should be ignored as erroneous. The mere fact that parties have entered into a Pooling and Servicing Agreement is also of no effect whatsoever in making the servicer a PETE. See *Northwestern Bank v. Neal*, 271 S.C. 544, 248 S.E. 2d 585 (1978); see also *In Re Smoak*, 461 B.R. 510, 519 (Bankr.S.D. Ohio 2011) (holding that a Pooling and Servicing Agreement “may establish ownership, but does not define the holder or other “person entitled to enforce” the Note under the Ohio UCC”); Official Comment to S.C. Code § 36-1-102(3)(private parties cannot change defined terms under the UCC); cf. *Burch v. Ashburn*, 295 S.C. 274, 278, 278, 368 S.E.2d 82, 84 (Ct. App. 1988)(holding that a separate agreement “may not be used to contradict the unambiguous terms of the note. And the terms of a separate agreement which is not intended to affect the note at all may not be used to defeat enforcement according to its own tenor, even though the note and the agreement arise from the same transaction” [citations omitted]).

Consequently, to the extent *Draper* can be read for the proposition that a servicer has standing to enforce a negotiable instrument in its own name, as a real party in interest, by virtue of some “pecuniary interest” – rather than by establishing it is a PETE under § 36-3-301, with the right to enforce by issue, negotiation or transfer pursuant to §§ 36-3-105(a), 36-3-201(a) or 36-3-203 – then *Draper* has violated the principle of displacement and thwarted the purpose of UCC Article 3. See S.C. Code Ann. § 36-1-103 and Official Comment; *Rider*, 407 S.C. at 398, 756 S.E.2d at 143; *Hitachi*, 366 S.C. at 170, 621 S.E.2d at 41; *Okey*, 812 F.2d at 908-909. Servicers should not get a “servicing exemption” from

following Article 3; UCC statutes should be applied equally and impartially to all litigants, and not be rewritten or ignored to favor lender/servicers.

C. The Draper Court Has Altered UCC Definitions.

Article 3 of the UCC provides a comprehensive set of rules governing the obligation of parties on negotiable promissory note, including how to determine who may enforce those obligations and to whom those obligations are owed. S.C. Code Ann. § 36-3-102; *see also In Re Veal*, 450 B.R. 897, 910 (9th Cir. Bankr. App. Pan. 2011). It is a fundamental concept under the UCC that private parties cannot change the meaning of terms defined by the UCC. *See* Official Comment to S.C. Code Ann. § 36-1-102(3); cf. S.C. Code Ann. §36-3-119(1); *see also* Official Comment to S.C. Code Ann. § 36-1-102(d)("[t]he meaning of the statute itself must be found in its text, including its definitions, and in appropriate extrinsic aids; it cannot be varied by agreement"). As discussed above, "[t]he UCC does not permit ... alteration of the meaning of the inviolable terms 'due negotiation' and 'holder in due course.'" *Becker v. Nat'l Bank & Trust Co.*, 222 Va. at 720, 284 S.E.2d at 795-796; Official Comment 1 to S.C. Code Ann. § 36-3-203 (clearly establishing enforcement and ownership are separate and distinct concepts). "In particular, the UCC does not permit contracting parties to "vary" the provision governing the definition of negotiable instruments and their negotiation." *In re Walker*, 466 B.R. 271 (Bankr.E.D. Penn. 2012).

As conclusively established above, the *Draper* Court has effectively changed the definition of "transfer" by making it entirely synonymous with common law principles of ownership, rather than UCC concepts of possession and delivery. *See Draper* 405 S.C. at 220, 746 S.E.2d at 481; S.C. Code Ann. § 36-3-203(b). It also changed the definition of

holder by conferring holder status not by negotiation, but by “a series of mergers and transfers.” Consequently, the violation of inviolable terms in the UCC – even if unintentional – is another serious error that destroys *Draper*’s precedential and legal value. See *Becker v. Nat’l Bank & Trust Co.*, 222 Va. at 720, 284 S.E.2d at 795-796; Official Comment 1 to S.C. Code Ann. § 36-3-203. When a statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory construction are not needed and the court has no right to impose another meaning. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Furthermore, a statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. *Sloan v. S.C. Bd. of Physical Therapy Examiners*, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006). Courts should consider not merely the language of the particular clause being construed, but the clauses’ meaning in conjunction with the whole purpose of the statute and the policy of the law. *Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997).

The *Draper* Court cited the right law, then ignored it. It gives servicers a “pass” they are not entitled to have. It thwarts legislative intent. Its application violates due process. It is simply wrong. *Draper* cannot be saved. It cannot be fixed.

D. The Negative Impact of *Draper* When Taken to its Logical Conclusion.

When *Draper* is taken to its logical conclusion, it becomes clear that any entity (e.g., a loan originator, depositor, REMIC Trust, etc.) that knows it is not a PETE under S.C. Code § 36-3-301 can overcome this defect simply delegating enforcement to a servicer via assignment – in direct contravention of UCC Article 3. Worse, because *Draper* defines a servicer so broadly as to include “a person who makes or holds the loan if the same person

also services the loan,” a lender which simply calls itself a “self-servicer” avoids the requirements of § 36-3-301. The best evidence that this concern is real is that this is precisely what Wells Fargo asserts – i.e., since Bentrim has argued that Respondent was a merely a servicer at the time it attempted to enforce the Note in 2007 and 2009, then under *Draper* those enforcement attempts were somehow valid (never mind the fact Respondent misled the court and Bentrim in those two foreclosure actions, or agreed with the OCC and our Attorney General in binding consent orders that it lacked the right to do so, and has continued to take the position it is the owner and holder by unbroken possession despite direct evidence to the contrary). [R. 1176-1210, 1211-1284].

The ultimate nightmare scenario is that an unscrupulous or careless lender – e.g., one that has negotiated an instrument away to a third person, or otherwise cannot account for the transfers of a note – will use *Draper* to absolve itself of its unscrupulous and/or careless conduct. Bentrim submits there is more than ample evidence in the record that this is exactly what Wells Fargo is attempting to do in the instant case, and has done it before. See, e.g., *In Re Veal*, 450 B.R. 897 (9th Cir. Bankr. App. Pan. 2011)(where Wells Fargo and its Servicer simultaneously sought to enforce a negotiable instrument in the Bankruptcy Court). The Bentrim case is not isolated, as evidenced by the consent findings of the OCC and Attorney General Consent Orders. [R. 1176-1210, 1211-1284].

E. The Potential for Double Exposure under *Draper*.

Draper is a real problem because when a servicer can evade the requirements of UCC Article 3, the homeowner is not only subject to double payments, but is completely and utterly defenseless against a Holder in Due Course – who in South Carolina can obtain a deficiency judgment against the homeowner. In *Adams v. Madison Realty &*

Development, Inc., 853 F.2d 163, 168 (3rd Cir. 1988), the Third Circuit Court of Appeals stressed that from the maker's standpoint: "it becomes essential to establish that the person who demands payment of a negotiable note, or to whom payment is made, is the duly qualified holder. Otherwise, the obligor is exposed to the risk of double payment, or at least to the expense of litigation incurred to prevent duplicative satisfaction of the instrument. These risks provide makers with a recognizable interest in demanding proof of the chain of title." *Id.*; *see also In Re Veal*, 450 B.R. 897, 920 (9th Cir. Bankr. App. Pan. 2011)("the primary purpose of the real party in interest doctrine is to ensure ... mistaken payments due not occur.").

Mr. Draper faces a very real threat that a Holder in Due Course could appear on the scene any minute bearing the original bearer instrument with proof it was acquired for value and without knowledge of defect. This is a real possibility because the trial court never required Bank of America to produce or even account for the loss of the original. If a Holder in Due Course did appear to enforce the Draper note, Mr. Draper would have no defense that he made payment to Bank of America (including the loss of his house by judicial sale). *See* S.C. Code Ann. §§ 36-3-302, 3-305; *Rosemond*, 288 S.C. at 523, 343 S.E.2d. at 645. The Holder in Due Course would be entitled to a deficiency judgment against him in South Carolina if the security was gone or insufficient to cover the obligation. *See e.g., American General Financial Services, Inc v Brown*, 376 S.C. 580, 658 S.E.2d 99 (2008)(cited for the general proposition the right to a deficiency judgment is provided by statute); S.C. Code Ann. § 29-3-660 (2007). In *Bank of Miami v Florida City Express, Inc.*, 367 So. 2d 683 (Fla. Ct. App. 1979) the Court summed up the problem best when it held: "Florida City Express, Inc , the maker of negotiable promissory notes,

must pay twice because the Bank of Miami, a holder in due course, was not paid once” and “[o]ur holding is based on the long familiar, universal rule ... that a holder in due course takes and holds a negotiable instrument free of all defenses of which he is not on notice. And it is very clear that this rule includes the defense of discharge or payment (emphasis added).” *Id.*

By giving a servicer a “pass” on the rigorous but fair requirements of Article 3 simply because it is a servicer – either for itself or for a third-person – the *Draper* Court leaves homeowners exposed and defenseless to deficiency judgments if a Holder in Due Course later appears. The fact a court allowed enforcement and foreclosure by a non-PETE servicer is not a defense to a Holder in Due Course.

"Financial institutions, noted for insisting on their customers' compliance with numerous ritualistic formalities, are not sympathetic petitioners in urging relaxation of an elementary business practice. It is a tenet of commercial law that '[h]oldership and the potential for becoming holders in due course should only be accorded to transferees that observe the historic protocol.'" *Adams*, 853 F.2d at 169 (3rd Cir. 1988) (citation omitted).

F. If the Court will not Overrule or Limit *Draper*, It Does Not Apply.

Even if the Court will not overrule or limit *Draper*, there are several cogent reasons why it does not apply in this specific case, either as a matter of law or because of genuine issues of material fact.

(1) *Wells Fargo has Admitted It Cannot Foreclose as a Servicer.*

The Respondent has admitted it was deficient “in the mortgage servicing and foreclosure processes” in regards to whether foreclosures complied with federal and state laws, whether foreclosures occurred when grounds for foreclosure were not present, such as when loans were performing, and whether any errors, misrepresentations or other deficiencies resulted in financial injury to borrowers. [R. 1176-1210]. The Respondent has admitted the conduct is in violation of SC Title 37 resulting in unfair, unlawful and deceptive practices under Title 39 and the admission has been fully adjudicated. It has admitted to its regulator and the South Carolina Attorney General that it cannot foreclose in its own name if it is merely the servicer.

(2) *No Standing Where there is Securitization.*

“A threshold inquiry for any court is the determination of justiciability, i.e., whether the litigation presents an active case in controversy. ‘No justiciable controversy is presented unless the [defendant] has standing to maintain the action.’” *Lennon v South Carolina Coastal Council*, 330 S.C., 414, 415, 498 S.E.2d 906, 906 (Ct. App. 1998) (citations omitted).

"If a loan is securitized, the real party in interest is the trustee of the securitization trust...." *LaSalle Bank N.A. v Nomura Asset Capital Corp.*, 180 F.Supp.2d 465, 469-71 (S.D.N.Y.2001); *La-Salle Bank N.A v. Lehman Bros. Holdings, Inc.*, 237 F.Supp.2d 618, 631-34 (D. Md.2002)). If a trustee possesses "customary powers to hold, manage, and

dispose of assets," then that trustee is a real party in interest. *Navarro Sav. Ass'n v Lee*, 446 U.S. 458, 464, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980). Here, the Kita and Bodiford Affidavits establishes a genuine issue of material fact that the Bentrim loan was securitized and owned by a REMIC Trust identified as "Pool 794" [R. 1098-1114]. Based on the foregoing, *Draper* should not confer standing when a negotiable instrument is securitized because the true party in interest is the REMIC Trustee. *Id.*

(3) Waiver.

Wells Fargo did not assert a counterclaim in its original Answer [R. 37-40]. Its counterclaim was obviously compulsory; accordingly, it has waived its right to enforce the Note even if *Draper* applies. Rule 13(a), SCRPC ("A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."); *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997) (explaining that if a compulsory counterclaim is not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action). Based on this rule, at a minimum the Court should deny enforcement rights on the current counterclaim.

(4) Equitable Issues

The Statement of the Case fully establishes the contradictory and shifting legal position taken by Wells Fargo during the pendency of these proceedings. Respondent's formal position in this case, through its pleadings, discovery and testimony, is that is the owner and holder of the note via unbroken successor-by-merger. Yet the Wakefield

Affidavit establishes the untruthfulness of this proposition. [R. 1294-1298]. Wells Fargo's unclean hands should preclude it from receiving the benefit of *Draper*. The "unclean hands doctrine" precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. *Wachovia Bank, N.A. v Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010) *aff'd as modified*, 404 S.C. 421, 746 S.E.2d 35 (2013).

ARGUMENT II

The Master's Order of October 28, 2014 Erroneously Found Wells Fargo is a Person Entitled to Enforce in Contravention of the UCC.

In the October 28, 2014 Order, the Master concluded "that Wells Fargo is the holder of the Note as a matter of law and a holder in due course of the Note as a matter of law" and "[f]urther, even if Wells Fargo is not the holder, it would still qualify as a 'person entitled to enforce' as defined in S.C. Code Ann. § 36-3-301." [R.7-8]. Accordingly, the Master granted summary judgment on Plaintiff's seventeenth cause of action for declaratory judgment [R. 9]. This ruling is consistent with the Master's many oral pronouncements on this issue [R. 1060, pp. 73-74, 76; R. 1063, p. 5; R. 1096 8]. The Master articulated his thought-process in another action, while the counsel for the litigants at bar were in the courtroom, as follows:

'As long as he is in possession of that [note] or his client's in possession of that note, they have the right to enforce it Talk to the lawyer in the back room [Varnado] and he might not agree with me either, but he's got that on appeal You all might turn me out wrong, but it's like raising children. You have to be consistent.'

[R. 1094, pp. 14-15]. Thus, we have a situation where the Master admits to a rule of thumb that focuses entirely on physical possession without regard to the actual requirements of UCC Article 3. This is not only erroneous but raises grave due process concerns.

The threshold question for any court examining the applicability of UCC Article 3 is to determine if the instrument is negotiable. *Swindler v. Swindler*, 355 S.C. 245, 250, 584 S.E.2d 438, 440 (Ct. App. 2003). To be a negotiable instrument a writing must: be signed by the maker; contain an unconditional promise or order to pay a sum certain in money ***and no other promise, order, obligation or power given by the maker except as authorized by this chapter***; be payable on demand or at a definite time; and be payable to order or to bearer. S.C. Code Ann. § 36-3-104(1). Appellant submits that the Note, by its own title as well as its own terms, meets the definition of § 36-3-104(1).

“An instrument is a reified right to payment. The right is represented by the instrument itself. The right to payment is transferred by delivery of possession of the instrument ‘by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.’” *See* Official Comment 1 to S.C. Code Ann. § 36-3-203, ¶ 3; S.C. Code Ann. § 36-3-602(a) (“[A]n instrument is paid to the extent payment is made by or on behalf of a party obliged to pay the instrument, and to a person entitled to enforce the instrument.”). Under S.C. Code Ann. § 36-3-602(a):

“Person entitled to enforce” an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 36-3-309 or 36-3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

The Ninth Circuit’s Bankruptcy Panel, in the important decision of *In re Veal*, 450 B.R. 897 (B.A.P. 9th Cir. 2011), succinctly explains:

“A thorough understanding of the concept of a “person entitled to enforce” is key to sorting out the relative rights and obligations of the various parties to a mortgage transaction. In particular, the person obligated on the note—a “maker” in the argot of Article 3 (See UCC § 3-103(a)(7))—must pay the

obligation represented by the note to the "person entitled to enforce" it. UCC § 3-412. Further, if a maker pays a "person entitled to enforce" the note, the maker's obligations are discharged to the extent of the amount paid. UCC § 3-602(a). Put another way, if a maker makes a payment to a "person entitled to enforce," the obligation is satisfied on a dollar for dollar basis, and the maker never has to pay that amount again. *Id.* See also UCC § 3-602(c). ... [i]f, however, the maker pays someone other than a "person entitled to enforce"—even if that person physically possesses the note the maker signed—the payment generally has no effect on the obligations under the note. The maker still owes the money to the "person entitled to enforce," and, at best, has only an action in restitution to recover the mistaken payment. See UCC § 3-418(b)."

450 B.R. at 910.

A holder is defined under S.C. Code Ann. §§ 36-1-201(21) as a **"a person who is in possession of a document of title or an instrument or a certificated investment security drawn, issued, or indorsed to him or to his order or to bearer or in blank** (emphasis added)." See S.C. Code Ann. § 36-1-201(20). The foregoing statutes must be read along with S.C. Code Ann. § 36-3-201(a) ("[n]egotiation" means a transfer of possession ... of an instrument by a person other than the issuer to a person who thereby becomes the holder") and Official Comment 1 thereto ("[n]egotiation occurs as a result of the voluntary transfer of an instrument to another person who becomes the holder as a result of the transfer"), as well as S.C. Code Ann. § 36-3-203(a) ("[a]n instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument") and 3-203(b) ("...if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder ...").

When all these provisions are analyzed together, it becomes obvious that in order to qualify as a 'person entitled to enforce' that PETE must have possession of the instrument by: (1) issue, (2) negotiation or (3) transfer.

Accordingly, in order for Respondent to be a ‘person entitled to enforce’ a note either as a holder or with the rights of a holder – whether at the inception of the counterclaim or at the within 2007 and 2009 foreclosure cases – Respondent must show possession by issue, negotiation or transfer at each junction. S.C. Code Ann. §§ 36-1-201(21); 36-3-301. Appellant submits Respondent cannot meet the first two requirements as a matter of law at any point [i.e., not now, nor in 2007 and 2009], nor can it factually prove the third at any point, either.

A. Wells Fargo Is Not a Person Entitled to Enforce through Issue.

Here, the named payee on the note is First Union National Bank, not Wells Fargo. [R. 1115]. Because it is not the identified payee, Wells Fargo cannot claim holder status on the grounds that the note was “drawn” or “issued” to it. *See Draper*, 405 S.C. at 222; 746 S.E.2d at 482; *accord Rosemond v. Campbell*, 288 S.C. 516, 524, 343 S.E.2d 641, 646 n.4 (1986)(holding the owner of finance company not entitled to holder status when named payee on the note was the finance company not him). Thus, Respondent is not a holder by issue. S.C. Code Ann. §§ 36-1-201(21)(A); 36-3-201(a).

B. Wells Fargo not a Person Entitled to Enforce Through Negotiation.

There are no indorsements on or attached to the Note (i.e., no allonges) which means there is no evidence in the record on appeal that the Note has ever been negotiated – either in blank or to an identified person. [R. 1115-1146]. It is axiomatic that negotiation requires indorsement. S.C. Code Ann. § 36-3-201(b)(“[i]f an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder”). Consequently, if there is no indorsement, then there has been

no negotiation. *Id.* In *Negotiable Instruments Under the Uniform Commercial Code*,

Professors Hart and Willier elaborate on this concept:

“The first requirement of being a holder is possession of the instrument. However, possession is not necessarily sufficient to make one a holder. . . . The payee is always a holder if the payee has possession. **Whether other persons qualify as a holder depends upon whether the instrument initially is payable to order or payable to bearer, and whether the instrument has been indorsed.**” (footnotes omitted). Accordingly, a third party must prove both physical possession *and* the right to enforcement through either a proper indorsement or a transfer by negotiation.”

Frederick M. Hart & William F. Willier, *Negotiable Instruments Under the Uniform Commercial Code*, § 12.02(1) at 12-13 to 12-15 (2012)(*emphasis added*). Likewise, the Texas Court of Appeals has held that “an instrument not in the possession of the original holder is not properly indorsed, then the person in possession of it does not have the status of a holder.” *Martin v. New Century Mortg. Co.*, 377 S.W.3d 79, 84 (Tex. App. 2012). Thus, as a matter of law, this fact precludes Wells Fargo from asserting holder status by virtue of negotiation. S.C. Code Ann. §§ 36-1-201(21)(B); 36-3-201(a).

The Master has erred because he has elaborated a personal, “rule of thumb” system of enforcement that confers holder status based entirely on current physical possession of the Bentrim note. [R. 1060, pp. 73-74, 76; R. 1063, p. 5; R. 1096 8]. Not only is the erroneous in its application of UCC Article 3, but because it gives a new definition of holder that is at odds with the definition provided in 1-201(21)(B), the Master has run afoul of the prohibition on a trial court altering or changing the terms of UCC Article 3. *See Becker v. Nat’l Bank & Trust Co.*, 222 Va. 716, 720, 284 S.E.2d 793, 795-96 (1981); *see also* Official Comment 1 to S.C. Code Ann. § 36-3-201. The Master thereby creates enforcement rights that are unique to Charleston County and disregards the legislative

intent of the General Assembly. Homeowners suffer as lenders are allowed to enforce without having actually having to follow the law.

It should be further noted that Wells Fargo has continually pleaded that its right to enforcement is exclusively based on the proposition that it is a holder by virtue of successor-by-merger from FUNB/Wachovia to Wells Fargo. (R, 106, ¶ 172; Cf., R. 48-53]. Yet even if this were true – which is it not – Wells Fargo could not qualify as a holder by virtue of “successor-by-merger” without showing an indorsement. S.C. Code Ann. § 36-1-201(20). To the extent Wells Fargo is relying on some theory of unbroken ownership (which is invalid), then it runs headlong into the same error into which the *Draper* Court fell– i.e., relying on an improper understanding of the UCC which is either displaced or impermissibly alters the definitions in the UCC. *Rider*, 407 S.C. at 398, 756 S.E.2d at 143; *Becker*, 222 Va. at 720, 284 S.E.2d at 795-96.

There is no indorsement; therefore there has been no negotiation; consequently Respondent is not the holder and could not enforce as a holder in 2007, 2009 or today. The Master did not apply the UCC but his own local rule. For this reason, the Master should be reversed.

C. Wells Fargo Is Not a Person Entitled to Enforce through Transfer.

As has become clear, negotiation is separate and distinct from the concept of transfer; a transferee cannot be a holder, but may receive enforcement rights via transfer. S.C. Code Ann. §§ 36-3-201, -203; Official Comment 1 to § 36-3-203.

What most distinguishes a “holder” from a “non holder in possession” is not enforceability *per se*; it is that a “non-holder in possession” must prove it has the rights of a holder before it can enforce. See S.C. Code Ann. §§ 36-3-308(b), 36-3-301(ii). This

contrasts with the rebuttable presumption of enforceability enjoyed by a holder enjoys. S.C. Code Ann. § 36-3-308(b); *see also RMS Residential Props., LLC v. Miller*, 32 A.2d 307, 321-322 (Conn. 2011). The Official Comments to S.C. Code Ann. § 36-3-203(b) provide crystal clear guidance:

*“Subsection (b) states that transfer vests in the transferee any right of the transferor to enforce the instrument ‘including any right as a holder in due course.’ If the transferee is not a holder because the transferor did not indorse, the transferee is nevertheless a person entitled to enforce the instrument under Section 3-301 if the transferor was a holder at the time of transfer. Although the transferee is not a holder, under subsection (b) the transferee obtained the rights of the transferor as holder. **Because the transferee’s rights are derivative of the transferor’s rights, those rights must be proved. Because the transferee is not a holder, there is no presumption under Section 3-308 that the transferee, by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it. Proof of a transfer to the transferee by a holder is proof that the transferee has acquired the rights of a holder. At that point the transferee is entitled to the presumption under Section 3-308. (emphasis added).**”*

In other words, a “non holder in possession” must prove the transaction in order to enjoy enforcement rights. S.C. Code Ann. § 36-3-301(ii); Section 3-203 Official Comment. “Prove” with respect to a fact means the burden of establishing the fact. S.C. Code Ann. § 36-3-103 (13). “Burden of establishing” a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence. S.C. Code Ann. § 36-1-201(8). Under Section 1-201(31), the Court can make no assumption of fact in regards to Wells Fargo’s obtaining a transfer of the Note through any predecessor by presenting evidence that would support its non-existence.

Appellant would point to the Maryland Court of Appeals’ decision in *Anderson v Burson*, 424 Md. 232, 35 A.3d 452 (2011) as persuasive in this matter. As here, the

Anderson Court was tasked with analyzing the enforceability of an unindorsed security where the transferee argued the primacy of physical possession. *Id.* The *Anderson* Court ruled that: “[a] non-holder in possession [and] cannot rely on possession of the instrument alone as the basis to enforce it.” *Id.* at 248-49, 35 A.3d at 462. Rather, *Anderson* continued, “[t]he transferee’s rights to enforce the instrument derives from the transferor (because by the terms of the instrument, it is not payable to the transferee),’ those rights must be proved. *Id.* ‘The transferee does not enjoy the statutorily provided assumption of the right to enforce the instrument that accompanies a negotiated instrument, and so the transferee ‘must account for possession of the unendorsed instrument by proving the transaction through which the transferee acquired it’” *Id.* at 249.

Similarly, the New Mexico Supreme Court, in *Bank of New York v. Romero*, 320 P.3d 1 (N.M. 2014) ruled that: “[p]ossession of an unindorsed note made payable to a third party does not establish the right of enforcement, just as finding a lost check made payable to a particular party does not allow the finder to cash it.” 320 P.3d at 7. Likewise, the Texas Court of Appeals has held that: “[a] person not identified in a note who is seeking to enforce it as the owner or holder must prove the transfer by which he acquired the note.” *Leavings v. Mills*, 175 S.W.3d 301, 309 (Tex. App. 2004). The Oklahoma Supreme Court follows in similar fashion stating that “without holder status and therefore the presumption of a right to enforce, the possessor of the note must demonstrate both the fact of the delivery and the purpose of the delivery of the note to the transferee in order to qualify as the person entitled to enforce.” *US Bank, N.A. v. Alexander*, 280 P.3d 936, 941 (Okla. 2012).

Importantly, the Texas Court of Appeals has also ruled that a genuine issue of material fact is created when there is an unexplained gap in the note’s chain of transfer.

Leavings v. Mills, 175 S.W.3d 301, 309 (Tex. App. 2004) (citing *First Gibraltar Bank, FSB v Farley*, 895 S.W.2d 425, 428-29 (Tex. App. 1995), writ denied (Aug. 1, 1995)).

This brings us to an important point. While Wells Fargo has changed its story so many times that is hard to credit what is true and what is false, the LNA and the testimony of Tracy Thomas are conclusive that Wells Fargo did lose the note. [R. 1285. R. 854. P. 125]. Since Wells Fargo has placed nothing in the record explaining the whereabouts of the Note while it was lost, and the Court cannot provide a factual basis in a summary judgment motion, then there is at least a scintilla of evidence that Wells Fargo cannot meet its obligation to show its chain of transfer. S.C. Code Ann. § 36-3-203(b) and Official Comment; *Hancock v Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (“the non-moving party is only required to submit a *mere scintilla* of evidence in order to withstand a motion for summary judgment.” *Cobb v. Benjamin*, 325 S.C. 573, 581 n. 2, 482 S.E.2d 589, 593 n. 2 (Ct. App. 1997) (“[W]here there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record.”)). This contention is also supported by the fact that (a) Wells Fargo has turned over grossly incomplete vault records and (b) prior to January, 2013, every Note copy produced by Respondent from 2007 forward lacked a specific vault bar-code found on the Original; the inferences from both these facts is that Respondent was not only not in possession of the Original but cannot and will never be able to account for its whereabouts (*e.g., if Respondent was in possession of the original from 2006-2013, why would it produce a copy of the Note pulled from the closing attorney’s file and not a copy with the Note with same vault bar-code found on the original? Why would it wait until January, 2013 to produce*

the Original at all?). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 468, 581 S.E.2d 496, 501 (Ct. App. 2003); *Bayle v. South Carolina Dep't of Transp*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 468, 581 S.E.2d 496, 501 (Ct. App. 2003); *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002).

Moreover, Respondent has produced a Pooling and Servicing Agreement which – if valid – can be deemed a transfer of the Note from Wachovia to TMS Service Corp. Inc. [R. 1309-1310; Sealed App. R 1320-1350]. It should be noted that Bentrim is not falling prey to the error of confusing ownership with enforcement, but recognizes that such agreements can effect transfers if so included. See *In re Veal*, 450 B.R. at 897 (referencing the application of UCC 1-201(b)(35) and 9-203). The Pooling & Servicing Agreement, while incomplete, is an area that Bentrim should be allowed discovery because it was withheld from him while the Master considered summary judgment; likewise, the scintilla of fact, or inference, that Respondent transferred the Note to a third-party should be sufficient to defeat summary judgment. *In re Veal* at 897; *Redwend*, 354 S.C. at 468, 581 S.E.2d at 501; *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803. The Affidavits of Kita and Bodiford, which show the Loan was owned by REMIC Trust known as Pool 794 is, likewise, an a valid ground to see if a transfer took place; this additional scintilla of fact, or inference therefrom, is likewise enough to overcome the grant of summary judgment. *Id.* [R. 1098-1107].

The Master has let the Respondent ignore its obligation to prove all transfers. The Respondent takes the position Appellant is not entitled to this information. Respondent should not be allowed such latitude at the Court of Appeals and the grant of summary judgment as to both the Declaratory Judgment cause of action and the finding that be reversed outright; moreover, on remand, the Court of Appeals should instruct the Master to compel Respondent to prove its chain of transfers. *Leavings v. Mills*, 175 S.W.3d at 309; *U.S. Bank, N.A. v Alexander*, 280 P.3d at 941; S.C. Code Ann. § 36-3-301(ii).

D. 12 U.S.C.A. § 215(a)-(e) Has No Applicability.

At the June 6, 2014 hearing, Defendant cited *CFS, LLC v. Bank of America*, 962 N.E.2d 151 (Ind. Ct. App. 2012) for the proposition that when Wachovia merged with Wells Fargo on March 20, 2010, Wells Fargo automatically became the holder of the Bentrin note by action of 12 U.S.C.A. § 215(a)-(e). This federal statute speaks for itself – when two *banks* merge, the property rights of each are transferred to the successor entity. To the extent this is an issue of ownership, not delivery of possession and transfer under the UCC, it has no applicability to the instant case.

In any event, there is at least a scintilla of evidence, and therefore a genuine issue of material fact – created by the Wakefield, Kita and Bodiford Affidavits, and the Pooling & Servicing Agreement – that Respondent if transferred the note to a third-party [i.e., TMS Service Corp., Inc. – a non bank] effective November 26, 2009, there was no possession or enforcement right to transfer from Wachovia to Wells Fargo at the time of the merger. [R. 1098-1107; R. 1309-1310; Sealed App. R 1320-1350].

The second reason is that the statute would not apply to TMS Service Corp., either. Not only is TMS Service Corp. not a qualifying national or state bank under 12 U.S. Code

Chapter 2, but Wakefield averred that it and its corporate parent dissolved. [R. 1294]. Thus, there was no merger. There is an even bigger point to be made here. Because the Bentrim note is a negotiable instrument, it is governed exclusively by UCC Article 3. *See Swindler v. Swindler*, 355 S.C. 245, 584 S.E.2d 438, 440-441 (2003)(finding that Article Three governs a note secured by a mortgage on real property); *see also Midfirst Bank, SSB, v. C.W. Haynes & Co.*, 893 F. Supp. 1304, 1312 n. 3 (D.S.C.1994) ("Article Three of the UCC controls transfers of negotiable instruments, and the mortgage notes are clearly negotiable."). Thus, Wells Fargo cannot rely on 12 U.S.C.A. § 215(a)-(e) to "bootstrap" into holder qualification as a matter of law – not even taking into account the factual defects in this argument. Thus, 12 U.S.C.A. § 215(a)-(e) does not supplant, preempt or trump Article 3. It does not qualify a successor bank as a "holder" if the successor cannot demonstrate the requirements of sections 1-201(20) and 3-203(c). At best, 12 U.S.C.A. § 215(a)-(e) would be applicable to the concept of "transfer" under S.C. Code Ann. §§ 36-3-201, -203.

This is supported by the holding in *CFS, LLC*, where the Indiana Court of Appeals clearly applied that state's version of Section 3-301 of the UCC. 962 N.E.2d at 153, n.2. It never ruled that Bank of America was automatically a holder by virtue of 12 U.S.C.A. § 215(a)-(e) – only that **under those particular facts** Bank of America had enforcement rights under Section 3-301. *Id.* The facts of *CFS, LLC* are not duplicated here. What distinguishes the instant case from *CFS, LLC* is the undeniable fact that (a) Wachovia sold 100% of the Bentrim loan on November 26, 2006 – years before it merged with Wells Fargo *with evidence that a transfer took place at the time of the sale*; (b) there is no evidence Wachovia or Wells Fargo has rights to transfer at the time of the Wachovia-Wells

Fargo merger. [R. 1098-1107; 1309-1310; Sealed App. R 1320-1350]. *In Re Veal* at 897; *Redwend*, 354 S.C. at 468, 581 S.E.2d at 501; *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803. Certainly more discovery needs to be done, as the transfer to TMS Service Corp., Inc. was sprung on Appellant at the last minute and there is little in the way of documentation. *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)(“summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.”);

Moreover, even if 12 U.S.C.A. § 215 permits or contemplates a transfer of enforcement rights under UCC Article 3, it cannot create holder rights where none existed – which was Respondent’s argument. The best it could do is possibly make Respondent a “non holder in possession” and’ as established above’ Respondent has not (and likely cannot) prove the chain of transactions necessary in order to enjoy enforcement rights. S.C. Code Ann. § 36-3-301(ii); Section 3-203 Official Comment. [“Prove” with respect to a fact means the burden of establishing the fact. 36-3-103 (13) “Burden of establishing” a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence. 36-1-201(8)]. Under Section 36-1-201(31), the Court can make no assumption of fact in regards to Wells Fargo’s obtaining a transfer of the Note through any predecessor by presenting evidence that would support its non-existence. Based on the foregoing, the Court of Appeals should reverse the Master in Equity on the ruling that Wells Fargo qualifies as a holder to the extent it is predicated on 12 U.S.C.A. § 215(a)(e).

E. Wells Fargo Is Not a Holder in Due Course.

The Master in Equity ruled that Wells Fargo was a “holder in due course” under S.C. Code Ann. § 36-3-302(a). [R. 7]. Essentially, a holder in due course is a bona fide purchaser for value. One legal text explains the concept as follows:

A holder in due course must meet five requirements. The first is meeting the requirements for becoming a holder. UCC § 3-302(a). Second, the instrument must not be obviously forged, altered, or otherwise suspicious looking. UCC § 3-302(a)(1). Third, the holder must have taken the instrument for value. UCC § 3-302(a)(2)(i). Fourth, the holder must have taken the instrument in good faith. UCC § 3-302(a)(2)(ii). Finally, the prospective holder in due course must have taken the instrument without notice that the instrument has certain types of problems. UCC § 3-302(a)(2)(iii), (iv), (v), and (vi).

Michael D. Floyd, *Mastering Negotiable Instruments: UCC Articles 3 and 4 and Other Payment Systems*, Carolina Academic Press (2008). There is a sixth requirement under S.C. Code Ann. § 36-3-302(a), that a holder in due course also take the instrument without notice of any claim to the instrument described in Section 3-306. Under the circumstances presented, there can be no reasonable or legal analysis which can support the lower court’s ruling that Respondent qualifies as a holder in due course. First, Respondent never pleaded it was a Holder in Due Course. [R. 706-757; 2012 R. 41-54, R. 84-111].

Second, there is no proof in the record that after Respondent sold the Bentrim loan to TMS Service Corp. on November 26, 2006, that Respondent ever paid value when it purportedly reacquired it in 2010. *Id.* at § 36-3-302(a)(2)(i). Mr. Wakefield’s affidavit claims the Note was repurchased in May, 2010 – nearly 18 months before Wells Fargo interposed the Counterclaim, but he fails to attach any records to substantiate the May 1st merger between The Money Store, LLC and TMS Service Corp as well as the purported distribution to Wells Fargo Bank, NA. [R. 1294-1298; 1309-1310; Sealed App. R 1320-

1350].

Third, while the Master in Equity seems to ground his ruling on holder in due course entirely on Wells Fargo's physical possession of the note, on the assumption that it was maintained via a transfer from a successor in interest, S.C. Code Ann. § 3-302(c) precludes a party taking an instrument as a successor in interest from qualifying as a holder in due course. Therefore even if Wells Fargo Bank, NA acquired the Note via succession from a party other than Wachovia Bank, NA, it cannot be a holder in due course. *Id.* at § 36-3-302(c)(iii). It cannot 'wash away' its liabilities through the reacquisition of the note; it is prohibited from ever being a holder in due course. *See* S.C. Code Ann. § 36-3-203, cmt 2.

Fourth, to be a holder in due course, Wells Fargo would have to admit its foreclosure actions in 2007 and 2009 were invalid because the November 29, 2006 'transfer' of 100% of the Bentrim Loan to TMS Service Corp. was made after a foreclosure suit (2005) and at a time Wachovia Bank claimed Bentrim was in arrears – which would be notice of a defect which bars holder in due course status. S.C. Code Ann. § 36-3-302(a).

Finally, there is a large and unresolved issue which demonstrates the illogic of the trial court's ruling. If Wells Fargo is truly a "holder in due course," and has always been a holder in due course, then in the October 28, 2014 Order the trial court should have dismissed all Appellants' first-party causes of action and all his affirmative defenses, rather than just some causes of action. A holder in due course, other than in relation with the Obligor and Obligee, takes an instrument free from claims on it as well as personal defenses of the Obligor.

Thus, on these facts, the Master's ruling that Wells Fargo is a holder in due course goes against concepts of commercial reasonableness and fair dealing. It in essence is a

finding that Bentrin cannot sustain his complaint against Wells Fargo for any actions of its predecessor, Wachovia Bank, NA. Thus, the Court has ruled, lacking any legal basis and in contravention of the summary judgment standard, that the foreclosure should go through (as Bentrin has no defenses) *and* that Bentrin's first-party claims must fail even though the Defendant cannot show holder status at the inception of the 2007 and 2009 suits that form the basis of his claims. Based on the foregoing, the Court of Appeals should reverse the Master in Equity on the ruling that Wells Fargo qualifies as a holder in due course with all the privileges and immunities provided under S.C. Code Ann. §§ 36-3-305, -306, -307 and -308.

SECTION III-~~4~~ OTHER SUMMARY JUDGMENT RULINGS

A. Consumer Protection Code Cause of Action.

The Master erred in granting summary judgment to Wells Fargo on Bentrin's cause of action for violation of the South Carolina Consumer Protection Code, S.C. Code Ann. § 37-3-101 *et seq.* "The Consumer Code applies to consumer loans that are defined as "loan[s] made by a person regularly engaged in the business of making loans" in which the debt is for personal, family or household purposes and that it is payable in two or more installments." S.C. Code Ann. § 37-3-104. *In re Brown*, 270 B.R. 43, 51 (Bankr. D.S.C. 2001).

Under the terms of the Note:

"EVENTS OF DEFAULT: I will be in default under this Note if any of the following events occur: (1) failure to make a payment as required under the Note, (2) The prospect of payment, performance, or realization by you on my collateral is significantly impaired, or (3) if I fail to perform any term(s) of any Mortgage which secures payment of the Note.

REMEDIES ON DEFAULT: If this is a consumer credit transaction which is payable in two or more installments and I fail to make any payment within

10 days of its due date, you will give me one opportunity to cure the payment default by making the payment, if (1) I do not cure within 20 days, (2) I am ever late with payment again, or (3) the prospect of payment or realization of collateral is significantly impaired, you may demand that this loan be paid immediately."

Since the Note's own language says it is a consumer credit transaction, then "[t]he parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument." *In re Estate of Holden*, 343 S.C. 267, 275-276, 539 SE 2d 703, 708 (2000).

Pursuant to S.C. Code Ann. § 37-1-301(11), it is clear that Bentrim loan is a consumer credit transaction. "Consumer Credit Transaction" means a consumer credit sale (§ 37-2-104) or consumer loan (§ 37-3-104) or a refinancing or consolidation thereof, a consumer lease (§ 37-2-106), or a consumer rental-purchase agreement (§ 37-2-701). *See* S.C. Code Ann. § 37-1-301(11). The 2002 transaction consolidated and refinanced a portion of an existing consumer loan with First Union National Bank into this loan. [See R. 1307, Line 105]. Moreover, in the 2009 foreclosure case, Respondent pled that "[t]he Mortgage ... constitutes a valid second lien on the Property" [R.709 ¶ 7]. "Consumer loan" is defined except as provided in Section 37-3-105, "consumer loan" is a loan made by a person regularly engaged in the business of making loans in which: (a) the debtor is a person other than an organization; (b) the debt is incurred primarily for a personal, family, or household purpose; (c) either the debt is payable in installments or a loan finance charge is made; and (d) either the principal does not exceed twenty-five thousand dollars or the debt is secured by an interest in land. Further, the Respondent was placed on notice by the S.C. Department of Consumer Affairs as well as the Attorney General that its investigation

in regards to the Bentrim loan was underway in October 2010, so notice under 37-5-108(6) was met. [R. 1211-1284]. *Redwend*, 354 S.C. at 468, 581 S.E.2d at 501; *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803.

B. Fraud & Related Causes of Action.

This Court should overrule the Master's grant of summary judgment on Bentrim's causes of action sounding in fraud. While the Master did not articulate his reasoning in granting summary judgment, the Respondent's principal argument for each was that that Bentrim's Amended Complaint failed to make meet the requirements Rule 9(b), SCRPC ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.") Appellant submits that the Amended Complaint goes on at length for approximately 60 paragraphs detailing with specificity the facts underlying the fraud-based claims. In addition, each of the challenged cause of actions references these factual paragraphs and Bentrim testified at length about these matters in his deposition. Appellant alleges a continuing and ongoing fraud on the part of the Respondent – including claiming holder status in the 2007 and 2009 foreclosure actions; representing to Bentrim that it was the owner of his mortgage when it was not; the misleading and fraudulent Lost Note Affidavit; the attempt to pass off copies of the Note from the real estate closing file as the Note; and repeated averments that the Bentrim Loan had not been sold – which was only admitted at the eleventh hour. Moreover, the Complaint details how Respondent provided false and misleading fraudulent and misleading account statements to Bentrim. All pleadings shall be so construed as to do substantial justice to all parties." Rule 8(f), SCRPC; *see also Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338,

340 (1991)(holding to ensure substantial justice to the parties, the pleadings must be liberally construed). “[T]echnical, restrictive or outmoded requirements of Code Pleading are not necessarily required [under the SCRCP].” *Gaskins v. S. Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App.2000). Professor Flanagan has noted: “[a] survey of the pleading cases decided after the adoption of the rules in 1985 suggests that the courts do not demand hyper factual pleadings.” See James F. Flanagan, *South Carolina Civil Procedure 2d*, p. 65, n. 17 (S.C. Bar 2012). With reference to Rule 9(f), Professor Flanagan has opined that some generality may be acceptable. *Id.* p. 75, n. 6. In any event, the fact the Master has allowed causes of action for UTPA and breach of contract with fraudulent intent, but not for fraud, constructive fraud or fraudulent misrepresentation, shows that there are genuine issues of material fact. *Redwend*, 354 S.C. at 468, 581 S.E.2d at 501; *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803.

C. Slander of Title Cause of Action.

The Court reverse the granting of summary judgment on the cause of action for slander of title. In its court filings, Respondent mischaracterizes Appellant’s slander of title cause of action – which goes beyond the mere filing of a *lis pendens*, and includes allegations regarding diminished value in the eyes of third parties, including the inability to refinance and inability to sell the property. In *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 204, 723 S.E.2d 597, 603 (Ct. App. 2012), the Court of Appeals allowed a slander of title claim to proceed against a lender. The *Solley* majority also specifically ruled that: “[r]ecording a mortgage that is a nullity should be considered a false statement derogatory to Solley’s title.” 723 S.E.2d at 606. The pleadings and discovery in this case, as well as legal argument over whether Wells Fargo is a PETE on the current counterclaim,

or had the right file the 2007 and 2009 actions, raise genuine issues of material fact that preclude summary judgment at this time. It is indisputable that Wells Fargo sold 100% of the note on November 29, 2006 (R. 1294-1129) but specifically told Bentrin in 2008 that it held the mortgage [R. 574-575]. The new party, if appropriate, was on notice to record.

Accordingly, there is a genuine issue of material fact that Wells Fargo slandered the Appellants property interest in 10 Nicholson Street, precluding him from selling, refinancing, etc., when he had a right to possess the property in fee at the time. This theory would need to be tested by additional discovery, which is a further ground to deny summary judgment on the conversion cause of action at this time. *Baughman*, 306 S.C. at 112, 410 S.E.2d at 543; *Redwend*, 354 S.C. at 468; 581 S.E.2d at 501; *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803.

D. Conversion Cause of Action.

This Court should overrule the Master's grant of summary judgment on Bentrin's conversion cause of action as an error of law. A plaintiff claiming conversion may prevail based upon a showing of unauthorized detention of property, after demand. The plaintiff must show either title or right to possession of the property at the time of conversion. Money may be the subject of conversion if it is capable of being identified, and there may be conversion of determinate sums even though specific coins and bills are not identified. *Mullis v Trident Emerg. Phys.*, 351 S.C. 503, 570 S.E.2d 549, 551 (Ct. App. 2002); *Oxford Fin. Cos. v. Burgess*, 303 S.C. 534, 539, 402 S.E.2d 480, 482 (1991). In *Regions Bank v. Schmauch*, 345 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003), the Court of Appeals held that conversion "may arise by some illegal use or misuse ... of another's personal property (emphasis added)." Respondent would cite to *Owens v Andrews Bank*

& Trust Co , 265 S.C. 490, 496, 220 S.E.2d 116, 119 (1975) for the general proposition that there can be no conversion where there is a mere obligation to pay a debt and “where there is merely the relationship of a debtor and creditor, an action based on conversion of the funds representing the debt is improper.” However, the UCC provides that an action for conversion may be brought “... when a bank ... obtains payments with respect to the instrument from a person not entitled to enforce the instrument or receive payment.” S.C. Code Ann. § 36-3-420; *cf. Halifax Corp v Wachovia Bank*, 268 Va. 641, 659, 604 S.E.2d 403, 411 (2004). Accordingly, the applicability of *Owens* is displaced as a matter of law. *In re Estate of Rider*, 407 S.C. 386, 398, 756 S.E.2d 136, 143 (2014).

Additionally, there are genuine issues of material facts surrounding the issue of conversion which preclude summary judgment. The Wakefield affidavit which purports to show the Note was sold on November 29, 2006 and the PSA produced at the eleventh hour explode the concept that there was only a debtor-creditor relationship. [R. 11194-11198; R. 1294-1298; 1309-1310; Sealed App. R 1320-1350]. So does the affidavit of Appellant’s expert Ms. Kita who has testified that the Bentrin loan was owned by a REMIC Trust. [R. 1101]. Yet during this time Respondent specifically told Bentrin (in 2008) that it owned the mortgage [R. 547-548]. Moreover, Respondent brought the 2007 and 2009 foreclosure actions claiming holder status which it cannot establish as a matter of law or fact, as set forth in Section II herein. Notwithstanding the foregoing, additionally, Wells Fargo has repeatedly denied that it was in a third-party servicing relationship and has repeatedly averred that it kept and every payment it collected from Bentrin. [R. 441-442].

Viewing these facts and inferences in the light most favorable to Bentrim, because Bentrim is only obligated to pay a PETE, there is a genuine issue as to whether Wells Fargo dispossessed him all sums paid to Respondent after November 29, 2006. S.C. Code Ann. § 36-3-412. If there is a question of whether Respondent was a PETE after November 29, 2006, and in the absence of any evidence in the record establishing an ongoing third-party servicing relationship (particularly one between Wells Fargo and the REMIC Trust Pool 794), then there is a genuine question that Respondent is liable under S.C. Code Ann. § 36-3-420.

Finally, because the Master has denied full documentary discovery, and additional depositions need to be taken, the incompleteness of discovery on this issue is further ground to deny summary judgment on the conversion cause of action at this time. *Baughman*, 306 S.C. at 112, 410 S.E.2d at 543; *Redwend*, 354 S.C. at 468, 581 S.E.2d at 501; *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803.

E. Implied Covenant of Good Faith and Fair Dealing Cause of Action.

This Court should overrule the Master's grant of summary judgment on Bentrim's cause of action for breach of the implied covenant of good faith and fair dealing as an error of law. The South Carolina Uniform Commercial Code provides: "[e]very contract or duty within this act imposes an obligation of good faith in its performance or enforcement." S.C. Code § 36-1-203; *see also* S.C. Code § 36-1-201(b)(20). This statutory authority exists independent of case law. The Order is silent on why the Court granted summary judgment on the good faith and fair dealing cause of action, but Respondent advanced the case of *RoTec v. Encompass Services, Inc* 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004). [R. 266-267]. Insofar as *RoTec* did not analyze the applicability of § 1-203, Plaintiff

submits that this claim based on statute should be preserved and Wells Fargo's motion for summary judgment on this issue should be denied. As established above, the principal of displacement is also impacted. *In re Estate of Rider*, 407 S.C. 386, 398, 756 S.E.2d 136, 143 (2014). Wells Fargo offers no citation to authority for the proposition that Judge Dennis' ruling of November 20, 2012 bars any claim which touches on contract.

Moreover, by allowing the cause of action for breach of contract to stand, there is no sound basis for the Master to grant summary judgment on the implied covenant cause of action. *Redwend*, 354 S.C. at 468, 581 S.E.2d at 501; *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803.

F. Civil Conspiracy Cause of Action.

This Court should overrule the Master's grant of summary judgment on Bentrims' cause of action for conversion based on genuine issues of material fact and/or incomplete discovery resulting in a premature ruling. "[I]n order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." *Island Car Wash, Inc. v Norris*, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987); accord *Cowburn v Leventis*, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (2005); *Pye v. Estate of Fox*, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006). Here, the Wakefield affidavit (produced a mere four days before the hearing) establishes that TMS Service Corp – an independent, separate corporation – purportedly owned the note; the Kita Affidavit establishes an issue of fact that Pool 794 owned the note; obviously, since Wells Fargo only revealed this fact in the last four days before the hearing, more discovery is needed and summary judgment would be inappropriate at this time on the issue of willfulness [R.

1194-1198, R. 1101, R 1309-1310; Sealed App. R 1320-1350]. Debt collectors, including law firms, can also be deemed co-conspirators. Attorneys' fees incurred in defending the instant counter-claim would be cognizable special damages, as established in discovery responses, as well as damage to credit as identified in the pleadings and depositions. [R. 73, ¶ 65; R. 80, ¶ 120]. Notwithstanding the foregoing, because Appellant has been denied full documentary discovery, the incompleteness of discovery on this issue is further ground to deny summary judgment on the civil conspiracy cause of action at this time. *Baughman*, 306 S.C. at 112, 410 S.E.2d at 543; *Redwend*, 354 S.C. at 468, 581 S.E.2d at 501; *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803.

G. Fair Debt Collection Practices Act Cause of Action.

There are genuine issues of material fact that as to whether Respondent – acting as a debt collector, not in collecting its own loans -- used “instrumentalit[ies] of interstate commerce or the mails ... who regularly collects or attempts to collect, directly or indirectly, debts owed, or due or due another.” 15 U.S.C.A. § 1692a. Thus, it was error for the Master to grant Wells Fargo summary judgment on Bentrim's Fair Debt Collection Practices Act cause of action. Wells Fargo argued that “the only evidence before this Court is that Wells Fargo was at all times collecting a debt in its own name and servicing its own debt.” [R. 273 ¶ a]. Yet there are genuine issues of material fact it was servicing for a third-party or parties. *Redwend*, 354 S.C. at 468, 581 S.E.2d at 501; *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803; [R. 1194-1198, R. 1101, R 1309-1310; Sealed App. R 1320-1350].

CONCLUSION

This Court should reverse its ruling in *Bank of America v. Draper* and decline to extend its holding to this case as an alternate ground to sustain the Master. This Court

should also reverse the Master on his summary judgment rulings in Sections 1 and 4 of the October 28, 2015 Order, and specifically find that Respondent is not currently a holder and/or holder in due course, nor was it a holder or holder in due course in the 2007 and 2009 foreclosure suits. On remand, this Court should require the Respondent to prove its chain of transfers.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Charleston County Master in Equity

APPELLATE CASE NO. 2014-002590

RECEIVED
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SC Court of Appeals

BRENT E. BENTRIM, ...Appellant

v.

WELLS FARGO BANK, N.A., ... Respondent

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Appellant complies with Rule 211(b), SCACR.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Charleston County Master in Equity

APPELLATE CASE NO. 2014-002590

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SC Court of Appeals

BRENT E. BENTRIM, ...Appellant

v.

WELLS FARGO BANK, N.A., ... Respondent

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Appellant's *Final Brief* in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid to the following:

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Master-In-Equity

Appellate Case No. 2014-002590
Circuit Court Case No. 2011-CP-10-2946

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MAR 08 2016

SC Court of Appeals

Brent E. Bentrin, ... Appellant,

v.

Wells Fargo Bank, N.A., ... Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the lower court correctly conclude Wells Fargo is the holder of a promissory note when it is the successor through merger to the payee bank and is in possession of the original note?
- II. Is Bentrims request to overturn *Bank of America v. Draper* properly before the Court when the lower court did not base any of its orders on the decision and Wells Fargo does not rely on the holding as an additional sustaining ground?
- III. Did the lower court properly grant summary judgment as to ten of Bentrims seventeen causes of action?

STATEMENT OF THE CASE

This case involves an attempt by the Appellant, Brent E. Bentrims ("Bentrims"), to nullify a Negotiable Promissory Note ("Note") and Mortgage which he executed in favor of First Union National Bank ("First Union") in 2002. The lower court found that the Respondent, Wells Fargo Bank, N.A. ("Wells Fargo"), as successor in interest to First Union, is the holder of the Note. The court also granted summary judgment as to ten of Bentrims seventeen causes of action.

Bentrims filed a *pro se* complaint against Wells Fargo on April 25, 2011. (R. pp. 28-36; Complaint). Wells Fargo answered on May 27, 2011. (R. pp. 37-40; Answer). Wells Fargo moved to amend its answer. By this point, Bentrims had retained counsel who specifically consented to the amendment, including the addition of counterclaims for foreclosure and suit on the promissory note. (R. p. 16; Consent Order). Wells Fargo filed its amended answer and counterclaims on May 8, 2012. (R. pp. 41-54; Amended Answer and Counterclaims). In his reply, Bentrims admitted that he signed the Note and Mortgage. (R. p. 55; Reply, ¶¶ 64-65).

Wells Fargo moved for summary judgment on September 19, 2012. (R. pp. 123-138; Motion for Summary Judgment). After a hearing, Judge R. Markley Dennis, Jr. dismissed Bentrims claims for breach of contract and violation of the Truth in Lending Act. (R. pp. 18-22;

Order Granting, in Part, and Denying in Part, Defendant's Motion for Summary Judgment). Bentrim did not move to reconsider nor did he appeal this order.

The parties then referred the case to Master-In-Equity Mikell R. Scarborough by a Consent Order of Reference filed November 13, 2012. (R. pp. 23-24; Consent Order of Reference).¹

Bentrim filed a motion to amend on November 1, 2013, seeking to add fourteen new causes of action. (R. p. 139; Motion to Amend). The motion was granted without hearing, and Wells Fargo timely filed an answer to the amended complaint, again with counterclaims for foreclosure and suit on the promissory note. (R. pp. 84-111; Wells Fargo's Counterclaims and Answer to Amended Complaint). Bentrim filed a reply to the counterclaims, again admitting that he signed the Note and Mortgage. (R. p. 113; Answer to Counterclaim, ¶¶ 8-9).

At a hearing on April 28, 2014, the lower court inspected the original Note and concluded that, "as of the date of this hearing, . . . Wells Fargo holds the original Note, and the Note is payable to its predecessor in interest, First Union National Bank." (R. p. 4, lines 3-4; Order). At a subsequent hearing on June 9, 2014, and in the corresponding Order filed October 28, 2014, the lower court denied Bentrim's motion to reconsider the ruling that Wells Fargo is the holder of the Note and elaborated on that prior ruling: "Wells Fargo is the holder of the Note as a matter of law and a holder in due course of the Note as a matter of law. Further, even if Wells Fargo was not the holder, it would still qualify as a 'person entitled to enforce' as defined in S.C. Code Ann. § 36-3-301." (R. p. 7, lines 12-15; Order).

¹ Judge Scarborough was already familiar with this particular loan. Bentrim's previous failures to make timely payments led to foreclosure actions filed in 2005, 2007 and 2009. (R. pp. 679-705; 2005 Complaint (Case No. 2005-CP-10-4814); R. pp. 706-738; 2007 Complaint (Case No. 2007-CP-10-3933; R. pp. 739-757; 2009 Complaint (Case No. 2009-CP-10-4700)). Judge Scarborough presided over both the 2005 and 2009 foreclosures.

In its October 28, 2014 Order, the lower court also addressed Wells Fargo's previously filed Motion for Summary Judgment (R. pp. 237-246; Motion for Summary Judgment) and granted summary judgment as to ten of Bentrim's seventeen causes of action.² (R. p. 9, lines 3-20, Order).

On December 1, 2014, following the denial of his motion to reconsider, Bentrim timely filed a Notice of Appeal of the holder issue. (R. p. 122; Notice of Appeal).

Bentrim filed a separate motion to reconsider that section of the October 28, 2014 Order which addressed the court's summary judgment rulings. On January 26, 2015, the Court entered an Order reaffirming summary judgment as to ten of Bentrim's causes of action. (R. pp. 11-12; Order Denying Defendant's Motion for Summary Judgment).

Bentrim timely appealed the summary judgment rulings on March 5, 2015. (R. p. 121; Second Notice of Appeal). The two appeals were consolidated with consent of the parties and by Order of this Court dated March 26, 2015.

STATEMENT OF FACTS

The relevant facts are undisputed. Bentrim is a financial advisor. (R. p. 1056; June 9, 2014 Tr. 60:2-4). He began his career at Merrill Lynch in 1996 and then transferred to First Union Securities in 2000. (R. p. 772; Bentrim Depo. 9:15-10:8; R. p. 774; Bentrim Depo. 18:11-19). First Union Securities became Wachovia Securities when the merger between First Union and Wachovia occurred and Bentrim worked for Wachovia Securities until he left that employment in March of 2002. (R. p. 772; Bentrim Depo. 9:25-10:8). Bentrim purchased a home at 10 Nicholson Street in Charleston in 2000 with a purchase-money mortgage from Bank

² The lower court initially granted summary judgment on an eleventh claim for violation of the South Carolina Unfair Trade Practices Act but later reversed that ruling. That claim is not a part of this appeal.

of America. (R. p. 774; Bentrin Depo. 20: 1-25). In 2002, he refinanced his home by borrowing \$182,700 from his employer, First Union. (R. p. 775; Bentrin Depo. 21:12-20; R. p. 1306; Satisfaction of Bank of America Mortgage at Book 412, Page 295; R. p. 983; April 28, 2014 Tr. 34:2-20).

As part of the refinance, Bentrin executed a Note to First Union in the amount of \$182,700.00, together with interest, on March 12, 2002. (R. pp. 1115-1118; Note; R. p. 30; Complaint, ¶ 9). The Note was secured by a Mortgage, also executed on March 12, 2002, and recorded in the Charleston County Registry in Mortgage Book C402 at Page 182. (R. pp. 1148-1153; Mortgage; R. p. 30; Complaint, ¶ 8).

At the time of the re-finance, Bentrin also had an equity line from First Union. (R. p. 64; Amended Complaint, ¶ 9). Bentrin used the proceeds from the new First Union loan to satisfy the Bank of America purchase-money mortgage in full and also to substantially pay down the First Union equity line. (R. p. 1307; Settlement Statement; R. p. 983; April 28, 2014 Tr. 34:1-20). To document the pay down of the equity line Bentrin entered into a Modification Agreement whereby the available credit for the equity line was reduced from \$49,000 to \$10,000. (R. p. 709; 2007 Complaint, ¶ 8; R. pp. 725-727; 2007 Complaint, Exhibit C).

Bentrin admits that he signed the March 12, 2002 Note and Mortgage in favor of First Union National Bank. (Initial Brief of Appellant, p. 2; R. p. 181; Plaintiff's Answers to Requests for Admission, ¶ 1; R. p. 973-974; April 28, 2014 Tr. 24:23-25:1). Further, he admits that he has made no payments on this loan since 2009. (R. p. 781; Bentrin Depo. 48:14-22).

Wells Fargo has physical possession of the original Note and has brought it to court on multiple occasions. Judge Scarborough inspected the Note. (R. p. 1063; Oct. 16, 2014 Tr. 5:14-24; R. p. 1043; June 9, 2014 Tr. 5:4-7). The Note is made payable to First Union National Bank.

There are no endorsements on the Note or allonges to the Note. (R. p. 1043; June 9, 2014 Tr. 6:4-11; R. p. 1115-1118, Note).

First Union merged with Wachovia Bank, N.A., which in turn merged with Wells Fargo Bank, N.A. (R. p. 1286; Lost Note Affidavit of Tracy Thomas, ¶ 5; R. p. 772; Bentrim Depo. 9:25-10:4). Bentrim acknowledges the occurrence of these bank consolidations and admits that Wells Fargo is the successor in interest to First Union. (R. p. 772; Bentrim Depo. 9:25-10:4; R. p. 1043; June 9, 2014 Tr. p. 7:17-19).

Similarly, Bentrim does not dispute that the Note has always been serviced by Wells Fargo or its predecessor entities. (Initial Brief of Appellant, p. 12: “Bentrim contends [that] . . . at all times [Wells Fargo] was merely a loan servicer. . .”).

STANDARD OF REVIEW

This Court reviews grants of summary judgment under the same standard that is applied at the trial level. *Foster v. Foster*, 384 S.C. 380, 383, 682 S.E.2d 312, 313 (Ct. App. 2009). Summary judgment should be issued when the evidence collectively shows that “there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRPC. Courts agree that “[t]he purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

ARGUMENTS

Bentrim signed a Note and Mortgage in favor of First Union. Through a series of bank mergers, First Union became Wells Fargo. Bentrim refuses to make payments to Wells Fargo on the grounds he received the loan from First Union, not Wells Fargo. The lower court rejected this position, finding Wells Fargo is the holder of the note. Bentrim does not receive a windfall simply because First Union and Wells Fargo merged banks.

I. Wells Fargo is the holder of the note as a matter of law.

The lower court correctly ruled that Wells Fargo is the “holder” of the Note. This ruling is wholly supported by two undisputed facts: 1) Wells Fargo is in physical possession of the Note, and 2) the Note is payable to First Union, a predecessor in interest to Wells Fargo. Bentrim asserts that Wells Fargo cannot enforce the Note because it is not specifically made payable to Wells Fargo. While he would undoubtedly like to see his debt obligation erased, his argument defies logic and is not supported by either the Uniform Commercial Code or the National Bank Act.

The Note is a negotiable instrument governed by the UCC. The UCC provides the definition of a “holder”:

‘Holder’ means a person who is in possession of a document of title or an instrument or a certificated investment security drawn, issued, or indorsed to him or to his order or to bearer or in blank.

S.C. Code Ann. § 36-1-201(20) (Rev. 2003).³

³ The definition of “holder” has remained essentially the same since 1991. The definition, however, was “reorganized for clarity” in 2014. S.C. Code Ann. § 36-1-201(20), Official Comment (Supp. 2014). It now reads: “‘Holder’ means: (A) the person in possession of a negotiable instrument that is payable either to bearer or an identified person that is the person in possession” For purposes of this analysis, it makes no difference which version of the definition is used.

Wells Fargo is the holder because it is the "person who is in possession of" the Note and the Note is, in effect, "issued" to it. While the name "Wells Fargo" does not appear on the Note, the Note is payable to First Union, and Wells Fargo, by operation of federal law, is deemed to be the same corporation as First Union. When national banks merge, the successor bank *becomes* the predecessor bank in the eyes of the law. When First Union and Wachovia merged, the consolidated entity known as Wachovia was deemed to be the same company as its predecessor in interest, First Union. Similarly, after merging with Wachovia, Wells Fargo is deemed to be the same bank as Wachovia. Further, all property interests, including promissory notes, were transferred to and vested in Wells Fargo without any type of transfer, such as endorsement. Therefore, due to these bank consolidations, a promissory note made payable to First Union is the equivalent of a promissory note made payable to Wells Fargo.

The National Bank Act provides as follows:

The corporate existence of each of the consolidating banks or banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and such consolidated national banking association **shall be deemed to be the same corporation** as each bank or banking association participating in the consolidation. All rights, franchises, and interests of the individual consolidating banks or banking associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the consolidated national banking association by virtue of such consolidation **without any deed or other transfer**. The consolidated national banking association, upon the consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises, and interests, including appointments, designations, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, and receiver, and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any one of the consolidating banks or banking associations at the time of consolidation, subject to the conditions hereinafter provided.

12 U.S.C. § 215(e) (emphasis added). South Carolina has a parallel banking statute to the same effect. S.C. Code Ann. § 34-3-850 (Supp. 2014).

While there is no South Carolina case law directly on point, courts across the country have uniformly held that, following a merger of national banks, the successor bank is deemed the holder of promissory notes previously made payable to one of the consolidating banks. *See In Re Yopp*, 720 S.E.2d 769, 775 (N.C. App. 2011) (under North Carolina law, successor becomes legal holder of former bank's promissory notes); *Fidelity Tax, L.L.C v. Hall*, No. 12AP-923, slip op. at 3-4 (Ohio App. July 18, 2013) (successor bank becomes holder of promissory note following merger under both Ohio and federal law); *In Re N.C. Deed of Trust*, 719 S.E.2d 207, 210-11 (N.C. App. 2011) ("[T]he evidence of the merger between LaSalle and Bank of America is competent evidence that Bank of America is the holder of the Loan Documents"); *Premier Bank v. Diagle*, 599 So. 2d 503, 504-05 (La. App. 1992) (successor bank in merger becomes holder of prior bank's promissory notes under 12 U.S.C. § 215); *Valley Nat'l Bank v. Chaim*, 984 N.Y.S.2d 635, 635, 2014 WL 30712 (N.Y. Sup. Ct. 2014) (under 12 U.S.C. § 215, successor bank acquires rights to prior bank's notes and mortgages); *Berkshire Bank v. Hartford Club*, No. HHDCV136042955S, 2014 WL 565173, at *4 (Conn. Super. Ct. Jan. 13, 2014) (successor bank is holder of note following merger with another bank because it gains title to prior bank's instruments); *Capital One, N.A. v. Finmar Assocs.*, No. 3403-11, 2013 WL 3242525, at *4 (N.J. Super. Ct. App. Div. June 28, 2013) (under both state and federal law, successor bank is holder of prior bank's notes following merger); *In re Rodriguez*, No. 11-BK-18847-RGM, 2015 WL 403968, at *2 (E.D. Va. Jan. 29, 2015) ("On November 1, 2009, World [Savings Bank] merged with Wachovia Bank, N.A. Wachovia subsequently merged with Wells Fargo Bank, N.A. Under 12 U.S.C. § 215(e), Wells Fargo became the holder of the Note upon which this case is based.").

The unspoken result of Bentrim's argument is that the Note is *not enforceable by any party* and he receives a windfall in the form of a cancelled debt obligation. The law is not to be construed in a manner that would award a party an undue windfall. *See Williamson v. U.S. Fire Ins. Co.*, 314 S.C. 215, 218, 442 S.E.2d 587, 588 (1994) (explaining that public policy does not favor windfalls); *see also Edwards v. Columbia, S.C., Teachers Fed. Credit Union*, 276 S.C. 89, 275 S.E.2d 879 (1981). The UCC and 12 U.S.C. § 215(e) work together to prevent the illogical outcome of Bentrim's argument. Neither Bentrim nor any other former customers of First Union should have their debts forgiven simply because First Union merged with Wachovia and Wachovia with Wells Fargo.⁴

Wells Fargo's status as holder gives it the right to enforce the Note: "The holder of an instrument whether or not he is the owner may . . . enforce payment in its own name." S.C. Code Ann. § 36-3-301 (Rev. 2003). Accordingly, the lower court was correct in ruling that Wells Fargo is the holder and entitled to enforce the Note.⁵

⁴ Since federal law and state law do not conflict in this instance, preemption is not an issue here; but, if it were, federal law would prevail. By virtue of the Supremacy Clause of the United States Constitution, "[e]ven where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Federal courts have determined that 12 U.S.C. § 215 preempts state law in matters concerning appointment of successor fiduciaries and general fiduciary duties. *See NCNB Texas Nat'l Bank v. Cowden*, 895 F.2d 1488, 1497 (5th Cir. 1990). It follows that, if the operation of 12 U.S.C. § 215(e) makes a successor bank the holder of the prior bank's instruments, then that result preempts a contrary result under UCC Article 3.

⁵ Section 36-3-301 was amended in 2008 to recognize that "enforcement is not limited to holders." S.C. Code Ann. § 36-3-301, Official Comment (Supp. 2014). Wells Fargo, because it is the holder, is also a "person entitled to enforce" under the new version of the statute. ("Person entitled to enforce" an instrument means (i) the holder of the instrument . . . ,"). Further, even if Wells Fargo were not the holder, it would still be entitled to enforce the Note under the new version of the statute as "a nonholder in possession of the instrument who has the rights of a holder" since, under the National Bank Act, Wells Fargo "hold[s] and enjoy[s] all

II. Bentrim's attempt to overturn *Draper* is not properly before the Court.

Bank of America, N.A. v. Draper, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013), established that a loan servicer has standing to initiate a foreclosure action on behalf of the owner of the loan. Bentrim "contends that not only should the Court of Appeals decline to extend *Draper* to the appeal at bar, but that it should overturn the case entirely." (Initial Brief of Appellant, p. 14). *Draper*, however, is not properly before the Court. The lower court's rulings in this case rest on Wells Fargo's status as a holder, not servicer, and for purposes of this appeal, Wells Fargo is not relying on the *Draper* holding as an additional sustaining ground.

Bentrim acknowledges the lower court did not rely on *Draper*, yet he urges the Court to overturn the case because he "believes Wells Fargo will argue *Draper*'s application as an additional sustaining ground." (Initial Brief of Appellant, p. 13). Bentrim's supposition - which is incorrect - does not give him standing to argue against *Draper* in this appeal. An appellate court may consider an additional sustaining ground when "the party who prevailed in the lower court urges an appellate court to affirm the lower court's ruling for a reason other than one primarily relied upon by the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 417, 526 S.E.2d 716, 722 (2000). Bentrim, of course, is not the "party who prevailed in the lower court." As such, he may only address an issue if it is first raised by Wells Fargo as an additional sustaining ground.

There is therefore no reason for this Court to address *Draper*. If the Court were to do so, however, it should uphold its prior opinion. The *Draper* decision comports with the vast majority of decisions from courts across the country which have addressed the issue of whether a servicer has standing to bring a foreclosure. See, e.g., *Greer v. O'Dell*, 305 F.3d 1297, 1301

rights of property . . . in the same manner and to the same extent as such rights . . . were held or enjoyed" by First Union and Wachovia. 12 U.S.C § 215(e).

(11th Cir. 2002) (“[T]he sole issue before us is whether a loan servicer is a ‘real party in interest’ with standing to conduct, through licensed counsel, the legal affairs of the investor relating to the debt that it services. We answer this question in the affirmative.”); *J.E. Robert Co., Inc. v. Signature Prop’s, LLC*, 71 A.3d 492, 500 (Conn. 2013) (loan servicer is entitled to enforce the note it services) (collecting cases); *Green Tree Serv. LLC v. Sanders*, No. 2005-CA-000371-MR, 2006 WL 2033668, at *3–4 (Ky. Ct. App. July 21, 2006) (servicer of a mortgage loan is a real party in interest in a foreclosure action); *U.S. Bank Nat’l Ass’n v. Gunn*, 31 F. Supp.3d 636, 639–40 (D. Del. 2014) (servicer is a real party in interest in cases where the loan serviced is the subject of litigation); *In re Neals*, 459 B.R. 612, 617 (Bankr. D.S.C. 2011) (“[T]here is a general view, which has been accepted in this jurisdiction and others, that a loan servicer is a ‘party in interest’ and has standing by virtue of its pecuniary interest in collecting payments under the terms of the note and mortgage.”).⁶

In the event the Court believes Bentrims’s arguments regarding *Draper* warrant appellate review, Wells Fargo respectfully requests that the Court establish a supplemental briefing schedule allowing it, as well as any interested third parties, to fully address Bentrims’s unusual request.

III. Summary judgment was properly entered for ten of Bentrims’s causes of action.

A. There is no need for additional discovery because the facts relevant to the lower court’s rulings are not disputed.

Throughout his opening brief, Bentrims makes the argument that he should be allowed more time for discovery before summary judgment is considered. Requests for more discovery, however, do not operate as a cure-all when a plaintiff’s claims are defective as a matter of law.

⁶ As Bentrims’s theories of liability have evolved, so has his position on *Draper*. He previously acknowledged to Judge Scarborough in open court that a servicer has the right to bring a foreclosure action. (R. p. 899; Feb. 10, 2014 Tr. 15:3-4: “We concede Mr. Laney’s point that a servicer can bring a claim.”).

Instead, summary judgment can be forestalled only when the additional requested discovery bears on dispositive issues. *See, e.g., Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (“[T]he nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is ‘not merely engaged in a “fishing expedition.”” (quoting *Baughman v. AT&T Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991))) (emphasis added); *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48; 54–55, 677 S.E.2d 32, 36 (Ct. App. 2009) (affirming summary judgment despite the appellant’s claim for more discovery because “on appeal, Guinan fails to demonstrate further discovery would uncover additional relevant evidence or create a genuine issue of material fact”) (emphasis added); *see also Wieters v. Roper Hosp., Inc.*, 58 F. App’x 40, 44 (4th Cir. 2003) (affirming summary judgment despite the submission of a Rule 56(f) affidavit because the nonmovant had failed to explain how the additional requested discovery “will be useful in resisting summary judgment”).

In this regard, “[a] complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.” *Gauld v. O’Shaughnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008) (quoting *Baughman*, 306 S.C. at 116, 410 S.E.2d at 546). This legal principle underscores the fundamental defect in Bentrin’s request for more discovery here. There is no dispute that Wells Fargo is the successor in interest to First Union, by way of merger with Wachovia, or that the Note is made to First Union without any subsequent endorsements or allonges. No amount of discovery can change these dispositive facts. *See Powell v. Bank of Am.*, 379 S.C. 437, 447, 665 S.E.2d 237, 242 (Ct. App. 2008) (reiterating the “overarching rule of civil procedure” that “whatever doesn’t make any difference, doesn’t matter” (quoting *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987))).

Similarly, the lower court granted summary judgment on ten of Bentrim's causes of action because the discovery of additional evidence could not salvage those claims. The Court should reject Bentrim's attempt to unnecessarily prolong this matter with additional discovery that cannot alter the lower court's unavoidable conclusions.

B. The Consumer Protection Code does not apply to Bentrim's loan.

The lower court correctly granted summary judgment on Bentrim's claim alleging a violation of S.C. Code Ann. § 37-5-108 (Rev. 2015), part of the South Carolina Consumer Protection Code. This section "applies to actions or other proceedings to enforce rights arising from consumer credit sales, consumer leases, *consumer loans*, and consumer rental-purchase agreements." S.C. Code Ann. § 37-5-102 (emphasis added). "Consumer loan" is a defined term under the statute. S.C. Code Ann. § 37-3-104. Importantly, however, the term "does not include a loan secured by a first lien *or equivalent security interest in real estate*." S.C. Code Ann. § 37-3-105 (emphasis added). Therefore, as a matter of law, Section 37-5-108 does not apply to a first mortgage real estate loan or its equivalent.

While Bentrim's Mortgage is technically a second lien, it is difficult to imagine a security interest more "equivalent" to a first lien than the Mortgage in question. At the time of the 2002 closing, Bentrim had a purchase-money mortgage from Bank of America in first lien position and an equity line from First Union as a second lien. Bentrim used the new \$182,700 loan from First Union to completely satisfy the Bank of America purchase-money mortgage and to substantially pay down the First Union equity line. The parties' Modification Agreement reduced the available credit from \$49,000 to \$10,000. The equity line then assumed first lien position, while the new Mortgage took second position. In most cases, a new lender would have insisted on a subordination of the equity line to its mortgage. However, given the minimal

amount of the equity line and the fact that it held both loans, there was no practical reason for First Union to require a subordination agreement. In practical effect, the First Union Mortgage replaced the Bank of America purchase money mortgage and is the equivalent of a first lien.

In interpreting a statute, courts must ascribe meaning to all parts of the statute. *State ex rel. McLeod v. Nessler*, 273 S.C. 371, 373, 256 S.E.2d 419, 420 (1979). If the word “equivalent” found in Section 37-3-105 is to have any meaning at all, Bentrim’s loan is the equivalent of a “loan secured by a first lien” and, therefore, is not a “consumer loan.” Accordingly, the Consumer Protection Code does not apply to his loan, and summary judgment was appropriate on this cause of action.

C. The undisputed evidence fails to support several elements of Bentrim’s fraud causes of action.

The lower court properly granted summary judgment as to Bentrim’s three fraud-based causes of action: fraud (sixth cause of action); constructive fraud (seventh cause of action), and mail fraud (sixteenth cause of action). The nine elements of fraud are: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer’s ignorance of its falsity; (7) the hearer’s reliance on its truth; (8) the hearer’s right to rely thereon; (9) the hearer’s consequent and proximate injury. *M. B. Kahn Const. Co. v. S.C. Nat. Bank of Charleston*, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980). For constructive fraud, proof of actual intent to deceive is not required. *Singleton v. Mullins Lumber Co.*, 234 S.C. 330, 350, 108 S.E.2d 414, 424 (1959). To the extent South Carolina recognizes a civil cause of action for mail fraud, its elements mirror those of common law fraud. *Gentry v. Yonce*, 337 S.C. 1, 8, 522 S.E.2d 137, 141, n.8 (1999). Failure to prove any element of fraud is fatal to the action and proper grounds

for summary judgment. *Robertson v. First Union Nat. Bank*, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct. App. 2002).

Bentrim's Initial Brief sets forth six specific acts which he contends constitute fraud on the part of Wells Fargo. A brief analysis of these allegations demonstrates why summary judgment was proper:

1. "[C]laiming holder status in the 2007 and 2009 foreclosure actions."

Prior to the instant action, Bentrim's failure to make timely payments on this loan led Wachovia to file foreclosure actions in 2005, 2007 and 2009. The 2005 and 2007 actions were dismissed after Bentrim reinstated the loans ahead of the foreclosure sales. The 2009 foreclosure was dismissed when no attorney appeared for Wachovia at the final hearing. (R. p. 27; September 12, 2006 Stipulation of Dismissal for 2005-CP-10-4814; R. p. 25; December 21, 2007 Order Dismissing 2007-CP-10-3933; R. p. 26; July 7, 2010 Order Dismissing 2009-CP-10-4700). The complaints in the 2007 and 2009 cases alleged that Wachovia was the holder of the Note and Mortgage. Wachovia's allegation does not give rise to a cause of action for fraud. As an initial matter, Wachovia *was* the holder so the representation was true.⁷ Second, even if it

⁷ Bentrim states repeatedly, but inaccurately, in his Initial Brief that Wells Fargo "sold the Note." In actuality, Wachovia did not sell the note. Rather, Wachovia sold a beneficial interest in the loan to its wholly-owned subsidiary, The Money Store Service Corporation. (R. p. 1294; Wakefield Affidavit, ¶¶ 3-4). The undisputed facts in the record demonstrate that Wells Fargo and its predecessor entities have held the Note at all times and the Note itself was never transferred. (R. p. 1286; Lost Note Affidavit, ¶ 5). These are factual matters and not the proper subject of expert testimony. Even so, Bentrim's expert affidavits, at most, conclude that the sale of the participation interest constitutes a sale of the "loan" and do not purport to establish a transfer of the commercial paper. These irrelevant "opinions" cannot overcome this case's actual undisputed facts or the lower court's summary judgment rulings. *See generally* 49 C.J.S. *Judgments* § 330 (2009) (explaining that "mere general statements and opinions by an expert are insufficient to controvert a movant's properly presented evidence on a motion for summary judgment"); *see also Shupe v. Settle*, 315 S.C. 510, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994) ("A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment.").

were not true, Bentrin took no action in reliance on the allegation and suffered no resulting damage. The matters were never adjudicated, foreclosure never occurred and, at all times, Bentrin maintained possession of the house. Further, to the extent he paid money to reinstate the Mortgage, he will be given credit for the amount paid in any foreclosure action.⁸

2. “Representing to Bentrin that it was the owner of his mortgage when it was not.”

For the same reasons, this representation does not give rise to claims based on fraud: it was true, Bentrin did not rely, and Bentrin suffered no damage.⁹

3. “The misleading and fraudulent Lost Note Affidavit.”

Bentrin refers to the Lost Note Affidavit executed by Wells Fargo employee Tracey Thomas on February 7, 2012. (R. pp. 1285-1192; Lost Note Affidavit). Prior to Bentrin’s filing this lawsuit in 2011, Wachovia brought three foreclosure actions against Bentrin. In the last foreclosure action, Brock & Scott PLLC represented Wachovia. At the time Bentrin initiated this lawsuit in 2011, Wells Fargo was unable to locate the original Note. Thomas executed the Lost Note Affidavit in the belief that the original was lost. (R. pp. 850-854; Thomas Depo. 112:19 – 125:13). Brock & Scott later contacted Wells Fargo and informed it that the original

⁸ While he contested Wachovia’s right to foreclose in the previous actions, Bentrin tacitly admits that Wachovia had the right to collect his previous payments on the Note since he admits Wachovia was the servicer of the loan.

⁹ Bentrin’s Initial Brief inappropriately cites to a 2011 Office of the Comptroller of the Currency Consent Order and a 2012 Consent Judgment. The matters are clearly irrelevant. The OCC Order states that it does not give individual borrowers like Bentrin “any legal or equitable right, remedy or claim.” (R. p. 1204; OCC Order, p. 27, ¶ 10). Courts across the country have ruled that the OCC order cannot be used as a defense to a foreclosure action. *See, e.g., Green v. Bank of Am. Corp.*, 530 F. App’x 426, 430 (6th Cir. 2013); *Hersh v. CitiMortgage, Inc.*, 2:13-CV-1344, 2013 WL 6858443 (W.D. Pa. Dec. 30, 2013); *Anderson v. Deutsche Bank Nat. Trust Co.*, 13-CV-12854, 2014 WL 988994 (E.D. Mich. Mar. 13, 2014). Similarly, by its very terms, the 2012 Consent Judgment unambiguously states that it cannot “constitut[e] evidence against Defendant [*i.e.* Wells Fargo].” (R. p. 1212, line 16; Consent Judgment, p. 2). The Court should not credit Bentrin’s improper reliance on these irrelevant materials.

Note was still in its possession. (R. p. 966; April 28, 2014 Tr. p. 17:5-18). The Lost Note Affidavit accurately sets forth the terms of the Note and states that Wells Fargo had made a diligent search but was unable to locate the Note. (R. pp. 1285- 1286; Lost Note Affidavit ¶ 3).

The Lost Note Affidavit cannot constitute fraud. At the time Thomas signed the affidavit, she believed the averments regarding the lost Note in the affidavits were true. Only later would she find that the Note had been in the possession of Wells Fargo's previous attorneys. To constitute fraud, the allegedly fraudulent statements must be false at the time they were made. *Winburn v. Ins. Co. of N. Am.*, 287 S.C. 435, 440, 339 S.E.2d 142, 146 (Ct. App. 1985) ("The truth or falsity of a representation must be determined as of the time it was made or acted on and not at some later date."). Moreover, the purpose of the Lost Note Affidavit was to serve as a substitute for the original Note. Bentrim could not have relied on the Lost Note Affidavit - it was simply a recitation of the terms from the original Note. Similarly, the Lost Note Affidavit, which was produced during the pendency of the lawsuit, could not have caused Bentrim any damages.

4. "The attempt to pass off copies of the Note from the real estate closing file as the Note."

Bentrim is presumably referring to the production of a copy of the Note during discovery. As an initial matter, the South Carolina Rules of Evidence specifically allow for the use of duplicates. S.C. Rule Ev. 1003. Further, these allegations, even viewed in the light most favorable to Bentrim, fail to meet the elements of a fraud claim. Because the document was produced during litigation, the allegedly fraudulent Note was *not* relied on by Bentrim, it was *not* in any way material to any decision made by him, and it caused *no* damages. See *M. B. Kahn*, 275 S.C. at 384, 271 S.E.2d at 415 (stating the elements of a fraud claim). There is no scintilla of evidence in the record to suggest otherwise.

5. “[R]epeated averments that the Loan had not been sold.”

As an initial matter, the loan has *not* been sold. Rather, a beneficial interest in the loan was sold, giving the purchaser rights to benefits such as income. (R. p. 1294; Wakefield Affidavit, ¶ 3). Regardless, Bentrim is again complaining about the actions of Wells Fargo’s attorneys during the course of this litigation. These allegations, even viewed in the light most favorable to Bentrim, cannot state a cause of action for fraud. Again, because the “averments” were made during litigation, they were not relied on by Bentrim and caused no damages. *See M. B. Kahn*, 275 S.C. at 384, 271 S.E.2d at 415 (stating the elements of a fraud claim).

6. Wells Fargo “provided false and misleading account statements to Bentrim.”

This is the crux of Bentrim’s claim - he disputes the amount owed under the Note. What should have been a simple request by Bentrim for an accounting turned into a series of demonstrably irrelevant arguments and four years of litigation. The lower court requested and reviewed the entire accounting history of the Note and Mortgage and determined that there was no evidence in the record to suggest that Wells Fargo knowingly provided false bank statements to Bentrim. (R. p. 976; Hearing Transcript April 28, 2014, p. 27: 9-24).

In summary, there is not a scintilla of evidence in the record to support Bentrim’s claims for fraud, constructive fraud or mail fraud, and summary judgment was therefore appropriate on these causes of action.

D. The filing of pleadings, including a *lis pendens*, is absolutely privileged and cannot form the basis for a claim of slander of title.

The Amended Complaint clearly states that the slander of title cause of action is based on Wells Fargo’s alleged wrongful filing of the previous foreclosure complaints and accompanying *lis pendens*. (R. p. 78; Amended Complaint, ¶ 115: “Based on the foregoing, Defendant and/or its predecessors in interest, *by virtue of filing improper foreclosure actions and*

lis pendenses”). As explained in great detail by this Court in a previous decision, all pleadings, including a *lis pendens*, are protected from slander of title claims by an absolute privilege. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002). This is different from a situation in which a party wrongfully files an invalid lien. *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 723 S.E.2d 597 (Ct. App. 2012) (filing of a null mortgage); *Huff v. Jennings*, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct. App. 1995) (wrongfully recording a lien - *as opposed to filing a pleading* - can be actionable as slander of title). Summary judgment was correct because Bentrim’s slander of title claim is barred by the absolute privilege afforded pleadings.

E. Bentrim’s payments to Wells Fargo cannot constitute conversion.

Bentrim asserts that S.C. Code Ann. § 36-3-420 supports his claim for conversion. This argument misinterprets the statute. Section 36-3-420 states:

The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. **An action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee.**

This code section generally applies to those instances when negotiable instruments are stolen or forged. Of course, neither situation applies to Bentrim’s Note. More to the point, the statute specifically prohibits a conversion action by the “issuer” of a negotiable instrument. An “issuer” is defined by the UCC as a “maker or drawer of an instrument.” S.C. Code Ann. § 36-3-105 (Rev. 2003). In this case, Bentrim is the maker of the instrument. Accordingly, the statute he cites - rather than support a conversion action - actually bars his conversion claim under the UCC. This conclusion is affirmed by the case he cites. *See Halifax Corp. v. Wachovia Bank*, 268

Va. 641, 656, 604 S.E.2d 403, 410 (2004) (plaintiff who issued the checks was barred from bringing a conversion action).

Summary judgment on the conversion claim was appropriate based on the common law too. Bentrim alleges that Wells Fargo converted his payments by failing to properly account for the amounts owed. (R. p. 79; Amended Complaint, ¶ 117). Under South Carolina law, these allegations cannot support a claim for conversion. The only funds which Wells Fargo received from Bentrim were payments on the subject loan. "There can be no conversion where there is a mere obligation to pay a debt. Thus, where there is merely the relationship of debtor and creditor, an action based on conversion of the funds representing the debt is improper." *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 497, 220 S.E.2d 116, 119 (1978). In *Owens*, the Supreme Court explained that "the overwhelming authority is that money on deposit in a bank cannot be the subject of conversion *unless it was intended to be kept separate or constituted a specific intact fund.*" *Id.* (emphasis added). There is no evidence in the record that Bentrim's payments were intended to be kept separate or constituted a specific intact fund. The lower court's grant of summary judgment was correct.

F. There is no independent cause of action for breach of the implied covenant of good faith and fair dealing.

Bentrim wrongly claims that breach of the implied covenant of good faith and fair dealing is an independent cause of action. His breach of contract claim was dismissed with prejudice by order of Judge Dennis on November 20, 2012. (R. p. 18, lines 8-9; Order dated Nov. 20, 2012). Bentrim did not file a Rule 59 motion or appeal the order. With no pending cause of action for breach of contract, the law does not support a stand-alone cause of action for breach of the implied covenant of good faith and fair dealing. *See RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004) (holding that

the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract). According, summary judgment was correct on this cause of action.

G. There is no evidence of special damages to support the civil conspiracy claim.

The elements of a civil conspiracy are “(1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages.” *Pye v. Estate of Fox*, 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006) (granting summary judgment when not all elements of conspiracy claim were met). Reviewing the record in the light most favorable to Bentrim, he fails to meet the requirement of special damages.

In order to prove special damages, Bentrim must show that “the acts in furtherance of the conspiracy were separate and independent from other wrongful acts alleged in the complaint.” *AJG Holdings LLC v. Dunn*, 392 S.C. 160, 167–68, 708 S.E.2d 218, 222–23 (Ct. App. 2011). In this case, however, the conspiracy cause of action simply regurgitates those allegations found throughout the seventeen-count Amended Complaint (R. pp. 63-83; Amended Complaint). In the conspiracy count, Bentrim alleges that Wells Fargo, together with Wachovia Retail Credit Servicing, Inc. and an unknown party, conspired to: (1) “charg[e] and collect[] improper compensation from [him],” and (2) “assert[] liability against [him] where no liability existed.” (R. p. 80; Amended Complaint, ¶ 120). In other words, Bentrim alleges that Wells Fargo charged him too much and also should not have charged him at all. These same allegations are found throughout the “Factual Allegations” section of the Amended Complaint, and the “Factual Allegations” are then re-stated and re-alleged for each of the seventeen causes of action. An examination of several causes of action demonstrates the overlap between the conspiracy claim and the rest of the Amended Complaint:

- Bentrīm’s claim for negligence alleges “improper . . . servicing, and accounting.” (R. p. 73; Amended Complaint, ¶ 69).
- Bentrīm’s claim for conversion alleges the bank “accept[ed] payments from [Bentrīm] when Wachovia was not the owner of the Note.” (R. p. 76; Amended Complaint, ¶ 87).
- Bentrīm’s fraud, constructive fraud, and mail fraud claims in the Amended Complaint make no particularized allegations apart from the shared “Factual Allegations,” but according to his Initial Brief they rely on allegations that Wells Fargo or its predecessors improperly “claim[ed] holder status in the 2007 and 2009 foreclosure actions”; “represented[ed] to Bentrīm that it was the owner of the mortgage when it was not”; and “provid[ed] false and misleading fraudulent and misleading account statements to Bentrīm.” (Initial Brief of Appellant, p. 46).
- Bentrīm’s Fair Debt Collection Practices Act claim alleges that Wells Fargo made “false, misleading and deceptive assertions regarding [his] indebtedness and [Wells Fargo’s] right to pursue collection, including the character and amount of the alleged debt.” (R. p. 81; Amended Complaint, ¶ 125).
- Bentrīm’s Consumer Protection Code claim alleges that Wells Fargo made “false, misleading and deceptive assertions regarding [Bentrīm’s] indebtedness and [Wells Fargo’s] right to pursue collection, including the character and the amount of the alleged debt.” (R. p. 81; Amended Complaint, ¶ 128).

These claims may vary somewhat in the wording, but they make the same allegations as the conspiracy claim. Because the claim for conspiracy fails to allege acts “separate and independent” from the other claims, it must fail.

Not surprisingly, Bentrīm’s claim for “special damages” related to the alleged conspiracy is vague and non-specific. Dismissal of a claim for civil conspiracy is appropriate when “a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim” *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009). Special damages cannot be generally alleged, but instead must “be specifically stated” to avoid dismissal. Rule 9(g), SCRCF; *Preferred Sav. Bank, Inc. v. Elkholy*, 303 S.C. 95, 99, 399 S.E.2d 19, 21 (Ct. App. 1990) (discussing Rule 9(g)); *AJG Holdings*, 392 S.C. at 168, 708 S.E.2d at 223 (“Special damages

must be properly pled, or the claim for civil conspiracy will be dismissed.”). The Amended Complaint simply alleges that Wells Fargo “and its co-conspirators caused special harm and damages to Plaintiffs under South Carolina law.” (R. p. 80; Amended Complaint, ¶ 121). It provides no explanation of what those special damages actually are. In response to Wells Fargo’s interrogatories, Bentrin produced a Statement of Damages, which states that the alleged damages resulting from conspiracy are “to be determined by the trier of fact but no less than \$100,000.” (R. p. 1304; Statement of Damages, line E). This response lacks sufficient details and fails to satisfy South Carolina law. Accordingly, Judge Scarborough properly granted summary judgment on Bentrin’s conspiracy claim.

H. Wells Fargo is not liable under the Fair Debt Collection Practices Act because it was deemed to have originated the debt.

Bentrin readily admits that First Union originated the Note and Mortgage. Further, he admits that Wells Fargo is the servicer of the loan. These undisputed facts are sufficient to uphold summary judgment.

A “debt collector,” as defined by the Fair Debt Collection Practices Act, is “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts” 15 U.S.C. § 1692a(6). There are six categories of exceptions to the definition. The term “debt collector” does not include: “(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . (ii) concerns a debt which was originated by such person.” First Union is Wells Fargo’s predecessor in interest. Therefore, to the extent Wells Fargo is attempting to collect a debt, the debt was originated “by such person,” and Wells Fargo is not a “debt collector” under the statute. *See* 12 U.S.C. § 215(e) (when national banks merge, a successor bank is deemed to be the same bank as the predecessor bank).

Further, as explained in great detail by numerous courts, the statute does not apply to loan servicers. *See, e.g., Reese v. JPMorgan Chase & Co.*, 686 F. Supp. 2d 1291, 1311 (S.D. Fla. 2009); *Casault v. Fed. Nat'l Mortgage Ass'n*, 915 F. Supp. 2d 1113, 1126 (C.D. Cal. 2012); *Belin v. Litton Loan Servicing, LP*, No. 8:06-cv-760-T-24EAJ, 2006 WL 1992410, at *2 (M.D.Fla. July 14, 2006); *Warren v. Countrywide Home Loans, Inc.*, 342 F. App'x 458, 460-61 (11th Cir.2009); *Foxx v. Ocwen Loan Servicing, LLC*, No. 8:11-CV-1766-T-17EAK, 2012 WL 2048252, at *3 (M.D. Fla. June 6, 2012). Because Wells Fargo and its predecessors serviced the loan at all times, it cannot be liable under the FDCPA.

Wells Fargo is not a debt collector under the statute, and the lower court was therefore correct to grant summary judgment as to Bentrim's claim for violation of the FDCPA.

CONCLUSION

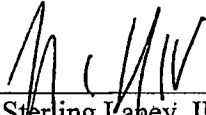
In this case, Bentrim presents a labyrinth of technical, but ultimately irrelevant, arguments based on the UCC in an attempt to erase his just debt obligation. The correct analysis, on the other hand, is simple and straightforward. Bentrim signed the promissory Note in 2002 in favor of First Union, which became the holder of the Note. First Union merged with Wachovia, which in turn merged with Wells Fargo. Wells Fargo and First Union, by operation of federal law, are deemed to be the same corporation. Wells Fargo has physical possession of the original Note, and there are no endorsements on or allonges to the Note. As such, Wells Fargo is the holder of the Note and entitled to enforce its provisions.

The lower court also granted summary judgment on ten of Bentrim's seventeen claims. In each instance, the lower court considered the evidence in the light most favorable to Bentrim and concluded, based on standard legal principles, that these ten claims should fail as a matter of law.

Therefore, Wells Fargo respectfully submits that the lower court's rulings are correct and should be affirmed.

Respectfully submitted,

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March 7, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Master-In-Equity

Appellate Case No. 2014-002590
Circuit Court Case No. 2011-CP-10-2946

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SC Court of Appeals

Brent E. Bentrin, ... Appellant,

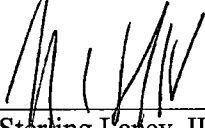
v.

Wells Fargo Bank, N.A., ... Respondent.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

The undersigned counsel certifies that his Final Brief complies with Rule 211(b).

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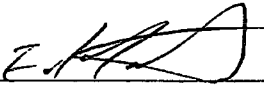
PROOF OF SERVICE

I, the undersigned Legal Secretary of the law offices of Womble Carlyle Sandridge & Rice LLP, Attorneys for Respondent, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by mailing a copy of the same, postage prepaid, to the following address(es):

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SC Court of Appeals



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March 8, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Charleston County Master in Equity

APPELLATE CASE NO. 2014-002590

BRENT E. BENTRIM, ...Appellant

v.

WELLS FARGO BANK, N.A., ... Respondent

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I. Introduction.

This complaint was brought by the Plaintiff in part to enforce the terms of his loan. Wells Fargo, time and again, has characterized Bentrin as unwilling to pay when it is undisputed the Wells Fargo refused (after an admitted accounting error) to accept payments tendered from Bentrin from December 2008 through January 2010. [R. 1418, R. 1299].

Now, Wells Fargo seeks to redefine “default” as “failure to pay amounts not due,” and “failure to pay payments refused.” Likewise, the Wells Fargo argues the Court should define “holder” as a ‘general label’ ... because if *it* is not the holder, so it argues, then “the unspoken result is that the Note is unenforceable by anyone.” Bentrin submits that Respondent’s position is untenable.

In reality, Wells Fargo must attempt to claim the title of a ‘holder’ – no matter how tenuous or specious the legal or factual basis to make the claim – because otherwise it cannot overcome the genuine issues of material fact it has failed to “demonstrate the purpose of delivery of the note to it in order to qualify as the person entitled to enforce”¹ to qualify as a non-holder in possession with rights to enforce under S.C. Code Ann. § 36-3-301(ii). Doing so would require it to answer whether it exposed Bentrin to dual liability on his loan since 2006 to a holder in due course.

Ultimately, the Court should also look at the strange juxtaposition of parties this case:

- It is the bank claiming a Negotiable Instrument is only enforceable as a contract between the original lender and borrower.

¹ Report of the Permanent Editorial Board for The Uniform Commercial Code, “Application of the Uniform Commercial Code to Selected Issues Related to Mortgage Notes,” page 6 dated November 14, 2011 by the American Law Institute.

- It is the bank claiming a sale and securitization of a Negotiable Instrument, absent negotiation, renders it unenforceable.
- It is the homeowner, not the bank, who argues the Uniform Commercial Code applies to Negotiable Instruments.
- It is the bank asserting records demonstrating a sale and transfer of the note are invalid.
- It is the homeowner who has produced, *based on personal knowledge of the loan servicing and accounting record*, expert testimony refuting unsubstantiated theories by the bank that no sale and transfer of the Note occurred.
- It is the bank, not the homeowner who is unable to offer any expert testimony to refute the servicing records and the application of the Uniform Commercial Code.

For the reasons set forth herein, this Court should reject Wells Fargo's arguments and reverse the Master.

II. ARGUMENTS WHY 12 U.S.C. § 215e IS INAPPLICABLE.

A. Genuine Issues of Material Fact Preclude 12 U.S.C. § 215e Application.

It is a bedrock principle of summary judgment procedure in this State that the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the non-moving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003); *Montgomery v. CSX Transport, Inc.*, 376 S.C. 37, 53-54, 656 S.E.2d 20, 29 (2008). Under *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009), "the non-moving party is only required to submit a *mere scintilla* of evidence in order to withstand a motion for summary judgment." Moreover, any fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good as direct evidence if it is equally as convincing to the trier of the facts. *Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 79-80, 735 S.E.2d

650, 658 (2012); *St Paul Fire & Marine Ins Co. v. Am. Ins. Co*, 251 S.C. 56, 59–60, 159 S.E.2d 921, 923 (1968).

Contrary to Wells Fargo’s position, this appeal has nothing to do with the fact that Wachovia Bank, N.A. merged with Wells Fargo Bank, N.A. effective March 20, 2010. Rather, the whole appeal turns on what happened to the Bentrim Note on November 29, 2006.

According to Wells Fargo, nothing much happened at all on November 29, 2006 except the sale of a “beneficial interest” in the Bentrim Loan by Wachovia to a subsidiary (the reason for which is never explained), with the request that any corporate formality or separate corporate structure between Wachovia and the subsidiary ignored by the Court. To side with Wells Fargo, then, this Court must accept as unchallenged and entirely true Wells Fargo’s factual position, buried in footnote 7 on page 15 of its Brief, stating that although “Wachovia sold a beneficial interest in the loan to its wholly-owned subsidiary, The Money Store Service Corporation,” nevertheless “the undisputed facts in the record demonstrate that Wells Fargo and its predecessor entities have held the Note at all times and the Note itself was never transferred.”

Bentrim, however, would point to the following facts and law which stand in complete contravention of Wells Fargo’s position. If the Court of Appeals gives credence to these facts, and the logical inferences therefrom – which Bentrim submits this Court is obligated to do – then it cannot uphold the grant of summary judgment:

(a). Respondent’s witness Timothy Wakefield testified that a 100% beneficial interest in the Bentrim loan was sold by Wachovia to TMS Service Corp. effective

November 29, 2006; Appellant's CPA expert Clifton Boddiford testified that this transaction constitutes a "sale" absolute. [R. 1294, R. 1108-1109, 1111-1112].

(b). Notwithstanding Respondent's arguments to the contrary, at the time of the sale, Wachovia also unequivocally **transferred** the Bentrim Note to TMS Service Corp., Inc. and made transfer warranties in Section #4 of the Pooling and Servicing Agreement [Sealed App. R 1320-1350]. This begs the question why would Wachovia enter into a PSA with TMS Service Corp, Inc., in which it disclaims any obligation except as a custodian, if it was not transferring legal possession to TMS Service Corp., Inc. of the Notes subject to the PSA? The fact that PSA shows where the then-holder (Wachovia) declared its intent to voluntarily transfer a note without negotiation, giving the transferee (TMS Service Corp.) possession via the servicing agreement meets all the tests of a transfer. S.C. Code Ann. §§ 36-3-103(a); 36-1-201(14); 36-3-203.

(c). Obviously, Respondent has not shown and cannot show any authority that allows a National Bank to enforce a note in its own name, as a "holder," when the note has been lawfully transferred to a non-National Bank subsidiary. This is the central factual and legal dispute between the parties.

(d). More importantly, there is no evidence offered by Respondent that TMS Service Corp., Inc. ever made a voluntary and intentional transfer of possession of the Bentrim Note back to Wachovia/Wells Fargo – which is necessary to meet the definition of "delivery" and therefore transfer under UCC Article 3. *Estate of Barr v Carson*, 300 S.C. 171, 173, 386 S.E.2d 791, 793 (Ct. App. 1989); S.C. Code Ann. §§ 36-3-103(a); 36-1-201(14); 36-3-203. It bears repeating that transfer is not about the receiving or accepting an instrument, but the manner in which the instrument is given/delivered. *Id.* When

combined with the fact that the Note is unindorsed (and therefore cannot have been negotiated back either), there is a huge failure of proof on the part of Respondent that Wachovia was the holder at the time of the 2007 and 2009 foreclosure suits.

(e). This conclusion is further supported by the fact that the Bentrin Note completely disappears from the Wachovia-Wells Fargo vault records from May, 2002 to February, 2013, with no proof offered as to whether it was with a Wachovia attorney (or the dates it was purportedly with a Wachovia attorney) other than unsupported, impermissible argument of counsel. [R. 1309-1310, Sealed App. R 1433-1445]. The fact that the copy of the Note attached to the LNA which Ms. Thomas certified as a “*true, correct and substantial copy of the lost or destroyed Note*” materially differed from the Note which Wells Fargo exhibited to the Court which had two barcodes on it, is also significant in that it means all during the time Respondent claimed to have the original note, it was not exhibiting an actual copy of the true original, but another copy altogether – leading to the inference that Respondent could never could lay its hands on a true original until February, 2013 and therefore was not in possession until then. [R. 1115-1118; R. 1119-1146].

(f) Appellant is accordingly entitled to an inference that Respondent cannot prove Wachovia was in possession of the Bentrin note at the time of the Wells Fargo merger [nor for that matter at the time of the 2007 and 2009 foreclosure suits, or even at the inception of the counterclaim] – rendering its 12 U.S.C. § 215e argument moot.

(g) If the Court of Appeals believes probative the fact TMS Service Corp., Inc. was a subsidiary of Wachovia (which Bentrin deems irrelevant since it had separate corporate existence from Wachovia, as the PSA goes to great lengths to describe) [R. 1309-

1310; Sealed App. R 1320-1350], then the Kita Affidavit shows that at some point – how or when has never been adduced in discovery – the Bentrim Note was owned by a Real Estate Management Investment Conduit (REMIC) Trust. [R. 1098-1101]. Bentrim would therefore be entitled to the inference that at some point, ownership and possession was vested in that non-Bank subsidiary REMIC Trust, which would require proof of some voluntary transfer back to Respondent, which is obviously missing. Interestingly, Respondent never explains the role of Pool 794.

(h). The Lost Note Affidavit of Tracy Thomas, upon which Respondent places so much emphasis, is therefore unreliable. She averred in the Lost Note Affidavit that the Note had never been “pledged, assigned, transferred, hypothecated or otherwise disposed of” – which she confirmed in her deposition – and Appellant is entitled to an inference that her testimony is incorrect. [R. 1285, R. 850, p. 110]. Ms. Thomas also conceded in her deposition she did not consult the ACLS Servicing Records in preparing her affidavit.” [R. 843-849]. In any event, how can Wachovia/Wells Fargo lose a note it had no right to possess? Again, there is absolutely no evidence in the record that the Note was ever voluntarily and intentionally transferred back to Respondent at any point after the transfer from Wachovia to TMS Service Corp, Inc.

(i). The Wakefield Affidavit submitted by Wells Fargo is silent on the issue of Pool 794, and does not explicitly state that the Note was still in the possession of TMS Service Corp. at the time of a putative merger of that entity into The Money Store.

When all the foregoing facts, and inferences from them, are viewed in the light most favorably to Bentrim, the issue of 12 U.S.C. § 215e is rendered moot because there is a genuine issue of fact that Wachovia neither lawfully owned or possessed the Note at

the time of the Wells Fargo merger. Bentrim is further entitled to the inference that Wachovia did not lawfully own or possess the Bentrim Note at the time of the 2007 and 2009 foreclosure actions, either. The fact that the documentary evidence supports Bentrim's version of events, while Respondent argues against the documentary evidence, only further substantiates the weakness of Respondent's argument.

Additionally, Wells Fargo urges the Court to ignore the affidavits of Bentrim's two experts, Casimira Kita (who developed the ACLS servicing software used by Wachovia before 2010) and Clifton Boddiford (a South Carolina CPA with expertise in banking matters), on the grounds that they offer mere "opinions." This request, however, conflicts with well-established South Carolina law.

In *Montgomery v CSX Transport, Inc.*, 376 S.C. 37, 53-54, 656 S.E.2d 20, 29 (2008), the South Carolina Supreme Court made it clear that in ruling on a summary judgment motion, "a court must consider *everything* in the record-pleadings, depositions, interrogatories, admissions on file, affidavits, etc." See also James F. Flanagan, *South Carolina Civil Procedure* 454 (2nd ed.1996) ("Affidavits are the principal means of bringing information before the court in a motion for summary judgment."). It is entirely proper to submit expert testimony by means of affidavits – including in banking cases. *Robertson v First Union National Bank*, 350 S.C. 339, 351-352, 565 S.E.2d 309, 315-316 (Ct. App. 2002). Moreover, contrary to Wells Fargo's unsupported assertions, an expert's otherwise admissible "opinion" is not inadmissible simply because it embraces the ultimate issue to be decided by the trier of fact. Rule 704, SCRE; see also *Knoke v. South Carolina Dep't of Parks, Rec & Tourism*, 324 S.C. 136, 478 S.E.2d 256 (1996).

In the instant case, Respondent never moved to exclude the affidavits of Boddiford and Kita, nor did the Master exclude them [which would have been an abuse of discretion had he done so following *Thomas Sand Co. v Colonial Pipeline Co.*, 349 S.C. 402, 412, 563 S.E.2d 109, 114 (Ct. App. 2002) (holding it was an abuse of discretion to bar expert testimony of witness with sufficient familiarity with the issues raised in the case)]. As such, their testimony – basically that the “participation interest” agreement was a sale no matter how Wells Fargo tries to couch it [R. 1108-1114] or that documents produced by Wells Fargo show that the Bentrin loan was owned by a REMIC Trust at some point [R.1098-1101] – not only substantiate genuine issues of material fact in opposition to Wells Fargo’s version that the note was never sold or transferred, but also form the basis for the inferences of fact that: (i) Wachovia sold and transferred the note years before the Wells Fargo merger; (ii) Wachovia did not have possession or ownership of the Note at the inception of the 2007 and 2009 suits; and (iii) Respondent cannot even prove legal or physical possession at the inception of the counterclaim.

Bentrin also submits that almost every reported case cited by both Appellant and Respondent, there is expert testimony (usually offered by the party seeking to enforce) showing how the instrument was negotiated or transferred. *See e.g., Bank of America, N.A. v. Draper*, 405 S.C 214, 746 S.E.2d 478 (Ct. App. 2013). Here, it is Bentrin who produces such experts, not Wells Fargo. His experts, thus, should be heard. Respondent’s reliance on *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994) is inapplicable and misplaced. *Shupe* is not an expert witness case nor a case in which there are affidavits competing with the movant’s version of events. In *Shupe*, the trial court granted summary judgment on a third-party beneficiary claim to insurance proceeds, where the non-moving

party filed no counter-affidavit and could not produce a contract of insurance. The facts of *Shupe* are simply inapplicable in the appeal at bar.

B. 12 U.S.C. § 215e Does Not Apply to Non-National Bank Subsidiaries.

In Appellant's Brief, Bentrim argued that 12 U.S.C. § 215e cannot apply in a factual situation where it is alleged that The Money Store merged into Wachovia (if that is in fact the case, as there is no evidence the Office of the Comptroller of the Currency approved such a merger). "If [a] respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct." *Turner v South Carolina Dep't Environ. Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008). In any event, under 12 U.S.C. § 37, the National Bank Act is inapplicable to a non-National Association subsidiary.

C. Wells Fargo Miscites Authority as to How 12 U.S.C. § 215e Operates.

Wells Fargo incorrectly cites numerous cases for the proposition that a transfer of an unindorsed note via a 12 U.S.C. § 215e merger automatically makes a successor bank a holder. Even a cursory review of these cases, contrary to Wells Fargo's argument, shows that, in fact, they do not hold that a successor bank is a "holder" simply because of the merger.

The lead case cited by Wells Fargo, *In re Yopp*, 217 N.C. 489, 497, 720 S.E.2d 769, 774 (N.C. Ct. App. 2011), concerns an attempt by a successor bank to enforce a promissory note. In that case, the plaintiff originally executed a Deed of Trust which was secured by a promissory note to Chevy Chase Bank. *Id.*, 720 S.E.2d at 770. That note was then transferred to a successor bank that began foreclosure proceedings – to which the plaintiff objected to on the grounds that the successor was not the holder of the note. *Id.* The *Yopp*

court ruled the successor was “‘substituted for’ and had ‘all the rights and powers of the transferring institution.’” *Id.*, 720 S.E.2d at 775 (citing N.C. Gen. Stat. Ann. § 53C-7-205). Thus, the *Yopp* Court found that the successor bank was “a non-holder in possession with the rights to enforce” – i.e., because there was a transfer via the merger, the successor bank was not a holder. *Id.*; see also *Smathers v. Smathers*, 239 S.E.2d 637, 638 (N.C. Ct. App. 1977)(“holding that despite evidence of voluntary transfer of promissory notes and the plaintiff’s possession thereof, the plaintiff was not the holder of the note under the UCC as the notes were not drawn, issued, or indorsed to her, to bearer, or in blank.”). Accordingly, *In re Yopp* reaches the opposite conclusion for which Respondent cites it.

Moreover, in *In re Yopp* the North Carolina Court of Appeals was explicit that mere “production of an original note at trial does not, in itself, establish that the note was transferred to the party presenting the note with the purpose of giving that party the right to enforce the instrument.” *Id.*, 720 S.E.2d at 774 (citing *Connolly v. Potts*, 306 S.E.2d 123, 125 (N.C. Ct. App. 1983). This stands in opposition to the significance Respondent places on exhibiting the original to note to Judge Scarborough starting in 2013 (as well as begs the question of why the original note has a different bar code than all the copies previously exhibited to the Court) [R. 1115-1118; R. 1119-1146].

Similarly, in *Berkshire Bank v. Hartford Club*, 158 Conn. App. 705 (Conn. App. Ct. 2015), the Connecticut Court of Appeals rejected the notion that a successor to a bank automatically became a holder by virtue of a merger. In that case, the defendant executed a mortgage secured by a promissory note to the Connecticut Bank and Trust Company (“CBT”); CBT then merged with a successor bank that commenced a foreclosure action against the defendant. *Id.* at *4. “[T]he note at issue [was] payable to CBT or order, and it

was not endorsed to the order of the “plaintiff.” *Id.* The *Berkshire Bank* court found that the successor was not the holder of the note “because the note was not payable to bearer or to an identified person who [was] the person in possession of the note.” *Id.* The successor “was a nonholder in possession of the instrument who had the rights of a holder (CBT) as the ‘transferee’ by merger.” *Id.*

Thus, the *Berkshire Bank* decision – as in *In re Yopp* – actually supports Bentrim’s contention that any transfer of an unindorsed note under a 12 U.S.C. § 215e merger (assuming the note is still in the possession of the original bank) simply makes the successor bank “a nonholder in possession of the instrument” and not a holder. *Id.* The other cases cited by Wells Fargo appear to be inapplicable because they do not pertain to negotiable instruments [*e.g.*, *Premier Bank v Daigle*, 599 So. 2d 503 (La. App. 1992); *Valley Nat’l Bank v. Chaim*, 984 N.Y.S.2d 635, 2014 WL 565173 (N.Y. Super. Ct. Jan. 13, 2014; *In re Rodriguez*, No. 11-BK-18847-RGM, 2015 WL 403968 (E.D. Va. Jan. 29, 2015)].

D. Bentrim’s Position is Consistent with General Principles of Statutory Construction.

General principles of statutory construction further support Bentrim’s argument against the Respondent’s interpretation of 12 U.S.C. § 215e and underscore the true holdings of *In Re Yopp* and *Berkshire Bank*. When construing federal statutes, the South Carolina Supreme Court has turned to the same concepts of statutory construction as it does when analyzing state statutes. *See Jennings v. Jennings*, 401 S.C. 1, 7, 736 S.E.2d 242, 244-245 (2012). In *Jennings*, Justice Hearn analyzed the federal Stored Communications Act, 18 U.S.C. §2510 and wrote:

“Statutory construction must begin with the language of the statute. In interpreting statutory language, words are generally given their common

and ordinary meaning. Where the language of the statute is unambiguous, the Court's inquiry is over, and the statute must be applied according to its plain meaning (internal citations omitted).”

Id., 401 S.C. at 7, 736 S.E.2d at 244-245.

With respect to 12 U.S.C. § 215e, the key phrase is “all rights, franchises and interests ... shall be *transferred* to and vested in the consolidated national banking association (emphasis added).” In the context of a negotiable promissory note, the plain and ordinary meaning of transfer or transferred is defined under the UCC as “deliver[y] by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.” S.C. Code Ann. § 36-3-203(a). Whatever definition is given for transfer, however, it is certainly not the same as negotiation under S.C. Code Ann. § 36-3-201 as Respondent urges.

Consequently, when the key action in 12 U.S.C. § 215e (“transferred”) is construed according to its plain and ordinary meaning, an unindorsed promissory note in the possession of a bank at the time of a merger is transferred to a successor bank within the meaning of § 36-3-203(a) and not negotiated under § 36-3-201 – which is consistent with the purposes of the UCC. *See also* S. C. Code Ann. § 36-3-119(2) (1976) (stating a note remains subject to the terms of Article 3 irrespective of the occurrence of any other transaction); *Swindler v. Swindler*, 355 S.C. 245, 251, 584 S.E.2d 438, 441 (Ct. App. 2003).

Thus, statutory construction of 12 U.S.C. § 215e results in the same conclusion reached in *Berkshire Bank* and *In re Yopp*, which only further illustrates Wells Fargo’s erroneous legal interpretation of the National Bank Act. Because a non-holder in possession must prove its chain of transfers – which Respondent cannot and will not do –

the Court of Appeals should not allow Respondent to cast itself as a holder when it has no basis to do so under 12 U.S.C. § 215e.

E. 12 U.S.C. § 215e Does Not Preempt UCC Article 3.

Bentrim agrees with Wells Fargo that there is no issue of federal preemption, which should end any further inquiry into the matter. *See McCall v Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (“[W]hatever doesn't make any difference, doesn't matter.”). Unfortunately, having conceded preemption is not implicated in this appeal, however, Wells Fargo nevertheless claims it *would* be applicable. The law, however, does not support Wells Fargo's contention. “Courts should not lightly infer preemption.” *City of Casey v. Norfolk Southern*, 391 S.C. 395, 409, 688 S.E.2d 136, 144 (2011). In fact, it is one of the two touchstones of preemption jurisprudence “that courts should begin with a presumption against preemption.” *Priester v Cromer*, 401 S.C. 38, 43, 736 S.E.2d 249, 252 (2012). In applying the US Constitution's Supremacy Clause, courts “start with the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress. *Weston v Kim's Dollar Store*, 385 S.C. 520, 526, 684 S.E.2d 769, 772 (Ct. App. 2009) *affirmed as modified* 399 S.C. 303, 731 S.E.2d 864 (2012). “In the interest of avoiding unintended encroachment on the authority of the states, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption; thus, preemption will not lie unless it is the clear and manifest purpose of Congress. *Quigley v. Rider*, 357 S.C. 477, 483, 593 S.E.2d 476, 479 (Ct. App. 2003).

Turning to the National Bank Act itself, we see that Congress specifically states that only state consumer protection codes are preempted, and only to the extent they do not

meet the test articulated in *Barnett Bank of Marion County, NA v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996); 12 U.S.C. § 25b. Consequently, there is no evidence of preemptive purpose in the National Bank Act. See *Quigley*, 357 S.C. at 483, 593 S.E.2d at 479 (holding that evidence of preemptive purpose is sought in the text and structure of the statute at issue). Limited preemption by the National Bank Act is consistent with long-standing authority. See Kurt Eggert, *Foreclosing on the Federal Power Grab: Dodd-Frank, Preemption, and the State Role in Mortgage Servicing Regulation*, 15 Chap. L. Rev. 171 (2011). Moreover, there is nothing explicit or implicit in the National Bank Act which would indicate Congress's intent to occupy the field of negotiable instruments, nor that there is anything in UCC Article 3 would conflict with the purposes of the Act – and compliance with both statutes is not impossible. Cf. *State v. 192 Coin-Operated Video Game Machs*, 338 S.C. 176, 525 S.E.2d 872 (2000) (declining to find federal statute nullified state anti-gambling statutes since compliance with both was possible); see also OCC Interpretive Letter # 1005 in which the OCC agrees that federal banking laws do not preempt the Uniform Commercial Code.

6. Appellant Does Not Seek to Nullify UCC Article 3.

The argument that Bentrism is attempting to nullify the Note or UCC Article 3 is absurd. Nowhere does Bentrism claim the Note is unenforceable – his principle contention is that Wachovia could not enforce the note in 2007 and 2009 when it claimed to be the holder of the note (which is an unfair and deceptive trade practice), and also that Wells Fargo has not yet proven at this time that it could enforce now as part of its foreclosure counterclaim. Bentrism does not seek a windfall; he merely wants to protect himself from being railroad out of his house on a dubious claim by a non-PETE which would not protect him from later liability by a true PETE. He has never been adjudicated to be in

default – as Wells Fargo concedes. All the attempts to cast him as the villain in this appeal is simply misdirection by Respondent.

III. Other Issues Abandoned by Wells Fargo

A. Applicability of *Draper*

In Respondent’s Brief, Wells Fargo expressly states that the holding in *Bank of America, N.A v Draper*, 405 S.C 214, 746 S.E.2d 478 (Ct. App. 2013), has no applicability to the appeal at bar. (Resp. Brief p. 9)(“[f]or the purposes of this appeal, Wells Fargo is not relying on the *Draper* holding as an additional sustaining ground.”). It should be noted that Wells Fargo also failed to request that the Court affirm for any ground appearing in the record on appeal, pursuant to Rules 208(b)(2) and 220(c), SCACR. Bentrim agrees with Wells Fargo that the Master did not rely on *Draper* in his ruling. Thus, Bentrim submits that Wells Fargo has affirmatively waived the applicability of *Draper* as an additional sustaining ground; in other words, by its own request, Wells Fargo’s status as a “servicer” is irrelevant to whether it is a person entitled to enforce under S.C. Code Ann. § 36-3-602(a).

While Appellant can find no South Carolina authority dealing with this precise situation (i.e., where a respondent refuses to argue the applicability of a potential alternate sustaining ground), he believes it is consistent with precedent to treat the Respondent’s express *rejection* of an alternate sustaining ground as an abandonment of the issue in the same manner it would be an abandonment if it failed to raise the issue at all. See *I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419–20, 526 S.E.2d 716, 723 (2000)(recognizing that a respondent may abandon an additional sustaining ground by failing to raise it in the appellate brief); *Grier v AMISUB of South Carolina, Inc.*, 397 S.C. 532, 540, 725 S.E.2d 693, 698 n. 2 (2012)(finding that when a respondent does not

identify a specific additional sustaining ground it abandons it); accord *Alexander v Houston*, 403 S.C. 615, 620, 744 S.E.2d 517, 520 n.4 (2013)(holding “we are reticent to invoke an alternative sustaining ground where the ground is not raised in the appellate brief”).

Accordingly, Bentrim withdraws his request that this Court overrule *Draper* at this time and joins Wells Fargo in asking that the holding in *Draper* not be applied in the instant appeal; this request is consistent with the judicial principle that a court usually should refrain from deciding unnecessary questions². *I’on*, 338 S.C. at 419, 526 S.E.2d 723.

B. Holder in Due Course

The Master ruled that Wells Fargo was a Holder in Due Course. [R. 7]. In his Statement of Issues on Appeal, Bentrim contested the same and thoroughly briefed the reasons why the Master was in error. By contrast, Respondent’s brief offers no argument in support of a finding that it is a holder in due course within the meaning of S.C. Code Ann. § 36-3-302(a). “If [a] respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant’s position is correct.” *Turner v South Carolina Dep’t Environ. Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008); *First Union Nat’l Bank v. FCVS Communications*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct.App.1996) *reversed on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997). Accordingly, Bentrim urges that the Court treat Wells Fargo’s failure

² Although Wells Fargo contends it is “unusual” to ask the Court of Appeals to reverse one of its own decisions, nothing precludes the Court of Appeals from doing so. Rule 217, SCACR; Toal, APPELLATE PRACTICE IN SOUTH CAROLINA 2D., p. 222 (SC Bar 2002)(“[t]he attorney is always free to argue his brief for the overruling of precedent.”). Since *Draper* is a moot issue, however, there is no need for the Court to address it. See *McCall v Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct.App.1987) (“[W]hatever doesn’t make any difference, doesn’t matter.”).

to respond as a confession that Bentrin has correctly analyzed the “holder in due course” issue and reverse the Master’s ruling with respect to the same.

C. Holder by Issue/ Holder by Negotiation

In his Appellant’s Brief, Bentrin extensively argued that Wells Fargo was not a person entitled to enforce by virtue of either issue [S.C. Code Ann. §§ 36-3-201(21); 36-3-201(a)] or negotiation [S.C. Code Ann. §§ 36-3-201(21); 36-3-201(b)] – i.e., that the Court of Appeals should reverse the Master on the grounds that Wells Fargo cannot ever be a “holder” of an unindorsed (and therefore un-negotiated) negotiable promissory note that was issued to First Union National Bank. In Respondent’s Brief, however, Wells Fargo offers no counter-argument that it was a holder other than by operation of 12 U.S.C. § 215e – an alternate supporting ground. “If [a] respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant’s position is correct.” *Turner*, 377 S.C. at 547, 661 S.E.2d at 121. Thus, Bentrin urges that the Court treat Wells Fargo’s failure to respond as a confession that Bentrin’s position is correct that Wells Fargo is not a holder by virtue of issue or negotiation, and to reverse the Master’s ruling accordingly.

D. Master’s Local “Rule of Thumb” for Enforcement

Appellant argued that the Master had created a personal “rule of thumb” system of enforcement that found Wells Fargo was entitled to enforce the Note – not only at the time of the 2007 and 2009 foreclosure suits against Bentrin, but also in the foreclosure counterclaim in the current case – based entirely on the fact that Wells Fargo exhibited physical possession of the Note at the time of the hearing. Wells Fargo failed to offer any argument in support of the Master’s legal conclusion that makes possession alone the

deciding factor in enforceability – which violates the prohibition on a trial court altering or changing the terms of UCC Article 3. *Becker v. Nat'l Bank & Trust Co.*, 222 Va. 716, 720, 284 S.E.2d 793, 795-796 (Va. 1981); Official Comment 1 to S.C. Code Ann. § 36-3-201. Once again, this should be treated as a confession that Bentrims' legal position is correct and that the Master erred in his general approach to determining enforceability based on possession at the time of trial. *Turner*, 377 S.C. at 547, 661 S.E.2d at 121. More to the point, it illustrates that Wells Fargo can only offer a single, alternate sustaining ground – the erroneous 12 U.S.C. § 215e argument – in support of the Master's ruling.

e. Wells Fargo Not a Person Entitled to Enforce Through Transfer.

The Master further ruled that “even if Wells Fargo was not the holder, it would still qualify as a ‘person entitled to enforce’ as defined in S.C. Code Ann. § 36-3-301;” i.e., a “non holder in possession.” As Bentrims illustrated, a “non-holder in possession” must prove it received the rights of a holder via transfer. S.C. Code Ann. §§ 36-3-301(ii); 36-3-203(b) & Official Comment; 36-3-103(13). Wells Fargo offers one conclusory footnote that – by virtue of application of 12 U.S.C. § 215e – Wells Fargo would also be a non-holder in possession. (Resp. Br. p. 9, n. 5). *Glasscock, Inc. v U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (“[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.”); *State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998), *aff'd as modified*, 337 S.C. 622, 525 S.E.2d 246 (2000) (“An issue is also deemed abandoned if the argument in the brief is merely conclusory.”). See *First Sav. Bank v McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting that when a party fails to cite supporting authority or when the argument is simply a conclusory statement, the party is deemed to

have abandoned the issue on appeal). Accordingly, Bentrim submits that the conclusory fashion in which Wells Fargo contends it is also a non-holder in possession constitutes an abandonment of the issue. *See In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001).

IV. SUMMARY JUDGMENT ISSUES

F. Fair Debt Collection Practices Act.

Respondent claims its status as a servicer precludes it from liability under 15 USC § 1692. However, Bentrim asserts that Wells Fargo designed, compiled and furnished deceptive forms to collect and foreclose to include loan servicing history, pleadings and counterfeit notes. *Id.* at § 812(a). If proven, regardless of whether they are not a debt collector, a Defendant is liable under the Act to the same extent. *Id.* at §§ 812(b), 813.

Further, Courts have repeatedly found that mortgage foreclosure is separate from loan servicing and therefore under the purview of 15 USC 1692: “While the Seventh Circuit has not considered this exact issue, however, so far all courts of appeals have held that ‘mortgage foreclosure is debt collection under the Act. Lawyers who meet the general definition of a ‘debt collector’ must comply with the FDCPA when engaged in mortgage foreclosure. And a lawyer can satisfy that definition if his principal business purpose is mortgage foreclosure or if he ‘regularly’ performs this function.’” *Glazer v. Chase Home Fin LLC*, 704 F.3d 453, 464 (6th Cir. 2013); *see also Wilson v. Draper & Goldberg, P.L.L C*, 443 F.3d 373, 376 (4th Cir. 2006) (rejecting argument that a debt ceased to be a debt under the FDCPA once foreclosure proceedings were commenced and holding that defendant attorney's "actions surrounding the foreclosure proceeding were attempts to collect that debt"); *Kaltenbach v. Richards*, 464 F.3d 524, 529 (5th Cir. 2006) (subjecting attorney defendant to general requirements of FDCPA in action involving foreclosure,

explaining that "a party who satisfies § 1692a(6)'s general definition of a 'debt collector' is a debt collector for the purposes of the entire FDCPA even when enforcing security interests"); *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1217 (11th Cir. 2012) (holding that non-judicial foreclosure actions fell within the general definition of debt collection under the FDCPA: "The fact that the letter and documents relate to the enforcement of a security interest does not prevent them from also relating to the collection of a debt within the meaning of § 1692e."); *Cf. Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 234 (3d Cir. 2005) (finding attorney defendants' actions of filing suit to enforce a lien on plaintiff's property fell within the general definition of debt collection)."

Specifically, Bentrim alleges that the Respondent and counsel all acted as debt collectors and conspired under 15 USC § 1692j to make it appear Wachovia and Wells Fargo was the true creditor by claiming to be the Note holder since 2006.

G. Consumer Protection S.C. Code § 37-5-108.

Again, the Respondent asks the Court to accept its definition of a consumer loan based solely on its belief. Respondent fails to cite code or case law in support of its assertion. *See Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) ("Issues raised in a brief but not supported by authority may be deemed abandoned and not considered on appeal."). However, in its painstaking attempt to reveal the mechanics of the refinance of Bentrim's loan in 2002, it admits nearly \$30,000 of his existing home equity line (a consumer loan as defined under 37-3-104) was modified and consolidated into the new loan. S.C. Code 37-5-108 applies to a consumer credit transaction (see S.C. Code Ann. § 37-5-108(1)). "Consumer credit transaction" means a consumer credit sale (Section 37-2-104) **or consumer loan (Section 37-3-104) or a refinancing or**

consolidation thereof, a consumer lease (Section 37-2-106), or a consumer rental-purchase agreement (Section 37-2-701). S.C. Code Ann. § 37-1-301(11)(emphasis added).

Appellant would rely on his Initial Brief for the remaining causes of action.

CONCLUSION

Fundamentally, this case impacts whether South Carolina Courts will require banks strictly to adhere to UCC Article 3, or whether banks will be able to skirt the law without repercussion. Based on the foregoing arguments and citation to authority, the Court should reject Respondent's argument that it is a "holder" under 12 U.S.C. § 215e and completely reverse the Master's Order.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Charleston County Master in Equity

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SC Court of Appeals

APPELLATE CASE NO. 2014-002590

BRENT E. BENTRIM, ...Appellant

v.

WELLS FARGO BANK, N.A., ... Respondent

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.



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April 4, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
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The Honorable Mikell R. Scarborough
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APPELLATE CASE NO. 2014-002590

BRENT E. BENTRIM, ...Appellant

v.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Appellant's **Final Reply Brief** in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid to the following:

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Brent E. Bentrim, Appellant,

v.

Wells Fargo Bank, N.A., Respondent.

Appellate Case No. 2014-002590

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Unpublished Opinion No. 2017-UP-344
Submitted April 3, 2017 – Filed August 9, 2017

AFFIRMED

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Pleasant, for Appellant.

Charles J. Baker, III and John C. Hawk, IV, of Womble
Carlyle Sandridge & Rice, LLP, of Charleston; and
Shelton Sterling Laney, III, of Womble Carlyle
Sandridge & Rice, LLP, of Greenville, for Respondent.

PER CURIAM: Brent E. Bentrim appeals the Master-in-Equity's order granting summary judgment in favor of Respondent Wells Fargo Bank, N.A., the alleged

holder of a negotiable promissory note (Note) Bentrim originally executed in favor of First Union National Bank. Bentrim argues that Wells Fargo is not the holder or holder in due course of the Note because Wells Fargo is not the identified payee and there is evidence that Wells Fargo's predecessor in interest sold the loan to a third party. Additionally, Bentrim argues the Master erred in granting summary judgment on multiple causes of action in favor of Wells Fargo. We affirm.

FACTS

In September 2000, Bentrim purchased a home at 10 Nicholson Street in Charleston, South Carolina, by obtaining financing from and granting a mortgage to Bank of America. On May 31, 2001, Bentrim executed and delivered to First Union a Prime Equity Line Agreement and mortgage,¹ allowing First Union to extend Bentrim credit not to exceed \$49,000. Bentrim subsequently refinanced his home through First Union. On March 12, 2002, Bentrim borrowed \$182,700 from First Union and executed a mortgage and Note in favor of First Union in that amount. Bentrim used the proceeds of the First Union loan to fully satisfy the Bank of America mortgage and partially satisfy the First Union equity line of credit.

Subsequently, First Union merged with Wachovia Bank, N.A. In November 2006, Wachovia sold the beneficial interest in Bentrim's Note to The Money Store Service Corporation (TMS). TMS was a subsidiary of The Money Store, LLC, which, in turn, was a subsidiary of Wachovia.

In September 2007, Wachovia initiated a foreclosure action in its own name against Bentrim, asserting it was the holder of Bentrim's Note and it had the right to foreclose. The 2007 foreclosure was dismissed in December 2007 because Bentrim made payments to bring the loan out of delinquency. In July 2009, Wachovia initiated another foreclosure action against Bentrim, asserting it was the holder of Bentrim's Note. During the pendency of the 2009 foreclosure, Wachovia merged with Wells Fargo.² The 2009 foreclosure was also dismissed because an attorney for Wachovia never showed at the hearing. Bentrim has not made a payment on the loan since 2009.

¹ The Prime Equity Line Agreement is a promissory note. This promissory note is secured by the mortgage executed on the same date. This is the second mortgage on the subject property.

² Bentrim does not dispute that the merger took place and admits Wells Fargo is the successor in interest to Wachovia.

Bentrim brought the present case against Wells Fargo in April 2011, asserting causes of action related to the handling of his loan by Wells Fargo and its predecessors in interest. Wells Fargo counterclaimed for foreclosure and the balance due on the Note. Wells Fargo and Bentrim filed cross-motions for summary judgment. The Master denied Bentrim's summary judgment motion, partially granted summary judgment in favor of Wells Fargo on several of Bentrim's causes of action, and found that Wells Fargo is the holder of the Note. This appeal followed.

1. We find Wells Fargo is the holder and holder in due course of Bentrim's Note because, by operation of 12 U.S.C. § 215a(e) (2014), Wells Fargo succeeded to First Union's status as holder and holder in due course. The definition of "[p]erson entitled to enforce' an instrument" in section 36-3-301 of the South Carolina Code (Supp. 2016) includes "the holder of the instrument." The definition of "holder" includes "the person in possession of a negotiable instrument that is payable either to bearer or an identified person that is the person in possession." S.C. Code Ann. § 36-1-201(b)(21)(A) (Supp. 2016).³ One is a holder in due course if the instrument, when issued, "does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity" and

the holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in Section 36-3-306 [of the South Carolina Code (Supp. 2016)], and (vi) without notice that

³ The definition of "holder" was revised in 2014 to "conform to the use of the term in the revision of Article 3 that became effective in 2008." *See* S.C. Code Ann. § 36-1-201 (Supp. 2016) (Reporter's Comment on 2014 Revision). The reorganization was for the purpose of clarity. *Id.* (Official Comment). Holder was previously defined as "a person who is in possession of . . . an instrument . . . drawn, issued, or indorsed to him or to his order or to bearer or in blank." S.C. Code Ann. § 36-1-201(20) (2003).

any party has a defense or claim in recoupment described in Section 36-3-305(a) [of the South Carolina Code (Supp. 2016)].

S.C. Code Ann. § 36-3-302(a) (Supp. 2016). Pursuant to 12 U.S.C. § 215a(e), a successor bank in a merger succeeds by operation of law to the predecessor bank's status as owner and holder of a Note. *See* 12 U.S.C. § 215a(e) ("[The] receiving association shall be deemed to be the same corporation as each bank . . . participating in the merger. All rights . . . of the individual merging banks . . . in and to every type of property . . . shall be transferred to . . . the receiving association by virtue of such merger without any . . . other transfer. The receiving association . . . shall hold . . . all rights of property . . . in the same manner and to the same extent as such rights . . . were held . . . by any one of the merging banks . . . at the time of the merger . . ."); *see, e.g., In re N.C. Deed of Trust*, 719 S.E.2d 207, 210 (N.C. Ct. App. 2011) (holding "Bank of America, as the surviving corporation after the merger, succeeded by operation of law to [the predecessor bank's] status as owner and holder of the [l]oan [d]ocuments").

First Union was the holder of Bentrims's Note because it had possession of the Note and was the identified payee. Further, First Union was the holder in due course of Bentrims's Note. First Union gave value for the Note when it loaned the \$182,700 to Bentrims. There is nothing in the record to indicate First Union did not take the Note in good faith. Because the Note had just been issued to First Union, it was not overdue, dishonored, or in default. The original Note does not bear any unauthorized signature and has not been altered. There could not have been any claims to the instrument as listed in section 36-3-306 because First Union took first delivery of the Note. Finally, Bentrims does not assert First Union had notice of any defense or claim in recoupment as described in section 36-3-305(a).

Wachovia, as the surviving bank in the Wachovia-First Union merger, succeeded by operation of law to First Union's status as holder and holder in due course of Bentrims's Note. Similarly, Wells Fargo, as the surviving bank in the subsequent Wells Fargo-Wachovia merger, succeeded by operation of law to Wachovia's status as holder and holder in due course of Bentrims's Note.

2. We find Wachovia's sale of the beneficial interest in Bentrims's loan to TMS had no effect on Wachovia's status as holder and holder in due course, and therefore, the Note was part of the property interests that transferred to Wells Fargo in the merger. *See Wells Fargo Bank v. Ostiguy*, 8 N.Y.S.3d 669, 671 (N.Y. App. Div. 2015) (holding Wells Fargo could enforce the subject note despite the

sale of the beneficial interest in the note to Freddie Mac, so long as Wells Fargo could prove the requirements of holder status); *see also Wells Fargo Bank v. Burke*, 34 N.Y.S.3d 865, 873 (N.Y. App. Div. 2016) (finding the sale of a beneficial interest in the subject loan did not divest the loan servicer of holder status because the loan servicer never gave up possession of the indorsed note and retained custody through the commencement date of its foreclosure action and beyond).

3. We find the Master properly granted summary judgment to Wells Fargo on Bentrim's various causes of action.

a. As to Bentrim's cause of action for violation of the South Carolina Consumer Protection Code - Remedies and Penalties based on unconscionability: S.C. Code Ann. § 37-5-102 (2015) (indicating Chapter 5 of the Consumer Protection Code "applies to actions or other proceedings to enforce rights arising from consumer credit sales, consumer leases, *consumer loans*, and consumer rental-purchase agreements" (emphasis added)); S.C. Code Ann. § 37-3-105(1) (2015) (excepting loans "secured by a first lien or equivalent security interest in real estate" from the definition of consumer loan).

b. As to Bentrim's claims that Wells Fargo and its predecessors in interest engaged in fraud by (1) claiming holder status in the 2007 and 2009 foreclosures, (2) claiming ownership of Bentrim's mortgage, (3) submitting a fraudulent and misleading Lost Note Affidavit, (4) attempting to pass off copies of the Note as the original Note, (5) representing the loan had not been sold, and (6) providing false and misleading account statements: *Sorin Equip. Co. v. The Firm, Inc.*, 323 S.C. 359, 365, 474 S.E.2d 819, 823 (Ct. App. 1996) ("To establish fraud, a party must prove: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury."); *id.* at 366, 474 S.E.2d at 823 ("Failure to prove any element of fraud is fatal to the action."); *Foxfire Vill., Inc. v. Black & Veatch, Inc.*, 304 S.C. 366, 374, 404 S.E.2d 912, 917 (Ct. App. 1991) ("Fraud cannot be presumed; it must be proved by clear, cogent, and convincing evidence.").

c. As to Bentrim's cause of action for slander of title: *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 22–23, 32, 567 S.E.2d 881, 892–93, 897

(Ct. App. 2002) (stating all pleadings, including the filing of a lis pendens, are absolutely privileged and cannot form the basis of an action for slander of title).

d. As to Bentrim's cause of action for conversion: S.C. Code Ann. § 36-3-420(a)(i) (Supp. 2016) (stating an action for conversion cannot be brought by the issuer of an instrument); S.C. Code Ann. § 36-3-105(c) (Supp. 2016) (defining an "issuer" as the "maker or drawer of an instrument").

e. As to Bentrim's independent cause of action for breach of the implied covenant of good faith and fair dealing: *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004) ("[T]he implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract.").

f. As to Bentrim's cause of action for civil conspiracy: *See Pye v. Estate of Fox*, 369 S.C. 555, 566–67, 633 S.E.2d 505, 511 (2006) ("The elements of a civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages."); *AJG Holdings LLC v. Dunn*, 392 S.C. 160, 167–68, 708 S.E.2d 218, 222–23 (Ct. App. 2011) (stating that in order to prove special damages, one must "show that the acts in furtherance of the conspiracy were separate and independent from other wrongful acts alleged in the complaint"), *aff'd*, 410 S.C. 346, 764 S.E.2d 912 (2014); *Vaught v. Waites*, 300 S.C. 201, 209, 387 S.E.2d 91, 95 (Ct. App. 1989) (stating dismissal is appropriate when the civil conspiracy "cause of action 'does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy'" (quoting *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981))).

g. As to Bentrim's cause of action for violation of the Fair Debt Collection Practices Act: 15 U.S.C. § 1692(e) (2015) ("It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors"); 15 U.S.C. § 1692a(6) (2015) (defining a "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts"); § 1692a(6)(F)(ii) ("The term does not include . . . any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt [that] was originated by such person").

AFFIRMED.⁴

GEATHERS, MCDONALD, and HILL, JJ., concur.

⁴ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Charleston County Master in Equity

APPELLATE CASE NO. 2014-002590

BRENT E. BENTRIM, ...Appellant

v.

WELLS FARGO BANK, N A., ... Respondent

PETITION FOR REHEARING

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SC Court of Appeals

Pursuant to Rules 221 and 240 of the South Carolina Rules of Appellate Procedure, the Appellant Brent E. Bentrim (“Bentrim”) moves the Court of Appeals for rehearing on its unpublished opinion, filed August 9, 2017, affirming the decision of the Charleston County Master in Equity who granted summary judgment in favor of Wells Fargo National Bank, N.A. (“Wells Fargo”) as the successor in interest to Wachovia Bank, N.A. (“Wachovia”) and First Union National Bank (“First Union”).

EN BANC REHEARING SUGGESTED

Bentrim suggests a rehearing *en banc* pursuant to Rule 219(a) of the South Carolina Appellate Court Rules, on the grounds that consideration by the full court is necessary to secure or maintain uniformity in decisions,” or “the proceeding involves a question of exceptional importance.” Rule 219(a), SCACR.

INTRODUCTION

The true questions raised in this appeal is whether Wachovia possessed and owned the Bentrim Note after November 29, 2006. Article 3 of the U.C.C. is comprehensive and displaces common law in regards to the requirement that, in order to enforce a note one claims to “possess”, he must demonstrate delivery. It is also comprehensive to resolving the issue when possession cannot be proven – U.C.C. Section 3-804. Rather than follow Article 3, however, this Court made factually wrong conclusions about Bentrim and changed the terms of his Note.

This Court concludes that, because the payee, First Union, was a holder and inexplicably a holder-in-due course on March 12, 2002, then the evidence of a merger with a payee elevates the acquiring institutions (Wachovia and Wells Fargo) to a holder-in-due course – shielding it from all claims and notices the payee had to include sales, negotiations and transfers of the Note. In other words, this Court finds that a merger is possession.

It is axiomatic that regardless of how Wells Fargo came to produce the Note, it cannot as a matter of law be a holder in due course because it did not possess the Note at the time Bentrin brought his claim, or that Wells Fargo brought its counterclaim.

By not following Article 3, the Court ruled on an open question of fact in a *summary judgment motion* – ignoring the fact that at the outset, this Court is supposed to examine all facts, and inferences from those facts, in the light most favorable to Bentrin. Failure to follow the U.C.C. and applying deference to the protections afforded homeowners, this Court has turned back 50 years of precedent and consumer protection. It finds a lender who drafts the very notes and sets the terms of a loan should be protected from borrowers. It ignores Wells Fargo and Wachovia were forced to implement a massive 'Foreclosure Corrections' program or a party to the second largest civil settlement for unfair and deceptive mortgage origination, servicing and foreclosure practices in violation of Federal and South Carolina law.

Wells Fargo Is Not the Holder in Due Course

Wells Fargo has admitted in the National Mortgage settlement that it is not a holder in due course of instruments like the Bentrin note. R. pp. 1056-1088, 1089 -1162. But even assuming that this admission is not binding on Wells Fargo, when Bentrin filed his complaint it did not have possession.

Possession is critical to a finding whether an entity is the holder. S.C. Code Ann. §§ 36-3-201; 37-1-201(37); *see Bank of New York v. Romero*, 330 P.3d 1 (N.M. 2014) (“A payee is always a holder as long as it has possession.”); *Wells Fargo Bank v. Ostiguy*, 8 N.Y.S.3d 669 (N.Y. App. Div. 2015).

Wells Fargo did not have possession because Wells Fargo gave Bentrin a Lost Note Affidavit. R. pp. 1163-1171. This is because Wells Fargo has said that it has no vault records from

2002-2010 for the Bentrin note.¹ R. pp. 118-1232. Thus, Wells Fargo did not have possession when Bentrin sued it, Likewise, it did not have possession when it brought its counterclaim – which is essential to the counterclaim. *Wells Fargo Bank v Ostiguy*, 8 N.Y.S.3d 669 (N.Y. App. Div. 2015). Wells Fargo cannot get around this fact. S.C. Code Ann. § 36-3-302. The Court cannot get around this fact by using 12 U.S.C. § 215a(e).

Wells Fargo Is Not the Holder Either

For the same reasons Wells Fargo cannot be the holder in due course, it cannot be the holder either because it did not have possession. S.C. Code Ann. § 36-1-201(20). Possession is evidence of delivery; if you lost a note, you cannot prove delivery. S.C. Code Ann. § 36-1-201(14). Thus, in order to enforce the Note, Wells Fargo was required to prove ownership of the note. *See* former S.C. Code. Ann. § 36-3-804. The Court cannot get around this fact by using 12 U.S.C. § 215a(e) either.

This Is Why the Sale is Important

Former S.C. Code. Ann. § 36-3-804 provides that, “[t]he owner of an instrument which is lost ... may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership.” So, having lost the Note – and being in unable to account for its whereabouts – Wells Fargo was required to show that Wachovia *owned* the Note after November 29, 2006 and it *owned* the Note prior to bringing its counterclaim. It did neither. It was error for the Court to allow this.

¹ Wells Fargo’s attorneys say that Wells Fargo has constructive possession of the Note through Brock & Scott, who filed the 2009 foreclosure action. Not only is this not proof, but Brock & Scott never once filed the Bentrin note with any Court – relying instead on a different copy of the note from the “original. Furthermore, during the pendency of this appeal, Brock & Scott sent Bentrin a letter claiming it was initiating a foreclosure sale, once again without possession, but with the same old copy.

The sale shows who had enforcement rights to a Note when possession was lost. The Court found there was a sale but claimed it was unimportant. (Opinion at * 4). Having lost the note – and being unable to account for its whereabouts – Wells Fargo cannot claim it had enforcement rights at the time of Bentrims’s suit, or at the time of their counterclaim. See former S.C. Code Ann. § 36-3-804. The Nation Bank Act [12 U.S.C. § 215a(e)] is only applicable if Wachovia possessed and owned the Note after November 29, 2006.

Having found a sale and Wells Fargo’s own admission that no vault records are available to prove it had possession thereafter, the Note’s owner was vested with enforcement rights. Lacking possession, the sale is of critical importance. Under former S.C. Code Ann. § 36-3-804², enforcement rights were vested with its owner, not Wachovia, once lost.

Wells Fargo fought production of documents via affidavits to claim a “no sale.” Bentrims countered with expert witnesses this Court ignored. Because the provisions of Article 3 are subject to the provisions of Article 9 (former S.C. Code Ann § 36-1-103(2)), and Article 9 “applies to a sale of promissory notes,” section 9-318(a) rejects any notion of a “non-sale.” S.C. Code Ann. §§ 36-9-109 (a)(3), 36-9-318(a).

“U.C.C. § 9-318(a), which provides that [a] debtor that has sold an account, chattel paper, payment intangible, or promissory note does not retain a legal or equitable interest in the collateral sold. (internal quotations omitted).” *Paloian v Grupo Sella SA de CV*, 433 BR 19 (U.S. Bankr. N.D. Ill. 2010).

² “The owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms.” While, as this Court notes, certain portions of the Code are updated for clarity, some, to include Section 3-804 have been changed in their entirety

Any attempt to characterize the sale as a “participation agreement” is flatly rejected under the old Article and clarified with current 9-318. “Subsection (a) makes explicit what was implicit, but perfectly obvious, under former article 9: The fact that a sale of an account or chattel paper gives rise to a “security interest” does not imply that the seller retains an interest in the property that has been sold. To the contrary, a seller of an account or chattel paper retains no interest whatsoever in the property to the extent that it has been sold. Subsection (a) also applies to sales of payment intangibles and promissory notes, transactions that were not covered by former article 9.” (Official Comment 2, 9-318.). Therefore, *Ostiguy* is inapplicable under these facts as it does not deal with 215a(e) rights in regards to a lost Note. *Wells Fargo Bank v. Ostiguy*, 8 N.Y.S.3d 669 (N.Y. App. Div. 2015).

First Union Was Not Entitled to Holder in Due Course Status

The Court bases the entire superstructure of the Opinion on the finding that, at issue, First Union was the holder in due course because it was the named payee on the Bentrin note. However, this finding is based on another error of law.

First Union was the original payee; therefore, it possessed the Note with Bentrin’s defenses to payment. See former S.C. Code Ann. § 36-3-304. A holder in due course, however, must take the instrument: (a) for value; and (b) in good faith; and (c) without notice ... of any defense against or claim to it on the part of any person (emphasis added).” See former S.C. Code Ann. § 36-3-302(1)(c); *Thomton, Sperry & Jensen, Ltd v. Anderson*, 352 N.W.2d 467 (Minn. Ct. App. 1984); *Fazio v Leath*, 112 A.2d 135 (NY App. Div. 1985). Thus, it is not just U.C.C defenses, but any defense. See former 3-302(1)(c). This accords with longstanding South Carolina case law. *Northwestern Bank v. Neal*, 271 S.C. 544, 548, 248 S.E.2d 585, 586 (1978) (holding “[t]he very essence of a holder in due course is that he takes free of any defenses of the seller.”).

Here, First Union dealt with Bentrin and had knowledge of his valid defenses. For example, it had knowledge Bentrin could rescind the loan within three days and, thus, “actual notice” that the obligation was “voidable.” *See* former S.C. Code §§ 36-3-304(1)(b); 37-2-502(1); Accordingly, with this knowledge, First Union could not be the holder in due course at issue. *See* former S.C. Code Ann. § 36-3-302(1)(c); *First Int. Bank v Blankstein*, 59 NY 2d 436 (NY Ct. App. 1983) (holding that “[k]nowledge that an agreement is rescindable at will similarly provides the holder with notice that a defense to the performance of the agreement has arisen and such notice precludes the holder from asserting that he is a holder in due course”).

Moreover, because First Union did not in fact fund the loan until March 22, 2002, it did not “take the instrument” for value on March 12, 2002 – under former S.C. Code Ann. § 36-3-303(a)(1) – “because the agreed consideration was not performed.” *See* S.C. Code Ann. §§ 36-3-302(1)(a); 36-3-303(a)(1). The fact that the note is under seal cannot operate to change the above law. *See* former S.C. Code Ann. § 36-3-113. This is another example of another defense that First Union had knowledge of at issue – making it impossible to be a holder in due course at issue.

If the Court of Appeals could find no authority where the holder by issue of a negotiable promissory note on refinancing a consumer loan was also its holder in due course, it is not surprising. The Missouri Court of Appeals, in *Pittman Place Development v Howard Investments*, held that “where the obligor is the only obligor on the note, the holder-in-due-course doctrine is irrelevant in determining rights between the obligor and obligee with respect to the instrument because the obligor retains its defenses against the obligee”. 330 S.W.3d 519, 534 (Mo. Ct. App. 2010). Comment 4 to S.C. Code Ann. § 36-3-302 is therefore appropriate “[t]he payee of an instrument can be a holder in due course, but use of the holder-in-due-course doctrine by the payee of an instrument is not the normal situation”). This case is one where First Union could not be the

holder in due course because it was the primary lender, the holder in due course doctrine would not apply.

Because 12 U.S.C. § 215a(e) states that “the receiving institution shall hold ... all rights of property ... in the same manner and to the same extent ... were held ... by anyone of the merging banks ... at the time of the merger” (Opinion at *3), it is a nullity. Once again, the Court erred in using 12 U.S.C. § 215a(e) to displace U.C.C. Article 3.

Wachovia and Wells Fargo Do Not Have Holder in Due Course Status

Even assuming First Union was entitled to holder in due course status, Wachovia still could not possess “holder in due course” status on the Bentrin Note at the date of the merger with Wells Fargo (March 19, 2010). This is because Wachovia was not insulated from any claims or defenses which arose against it *after* it “took” the Bentrin Note, under § 36-3-305. Examples of such defenses include: (1) Wachovia had already accelerated the loan; (2) Wachovia was aware of Bentrin’s defenses; (3) had admitted it wrongfully accelerated the Note; and (4) was in possession of in excess of \$10,000 in funds tendered by Bentrin. *See* former S.C. Code Ann. § 36-3-305 and note 1.

Wachovia’s own servicing records show evidence of these problems. R. pp. 1098-1101, 1108-1114. Moreover, since the Court found that Wachovia had sold the Bentrin loan to TMS Service Corp. on November 29, 2006 (Opinion at ** 2, 4), Wachovia was aware of a claim from TMS Service Corp. because Wachovia had warranted such a claim in the Participation Agreement, on November 29, 2006. Finally, by signing the Participation Agreement, on November 29, 2006, Wachovia had notice under § 36-1-201 that it had given up all rights to the Note. If Wachovia could not be a holder in due course, then neither could Wells Fargo.

Incorrect Factual Findings

The Court of Appeals makes two factual statements which are incorrect or misleading:

- “The 2009 foreclosure was also dismissed because an attorney for Wachovia never showed at the hearing.” (Opinion at *2).

This is false. A *witness* did not show up for Wachovia, despite instruction from the Court to appear, to testify to Wachovia’s damages. A lawyer was present.

- “Bentrim has not made a payment on the loan since 2009.”

As outlined above, Bentrim was making payments when Wachovia (regardless of as a servicer or holder) in 2008, began to demand amounts not due. It admitted wrongfully accelerating the Note in 2008 and refused further payments. “Equity will not require the doing of a futile task, nor foreclose the rights of a party from obtaining specific performance for failure to do something which in view of all the facts would have been useless.” *Elliott v. Dew*, 264 S.C. 40, 46, 212 S.E. 2d 421, 424 (1975). As Wachovia would not provide a correct amount to reinstate, he tendered what he believed accurate in late 2009 as well as January 11, 2010 payment. Wachovia refused to accept these payments.

“[W]ere the amount due is within the exclusive knowledge of the creditor and the creditor on demand neglects or refuses to indicate the correct amount that is due, the debtor may tender so much as he thinks is justly due, and if less than the true amount, the tender nevertheless will be good.” *Id.* Finally, “If no objections are made by the defendant to the sufficiency of the tender by the purchaser at the time it is made, or if the defendant then repudiates the contract, he cannot set up defects in the tender as a defense to the suit.” *Id.*

Non-Holder in Possession

The Master further ruled that “even if Wells Fargo was not the holder, it would still qualify as a ‘person entitled to enforce’ as defined in S.C. Code Ann. § 36-3-301,” i.e., a “non holder in

possession.” Bentrin has illustrated in his briefs that a “non-holder in possession” must prove it received the rights of a holder via transfer. S.C. Code Ann. §§ 36-3-301(ii); 36-3-203(b) & Official Comment; 36-3-103(13). Wells Fargo offers one conclusory footnote that – by virtue of application of 12 U.S.C. § 215a(e) – Wells Fargo would also be a non-holder in possession. In the Opinion, the Court ignores non-holder in possession altogether. For the same reasons, however, Wachovia and Wells Fargo lost possession of the Bentrin note and, thus, they cannot show that they were the non-holder in possession.

12 U.S.C. § 215a(e) Does Not Preempt UCC Article 3

Bentrin agreed with Wells Fargo that there is no issue of federal preemption, which should have ended any further inquiry into the matter. The Court, however, found that 12 U.S.C. § 215a(e) preempted U.C.C. Article 3. This is an error. “Courts should not lightly infer preemption.” *City of Casey v Norfolk Southern*, 391 S.C. 395, 409, 688 S.E.2d 136, 144 (2011). In fact, it is one of the two touchstones of preemption jurisprudence “that courts should begin with a presumption against preemption.” *Priester v Cromer*, 401 S.C. 38, 43, 736 S.E.2d 249, 252 (2012). In applying the US Constitution’s Supremacy Clause, courts “start with the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress. *Weston v. Kim’s Dollar Store*, 385 S.C. 520, 526, 684 S.E.2d 769, 772 (Ct. App. 2009) *affirmed as modified* 399 S.C. 303, 731 S.E.2d 864 (2012). “In the interest of avoiding unintended encroachment on the authority of the states, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption; thus, preemption will not lie unless it is the clear and manifest purpose of Congress. *Quigley v. Rider*, 357 S.C. 477, 483, 593 S.E.2d 476, 479 (Ct. App. 2003).

Turning to the National Bank Act itself, we see that Congress specifically states that only state consumer protection codes are preempted, and only to the extent they do not meet the test articulated in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996); 12 U.S.C. § 25b. Consequently, there is no evidence of preemptive purpose in the National Bank Act. See *Quigley*, 357 S.C. at 483, 593 S.E.2d at 479 (holding that evidence of preemptive purpose is sought in the text and structure of the statute at issue). Limited preemption by the National Bank Act is consistent with long-standing authority. See Kurt Eggert, *Foreclosing on the Federal Power Grab Dodd-Frank, Preemption, and the State Role in Mortgage Servicing Regulation*, 15 Chap. L. Rev. 171 (2011). Moreover, there is nothing explicit or implicit in the National Bank Act which would indicate Congress's intent to occupy the field of negotiable instruments, nor that there is anything in UCC Article 3 which would conflict with the purposes of the Act – and compliance with both statutes is not impossible. Cf. *State v. 192 Coin-Operated Video Game Mchs.*, 338 S.C. 176, 525 S.E.2d 872 (2000) (declining to find federal statute nullified state anti-gambling statutes since compliance with both was possible); see also OCC Interpretive Letter # 1005 in which the OCC agrees that federal banking laws do not preempt the Uniform Commercial Code.

Fair Debt Collection Practices Act

The Court finds Wells Fargo claims its status as an 'original creditor' precludes it from liability under 15 U.S.C. § 1692. However, Bentrin asserts that Wells Fargo designed, compiled and furnished deceptive forms to collect and foreclose to include loan servicing history, pleadings and counterfeit notes. *Id.* at § 812(a). If proven, regardless of whether they are not a debt collector, a Defendant is liable under the Act to the same extent. *Id.* at §§ 812(b), 813.

Further, Courts have repeatedly found that mortgage foreclosure is separate from loan servicing and therefore under the purview of 15 U.S.C. § 1692: "While the Seventh Circuit has not

considered this exact issue, however, so far all courts of appeals have held that 'mortgage foreclosure is debt collection under the Act. Lawyers who meet the general definition of a 'debt collector' must comply with the FDCPA when engaged in mortgage foreclosure. And a lawyer can satisfy that definition if his principal business purpose is mortgage foreclosure or if he 'regularly' performs this function.'" *Glazer v Chase Home Fin. LLC*, 704 F.3d 453, 464 (6th Cir. 2013); *see also Wilson v Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376 (4th Cir. 2006) (rejecting argument that a debt ceased to be a debt under the FDCPA once foreclosure proceedings were commenced and holding that defendant attorney's "actions surrounding the foreclosure proceeding were attempts to collect that debt"); *Kaltenbach v Richards*, 464 F.3d 524, 529 (5th Cir. 2006) (subjecting attorney defendant to general requirements of FDCPA in action involving foreclosure, explaining that "a party who satisfies § 1692a(6)'s general definition of a 'debt collector' is a debt collector for the purposes of the entire FDCPA even when enforcing security interests"); *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1217 (11th Cir. 2012) (holding that non-judicial foreclosure actions fell within the general definition of debt collection under the FDCPA: "The fact that the letter and documents relate to the enforcement of a security interest does not prevent them from also relating to the collection of a debt within the meaning of § 1692e."); *Cf. Piper v Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 234 (3d Cir. 2005) (finding attorney defendants' actions of filing suit to enforce a lien on plaintiff's property fell within the general definition of debt collection)."

Specifically, Bentrim alleges that the Respondent and counsel all acted as debt collectors and conspired under 15 U.S.C. § 1692j to make it appear Wachovia and Wells Fargo was the true creditor by claiming to be the Note holder and owner since 2006.

Consumer Protection S.C. Code § 37-5-108

The Court found that Bentrim consolidated a portion of his existing home equity line (a consumer loan as defined under S.C. Code Ann. § 37-3-104) into the refinance, therefore it is a consumer credit transaction subject to S.C. Code Ann. § 37-5-108. Section 37-5-108 applies to a consumer credit transaction (see S.C. Code Ann. § 37-5-108(1)). "Consumer credit transaction" means a consumer credit sale (Section 37-2-104) **or consumer loan (Section 37-3-104) or a refinancing or consolidation thereof**, a consumer lease (Section 37-2-106), or a consumer rental-purchase agreement (Section 37-2-701). S.C. Code Ann. § 37-1-301(11)(emphasis added).

Further, as outlined Wells Fargo in both its 2007 and specifically in its 2009 complaint plead the Note was not a first mortgage and therefore not eligible for loss mitigation. Further, the Court cannot change the terms of the Note expressly waiving for collateral 10 Nicholson Street while used as a primary dwelling.

Fraud & Slander of Title

Because the Court found a sale, Bentrim has met the requirements of fraud. "South Carolina recognizes that a mortgagee has an interest in the mortgaged property." *State v. Leach*, 282 S.C. 178, 318, S.E. 2d 267 (1984). "The mortgagee is the owner of the money lent or due and shall be entitled to recover satisfaction for such money out of the land by foreclosure and sale according to law." S.C. Code Ann. § 29-3-10.

Bentrim has asserted Wachovia in 2007 and 2009 had no right to foreclose. Wells Fargo defense was claiming to be the Note's holder and owner under the common law theory "the mortgage follows the Note," now displaced with S.C. Code Ann. §§ 36-9-203(g) and 36-9-318. The *Ostiguy* case, cited by the Court, does not stand for the proposition that a "sale" has no impact on a party's right to foreclose. In fact, it clearly provides "[a] plaintiff has standing in a mortgage foreclosure action where it is both the holder or assignee of the subject mortgage and the holder or

assignee of the underlying note at the time the action is commenced." It follows "[a] mortgage and a note are separate securities for the same debt, and a mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action." *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009).

Therefore, under South Carolina Law, when TMS Service Corp gave value to Wachovia, who authenticated (i.e., "signed") the Participation Agreement, as the "owner" of the Note, it became the mortgagee under S.C. Code Ann. § 36-9-203(g). Citing the case of *Landmark Nat'l Bank v. Kesler*, 289 Kan. 528, 216 P.3d 158, 167 (2009), the Supreme Court of Nevada explains: "[t]he deed and note must be held together because the holder of the note is only entitled to repayment, and does not have the right under the deed to use the property as a means of satisfying repayment. *Id.* Conversely, the holder of the deed alone does not have a right to repayment and, thus, does not have an interest in foreclosing on the property to satisfy repayment." *Edelstein v. Bank of New York Mellon*, 286 P. 3d 249 (Nev. 2012).

Summary Judgment

This was a case decided on summary judgment. It is a bedrock principle of summary judgment procedure in this State that the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the non-moving party. *Montgomery v. CSX Transport, Inc.*, 376 S.C. 37, 53-54, 656 S.E.2d 20, 29 (2008). Under *Hancock v. Mid-South Mgmt Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009), "the non-moving party is only required to submit a *mere scintilla* of evidence in order to withstand a motion for summary judgment." Moreover, any fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good as direct evidence if it is equally as convincing to the

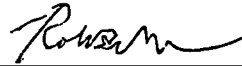
trier of the facts. *Graves v CAS Medical Systems, Inc.*, 401 S.C. 63, 79-80, 735 S.E.2d 650, 658 (2012). Based on this standard, Bentrin has shown more than enough facts, and inferences from the facts, to withstand summary judgement.

CONCLUSION

This Court erred applying 12 U.S.C. § 215a(e) without first applying provisions set forth in the Uniform Commercial Code to determine what rights Wachovia Bank, NA did have in Bentrin's Note after November 29, 2006. Because the Court has found a sale, there remains genuine issues as to Wells Fargo's defenses against Bentrin's first party claims as well as its ability to counterclaim.

All Bentrin asks is that the Court rule on these issues with the same care and concern that the New York Appellate Division did in the two recent cases that this Court cites in the opinion – *Wells Fargo Bank v Ostiguy*, 8 N.Y.S.3d 669 (N.Y. App. Div. 2015) and *Wells Fargo Bank v. Burke*, 34 N.Y.S.3d 865 (N.Y. App. Div. 2016).

Respectfully submitted,



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August 24, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Charleston County Master in Equity

APPELLATE CASE NO. 2014-002590

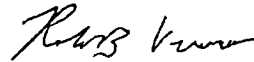
BRENT E. BENTRIM, ...Appellant

v.

WELLS FARGO BANK, N.A., ... Respondent

CERTIFICATE OF COUNSEL

The undersigned certified that this *Petition for Rehearing* complies with Rule 211(b), SCACR.



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August 24, 2017

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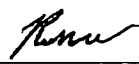
WELLS FARGO BANK, N.A., ... Respondent

PROOF OF SERVICE – PETITION FOR REHEARING

The undersigned attorney for Appellants hereby certify that a true copy of the *Petition for Rehearing* in the above-referenced matter has been served on all counsel of record by sending a copy via hand delivery and email on this the 24th day of August, 2017 to the following:

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August 24, 2017

VIA HAND DELIVERY

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

Re: *Brent E. Bentrim v. Wells Fargo Bank, N.A.*
Appellate Case No.: 2014-002590
Our File No.: 6223-1

Dear Ms. Kitchings:

The Appellant Brent E. Bentrim respectfully submits the original and six (6) copies of his *Petition for Rehearing* in the above-captioned matter, plus an additional copy to be hand-stamped and returned with my courier. My firm's check in the amount of \$25.00 for the petition fee is attached herewith. I am serving counsel of record via hand-delivery and email. Should you have any questions please do not hesitate to contact our office.

With best regards, I remain,

Very truly yours,

BROWN AND VARNADO LLC



Robert B. Varnado

RECEIVED

AUG 24 2017

SC Court of Appeals

RBV/kg

Enclosure(s): as stated

cc: Charles J. Baker III, Esquire (*via hand delivery and email*)
S. Sterling Laney III, Esquire (*via hand delivery and email*)
John C. Hawk IV, Esquire (*via hand delivery and email*)

The South Carolina Court of Appeals

Brent E. Bentrin, Appellant,

v.

Wells Fargo Bank, N.A., Respondent.

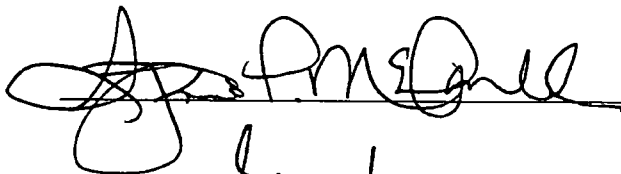
Appellate Case No. 2014-002590

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Robert Bratton Varnado, Esquire

Alexis Mills Wimberly, Esquire

Charles J. Baker, III, Esquire

Shelton Sterling Laney, III, Esquire

FILED

November 17, 2017

John C. Hawk, IV, Esquire
The Honorable Mikell R. Scarborough



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
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November 17, 2017

Mr. Robert Bratton Varnado, Esquire
PO Box 1127
103 Ronnie Boals Boulevard
Mt. Pleasant SC 29465

Mrs. Alexis Mills Wimberly, Esquire
103 Ronnie Boals Blvd
Mount Pleasant SC 29464

Re: Brent E. Bentrin v. Wells Fargo
Appellate Case No. 2014-002590

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing *en banc* was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Charles J. Baker, III, Esquire
Shelton Sterling Laney, III, Esquire
John C. Hawk, IV, Esquire