

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Carol A. Tolen, Special Referee
Trial Court Case No. 2012-CP-20-00132

Appellate Case No. 2018-000230

ArrowPointe Federal Credit Union, Respondent,

v.

Jimmy Eugene Bailey; Laura Jean Bailey; and U.S. Bank National Association not in its individual capacity but solely in its capacity as Indenture Trustee for WVUE 2015-1, Defendants,

Of which U.S. Bank National Association not in its individual capacity but solely in its capacity as Indenture Trustee for WVUE 2015-1 is the Appellant.

RECORD ON APPEAL

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SC Court of Appeals

Volume I

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**Exhibits referenced are duplicate Exhibits in Joint Stipulation.*

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD) CIVIL ACTION NO. 2012-CP-20-132

ArrowPointe Federal Credit Union,

Plaintiff,

vs.

Jimmy Eugene Bailey; Laura Jean Bailey;
and DLJ Mortgage Capital, Inc.,

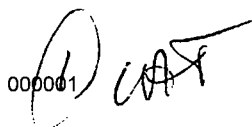
Defendants.

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND ORDER FOR
FORECLOSURE**

Pursuant to SCRCP Rule 53 of the South Carolina Rules of Civil Procedure, and by Order dated September 5, 2012, this case was referred to the undersigned to make appropriate findings of fact and conclusions of law with authority to enter a final judgment in the case.

This matter came before the Court for hearing on the Plaintiff ArrowPointe Federal Credit Union's ("AFCU" or "Plaintiff") Motion for Summary Judgment, Defendant DLJ's Motion to Substitute Defendant and Amend Caption, and Plaintiff and Defendant DLJ's merits hearing for foreclosure of each party's mortgage lien. Plaintiff filed this action to foreclose a mortgage given to Plaintiff by Defendants Jimmy Eugene Bailey and Laura Jean Bailey ("Baileys"). Defendant DLJ Mortgage Capital, Inc. ("DLJ") filed an Answer, asserting that its mortgage has priority over the Plaintiff's mortgage. DLJ filed a Motion for Summary Judgment that its mortgage loan was entitled to priority over Plaintiff's mortgage loan, which was denied by the Court.

After considering the pleadings, affidavits, Plaintiff's Motion for Summary Judgment, as well as memoranda and arguments presented at the hearings on the motion, this Court finds that

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the Plaintiff is entitled to judgment as a matter of law that its mortgage lien has priority over DLJ's mortgage lien. Plaintiff is also entitled to foreclosure of its mortgage lien by and through the sale of the property described in the Lis Pendens. Further, U.S. Bank National Association not in its individual capacity but solely in its capacity as Indenture Trustee for WVUE 2015-1 is hereby substituted in place of DLJ as the proper defendant in this case by virtue of an assignment of the DLJ mortgage to it during the pendency of this case.

Pursuant to the Order of Reference, a hearing on Plaintiff's Motion for Summary Judgment was held, and then a merits hearing concerning each party's debt on their respective loans was held and was attended by attorneys as noted in the Record of Hearing. Evidence was offered and received as shown in the Record of Hearing. Based on the evidence, I find and conclude as follows:

FINDINGS OF FACT

The parties have stipulated to facts in the Joint Stipulation filed March 13, 2017 with the Fairfield County Clerk of Court's Office ("Joint Stipulation"). The Court acknowledges the Joint Stipulation and incorporates those stipulated facts as its findings in this Order, and incorporates the defined terms from the Joint Stipulation into this Order.

1. The Baileys are in default on repayment of the loan secured by the Line of Credit Mortgage as shown by the affidavit of default filed with the Court. According to the affidavit filed herein, no Defendant in default is in the military service of the United States of America, as contemplated under the Servicemembers' Civil Relief Act, 50 U.S.C. App. §501, *et seq.* and any amendments thereto.

2. All parties were notified of the time, date, and place of the hearing in this matter.

3. Payment due on the Note for AFCU's loan has not been made as provided in the note, and AFCU has elected to require immediate payment of the entire amount due thereon and has placed the Note and Line of Credit Mortgage in the hands of the attorney herein for collection by foreclosure.

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4. The sum of \$2,795.00 is a reasonable fee to allow as attorneys' fees for Plaintiff's attorney for services performed and anticipated to be performed until final adjudication of the within action, under the terms of the Note and Line of Credit Mortgage.

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

a. Principal due	\$100,105.00
b. Interest from July 4, 2011, at 6% per annum	39,910.21
c. Insurance premiums	5,880.00
d. Costs of collection prior to hearing (service, filing, etc.)	804.76
e. Taxes, insurance, etc. not included above	37,706.63
f. Attorney's fees and collection costs	2,795.00
Total debt secured by Note and Line of Credit Mortgage	\$187,201.60

Interest for the period from the date shown in (b) above through the date of this judgment at the above stated rate to be added to the above stated "Total Debt" to comprise the amount of the judgment debt entered herein and interest after the date of judgment at the rate of 6.00% per annum (pursuant to the terms of the Note and Line of Credit Mortgage) on the judgment debt should be added to such judgment debt to comprise the amount of AFCU's debt secured by the Mortgage through the date to which such interest is computed.

6. AFCU is seeking the usual foreclosure of the Line of Credit Mortgage and has in the Complaint, or subsequent thereto in writing, expressly waived the right to a personal or deficiency judgment should the proceeds of sale not be sufficient to satisfy the judgment debt.

7. Payment due on the Second Note has not been made as provided in the Second Note, and DLJ has elected to require immediate payment of the entire amount due thereon and has placed the Second Note and Second Mortgage in the hands of attorneys appearing herein for collection by foreclosure.

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8. The amounts in the Attorneys' Fees affidavits submitted at the hearing and filed by DLJ's attorneys are reasonable fees to allow as attorneys' fees for DLJ's attorneys for services performed and anticipated to be performed until final adjudication of the within action, under the terms of the Second Note and Second Mortgage.

9. The amount due and owing on the Second Note secured by the Second Mortgage, with interest at the rate provided in the Second Note is as stated in an Affidavit of Verified Statement of Account, which is Exhibit V of the Joint Stipulation and as entered into evidence at the hearing, along with other costs and expenses of the within action, including an attorneys' fees, secured by the Second Note and Second Mortgage, in the collective amount of:

Total debt secured by Second Note and Second Mortgage	\$436,609.23

Interest from March 13, 2017 through the date of this judgment at 4.875% to be added to the above stated "Total DLJ Debt" to comprise the amount of the judgment debt entered herein and interest after the date of judgment at the rate of 4.875% per annum (pursuant to the terms of the Second Note and Second Mortgage) on the judgment debt should be added to such judgment debt to comprise the amount of DLJ's debt secured by the Second Mortgage through the date to which such interest is computed.

10. DLJ is seeking the usual foreclosure of the Second Mortgage and has in the pleadings, or subsequent thereto in writing, expressly waived the right to a personal or deficiency judgment should the proceeds of sale not be sufficient to satisfy the judgment debt.

ISSUES

AFCU argues that its Line of Credit Mortgage was recorded prior to DLJ's Second Mortgage, and therefore the AFCU's Line of Credit Mortgage is entitled to priority under race-notice. DLJ argues that its Second Mortgage is a replacement mortgage, which replaced its First

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Mortgage. DLJ argues that because its Second Mortgage is a replacement mortgage, intervening lienholders such as AFCU are not entitled to the normal priority granted according to the date that the competing mortgages are recorded.

DLJ also argues that its First Mortgage contains language allowing its Second Mortgage to increase the amount it secures with priority over the Line of Credit Mortgage. DLJ argues that AFCU was on record notice by virtue of the recorded First Mortgage that the balance secured by the First Mortgage could increase. The pertinent part of the First Mortgage states that it secures the instant Note and "any renewal, extension or modification." DLJ argues that this language gives notice to the public, including other lenders such as AFCU, that the amount the First Mortgage secures can increase. Alternatively, to the extent the language did not put AFCU on such notice, then DLJ argues it is still entitled to lien priority through the doctrine of replacement mortgage up to the amount that its First Mortgage secured.

CONCLUSIONS OF LAW

The theory of replacement mortgage is espoused not in the case law or statutory law of South Carolina, but in the Restatement Third of Property. According to the Restatement, a replacement mortgage can retain the original priority of the mortgage that is being replaced, except to the extent that the replacement mortgage changes the terms of the original mortgage or if the replacement mortgage is materially prejudicial to any existing subordinate lienholders. REST 3d PROP-MORT § 7.3.

The terms of the First Note and First Mortgage are different than the terms of Second Note and Second Mortgage. The principal balance is \$39,450.00 greater. The Baileys cashed out supposed equity, using a loan-to-value ratio that did not include the Credit Union's mortgage loan.

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There were substantial closing costs associated with the Second Note and Second Mortgage Loan.

Affidavit of James R. Price, ¶ 19.

1. South Carolina Does Not Recognize Replacement Mortgage

DLJ's argument is based on the Restatement and not existing precedent. The Restatement is not the law of South Carolina, and no appellate court has yet adopted the concept of replacement mortgages. Therefore, DLJ cannot use this principal to claim priority over an earlier mortgage lien.

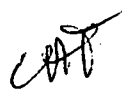
2. First Mortgage Language Would Not Allow Secured Balance to Increase in a Subsequent Replacement Mortgage

Even if South Carolina courts recognize Replacement Mortgage, which this Court rejects, then the aforementioned language in the First Mortgage would not allow DLJ to increase the balance secured by its First Mortgage in a subsequent replacement mortgage.

3. Material Prejudice

Even if South Carolina courts recognize Replacement Mortgage, which this Court rejects, then AFCU would be materially prejudiced by the Second Note and Second Mortgage because the Second Mortgage purports to secure sums higher than the debt secured by the First Mortgage. I have considered whether South Carolina courts would interpret the Replacement Mortgage doctrine to allow the Second Mortgage to hold priority over the Line of Credit Mortgage, but only to the extent of the debt secured by the First Mortgage. I believe and hold that South Carolina courts would reject this interpretation and, rather, would hold that any material prejudice is fatal to Replacement Mortgage.

Because DLJ advanced significant, additional money to the borrowers in its Second Note secured by the Second Mortgage in excess of the debt secured by the First Mortgage, AFCU was

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substantially and materially prejudiced. (Affidavit of James R. Price, Exhibit A). An increase in the principal amount secured by a replacement mortgage is generally deemed to be materially prejudicial to an intervening lienholder such as AFCU. Restatement (Third) of Property; Mortgages § 7.3(a)(2), comment b. When the "replacement" mortgage has materially prejudiced an intervening lienholder, the "replacement" mortgage is not entitled to the priority of the mortgage it is hoping to replace. Restatement (Third) of Property; Mortgages § 7.3.

Based upon the record herein I conclude as follows:

Plaintiff should have judgment of foreclosure of the Line of Credit Mortgage, and the Subject Property should be ordered sold at public auction after due advertisement.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. There is due to the Plaintiff on the obligation and the Line of Credit Mortgage set forth in the Complaint the sum of \$187,201.60 representing the total debt due Plaintiff as set out in Findings of Fact above, together with interest at the rate provided therein on the balance of principal from the date aforesaid to the date hereof.
2. The amount due in the preceding paragraph (the "total debt") and later accrued interest on the principal shall constitute the total judgment debt due the Plaintiff and shall bear interest hereafter at the rate of 6.00% per annum.
3. Any Defendants liable for the aforesaid Line of Credit Mortgage debt shall on or before the date of sale of the property hereinafter described, pay to the Plaintiff, or Plaintiff's attorney the amount of Plaintiff's debt as aforesaid, together with the costs and disbursements of this action.
4. On default of payment at or before the time herein indicated, the Subject Property shall be sold by the undersigned Special Referee at public auction, at the location, and upon the date and time set forth in the Notice of Sale, and should the regular day of judicial sales fall on a legal holiday, then and in such event, the sales day shall be on Tuesday next succeeding such holiday, on the following terms, that is to say:


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(a) FOR CASH: The undersigned Special Referee will require a deposit of five (5%) percent on the amount of the bid in cash or equivalent (unless Plaintiff is the successful bidder) the same to be applied to the purchase price upon compliance with the bid. In case of non-compliance within the time specified in the Notice of Sale, the deposit will be forfeited and applied to the costs and Plaintiff's debt.

(b) Interest on the balance of the bid shall be paid to the day of compliance at the rate of 6.00% per annum.

(c) The sale shall be subject to property taxes and assessments, existing easements and restrictions and easements and restrictions of record and any other senior encumbrances.

(d) Purchaser shall pay for deed preparation and costs of recording the deed and deed stamps.

5. If the Plaintiff's representative does not appear at the sale, the property will be withdrawn by the selling officer and the property will be sold on the next available sales date, after due advertisement.

6. If Plaintiff is the successful bidder at the sale for a sum not exceeding the amount of costs, expenses and the indebtedness of Plaintiff, Plaintiff may pay to the Special Referee only the amount of the costs and expenses, crediting the balance of the bid on Plaintiff's indebtedness.

7. Personal or deficiency judgment being waived, the bidding will not remain open after the date of sale, but compliance with the bid must be made immediately.

8. That the Special Referee will, by advertisement according to law, give notice of the time, and place of such sale, and the terms thereof; and will execute to the Purchaser, or Purchasers, a deed to the premises sold. The Plaintiff, or any other party to this action, may become a purchaser at such sale. If the Purchaser or Purchasers at the sale should fail to comply with the terms thereof, then the Special Referee may advertise the said premises for resale on the next, or some other subsequent sales day, at the risk of the highest bidder, and so from time to time thereafter until a full compliance shall be secured.

9. That the Special Referee will apply the proceeds of the sale as follows:

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

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

NEXT: Any surplus will be held pending further Order of this Court.

10. It is further ORDERED, ADJUDGED AND DECREED that in the event the successful bidder is other than the owner defendants in possession herein, the Sheriff of Fairfield County, upon receipt of a Writ of Assistance or other order of ejectment, is ordered and directed to eject and remove from the premises the occupant(s) of the property sold, together with all personal property located thereon, and put the successful bidder or his assigns in full, quiet and peaceable possession of said premises without delay, subject however to all existing leases, and to keep the successful bidder or his assigns in such peaceable possession.

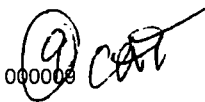
11. It is further ORDERED, ADJUDGED AND DECREED that each Defendant named herein and all persons whosoever claiming under any one of them be forever barred and foreclosed of all right, title, interest, and equity of redemption in the said mortgaged premises so sold, or any part thereof.

12. IT IS FURTHER ORDERED that the deed of conveyance made pursuant to said sale shall contain the names of only the first-named Plaintiff and the owner Defendants, and the Defendant who was the titleholder of the Subject Property at the time of the filing of the notice of pendency of the within action, and the name of the grantee; and the Clerk of Court for Fairfield County is authorized to omit from the indices pertaining to such conveyance the name of all parties not contained in said deed.

13. The undersigned Special Referee will retain jurisdiction to do all necessary acts incident to this foreclosure including, but not limited to, the issuance of a Writ of Assistance.

14. The following is a description of the property herein ordered to be sold:

All that certain lot of land with any improvements thereon containing 0.50 acres, more or less situate at 247 Morninglow Drive, Winnsboro, Fairfield County, South Carolina and is shown and

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designated as Lot No. 137, Section 22 on that certain plat of survey for Patrick Eugene Rachels dated February 12, 1996, and recorded February 28, 1996, in Plat Slide 544 at page 1233 and has such courses and distances, metes and bounds as shown on said plat which said plat is incorporated herein by reference.

This is the same property conveyed by Patrick Eugene Rachels to Jimmy Eugene Bailey and Laura Jean Bailey by deed dated September 1, 2000, and recorded September 7, 2000, in Deed Book QM at page 349. Reference is also made to that certain deed from Jimmy Eugene Bailey and Laura Jean Bailey to Jimmy Eugene Bailey and Laura Jean Bailey as joint tenants with right of survivorship and not as tenants-in-common dated October 27, 2009, and recorded on November 4, 2009, in Deed Book 973 at page 9.

TMS #095-02-02-022-000

CURRENT ADDRESS OF PROPERTY: 247 Morninglow Drive, Winnsboro, South Carolina
29180

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

16. "U.S. Bank National Association not in its individual capacity but solely in its capacity as Indenture Trustee for WVUE 2015-1" is substituted as defendant in place of DLJ Mortgage Capital, Inc.;

17. The caption of this action is hereby amended to reflect that U.S. Bank National Association not in its individual capacity but solely in its capacity as Indenture Trustee for WVUE 2015-1 is a defendant as follows: *ArrowPointe Federal Credit Union v. Jimmy Eugene Bailey, Laura Jean Bailey, and U.S. Bank National Association not in its individual capacity but solely in its capacity as Indenture Trustee for WVUE 2015-1*, and to remove DLJ Mortgage Capital, Inc., as one of the defendants;

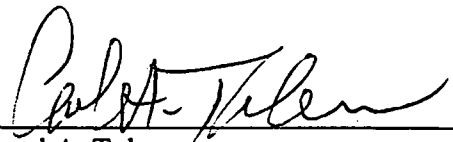
18. The Clerk of Court is instructed to make the amendments to the caption;

19. Counsel of record for U.S. Bank National Association not in its individual capacity but solely in its capacity as Indenture Trustee for WVUE 2015-1 shall be Drew B. Walker, Esquire, and the law firm of Rogers Lewis Jackson Mann & Quinn, LLC, and Sean M. Foerster, Esquire, and

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the law firm of Rogers Townsend & Thomas, PC. The Clerk of Court and any other person who may be sending notices in connection with this case are hereby instructed to serve upon the these attorneys all notices, motions, pleadings, and other documents to which Defendant U.S. Bank National Association not in its individual capacity but solely in its capacity as Indenture Trustee for WVUE 2015-1 might be entitled.

IT IS SO ORDERED.



Carol A. Tolen
Fairfield County Special Referee

1-18-18, 2017
Winnsboro, South Carolina



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF FAIRFIELD) CASE NO. 2012-CP-20-00132

ArrowPointe Federal Credit Union,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER DENYING DEFENDANT
	)	JPMORGAN CHASE BANK'S
Jimmy Eugene Bailey, Laura Jean Bailey, and	)	MOTION FOR SUMMARY
JPMorgan Chase Bank,	)	JUDGMENT
	)	
Defendants.	)	

This matter came before the Court on the Motion of Defendant JPMorgan Chase Bank ("Defendant Chase") for Summary Judgment against the Plaintiff ArrowPointe Federal Credit Union. This Court conducted a hearing on Defendant's Motion on September 19, 2013. In addition to the oral arguments presented at the hearing, the Court has considered any memoranda of law submitted by the parties. Defendant Chase's Motion for Summary Judgment is DENIED.

I. BACKGROUND

The parties do not dispute the following facts. On September 29, 2009, Defendants Jimmy and Laura Bailey ("Defendants Bailey") refinanced an existing mortgage on the real property described in Plaintiff's foreclosure Complaint. The lender was Quicken Loans, Inc. This mortgage was recorded in October, 2009.

On October 27, 2009, Defendants Bailey gave a mortgage to the Plaintiff. This mortgage was recorded on November 4, 2009.

On November 23, 2009, Jimmy and Laura Bailey refinanced their mortgage with Quicken Loans, Inc. This mortgage was recorded on December 15, 2009. The amount of this loan was greater than the first mortgage given to Quicken Loans, which was recorded in October 2009.

Quicken Loans, Inc. did not obtain a Subordination Agreement from Plaintiff during the closing process associated with its refinance. Defendant Chase became the successor in interest of the Quicken Loans mortgage recorded on December 15, 2009. The priority of the Defendant Chase's mortgage recorded on December 15, 2009 is disputed. The parties agree that neither Plaintiff's mortgage nor Defendant's mortgage are purchase money mortgages. It is also undisputed that Chase's mortgage recorded December 15, 2009 was in a larger amount than its prior mortgage recorded in October 2009.

The present action was brought by Plaintiff for foreclosure of the Plaintiff's mortgage covering the real property described in the Lis Pendens filed in this case. Defendant Chase timely answered and now seeks Summary Judgment. Defendant Chase alleges that its mortgage recorded December 15, 2009 has priority over Plaintiff's mortgage recorded November 4, 2009.

II. LEGAL STANDARD

A motion for summary judgment should only be granted if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." BPS, Inc. v. Worthy, 608 S.E.2d 155, 362 S.C. 319 (S.C. Ct. App. 2005). The moving party bears the initial burden of demonstrating to the Court the absence of an issue of material fact. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Once the initial burden is met by the moving party, the burden then shifts to the non-moving party to show a genuine issue of material fact exists. Id.

In deciding if an issue of material fact exists, all evidence and inferences should be viewed in the light most favorable to the non-moving party. BPS, Inc., 608 S.E.2d 155, 362 S.C. 319 (S.C. Ct. App. 2005). When all this is considered, if there is a dispute of material fact, even concerning the conclusions to be drawn from evidentiary facts, summary judgment should not be granted. Id.

III. DISCUSSION

In South Carolina, the priority of mortgage creditors is determined by the date each mortgage is recorded, with the first mortgage to be recorded having the first priority. S.C. Code Ann. § 30-7-10. “This statute indicates our [South Carolina’s] recording act is a race-notice act which will provide protection to a subsequent purchaser or creditor provided he records first.” MI Co., Ltd. V. McLean, 325 S.C. 616, 482 S.E.2d 597, 602 (S.C. App. 1996). Therefore, South Carolina is a race-notice state, and the first creditor to record its mortgage will take priority over creditors recording it mortgage later.

The argument set forth by the movant, Defendant Chase, is a replacement mortgage theory. Defendant Chase contends the mortgage recorded on December 15, 2009 was a replacement of its mortgage recorded in October 2009. If the theory of replacement mortgage is accepted, Chase’s mortgage recorded on December 15, 2009 is a replacement rather than a refinance, meaning intervening lienholders are not entitled to the normal priority granted according to the date the instruments are recorded. Defendant Chase relies on case law from other jurisdictions, including New Jersey, Michigan and Arizona, which recognize the replacement mortgage theory. Defendant Chase further relies on the *dissent* in *Matrix v. Frazer* written by Justice Pleciones, in which he discusses “replacement and modification.” 394 S.C. 134, 714 S.E.2d 532 (S.C. 2011).

Plaintiff argues that replacement mortgage theory is not the law of the State of South Carolina and should not be applied in this case. Because Defendant Chase did not obtain a Subordination Agreement from Plaintiff when it refinanced its mortgage recorded on December 15, 2009, Defendant Chase lost its priority and is now in second position. *Id.* Plaintiff further

argues that because Defendant Chase advanced significant additional money to the borrowers in its December 2009 mortgage, Plaintiff was substantially and materially prejudiced.

Plaintiff answers Defendant Chase's theory of replacement mortgage demonstrating that Defendant Chase is requesting summary judgment based on the *Restatement Third of Property* and foreign case law, but not existing precedent.

IV. CONCLUSIONS OF LAW

The Court concludes as follows:

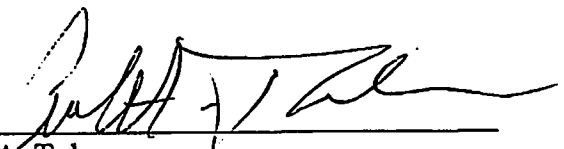
1. The Court holds that the replacement mortgage theory is not the law of the State of South Carolina and should not apply in this case. Therefore, as a matter of law, Defendant Chase's mortgage recorded on December 15, 2009 does not take priority over the Plaintiff's mortgage which was recorded first, on November 4, 2009.

For the foregoing reasons, Defendant Chase's Motion for Summary Judgment against ArrowPointe Federal Credit Union is DENIED.

IT IS SO ORDERED.

March 19
Winnsboro, South Carolina

2015
2014



Carol A. Tolen
Fairfield County Special Referee

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF FAIRFIELD) CIVIL ACTION NO. 2012-CP-20-132

ArrowPointe Federal Credit Union,

Plaintiff,

vs.

Jimmy Eugene Bailey; Laura Jean Bailey; and
JPMorgan Chase Bank,

Defendants.

LIS PENDENS

2012-CP-20-038

2012 MAR 27 A 11:05
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO ECKHART

NOTICE IS HEREBY GIVEN that an action has been commenced by the Plaintiff above-named against the Defendants above-named for the foreclosure of a certain mortgage given by Jimmy E. Bailey and Laura Jean Bailey to ArrowPointe Federal Credit Union dated October 27, 2009, recorded November 4, 2009, in the Office of the Clerk of Court for Fairfield County, in Book 973 at page 28.

The description of the premises as contained in said mortgage is as set out in Exhibit "A" attached hereto and made a part hereof.

SHERPY & JONES, P.A.

By:

Christy C. Jones

Christy C. Jones
Post Office Box 2599
Lexington, South Carolina 29071
(803) 356-3327
ATTORNEY FOR PLAINTIFF

3/12, 2012

EXHIBIT A

All that certain lot of land with any improvements thereon containing 0.50 acres, more or less situate at 247 Morninglow Drive, Winnsboro, Fairfield County, South Carolina and is shown and designated as Lot No. 137, Section 22 on that certain plat of survey for Patrick Eugene Rachels dated February 12, 1996, and recorded February 28, 1996, in Plat Slide 544 at page 1233 and has such courses and distances, metes and bounds as shown on said plat which said plat is incorporated herein by reference.

This is the same property conveyed by Patrick Eugene Rachels to Jimmy Eugene Bailey and Laura Jean Bailey by deed dated September 1, 2000, and recorded September 7, 2000, in Deed Book QM at page 349. Reference is also made to that certain deed from Jimmy Eugene Bailey and Laura Jean Bailey to Jimmy Eugene Bailey and Laura Jean Bailey as joint tenants with right of survivorship and not as tenants-in-common dated October 27, 2009, and recorded on November 4, 2009, in Deed Book 973 at page 9.

TMS #095-02-02-022-000

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD) CIVIL ACTION NO. 2012-CP-20-132

ArrowPointe Federal Credit Union,

Plaintiff,

vs.

Jimmy Eugene Bailey; Laura Jean Bailey; and
JPMorgan Chase Bank,

Defendants.

SUMMONS
(Non-Jury)

Foreclosure of Real
Estate Mortgage

FILED MAR 27 A 11:05
FAIRFIELD COUNTY
CLERK OF COURT
RECEIVED

TO: THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in the above entitled action, a copy of which is herewith served upon you, and to serve a copy of your Answer upon the undersigned at their offices, Sherpy & Jones, P.A., Attention: Christy C. Jones, Esquire, Post Office Box 2599, Lexington, South Carolina 29071, within thirty (30) days after service hereof upon you, exclusive of the date of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

SHERPY & JONES, P.A.

By: Christy C. Jones
Christy C. Jones
Post Office Box 2599
Lexington, South Carolina 29071
(803) 356-3327
ATTORNEY FOR PLAINTIFF

3/12, 2012

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF FAIRFIELD) CIVIL ACTION NO. 2012-CP-20-132

ArrowPointe Federal Credit Union,

Plaintiff,

vs.

Jimmy Eugene Bailey; Laura Jean Bailey; and
JPMorgan Chase Bank,

Defendants.

COMPLAINT
(Non-Jury Foreclosure)
(Deficiency waived)

FILED
CLERK OF COURT
FAIRFIELD COUNTY
MAR 27 A 11:06

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

1. This is an action for foreclosure of a mortgage of certain real estate in Fairfield County, South Carolina.
2. Plaintiff is a credit union duly organized and existing under and by virtue of the laws of the United States of America.
3. Upon information and belief, Jimmy Eugene Bailey is a citizen and resident of the County of York, State of South Carolina.
4. Upon information and belief, Laura Jean Bailey is a citizen and resident of the County of York, State of South Carolina.
5. Some lien on or interest in the real estate that is the subject of this action may be claimed by the Defendants herein.
6. Heretofore, on or about October 27, 2009, Jimmy E. Bailey and Laura Jean Bailey executed and delivered to ArrowPointe Federal Credit Union a certain Note in writing, wherein said Jimmy E. Bailey and Laura Jean Bailey promised to pay to the Plaintiff the principal sum of \$99,000.00, together with interest at the rate of 6% per annum on the unpaid balance. Said principal

and interest is payable in monthly installments of \$900.00. A copy of the Note is attached hereto and is incorporated herein as Exhibit "A."

7. In order to secure the payment of the Note according to the terms and conditions thereof, Jimmy E. Bailey and Laura Jean Bailey made, executed, and delivered to ArrowPointe Federal Credit Union a certain real estate mortgage ("Mortgage") covering the following described property:

All that certain lot of land with any improvements thereon containing 0.50 acres, more or less situate at 247 Morninglow Drive, Winnsboro, Fairfield County, South Carolina and is shown and designated as Lot No. 137, Section 22 on that certain plat of survey for Patrick Eugene Rachels dated February 12, 1996, and recorded February 28, 1996, in Plat Slide 544 at page 1233 and has such courses and distances, metes and bounds as shown on said plat which said plat is incorporated herein by reference.

This is the same property conveyed by Patrick Eugene Rachels to Jimmy Eugene Bailey and Laura Jean Bailey by deed dated September 1, 2000, and recorded September 7, 2000, in Deed Book QM at page 349. Reference is also made to that certain deed from Jimmy Eugene Bailey and Laura Jean Bailey to Jimmy Eugene Bailey and Laura Jean Bailey as joint tenants with right of survivorship and not as tenants-in-common dated October 27, 2009, and recorded on November 4, 2009, in Deed Book 973 at page 9.

TMS #095-02-02-022-000

Subject to easements and restrictions of record.

8. The Mortgage was signed, witnessed and probated; and thereafter the Mortgage was recorded in the Office of the Clerk of Court for Fairfield County in Book 973 at Page 28. A copy of said Mortgage is attached hereto and incorporated herein as Exhibit "B."

9. The Mortgage evidences and secures the repayment of money advanced by the Mortgagee to, or on behalf of, the Mortgagor and constitutes a secured mortgage on the mortgaged premises.

10. The mortgage being foreclosed involves residential property, but the mortgage loan is not owned, securitized or guaranteed by Fannie Mae or Freddie Mac. The Plaintiff is the servicer and is not participating in the HMP.

11. Notice has been given to the applicable Defendants as required by the terms of the Mortgage or any applicable law prior to the commencement of this action. A copy of any rights Defendants may have is attached hereto and incorporated herein as Exhibit "C." No other Notice is required since Plaintiff is a federal credit union and is exempt from any applicable provisions of the South Carolina Consumer Protection Code.

12. In and by the terms of said Note and Mortgage, it is provided, among other things that on failure to pay any installment of principal or interest or any portion thereof when due, or if any of the conditions and requirements in the Note or Mortgage are not complied with, then the whole principal sum and accrued interest shall, at the option of the legal holder thereof, become due and payable with thirty (30) days' notice, and be collectible by foreclosure.

13. In and by the terms of the Note and/or Mortgage, it is further provided that the Defendants shall pay Plaintiff all costs, expenses and disbursements of any action for collection or foreclosure after default, including attorneys' fees.

14. The monthly payments due on the Note and Mortgage are in default since July 4, 2011, and the conditions of the Note and Mortgage have been broken and the Plaintiff elects to and does declare the entire balance of said indebtedness to be due and payable. The principal and interest due on the Note and Mortgage as of March 12, 2012, the sum of \$104,258.83, with interest at the rate of 6% per annum from March 12, 2012, and together with the costs, expenses and disbursements of this action, including attorneys' fees. The accrued interest and other amounts due and owing shall be proven in detail to the trier of fact.

15. Based upon a search of the public records of the aforesaid county, all persons or entities having a junior interest or subordinate lien or possible claim in upon the mortgaged premises as of the date and time of the filing of the Lis Pendens herein have been made Defendants to this action.

16. The Plaintiff demands no personal or deficiency judgment and any right to the same is specifically waived.

17. Pursuant to the terms of the Note and Mortgage, Plaintiff has employed counsel to prosecute this action and agreed to pay for those services. The amount of all legal expenses, including attorneys' fees shall be proven in detail to the trier of fact.

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

19. Upon information and belief, said information having been obtained from the records of Fairfield County, South Carolina, the Defendants below named have or may claim to have some interest in or lien upon the subject premises by virtue of the matters and things hereinbelow alleged, but that any such interest in or lien upon the said premises is junior and subordinate to Plaintiff's said mortgage, to-wit:

a. The Defendant JPMorgan Chase Bank, N.A. aka JPMorgan Chase & Co. by virtue of a mortgage given to it by Jimmy Eugene Bailey and Laura Jean Bailey in the original principal amount of \$296,000.00, which mortgage is dated November 23, 2009, and was recorded in the Office of the Clerk of Court on December 15, 2009, in 977 at page 54.

WHEREFORE, Plaintiff prays for judgment as follows:

a. The amount due upon the said Note and Mortgage held by the Plaintiff be ascertained and determined under the direction of this Court, together with attorneys' fees, the costs, expenses and disbursements of this action and judgment be entered against the owner Defendants in such amount.

b. That Plaintiff's mortgage be declared a first lien and that Plaintiff have judgment of foreclosure for the amount so found to be due and owing thereon, together with any taxes or insurance premiums which may be due or which may be or have been paid by Plaintiff, together with attorneys' fees, and for the costs, expenses and disbursements of this action.

c. That the Court order the reimbursement of all costs for inspecting and securing the property incurred by the Plaintiff as a result of the delinquency.

d. That the Court appoint a Receiver to collect the rents, issues, profits or designated sums from the mortgagor(s), and/or the grantee(s) of the mortgagor(s), and/or tenant(s) occupying or exercising control over the mortgaged premises and hold the same subject to the further order of this Court.

e. That the mortgaged premises be sold according to law and the practice of this Court, the equity of redemption be barred, and that the proceeds of sale be applied as follows:

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

Second, to the payment and discharge of the amount due on Plaintiff's note and mortgage, together with attorneys' fees as aforesaid and costs; and

Third, the surplus, if any, be distributed according to law.

f. That the Court issue an order directing the Sheriff of Fairfield County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the property should the same become necessary.

g. For such other and further relief as may be just and proper.

SHERPY & JONES, P.A.

By: Christy C. Jones
Christy C. Jones
Post Office Box 2599
Lexington, South Carolina 29071
(803) 356-3327
ATTORNEY FOR PLAINTIFF

3/12, 2012

STATE OF SOUTH CAROLINA

COUNTY OF YORK

)
)
)

PERSONALLY appeared before me Samantha Faulkenberry, who, being duly sworn, deposes and says: that deponent is an officer or agent of ArrowPointe Federal Credit Union, a credit union, which is a party to the foregoing action and is making this verification on its behalf from deponent's personal knowledge and the records of the credit union; that deponent has read the allegations in the foregoing Complaint and the same are true of deponent's own knowledge, except those matters stated on information and belief and, as to those matters, deponent believes them to be true.

Samantha Faulkenberry
Samantha Faulkenberry

SWORN to before me this 19th
day of March, 2012.

Cheryl H. Bass (L.S.)
Notary Public for South Carolina
My Commission Expires: 6/1/2015

2012 MAR 27 A 11:06
FAIRFIELD COUNTY
CLERK OF COURT
JERRY D. PECKHAM

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

ArrowPointe Federal Credit Union,
Plaintiff,

v.

Jimmy Eugene Bailey, Laura Jean
Bailey, and JPMorgan Chase Bank,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

CASE NO. 2012-CP-20-00132

**DEFENDANT JPMORGAN CHASE BANK
NATIONAL ASSOCIATION'S ANSWER AND
COUNTERCLAIM
(Declaratory Judgment)
(Nonjury)**

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Dw/JS
MAY 15 2012

2522-9

2012 MAY 14 A 9:31
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO ELLIOTT

The Defendant JPMorgan Chase Bank, National Association ("Defendant") answering the Plaintiff ArrowPointe Federal Credit Union's ("Plaintiff") Complaint provides as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of this Plaintiff's Complaint not specifically admitted, qualified or explained is hereby denied.
2. Reference to paragraphs is a reference to Paragraphs contained in the Plaintiff's Complaint unless specifically stated otherwise.
3. Defendant admits the allegations in Paragraph 1.
4. Defendant is without sufficient information or knowledge to form a belief as to the allegations in Paragraph 2 and therefore denies those allegations.
5. Defendant is without sufficient information or knowledge to form a belief as to the allegations in Paragraph 3 and therefore denies those allegations.
6. Defendant is without sufficient information or knowledge to form a belief as to the allegations in Paragraph 4 and therefore denies those allegations.

7. As to the allegations in Paragraph 5, Defendant admits that it holds a lien and interest by way of mortgage on the subject real estate, alleges that its mortgage is senior to all others and it denies any additional allegations in Paragraph 5.

8. Defendant makes reference to the Note referenced in Paragraph 6 and denies any allegations inconsistent with the Note.

9. Defendant makes reference to the Mortgage referenced in Paragraph 7 and denies any allegations inconsistent with the Mortgage.

10. Defendant makes reference to the Mortgage and records of the Office of the Clerk of Court for Fairfield County referenced in Paragraph 8 and denies any allegations inconsistent with the Mortgage and records.

11. Defendant makes reference to the Mortgage referenced in Paragraph 9 and denies any allegations inconsistent with the Mortgage.

12. Defendant is without sufficient information or knowledge to form a belief as to the allegations in Paragraph 10 and therefore denies those allegations.

13. Defendant is without sufficient information or knowledge to form a belief as to the allegations in Paragraph 11 and therefore denies those allegations.

14. Defendant makes reference to the Note and Mortgage referenced in Paragraph 12 and denies any allegations inconsistent with the Note and Mortgage.

15. Defendant makes reference to the Note and Mortgage referenced in Paragraph 13 and denies any allegations inconsistent with the Note and Mortgage.

16. Defendant is without sufficient information or knowledge to form a belief as to the allegations in Paragraph 14 and therefore denies those allegations.

17. As to the allegations in Paragraph 15, Defendant admits that it has an interest in the subject real property, denies that the interest is subordinate or junior, alleges that its interest is senior to all others and is without sufficient information or knowledge to form a belief as to the balance of the allegations and therefore denies them.

18. Defendant is without sufficient information or knowledge to form a belief as to the allegations in Paragraph 16 and therefore denies those allegations.

19. Defendant makes reference to the Note and Mortgage referenced in Paragraph 17 and denies any allegations inconsistent with the Note and Mortgage. To the extent additional allegations are alleged in Paragraph 17, Defendant is without sufficient information or knowledge to form a belief as to the allegations in Paragraph 17 and therefore denies those allegations.

20. Defendant makes reference to the Note and Mortgage referenced in Paragraph 18 and denies any allegations inconsistent with the Note and Mortgage.

21. As to the allegations in Paragraph 19, Defendant admits that it has interest in the subject real property, denies that its interest is subordinate or junior, alleges that its interest is senior to all others and is without sufficient information or knowledge to form a belief as to the balance of the allegations and therefore denies them. As to the allegations in Paragraph 19(a), Defendant admits that it holds the referenced mortgage that was assigned to it by its predecessor, which was given to the predecessor by Jimmy Eugene Bailey and Laura Jean Bailey.

22. The Wherefore prayer does not require a response and the Defendant denies any allegations in the prayer to the extent a response is required.

FOR A SECOND DEFENSE

23. The allegations contained in prior paragraphs of this Answer are re-alleged as if repeated here verbatim.

24. On or about September 29, 2009, Defendants Jimmy Eugene Bailey and Laura Jean Bailey ("Borrower Defendants"), on information and belief, made, executed, and delivered a certain note ("Prior Note") in the principal sum of \$256,550.00, at a rate pursuant to the terms of the Prior Note.

25. In order to secure the payment of the Prior Note according to the terms and conditions thereof, Borrower Defendants made, executed and delivered unto Mortgage Electronic Registration Systems, Inc. ("MERS") acting as a nominee for Quicken Loans Inc. ("Quicken") a certain senior mortgage dated September 29, 2009 ("Prior Mortgage") encumbering the subject property described in Paragraph 7 of Plaintiff's Complaint ("Subject Property").

26. Thereafter, the Prior Mortgage was recorded in the Office of the Clerk of Court for Fairfield County in Mortgage Book 971 at Page 41 on October 20, 2009.

27. The Prior Mortgage constituted a first lien, senior mortgage on the Subject Property.

28. While the Prior Mortgage was recorded in senior position, Plaintiff received a note and mortgage ("Plaintiff's Note and Mortgage") as described in Paragraphs 6, 7 and 8 of its Complaint.

29. Plaintiff's Mortgage, recorded on November 4, 2009, was prior, junior and subordinate to the recorded Prior Mortgage.

30. Plaintiff knew or should have known that it was placing a junior mortgage

on the Subject Property without expectation that its mortgage was senior.

31. On November 23, 2009, Quicken, Defendant's predecessor, received a Note ("Defendant's Note") from Borrower Defendants in the principal amount of \$296,000.00.

32. In order to secure the payment of Defendant's Note according to the terms and conditions thereof, Borrower Defendants made, executed and delivered unto MERS acting as a nominee for Quicken a certain senior mortgage ("Defendant's Mortgage") encumbering the Subject Property dated November 23, 2009, which was subsequently recorded on December 15, 2009 with the Office of the Clerk of Court for Fairfield County at Mortgage Book 977 at Page 54.

33. Quicken assigned Defendant's Note and Defendant's Mortgage to Defendant by assignment dated January 6, 2012 and recorded January 25, 2012 in the Office of the Clerk of Court for Fairfield County at Book 1059 at Page 62.

34. Proceeds of the Defendant's Note and the Defendant's Mortgage loan were used to pay off the Prior Note and Prior Mortgage on the Subject Property given by the Defendant Borrowers to Quicken and MERS as nominee for Quicken on September 29, 2004 and recorded on October 20, 2009.

35. Defendant and Defendant's predecessor in interest had a direct interest in the discharge of the Prior Mortgage and did not voluntarily pay the Prior Mortgage.

36. Defendant and Defendant's predecessor were secondarily liable for the debt or discharge of the Prior Mortgage.

37. There will be no prejudice or injustice to Plaintiff by the allowance of a judgment granting equitable subrogation.

38. Defendant and Defendant's predecessors did not have actual knowledge of Plaintiff's Mortgage at the time the Defendant's Mortgage was placed on the Subject Property.

39. Therefore, the Defendant's Mortgage should be equitably subrogated to the rights and priority of the Prior Mortgage.

FOR A THIRD DEFENSE

40. The allegations contained in prior paragraphs of this Answer are re-alleged as if repeated here verbatim.

41. The Prior Mortgage, recorded on October 20, 2009, was senior to the Plaintiff's Mortgage, recorded on November 4, 2009.

42. The Prior Mortgage was released of record and, as part of the same November 23, 2009 transaction, was replaced by Defendant's Mortgage.

43. The Prior Mortgage was of record at all times while the Plaintiff's Mortgage was of record until the Prior Mortgage was replaced by the Defendant's Mortgage when recorded on December 15, 2009.

44. The Plaintiff knew Plaintiff's Mortgage was junior to the Prior Mortgage at the time of Plaintiff's loan transaction and had no expectation that it would have a senior mortgage on the Subject Property.

45. The Plaintiff was not materially prejudiced by the replacement mortgage.

46. The Defendant's Mortgage should be recognized as a replacement mortgage that has the rights and priority of the Prior Mortgage, which is senior to the Plaintiff's Mortgage and all other liens on the Subject Property.

FOR A FOURTH DEFENSE

47. Each and every allegation and response to the preceding Paragraphs above is re-alleged and restated herein verbatim.

48. The Defendant's claims are barred by the Doctrine of Waiver.

FOR A FIFTH DEFENSE

49. Each and every allegation and response to the preceding Paragraphs above is re-alleged and restated herein verbatim.

50. The Defendant's claims are barred by Doctrine of Laches.

FOR A SIXTH DEFENSE

51. Each and every allegation and response to the preceding Paragraphs above is re-alleged and restated herein verbatim.

52. The Defendant's claims are barred by Doctrine of Estoppel.

FOR A SEVENTH DEFENSE AND BY WAY OF COUNTERCLAIM

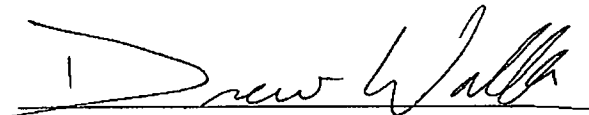
53. Each and every allegation and response to the preceding Paragraphs above is re-alleged and restated herein verbatim.

54. A justiciable controversy exists as to the rights, status and priority of the writings that constitute liens that are the subject of this action.

55. By way of the facts alleged above and the facts to be gleaned during this civil action, Defendant requests declaratory relief by final decree from this Court declaring that Defendant's Mortgage is senior to Plaintiff's Mortgage and all other liens on the Subject Property.

WHEREFORE, having fully replied to the Complaint of this Plaintiff, the Defendant requests that the Plaintiff's Complaint be dismissed with costs assessed to the

Plaintiff, this Defendant's mortgage be declared senior and superior to all other liens and any other relief that this Court deems just and proper.

A handwritten signature in black ink, appearing to read "Drew B. Walker", written over a horizontal line.

Drew B. Walker (SC Bar No. 78271)
ELLIS, LAWHORNE & SIMS, P.A.
1501 Main Street, 5th Floor (29202)
PO Box 2285
Columbia, SC 29201
P: 803-254-4190
F: 803-779-4749
dwalker@ellislawhorne.com

Attorney for JPMorgan Chase Bank, N.A.

May 11, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

ArrowPointe Federal Credit Union,

Plaintiff,

v.

Jimmy Eugene Bailey, Laura Jean Bailey,
and DLJ Mortgage Capital, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO. 2012-CP-20-00132

LIS PENDENS

NOTICE IS HEREBY GIVEN THAT a counterclaim and cross-claim has been or will be filed in this Court upon complaint of Defendant DLJ Mortgage Capital, Inc., against Plaintiff ArrowPointe Federal Credit Union and Defendants Jimmy Eugene Bailey and Laura Jean Bailey for the foreclosure of a certain mortgage of real estate given by Laura Jean Bailey and Jimmy Eugene Bailey to Mortgage Electronic Registration Systems, Inc. as nominee for Quicken Loans, Inc., its successors and assigns (MIN #100039032219346943) dated November 23, 2009, and recorded in the Office of the Clerk of Court for Fairfield County on December 15, 2009, in Mortgage Book 977 at Page 54. This Mortgage was assigned to JPMorgan Chase Bank, National Association, by assignment dated January 6, 2012, and recorded January 25, 2012, in the Office of the Clerk of Court for Fairfield County in Book 1059 at Page 62. Thereafter, the Mortgage was assigned to Quicken Loans, Inc. by assignment dated April 24, 2013, and recorded July 3, 2013, in the Office of the Clerk of Court for Fairfield County in Book 1120 at page 74. Thereafter, the Mortgage was assigned to DLJ Mortgage Capital, Inc., by assignment dated July 1, 2014, and recorded May 1, 2015, in the Office of the Clerk of Court for Fairfield County in Book 1189 at page 50.

The premises covered and affected by the mortgage and foreclosure is described as follows:

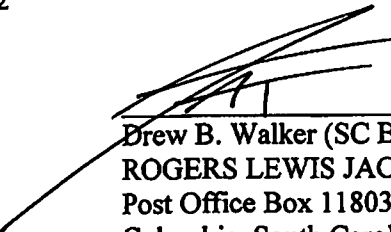
All that certain piece, parcel or lot of land, together with the improvements thereon, lying, being and situate in the County of Fairfield, State of South Carolina, being shown and designated as Lot 137 of Section 22 of Lake Wateree on a plat of survey prepared for Patrick Eugene Rachels by Ashmark Land Surveyors dated February 12, 1996, and recorded in Slide 544 of Plats at Page 1233; and being bounded on the North by Lot 136; on the East by Lake Wateree; on the South by Lot 138; and on the West by right-of-way of Morninglow Drive.

This being the same property conveyed to Jimmy Eugene Bailey and Laura Jean Bailey by deed of Patrick Eugene Rachels dated September 1, 2000 and recorded September 7, 2000 in Book QM at Page 349. Subsequently, Jimmy Eugene

Bailey and Laura Jean Bailey conveyed the subject property to Jimmy Eugene Bailey and Laura Jean Bailey, as joint tenants with the right of survivorship, by deed dated October 27, 2009 and recorded November 4, 2009 in Book 973 at Page 9.

Property Address: 247 Morninglow Drive, Winnsboro, SC 29180

TMS# 095-02-02-022



Drew B. Walker (SC Bar # 78271)
ROGERS LEWIS JACKSON MANN & QUINN, LLC
Post Office Box 11803
Columbia, South Carolina 29211
(803)978-1969
dwalker@rogerslewis.com



Sean M. Foerster (SC Bar # 77466)
ROGERS TOWNSEND & THOMAS, PC
220 Executive Center Drive (29210)
Post Office Box 100200
Columbia, South Carolina 29202-3200
(803)771-7900
sean.foerster@rtt-law.com

Attorneys for Defendant DLJ Mortgage Capital, Inc.
The above-signed law firms and their respective staff are debt collectors.

January 27, 2016

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

ArrowPointe Federal Credit Union,

Plaintiff,

v.

Jimmy Eugene Bailey, Laura Jean Bailey,
and DLJ Mortgage Capital, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO. 2012-CP-20-00132

SUMMONS TO COUNTERCLAIMS AND
CROSS-CLAIM

TO PLAINTIFF AND DEFENDANTS JIMMY EUGENE BAILEY AND LAURA JEAN BAILEY:

YOU ARE HEREBY SUMMONED and required to appear and defend by answering the counterclaims and cross-claim of Defendant DLJ Mortgage Capital, Inc., in this action, of which a copy is herewith served upon you, and to serve a copy of your Reply to the counterclaims and/or Answer to the cross-claim on the subscribers at Post Office Box 100200, Columbia, South Carolina 29202, and/or Post Office Box 11803, Columbia, South Carolina 29211, within thirty (30) days after the service hereof, exclusive of the day of such service, except that the United States of America, if named, shall have sixty (60) days to answer after the service hereof, exclusive of the day of such service; and if you fail to do so, judgment by default will be rendered against you for the relief demanded in the Amended Answer, Counterclaims, and Cross-claim.

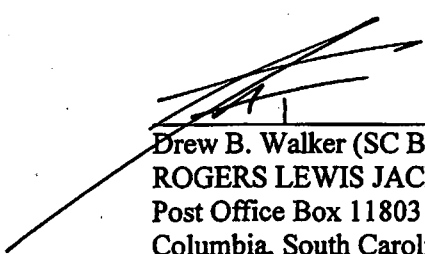
YOU WILL ALSO TAKE NOTICE that Plaintiff will move for an order of reference or that the Court may issue a general order of reference of this action to a master in equity/special referee, pursuant to Rule 53, SCRPC.

TO MINOR(S) OVER FOURTEEN YEARS OF AGE, AND/OR TO MINOR(S) UNDER FOURTEEN YEARS OF AGE AND THE PERSON WITH WHOM THE MINOR(S) RESIDES, AND/OR TO PERSONS UNDER SOME LEGAL DISABILITY:

YOU ARE FURTHER SUMMONED AND NOTIFIED to apply for the appointment of a guardian ad litem within thirty (30) days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by Defendant DLJ Mortgage Capital, Inc.

[signature on the following page]

Summons
C/A # 2012-CP-20-00132



Drew B. Walker (SC Bar # 78271)
ROGERS LEWIS JACKSON MANN & QUINN, LLC
Post Office Box 11803
Columbia, South Carolina 29211
(803)978-1969
dwalker@rogerslewis.com

✓ Sean M. Foerster (SC Bar # 77466)
ROGERS TOWNSEND & THOMAS, PC
220 Executive Center Drive (29210)
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*The above-signed law firms and their respective staff are debt
collectors.*

January 27, 2016

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

ArrowPointe Federal Credit Union,

Plaintiff,

v.

Jimmy Eugene Bailey, Laura Jean Bailey,
and DLJ Mortgage Capital, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO. 2012-CP-20-00132

AMENDED ANSWER, COUNTERCLAIMS, AND
CROSS-CLAIM
(Deficiency Judgment Waived)

Defendant DLJ Mortgage Capital, Inc. ("Defendant") answering Plaintiff ArrowPointe Federal Credit Union's ("Plaintiff") Complaint provides as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of this Plaintiff's Complaint not specifically admitted, qualified or explained is hereby denied.
2. Reference to paragraphs is a reference to Paragraphs contained in the Plaintiff's Complaint unless specifically stated otherwise.
3. Defendant admits the allegations in Paragraph 1.
4. Defendant is without sufficient information or knowledge to form a belief as to the allegations in Paragraph 2 and therefore denies those allegations.
5. Defendant is without sufficient information or knowledge to form a belief as to the allegations in Paragraph 3 and therefore denies those allegations.
6. Defendant is without sufficient information or knowledge to form a belief as to the allegations in Paragraph 4 and therefore denies those allegations.
7. As to the allegations in Paragraph 5, Defendant admits that it holds a lien and interest by way of mortgage on the subject real estate, alleges that its mortgage is senior to all others and it denies any additional allegations in Paragraph 5.
8. Defendant makes reference to the Note referenced in Paragraph 6 and denies any allegations inconsistent with the Note.
9. Defendant makes reference to the Mortgage referenced in Paragraph 7 and denies any allegations inconsistent with the Mortgage.

10. Defendant makes reference to the Mortgage and records of the Office of the Clerk of Court for Fairfield County referenced in Paragraph 8 and denies any allegations inconsistent with the Mortgage and records.

11. Defendant makes reference to the Mortgage referenced in Paragraph 9 and denies any allegations inconsistent with the Mortgage.

12. Defendant is without sufficient information or knowledge to form a belief as to the allegations in Paragraph 10 and therefore denies those allegations.

13. Defendant is without sufficient information or knowledge to form a belief as to the allegations in Paragraph 11 and therefore denies those allegations.

14. Defendant makes reference to the Note and Mortgage referenced in Paragraph 12 and denies any allegations inconsistent with the Note and Mortgage.

15. Defendant makes reference to the Note and Mortgage referenced in Paragraph 13 and denies any allegations inconsistent with the Note and Mortgage.

16. Defendant is without sufficient information or knowledge to form a belief as to the allegations in Paragraph 14 and therefore denies those allegations.

17. As to the allegations in Paragraph 15, Defendant admits that it has an interest in the subject real property, denies that the interest is subordinate or junior, alleges that its interest is senior to all others and is without sufficient information or knowledge to form a belief as to the balance of the allegations and therefore denies them.

18. Defendant is without sufficient information or knowledge to form a belief as to the allegations in Paragraph 16 and therefore denies those allegations.

19. Defendant makes reference to the Note and Mortgage referenced in Paragraph 17 and denies any allegations inconsistent with the Note and Mortgage. To the extent additional allegations are alleged in Paragraph 17, Defendant is without sufficient information or knowledge to form a belief as to the allegations in Paragraph 17 and therefore denies those allegations.

20. Defendant makes reference to the Note and Mortgage referenced in Paragraph 18 and denies any allegations inconsistent with the Note and Mortgage.

21. As to the allegations in Paragraph 19, Defendant admits that it has interest in the subject real property, denies that its interest is subordinate or junior, alleges that its interest is senior to all others and is without sufficient information or knowledge to form a belief as to the balance of the allegations and therefore denies them. As to the allegations in Paragraph 19(a), Defendant admits that it holds the referenced mortgage that was assigned to it by its predecessor, which was given to the predecessor by Jimmy Eugene Bailey and Laura Jean Bailey.

22. The Wherefore prayer does not require a response and the Defendant denies any allegations in the prayer to the extent a response is required.

FOR A SECOND DEFENSE

23. The allegations contained in prior paragraphs of this Answer are re-alleged as if repeated here verbatim.

24. On or about September 29, 2009, Defendants Jimmy Eugene Bailey and Laura Jean Bailey ("Borrower Defendants"), on information and belief, made, executed, and delivered a certain note ("Prior Note") in the principal sum of \$256,550.00, at a rate pursuant to the terms of the Prior Note.

25. In order to secure the payment of the Prior Note according to the terms and conditions thereof, Borrower Defendants made, executed and delivered unto Mortgage Electronic Registration Systems, Inc. ("MERS") acting as a nominee for Quicken Loans Inc. ("Quicken") a certain senior mortgage dated September 29, 2009 ("Prior Mortgage") encumbering the subject property described in Paragraph 7 of Plaintiff's Complaint ("Subject Property").

26. Thereafter, the Prior Mortgage was recorded in the Office of the Clerk of Court for Fairfield County in Mortgage Book 971 at Page 41 on October 20, 2009.

27. The Prior Mortgage constituted a first lien, senior mortgage on the Subject Property.

28. While the Prior Mortgage was recorded in senior position, Plaintiff received a note and mortgage ("Plaintiff's Note and Mortgage") as described in Paragraphs 6, 7 and 8 of its Complaint.

29. Plaintiff's Mortgage, recorded on November 4, 2009, was prior, junior and subordinate to the recorded Prior Mortgage.

30. Plaintiff knew or should have known that it was placing a junior mortgage on the Subject Property without expectation that its mortgage was senior.

31. On November 23, 2009, Quicken, Defendant's predecessor, received a Note ("Defendant's Note") from Borrower Defendants in the principal amount of \$296,000.00.

32. In order to secure the payment of Defendant's Note according to the terms and conditions thereof, Borrower Defendants made, executed and delivered unto MERS acting as a nominee for Quicken a certain senior mortgage ("Defendant's Mortgage") encumbering the Subject Property dated November 23, 2009, which was subsequently recorded on December 15, 2009 with the Office of the Clerk of Court for Fairfield County at Mortgage Book 977 at Page 54.

33. This Mortgage was assigned to JPMorgan Chase Bank, National Association, by assignment dated January 6, 2012, and recorded January 25, 2012, in the Office of the Clerk of

Court for Fairfield County in Book 1059 at Page 62. Thereafter, the Mortgage was assigned to Quicken Loans, Inc. by assignment dated April 24, 2013, and recorded July 3, 2013, in the Office of the Clerk of Court for Fairfield County in Book 1120 at page 74. Thereafter, the Mortgage was assigned to Defendant by assignment dated July 1, 2014, and recorded May 1, 2015, in the Office of the Clerk of Court for Fairfield County in Book 1189 at page 50.

34. Proceeds of the Defendant's Note and the Defendant's Mortgage loan were used to pay off the Prior Note and Prior Mortgage on the Subject Property given by the Defendant Borrowers to Quicken and MERS as nominee for Quicken on September 29, 2004 and recorded on October 20, 2009.

35. Defendant and Defendant's predecessor in interest had a direct interest in the discharge of the Prior Mortgage and did not voluntarily pay the Prior Mortgage.

36. Defendant and Defendant's predecessor were secondarily liable for the debt or discharge of the Prior Mortgage.

37. There will be no prejudice or injustice to Plaintiff by the allowance of a judgment granting equitable subrogation.

38. Defendant and Defendant's predecessors did not have actual knowledge of Plaintiff's Mortgage at the time the Defendant's Mortgage was placed on the Subject Property.

39. Therefore, the Defendant's Mortgage should be equitably subrogated to the rights and priority of the Prior Mortgage.

FOR A THIRD DEFENSE

40. The allegations contained in prior paragraphs of this Answer are re-alleged as if repeated here verbatim.

41. The Prior Mortgage, recorded on October 20, 2009, was senior to the Plaintiff's Mortgage, recorded on November 4, 2009.

42. The Prior Mortgage was released of record and, as part of the same November 23, 2009 transaction, was replaced by Defendant's Mortgage.

43. The Prior Mortgage was of record at all times while the Plaintiff's Mortgage was of record until the Prior Mortgage was replaced by the Defendant's Mortgage when recorded on December 15, 2009.

44. The Plaintiff knew Plaintiff's Mortgage was junior to the Prior Mortgage at the time of Plaintiff's loan transaction and had no expectation that it would have a senior mortgage on the Subject Property.

45. At the time the Plaintiff filed its Mortgage, it knew that the Prior Mortgage was subject to modification and extension such that Plaintiff had no reasonable expectation that the

Borrower Defendant's liability to the Defendant under the Prior Mortgage would not increase, thereby reducing the Plaintiff's ability to avail itself of its security, if any.

46. The Plaintiff was not materially prejudiced by the replacement mortgage.

47. The Defendant's Mortgage should be recognized as a replacement mortgage that has the rights and priority of the Prior Mortgage, which is senior to the Plaintiff's Mortgage and all other liens on the Subject Property.

48. Under the facts and circumstances in this place, equity requires that the Defendant's Mortgage be given priority over the Plaintiff's Mortgage.

FOR A FOURTH DEFENSE

49. Each and every allegation and response to the preceding Paragraphs above is re-alleged and restated herein verbatim.

50. The Defendant's claims are barred by the Doctrine of Waiver.

FOR A FIFTH DEFENSE

51. Each and every allegation and response to the preceding Paragraphs above is re-alleged and restated herein verbatim.

52. The Defendant's claims are barred by Doctrine of Laches.

FOR A SIXTH DEFENSE

53. Each and every allegation and response to the preceding Paragraphs above is re-alleged and restated herein verbatim.

54. The Defendant's claims are barred by Doctrine of Estoppel.

FOR A SEVENTH DEFENSE AND BY WAY OF COUNTERCLAIM

55. Each and every allegation and response to the preceding Paragraphs above is re-alleged and restated herein verbatim.

56. A justiciable controversy exists as to the rights, status and priority of the writings that constitute liens that are the subject of this action.

57. By way of the facts alleged above and the facts to be gleaned during this civil action, Defendant requests declaratory relief by final decree from this Court declaring that Defendant's Mortgage is senior to Plaintiff's Mortgage and all other liens on the Subject Property.

FOR AN EIGHTH DEFENSE AND BY WAY OF COUNTERCLAIM AGAINST ARROWPOINTE FEDERAL CREDIT UNION AND CROSS-CLAIM AGAINST JIMMY EUGENE BAILEY AND LAURA JEAN BAILEY

58. Each and every allegation and response to the preceding Paragraphs above is re-alleged and restated herein verbatim.

59. This is a counterclaim and cross-claim for the foreclosure of a mortgage upon certain real estate in Fairfield County, South Carolina.

60. Pursuant to S.C. Code Ann. § 33-15-101(b)(8), Defendant is a corporation or other legal entity authorized to collect debts and/or enforce mortgages, security interests or other rights in property securing debts in South Carolina.

61. Defendant has the legal right to enforce the negotiable instrument secured by Defendant's Mortgage and is the real party in interest as defined by Rule 17(a), SCRPC.

62. Defendant's servicing agent for the mortgage loan described in this foreclosure action is participating in the Home Affordable Modification Program ("HAMP"), but the subject loan is not eligible for modification under the HAMP because the property is vacant.

63. The premises covered and affected by Defendant's Mortgage and by this counterclaim and cross-claim for foreclosure is described as follows:

All that certain piece, parcel or lot of land, together with the improvements thereon, lying, being and situate in the County of Fairfield, State of South Carolina, being shown and designated as Lot 137 of Section 22 of Lake Wateree on a plat of survey prepared for Patrick Eugene Rachels by Ashmark Land Surveyors dated February 12, 1996, and recorded in Slide 544 of Plats at Page 1233; and being bounded on the North by Lot 136; on the East by Lake Wateree; on the South by Lot 138; and on the West by right-of-way of Morninglow Drive.

This being the same property conveyed to Jimmy Eugene Bailey and Laura Jean Bailey by deed of Patrick Eugene Rachels dated September 1, 2000, and recorded September 7, 2000 in Book QM at Page 349. Subsequently, Jimmy Eugene Bailey and Laura Jean Bailey conveyed the subject property to Jimmy Eugene Bailey and Laura Jean Bailey, as joint tenants with the right of survivorship, by deed dated October 27, 2009, and recorded November 4, 2009, in Book 973 at Page 9.

Property Address: 247 Morninglow Drive, Winnsboro, SC 29180

TMS# 095-02-02-022

64. Some lien on or interest in the real estate, the subject of this action, may be claimed by Plaintiff/Counterclaim Defendant ArrowPointe Federal Credit Union ("Plaintiff") and Defendants/Cross-Claim Defendants Jimmy Eugene Bailey and Laura Jean Bailey ("Baileys"). Plaintiff may have some interest in or lien upon the premises covered by Defendant's Mortgage by virtue of Plaintiff's Mortgage, but, pursuant to the allegations set forth above in this pleading, that such interest or lien is junior and subsequent to the lien of Defendant's Mortgage.

65. Any defendants herein described as judgment creditors have by filing said judgments designated their attorney entering the judgment as their agent for service of process under the provisions of S.C. Code Ann. § 15-35-840.

66. Defendant's Mortgage evidences and secures the repayment of money advanced by Defendant's predecessor in interest to, or on behalf of, the Baileys and constitutes a first lien on the mortgaged premises.

67. Any notice required by the terms of Defendant's Note and Mortgage or by state or federal laws has been given to the Baileys.

68. After all payments received by Defendant have been credited to the subject loan, the loan is in default and due for July 1, 2011, and the conditions of the Note and Mortgage have been broken. Defendant elects to and does declare the entire balance of said indebtedness due and payable, and that there is due on Defendant's Note and Mortgage as of July 1, 2011, the principal sum of \$289,175.07, with interest from June 1, 2011, advances, late charges, and also for the costs and disbursements of this action, including attorney's fees.

69. Pursuant to the terms of Defendant's Mortgage and applicable state law, Defendant requests that Defendant's Mortgage be foreclosed and that the property be sold at public auction in accordance with law, subject to any liens for taxes, special assessments of record against such property, and existing easements or restrictions of record.

70. Pursuant to the terms of Defendant's Mortgage, Defendant has employed counsel to prosecute this action and a reasonable value of services of counsel in this action is such sum as the Court may find appropriate.

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

72. Defendant's right to a personal or deficiency judgment pursuant to S.C. Code Ann. §§ 29-3-650 and 29-3-660 is expressly waived.

WHEREFORE, having fully replied to the Complaint of this Plaintiff, Defendant prays that this Honorable Court inquire into the matters and set forth herein and:

- 1) Dismiss Plaintiff's Complaint with costs assessed to the Plaintiff;
- 2) Declare Defendant's mortgage to be senior and superior to all other liens;
- 3) Direct the Clerk of Court to annotate the public records to reflect ownership of the Mortgage in the Plaintiff, if necessary;
- 4) Ascertain and determine the amount due upon Defendant's Note and Mortgage together with attorney's fees and costs of this action;

5) Render judgment of foreclosure for the amount so found to be due and owing thereon, together with any ad valorem taxes or insurance premiums which may be due and have been advanced by Defendant, with reasonable attorney's fees, and for the costs of this action;

6) Order the reimbursement of all costs for inspecting and securing the subject property incurred by Defendant as a result of the delinquency;

7) Appoint a Receiver to collect the rents, issues, profits or designated sums from the mortgagors, and/or any grantees of the mortgagors, and/or any tenants occupying or exercising control over the mortgaged premises and hold the same subject to the further order of this Court;

8) Under the direction of this Court, sell the mortgaged premises, bar any equity of redemption, and apply the proceeds of sale as follows:

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

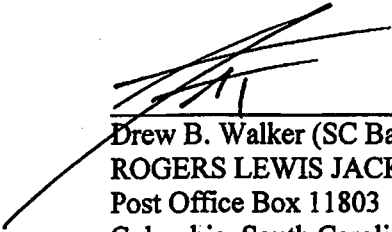
Second, to the payment and discharge of the amount due on Defendant's Note and Mortgage, together with attorney's fees as aforesaid; and

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

9) Issue an order directing the Sheriff of Fairfield County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the property should the same become necessary; and

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

[signature on the following page]



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January 27, 2016

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF FAIRFIELD

3
4 ARROWPOINTE FEDERAL CREDIT UNION,

5 Plaintiff,

6 vs.

CASE NO. 2012-CP-20-00132

7 JIMMY EUGENE BAILEY, LAURA JEAN BAILEY, AND
8 DLJ MORTGAGE CAPITAL, INC.,

9 Defendants.

10
11 SUMMARY JUDGMENT HEARING HELD BEFORE THE HONORABLE
12 CAROL TOLMAN, SPECIAL REFEREE

13 DATE: March 13, 2017

14 TIME: 10:57 A.M.

15 LOCATION: Law Offices of
16 Coleman & Tolen, LLC
120 West Washington Street
17 Winnsboro, SC

18 REPORTED BY: LORI S. MORTGE,
19 Certified Court
Reporter, CCR

20
21 A. WILLIAM ROBERTS, JR., & ASSOCIATES

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(INDEX AT REAR OF TRANSCRIPT)

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1 introduced now, I guess, is the joint stipulation
2 and I believe there was one correction that I
3 believe everyone agreed to on Number 15, the last
4 sentence?
5 MR. WALKER: It has been corrected, Your
6 Honor. It now says Quicken rather than Plaintiff.
7 SPECIAL REFEREE: Okay.
8 MR. WALKER: In the draft we sent you it
9 says Plaintiff --
10 SPECIAL REFEREE: Yes.
11 MR. WALKER: -- and it now says Quicken
12 who is the defendant -- who was the defendant and
13 original mortgagee. But DLJ stands in the shoes of
14 Quicken.
15 SPECIAL REFEREE: Okay. Are we ready to
16 proceed?
17 MS. JONES: Yes, Your Honor.
18 MR. WALKER: Yes, Your Honor.
19 MR. FOERSTER: Yes, Your Honor.
20 SPECIAL REFEREE: Be glad to hear from
21 you. Ms. Jones?
22 MS. JONES: Thank you. So this is the
23 hearing on the Plaintiff's motion for summary
24 judgment as to the priority of our mortgage lien as
25 it relates to Defendant DLJ Mortgage Capital lien.

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1 SPECIAL REFEREE: This is the case of
2 the ArrowPointe Federal Credit Union, Plaintiff,
3 versus Jimmy Eugene Bailey and Laura Jean Bailey and
4 DLJ Mortgage Capital, Inc. Do I have that caption
5 correct since we've amended throughout?
6 MR. FOERSTER: Yes, Your Honor, but we
7 also have a pending motion today to substitute that
8 defendant one more time. The loan has actually been
9 sold twice more since the last time we substituted
10 DLJ Mortgage Capital into this case, so we were
11 hoping to take that motion up today as well.
12 SPECIAL REFEREE: Okay. Are there any
13 objections to it?
14 MS. JONES: There's no objection. My --
15 my only comment is that I be allowed to call them
16 DLJ today.
17 MR. FOERSTER: That -- that's fine.
18 SPECIAL REFEREE: Granted.
19 MS. JONES: When I say DLJ I mean --
20 MR. WALKER: I would join in that
21 request that I be able to call that, too.
22 MR. FOERSTER: All right. Thank you.
23 SPECIAL REFEREE: Granted. This is
24 Civil Action Number 2012-CP-20-00132. And are we
25 ready to go forward? Introduced already -- or

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1 I'll refer to that as DLJ or Quicken throughout my
2 argument today.
3 The statement of facts in the
4 Plaintiff's memorandum in support for the
5 Plaintiff's motion for summary judgment are
6 essentially the same statement of facts that were in
7 the Defendant's motion -- in support of the
8 Defendant's motion for summary judgment. And that's
9 because the facts in this case and the timeline of
10 this case really is not -- they're not in dispute,
11 so we feel that there being no iss -- no genuine
12 issue of material fact that this is a matter of law
13 that can be decided at the summary judgment level,
14 at least as to the priority of our various mortgage
15 liens.
16 So to go over the timeline very briefly,
17 the borrowers in this case are Jimmy and Laura
18 Bailey. They first gave a mortgage to Quicken in
19 the amount of \$256,550. That mortgage was recorded
20 October 20th, 2009. In our joint stipulation of
21 facts we refer to this mortgage as first mortgage
22 loan and we're trying just to be clear, this is not
23 an admission on ArrowPointe's part that this
24 mortgage is in first place.
25 Then after the mortgage to Quicken Jimmy



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1 and Laura Bailey come to my client, ArrowPointe
2 Federal Credit Union, and they get a \$99,000
3 revolving credit mortgage -- or they give a
4 revolving credit mortgage to ArrowPointe Federal
5 Credit Union. That was recorded November 4th, 2009,
6 so this is about 15 days after the Quicken mortgage.
7 It's undisputed that when ArrowPointe
8 closed this loan it expected to be in second
9 position behind the first mortgage loan to Quicken,
10 and the joint stipulation of facts call this
11 mortgage the line of credit mortgage for clarity
12 sake.
13 So the third and final mortgage in this
14 timeline is Jimmy and Laura Bailey, again they go
15 back to Quicken, they refinance their first mortgage
16 loan. We're calling this a second mortgage loan.
17 This is not an admission on DLJ's part that they
18 believe it's in second place. It's just something
19 we called it for clarity sake in the joint
20 stipulation of facts.
21 So this mortgage was in the amount of
22 \$296,000. So this was an extra \$39,450 more as to
23 the principal amount loaned on the second mortgage
24 versus the first mortgage. It's undisputed that
25 Quicken did not know about ArrowPointe's revolving

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1 the event that happened after its -- ArrowPointe's
2 mortgage that affect the lien priority between the
3 parties. The first issue that we wanted to take up
4 is equitable subrogation, that was an argument that
5 was brought forth in the Matrix versus Frazier case.
6 The Court made it clear in Matrix that
7 equitable subrogation is intended when a third party
8 is coming in and paying off an existing obligation.
9 The facts of the Matrix v. Frazier are very similar
10 to these facts and basically the Court said, no, you
11 can't be equitably subrogated to your own rights.
12 You can't stand in your own shoes by equitable
13 subrogation. So if you pay off your own mortgage,
14 you cannot maintain the first priority of your first
15 mortgage by virtue of equitable subrogation.
16 So in the dissent to the Matrix case I
17 believe it was Justice Pleicones mentions a theory
18 of replacement mortgage and that is something that
19 has been espoused by the Defendant Quicken, now DLJ,
20 essentially saying that the second mortgage that
21 Quicken did actually replaces the first. So that
22 the second mortgage gets the lien recording date of
23 the first mortgage, which would be October 20th,
24 2009, not December 15th, 2009. So that if the Court
25 accepts the replacement mortgage theory, the second

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1 credit mortgage at the time it made this loan, but
2 it's also undisputed they were on record notice by
3 virtue of ArrowPointe's revolving credit mortgage
4 having been recorded. So this -- this third
5 mortgage in the timeline was recorded December 15th,
6 2009 so we have one in October, one in November, one
7 in December. Just like that.
8 So when Quicken did the second mortgage
9 it paid off its first in that spot of the record,
10 that's undisputed as well.
11 Another -- finally, just for purposes of
12 the fact that this may be the default hearing as
13 well as to the Baileys, the Baileys -- it's
14 undisputed the Baileys are in default as to the note
15 to Quicken, now DLJ, they're in default with our
16 note as well.
17 Procedurally we note both parties have
18 filed for foreclosure against the Baileys and the
19 Baileys have not answered either complaint for
20 foreclosure.
21 So we're here today essentially arguing
22 about the priority of the revolving credit mortgage
23 or line of credit mortgage that ArrowPointe gave
24 versus the second mortgage that Quicken gave.
25 We are -- ArrowPointe argues that it's

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1 mortgage would have priority over ArrowPointe's line
2 of credit mortgage.
3 The ArrowPointe has a couple of --
4 actually about three points related to the
5 replacement mortgage theory. The first is that the
6 replacement mortgage theory is not the common law of
7 the State of South Carolina, it's not in the Code of
8 Laws, it's not statutory law. It comes from the
9 Restatement Third of Mortgages, so replacement
10 mortgage theory is not the law of the state at this
11 time.
12 Secondly, if the Court decides to adopt
13 the replacement mortgage theory, there is a big
14 exception that we feel applies in this case and the
15 exception is that there's been a change in terms
16 from the first mortgage to the second mortgage such
17 that the change in terms constitute a substantial
18 prejudice to intervening lienholders such as
19 ArrowPointe.
20 So the terms of -- so we're going to
21 look and see did the terms change. Well, we know
22 the amount advanced changed because it changed from
23 256,550 to \$296,000, so it increased \$39,450 so we
24 know those terms changed. We see -- with the joint
25 stipulation of facts we see that the closing costs

Page 10 1 went up from \$8300 to \$12,000. And so -- but mostly 2 the change in terms is related to the amount 3 advanced. 4 So then we go to, all right, does this 5 change in terms substantially prejudice ArrowPointe? 6 And it is that advance in new money that does 7 constitute a material prejudice to ArrowPointe. In 8 fact, there are statement of third -- their 9 Statement of Third Property says an increase in the 10 principal amount secured by replacement mortgage is 11 generally deemed to be materially prejudicial to an 12 intervening lienholder such as a credit union. 13 So when that happens, when there's been 14 a substantial prejudice to intervening lienholders, 15 the replacement mortgage is not entitled to the 16 priority of the mortgage that is being replaced. So 17 if you look at the credit union having lent \$99,000 18 to the Baileys on a home equity loan and you 19 consider, all right, second mortgage lenders, when 20 they are doing a home equity loan, what do they need 21 to know? Well, they need to know the amount of 22 equity in the home. And that depends on the value 23 of the home and the amount due to senior 24 lienholders. 25 So when you consider that the additional	Page 11 1 funds advanced, over \$39,000, is essentially 40 2 percent of the amount that the credit union went out 3 to the Baileys in the first place, that becomes 4 pretty clear that this is substantial and materially 5 prejudicial to an intervening subordinate 6 lienholder. 7 If -- also if you look -- I'm going to 8 switch over to public policy. There's a commentary 9 in the restatement related to replacement mortgages. 10 It basically says it's good for the public for 11 mortgage creditors to be able to freely modify loans 12 for borrowers who are troubled, whether you want 13 modify it to extend the term of the loan or you want 14 to modify it to lower the interest rate, you want to 15 modify it to lower the principal amount due, it's in 16 the public's best interest to allow mortgage 17 creditors to freely modify their mortgage loans 18 without worrying about, you know, damaging their 19 priority. 20 So in this case when you consider that 21 the Baileys are now \$39,000 more in debt by virtue 22 of this refinance it's hardly -- can hardly be 23 viewed as a workout. Especially when you consider 24 that the extra money advanced did not just go to pay 25 off prior amounts owed by virtue of whether or not
Page 12 1 they missed some payments or some taxes or the 2 mortgage creditor had to force-place insurance. 3 None of that actually went towards paying down the 4 mortgage. It was cash out to the Baileys. 5 So the public policy of trying to avoid 6 foreclosures by allowing mortgage creditors to 7 freely modify their loans, that's not going to be -- 8 that's not going to be hurt by refusing to accept 9 the replacement mortgage theory. 10 So when it comes to replacement mortgage 11 theory we -- our points are that it's not the law of 12 the state; if the Court deems that it should be and 13 the Court wants to make this the law of the state 14 then the exception within the replacement mortgage 15 theory about substantial prejudice is present here 16 such that the replace -- the second mortgage lien 17 should not be deemed to have replaced the first. 18 All right. Also, Defendant DLJ has 19 advanced an argument related to future advance 20 clauses. Essentially quoting some language in 21 Exhibit A of our joint stipulation, quoting language 22 that essentially says that this note also -- that 23 the collateral also secures this note also secures 24 renewals, extensions and modifications. And DLJ is 25 taking that opportunity to state that this	Page 13 1 constitutes a future advance clause in the mortgage. 2 I've got a Code Section 29-3-50, 3 Subsection A talks about future advanced mortgages. 4 And Subsection A essentially says any mortgage 5 creating a lien on any real estate securing future 6 advances to be made are valid from the day and hour 7 when recorded. 8 But the last part of the first paragraph 9 of Subsection A states the total amount of existing 10 indebtedness and future advances outstanding at any 11 one time may not exceed the maximum principal amount 12 stated therein, plus interest on that principal, 13 which that makes sense. The statute makes it clear, 14 a future advanced mortgage must state the maximum 15 principal that may not be exceeded. And the reason 16 why that is a requirement is so that junior 17 lienholders can pull the mortgage, read it and 18 determine the maximum amount of liability that can 19 be incurred by the borrowers under this mortgage. 20 So Exhibit A that's part of our joint 21 stipulation does not have this maximum principal 22 amount stated as such, it's not stated -- it's 23 stated as this is the amount borrowed, not this is 24 the maximum amount borrowed, or the amount borrowed 25 will not exceed this amount. It's just stated that



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1 this is the amount borrowed.
2 By contrast, if you look at the credit
3 union's revolving credit mortgage, it does contain
4 such language. It says -- and this is Exhibit I,
5 which is the credit union's revolving credit
6 mortgage. First of all, at the top in really big
7 letters it says revolving credit mortgage, which is
8 not actually required by the statute but just
9 generally a good idea.
10 Paragraph 1 states, quote: The
11 outstanding principal balance owing at any one time
12 under the credit agreement shall not exceed \$99,000.
13 So that's the type of clause that is the hallmark of
14 the future advance mortgage.
15 Finally, Your Honor, the Plaintiff asked
16 the Court to acknowledge the maxim that equity aids
17 the vigilant. Quicken, or DLJ, they were in the
18 best position to avoid disputes such as this if they
19 would employ the longstanding practice of adequately
20 searching title, pinpointing existing liens as part
21 of the closing process. Matrix essentially warned
22 us mortgage creditors not to be so cavalier in
23 handling our refinances. Had Quicken or DLJ
24 exercised industry standard level vigilance in the
25 refinancing of its mortgage loan, we wouldn't be

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1 Mortgage Capital, Inc. who, as we mentioned earlier,
2 I refer to them as DLJ, but that mortgage has been
3 assigned to a new lender which was entered today but
4 just for reference sake I will refer to DLJ.
5 Your Honor, before I get into the
6 substance of why DLJ would argue in opposition to
7 the motion for summary judgment I would like to take
8 up just a few procedural issues.
9 The matter here today has been noticed
10 for by Ms. -- by Ms. Jones for her -- for her motion
11 for summary judgment to be heard. It's also been
12 noticed by -- by her office and by my office for a
13 final hearing on the merits. Your Honor, I think
14 if -- it leaves us in a little bit of an awkward
15 procedural posture to hear a motion for summary
16 judgment but also to have a final hearing on the
17 merits. In the event Your Honor grants her motion
18 for summary judgment there would be very little, if
19 any, issues to take up at the final hearing on the
20 merits. If you deny her motion for summary judgment
21 then we, obviously, have some issues to take up on
22 the final hearing on the merits.
23 And I think it's putting us in a little
24 bit of an interesting position and also putting the
25 Court in an interesting position of potentially

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1 here today arguing about priority.
2 So even more than that, it's astounding
3 to think that if the argument that's advanced by
4 Defendant is adopted, refinancing mortgage
5 creditors -- they don't even need to conduct a title
6 search even if they're going to do a cashout closing
7 giving additional funds to -- to the borrowers. So,
8 you know, that -- that flies in the face not only of
9 the exception in the statement which has been
10 advanced, but also equity and the reality of the
11 practice that our mortgage loan practitioners use.
12 So for these reasons we believe the
13 Court should reject the replacement mortgage theory,
14 we believe equitable subrogation is not appropriate
15 at this time, and we don't think that any language
16 in Exhibit A can rightfully be deemed a future
17 advance clause to give notice to future creditors
18 that the principal is going to change on the first
19 mortgage. So we believe there's no genuine issue of
20 material fact such that the Plaintiff is entitled to
21 judgment as a matter of law, that its mortgage lien
22 is entitled to priority.
23 SPECIAL REFEREE: Thank you.
24 MR. WALKER: Thank you, Your Honor.
25 Drew Walker here on behalf of the Defendant DLJ

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1 having to rule on that. There may be some things
2 you want to take in abeyance, but I would suggest to
3 the Court that we at least proffer all of the
4 evidence for the final hearing on the merits as
5 well. I mean, my argument will be to deny the
6 motion for summary judgment so that we have a very
7 clear standard of what we're getting ourselves into,
8 not -- we've got stipulated facts.
9 You know, if you rule on the motion for
10 summary judgment that's going to be a standard in
11 the light most favorable to my client, it's our Rule
12 56 motion. Obviously we do have stipulated facts,
13 we're not having any live testimony. So we're
14 pretty much, I will concede here, arguing over the
15 law. I would suggest to the Court that the joint
16 stipulation of facts that we have in front of us,
17 everyone at this table, and that will be -- a copy
18 will be -- a signed copy will be given to the court
19 reporter as an exhibit. I would say not only to the
20 motion but as -- as to the underlying hearing on the
21 merits as well, and that joint stipulation of facts
22 will be filed with the Clerk of Court after we're
23 through here today and everybody's in agreement,
24 there's no disagreement on what it holds.
25 That joint stipulation of facts, as

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1 you'll notice, is about six -- five or six pages
2 long. It's got Exhibits A through Y in it and it
3 also has 29 or 30 stipulated facts, including
4 calculations of the debt. It is much more robust, I
5 would -- I would represent to the Court, than
6 Ms. Jones' statement of the facts in her -- in her
7 motion and memorandum for summary judgment.
8 So I think there is more for the Court
9 to weigh than what was presented to it when the
10 motion for summary judgment was filed by the
11 Plaintiff, and for that very reason alone I would
12 argue that the Rule 56 motion should be -- should be
13 denied so that the Court can fully take into
14 consideration all of those exhibits that we agree
15 are part of the record and part of the evidence.
16 Do we have any disagreement there,
17 Christy? Not as to what I'm arguing about --
18 MS. JONES: Right.
19 MR. WALKER: -- something being denied
20 but just as to the joint stipulation of facts to be
21 entered as to the record?
22 MS. JONES: Are you proposing that the
23 joint stipulation are for the sole purpose of the
24 merits, or if you want to call it the default
25 hearing and not for the purpose of the summary

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1 get into this -- the substance --
2 SPECIAL REFEREE: I think we need to go
3 ahead and hear the full summary judgment issue.
4 MR. WALKER: Hear the full summary
5 judgment, okay.
6 SPECIAL REFEREE: Yes.
7 MR. WALKER: Okay.
8 SPECIAL REFEREE: And then we'll know
9 where we're proceeding.
10 MR. WALKER: Okay. Okay. And that
11 sounds good. Thank you, Your Honor, for that --
12 that direction. Okay.
13 Moving into the substance of the motion
14 for summary judgment that the Plaintiff has brought,
15 again, we're in agreement that these -- this joint
16 stipulation is part of the record. Factually I
17 agree with most -- not every point that Ms. Jones
18 has -- has brought to the Court other than the fact
19 that all of these facts were in front of the Court
20 when this memorandum was filed or that they're
21 necessarily the basis of the motion for summary
22 judgment.
23 Certainly disagree on the legal issues
24 in how replacement mortgage has been couched. I
25 know this Court is familiar with this, having heard

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1 judgment?
2 MR. WALKER: No. No. I mean, I think
3 that -- I think that decision is up to the Court. I
4 would -- if -- if the motion for summary judgment is
5 going to be the only thing considered, I would
6 obviously want the joint stipulation weighed as well
7 within that.
8 MS. JONES: That's fine.
9 MR. WALKER: If you're okay with that.
10 MS. JONES: I think it's appropriate to
11 look at this with regard to the motion for summary
12 judgment.
13 MR. WALKER: Right.
14 MS. JONES: And, if necessary, for
15 the -- for the various merits.
16 MR. WALKER: And all those exhibits are
17 part of the record.
18 MS. JONES: I agree to that, yes.
19 MR. WALKER: Okay. So we have -- we're
20 on the same page there, which is good procedurally.
21 Now, I would argue that --
22 SPECIAL REFEREE: Let's hope that I am.
23 MR. WALKER: I hear you. And with all
24 that said do you have any -- do you want to direct
25 us in any way on how to handle this motion before I

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1 my motion for summary judgment and having denied it.
2 Again, I think things have evolved, things have been
3 stipulated to that more fully support replacement
4 mortgage, Your Honor.
5 One of those being that we've stipulated
6 that -- that my client, DLJ, did not have actual
7 knowledge of the line of credit mortgage when it
8 entered into its second mortgage transaction. That
9 was later in time than the line of credit mortgage.
10 As Your Honor well knows, equitable subrogation is a
11 longstanding legal principle that these Court --
12 that our Court has recognized.
13 This replacement mortgage theory is
14 simply an extension of equitable subrogation. I
15 think Justice Pleicones was very clear on that in
16 his Matrix opinion that the same doctrines and the
17 same analysis that apply to equitable subrogation
18 would apply most likely to just something that is a
19 matter of semantics, a different -- something with a
20 different title and the reason it has a different
21 title is because it is the same lender rather than a
22 third-party lender replacing its own mortgage.
23 Now, there's no doubt that my client was
24 on constructive record notice. The mortgage should
25 have been found. But if that was the end of the

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1 analysis, we wouldn't have this whole progeny of
2 equitable subrogation case law that dates back to
3 the 1970s. And, really, the premise that so many
4 justices have elucidated is that a simple mistake in
5 searching title should not result in a forfeiture.
6 I bring to the Court's attention, and if
7 I may I've got a memorandum in opposition to the --
8 to the motion that I'd like to submit to the Court
9 and will also file with the Court. This will be an
10 exhibit to it. (Tendering.)
11 Your Honor, the words used by Mr. --
12 Justice Pleicones in the Matrix opinion is that the
13 purpose of subrogation, which is replacement here,
14 is to prevent a junior lienholder from converting
15 the mistake of the lender into a magical gift for
16 himself. The Plaintiff does not deny that they
17 expected to be a junior lienholder when they took
18 their loan out. That is stipulated to. They had
19 that expectation and, Your Honor, this would be a
20 magical gift to them. All of a sudden they're
21 thrust into first -- first position because of a
22 mistake that Quicken Mortgage, which is now DLG,
23 made -- DLJ made by missing this in their -- in
24 their title search.
25 Your Honor, this is an exhibit, Exhibit

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1 judgment, just because something is not statutory
2 law or is a novel issue of law doesn't mean that it
3 doesn't have roots in the common law. The
4 restatements, which this is Restatement 7.6, just
5 after the recently blessed Restatement 7.3 for
6 equitable subrogation in Matrix, the restatements
7 are -- are rooted in our common law. We cited a
8 litany of cases that I would incorporate from our
9 Rule 59 motion a few years ago in this case, but one
10 of those is the Johnson verse Robert E. Lee case
11 that can be found at 401 SC 500.
12 So just because it has not been
13 explicitly blessed thus far by our appellate courts
14 doesn't mean that our trial courts shouldn't
15 recognize a doctrine that is so akin to equitable
16 subrogation and is blessed by the restatement
17 authors as common law of the State of South
18 Carolina.
19 Second and as a segue, Ms. --
20 Plaintiff's counsel did refer to the changes in the
21 terms of the two loans. And I'd like to very
22 explicitly point out that a change in the terms,
23 even if the Court was to find, which we deny but
24 argue in the alternative -- even if the Court was to
25 find material prejudice, that is not fatal to

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1 Z. Exhibits A through Y are the joint stipulation
2 of facts, Exhibit Z is an order in a very similar
3 case that was decided by Judge Dukes, the
4 Master-in-Equity in Beaufort County, where he said
5 that he believes that the common law of South
6 Carolina does recognize replacement mortgage.
7 Obviously this is not controlling law, this is a
8 trial court, but this is very persuasive law by
9 Judge Dukes who took into consideration the same set
10 of facts and a very similar set of facts in this
11 case which was also actually a Quicken mortgage,
12 they had two replaced mortgages. They -- they
13 missed it twice but, nevertheless, it shouldn't have
14 put CBC National Bank, who was a junior creditor the
15 entire time and they were actually a judgment lien
16 creditor, they shouldn't get a magical gift onto
17 themselves.
18 So Judge Dukes' in this case very recent
19 order agreed with Justice Pleicones that South
20 Carolina would recognize replacement mortgage.
21 One of Plaintiff's counsel's initial
22 arguments is that it's not common law or statutory
23 law of the state. I agree it's not statutory law of
24 the state but, just like we stated in our motion
25 to -- to amend per Rule 59, the denial of summary

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1 replacement mortgage. The comments and the rest of
2 that restatement very clearly state that it only
3 is -- it's only detrimental to the extent that there
4 was prejudice. So if our payoff of the first
5 mortgage, which was around \$257,000, if they were
6 prejudiced by us increasing the next principal
7 amount up another \$39,000, we would still have
8 priority in this foreclosure -- in this sale that
9 may be forthcoming to the extent of \$257,000. They
10 don't get to jump \$257,000 in front of the place
11 marker where they originally started out.
12 If the Court finds that there was
13 material prejudice then -- but believes that
14 replacement mortgage is the law in South Carolina,
15 then DLJ would have priority up to the extent that
16 they did not prejudice the Plaintiff and that would
17 be roughly \$257,000. That amount is very clear in
18 the payoff and the settlement statement as part of
19 the joint stipulation, and so we would argue that.
20 But, Your Honor -- and the reason we
21 argue that in the alternative and deny it is because
22 we do believe that the mortgage put junior lien
23 creditors, as the restatement authors commentate on
24 very clearly, put them on notice that the amount
25 could increase. This statute says what it says. I

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1 do not think that it stands -- having read it very
2 quickly during argument don't think -- do not think
3 it stands in -- in complete juxtaposition of what
4 the restatement commentators are saying is that
5 junior creditors are put on notice that amounts may
6 increase. And I think the language in our mortgage
7 that was also part of the public record does just
8 that.

9 And, again, can speak to equitable
10 maxims, can speak to the fact that the closing
11 attorney should have found this mortgage but, again,
12 we would not have the law that we have in this state
13 regarding equitable subrogation if we weren't trying
14 to -- if we weren't trying to prevent complete
15 windfalls to junior creditors. And I think that
16 is -- that is the case in this action. And I would
17 also just submit to the Court this memorandum in
18 opposition for consideration of the motion for
19 summary judgment.

20 SPECIAL REFEREE: Anything further?
21 MS. JONES: Yes, Your Honor. Very
22 briefly. It's stated that Quicken says they didn't
23 have actual knowledge of ArrowPointe's mortgage.
24 That's not the standard, the standard is
25 constructive notice.

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1 is distinguishable because there's no substantial
2 material prejudice to the junior lienholder in that
3 case.

4 MR. WALKER: Judge, just a brief reply
5 on those points only. Constructive notice is not
6 the standard in equitable subrogation. The only
7 thing that is fatal to equitable subrogation in
8 South Carolina is actual knowledge, actual notice.
9 We think, by extension, that actual knowledge or
10 actual notice at best in replacement mortgage is the
11 only thing that could be fatal. The commentators do
12 not even hold that actual notice or actual knowledge
13 is fatal in replacement mortgage, nor do they in
14 their restatement on equitable subrogation.
15 However, because our South Carolina courts have
16 routinely held that actual knowledge is, we think
17 that is an important fact here.

18 Constructive notice. People are
19 obviously on record of notice by virtue of recording
20 staff -- statute all the time. But in the equitable
21 subrogation, which we think is so akin to this, that
22 is absolutely not the standard.

23 In regards to Judge Dukes' order, I
24 think it's very telling of his -- how he feels about
25 future advance clauses with the same language and

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1 Also, as to Exhibit Z, which I'm reading
2 through right now as well, is distinguishable from
3 the instant case because the replaced mortgage is
4 lesser -- of a lesser amount than the mortgage that
5 was being replaced. In Exhibit Z Judge Dukes'
6 opinion states that the first mortgage was in the
7 amount of 298,650 and then Quicken's second mortgage
8 was in the amount of 296,725. So the second
9 mortgage was in a lesser amount.

10 This case is completely different than
11 our instant case. The intervening lienholder was
12 also a judgment lienholder, they're not searching
13 title before you go get a judgment or not as giving
14 rise to the cause of action that -- that gave rise
15 to the judgment. So you don't have an intervening
16 lienholder who has actually done their job, searched
17 title, determined the amount owed to prior
18 lienholders and made an affirmative decision to lend
19 \$99,000 based on the amount of equity that it
20 determines there is in the home only to later have
21 the rug be pulled out from under it that, you know,
22 40 percent of what it's liened -- what it has lended
23 has been eaten up by the first mortgage lender
24 unilaterally increasing the amount due.

25 So I believe that this Judge Dukes case

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1 mortgages in this case as there are in Quicken's
2 mortgages in our instant case. As legal analysis in
3 Section 4B says, that assuming, arguendo, that CBC
4 could suggest a weakened position through the
5 replacement transaction at issue, the publicly
6 recorded language of the original mortgage put CBC
7 on notice that future advances -- advances could be
8 made and interest rates could change.

9 So I -- he speaks to that, he rules on
10 that. He thinks that is a valid part of -- of the
11 case. Now, I think Your Honor would have to, you
12 know, obviously, take into account the language of
13 the future advance clause which is another reason to
14 deny summary judgment. You're going to have to
15 weigh those facts, the Court is going to have to
16 weigh the joint stip -- you know, the facts in the
17 joints stipulation.

18 Also I would agree with Ms. Jones that
19 there are some different facts in that case. The
20 principal amount of the third mortgage was lower
21 than the second mortgage wherein in this case it's
22 higher. But, again, material prejudice is not fatal
23 to the entire replacement mortgage theory, it's just
24 to the extent of the prejudice. Now, \$40,000 may
25 have been 40 percent of their principal amount of

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1 their loan, but it was a drop in the bucket compared
2 to the equity that is in this property that both
3 lenders has looked at. My client was \$260,000 in
4 already with these borrowers, and to the extent we
5 raised it up into the 290s and the Court determines
6 that's a material prejudice, we still believe under
7 replacement mortgage that we should get up to 260.
8 I don't have any further comments at
9 this time, Your Honor. We would argue because of
10 all of the issues in front of the Court and because
11 of the standard and the issues that we think need to
12 be weighed at a hearing on the merits that the Court
13 deny the motion for summary judgment.
14 MS. JONES: Your Honor, if I may very
15 briefly. Thank you. When we're looking at Judge
16 Dukes' opinion, and we're talking about the future
17 advance clause, if you consider the amounts due in
18 both mortgages in this opinion, Exhibit Z, the first
19 mortgage puts you on notice that it won't go above
20 298,650, which was the amount of the first mortgage,
21 and the second mortgage did not go above that
22 amount. So that, again, is -- is distinguishable in
23 this case.
24 If you want to say that the Exhibit A,
25 the first mortgage of Quicken, is a future advance

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1 MR. WALKER: Okay.
2 SPECIAL REFEREE: Yes.
3 MR. WALKER: Okay. And so the basis of
4 the ruling is going to be that South Carolina, in
5 your opinion, does not recognize the replacement
6 mortgage theory for the state --
7 SPECIAL REFEREE: That is correct.
8 Thank you. Off the record.
9 (Off-the-record conference.)
10 (EXH. AA, Affidavit of Attorney's Fees
11 and Costs for Sean Foerster, dated March
12 10, 2017, was marked for
13 identification.)
14 (EXH. BB, Affidavit of Attorney's Fees
15 for Drew Walker, dated March 13, 2017,
16 was marked for identification.)
17 (EXH. CC, Affidavit of Attorney's Fees
18 for Christy Jones, dated March 13, 2017,
19 was marked for identification.)
20 (EXH. DD, Affidavit of Non-Military
21 Service, dated March 13, 2017, was
22 marked for identification.)
23 (Off-the-record conference.)
24 MR. FOERSTER: I just want the record to
25 reflect that I am in possession -- I had offered it,

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1 clause and it says -- it sets 256,550 as the maximum
2 amount to be lent, that is not the case with the
3 second mortgage whereas with this Judge Dukes case
4 the second mortgage amount was less than the first.
5 So that bears on the future advance argument as well
6 as the material prejudice.
7 SPECIAL REFEREE: Can we go off the
8 record for just a moment?
9 MR. WALKER: Sure.
10 (Off-the-record conference.)
11 SPECIAL REFEREE: I do not see this as a
12 replacement theory case. I think it's been
13 longstanding that we are a recording state and the
14 recording has always -- in my experience and in my
15 readings has always been the top priority with care
16 taken through attorney's offices that it's just
17 critical that the notice is by recording the
18 mortgages with the Clerk of Court.
19 MR. WALKER: And you said you don't see
20 this as a replacement mortgage case. Did you mean
21 to say you don't see South Carolina as a replacement
22 recorded --
23 SPECIAL REFEREE: Correct.
24 MR. WALKER: -- state?
25 SPECIAL REFEREE: Thank you.

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1 the original promissory note of the Defendant in
2 this action. That's all.
3 MS. JONES: Your Honor, so this is the
4 default hearing of the mortgage foreclosure against
5 the Baileys.
6 SPECIAL REFEREE: Okay. Thank you,
7 Ms. Jones.
8 MS. JONES: So there's an order of
9 reference entered in this case referring the matter
10 to the Special Referee. The lis pendens was filed
11 in this case being of record March 27th, 2012, the
12 foreclosure being dated October 27th, 2009. It was
13 filed on November 4th, 2009 in the Office of Clerk
14 of Court for Fairfield in Mortgage Book 973 at Page
15 28, and it describes the property being foreclosed.
16 Summons and complaint was filed March 27, 2012, also
17 describing the same property as what is in the lis
18 pendens.
19 There are affidavits of service of
20 record filed in this case. Jimmy Eugene Bailey and
21 Laura Jean Bailey were both served on April 9, 2012.
22 JPMorgan Chase Bank was served April 9th, 2012.
23 Since this time JPMorgan Chase has assigned its
24 mortgage back to Quicken, then Quicken assigned the
25 mortgage to DLJ, and then prior to this hearing

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1 we've learned DLJ has assigned the mortgage to
2 another party and it's been assigned yet again. So
3 we will update the caption to reflect the Court's
4 order substituting another party for DLJ Mortgage
5 Capital.
6 MR. FOERSTER: Yeah. The name is -- I
7 can read it into the record. It's U.S. Bank
8 National Association not in its individual capacity
9 but solely in its capacity as Indenture Trustee for
10 WVUE 2015-1.
11 MS. JONES: Okay. So the caption will
12 be amended to reflect that. I'd also like to point
13 of record the affidavit filed with the motion for
14 order of reference showing that no defendant was in
15 the military service of the United States. Also the
16 affidavit of default as to which defendants who are
17 in default, which would be Jimmy and Laura Bailey.
18 They're in default of our mortgage -- mortgage
19 foreclosure cause of action.
20 We'd like to bring to the attention of
21 the Court the answer of the Defendant, DLJ Mortgage
22 Capital, which dispute of the priority of our
23 mortgage lien asserting that its interest was
24 superior to ours. That defense has been decided by
25 this Court's order on summary judgment granting

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1 have been given any required notice of the right to
2 cure. Proper notice of the hearing have been given
3 to the Baileys, the Baileys are not present today.
4 By prior order the Plaintiff's mortgage has been
5 determined to be a first mortgage. The following
6 junior lienholder whose priority will be determined
7 if there's surplus funds under Rule 71 would be the
8 Defendant DLJ Mortgage Capital which is being
9 substituted by -- by name of U.S. Bank National with
10 some additional information that we will take care
11 of when we change the caption as the original
12 principal amount of \$296,000. Mortgage date
13 November 23rd, 2009, recorded in the Office of Clerk
14 of Court for Fairfield County on December 15, 2009
15 in Book 977 at Page 54.
16 The Plaintiff's affidavit of debt shows
17 the mortgage debt to be as follows: The principal
18 due is \$100,105. Interest through today's date is
19 \$39,910.21. Credit union has paid force-placed
20 insurance premiums in the amount of \$5,880. Cost of
21 collection prior to the hearing in the amount of
22 \$804.76. The Plaintiff has paid for real property
23 taxes. In fact, the Plaintiff has redeemed this
24 property from the tax sale. The amount of the tax
25 the Plaintiff has paid is \$37,706.63.

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1 priority to the Plaintiff.
2 The order of reference was entered
3 September 5th, 2012, referring the case to Ms. Tolen
4 for the purposes stated in the order, including the
5 issuance of a final judgment.
6 The notice of hearing was mailed to the
7 Defendants on February 27th, 2017. The original
8 notice of hearing and the affidavit of service, that
9 notice were filed with the Court on March 3rd.
10 Your Honor, included in the joint
11 stipulation of facts with the Plaintiff's motion for
12 summary judgment is included the Plaintiff's note,
13 the Plaintiff's mortgage. The Plaintiff has not
14 assigned its mortgage. Also included is -- is
15 Exhibit 8 -- wait -- Exhibit X is the Plaintiff's
16 employee's affidavit of the amount due under the
17 note establishing the debt that's due. Exhibit CC
18 is the affidavit of attorney's fees and costs. And
19 Exhibit Y is the right to cure that was sent to the
20 Baileys on this loan.
21 Plaintiff is the present owner and
22 holder of the note and mortgage, the note and
23 mortgage are in default. The entire balance due has
24 been accelerated, proper demand has been made for
25 payment. All debtors under the note and mortgage

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1 Your Honor, we're asking for the current
2 fees and collection costs in the amount of \$2,795.
3 By affidavit this is a flat fee that the Plaintiff
4 has incurred and paid. The total debt secured by
5 the note and mortgage is \$187,201.60. Interest on
6 the debt runs at the rate of six percent through the
7 date of the sale. The Plaintiff has waived its
8 right to seek a deficiency judgment in this case.
9 MR. FOERSTER: Your Honor, Sean Foerster
10 here on behalf of the formerly known as Defendant
11 DLJ Mortgage Capital, now known as U.S. Bank
12 National Association.
13 In support of our foreclosure
14 cross-claim and counterclaim, we've offered into
15 evidence via the stipulation the following
16 documents: That Exhibit J is our promissory note
17 which, of course, I have an original with me today
18 but I'm offering into the record just a copy.
19 Exhibit L is our mortgage. Exhibit M is
20 an assignment of that mortgage. Exhibit N, O are
21 also assignments of the mortgage.
22 Exhibit V is an affidavit that bears a
23 statement of account from the mortgage servicer,
24 listing what the current debt is owed -- current
25 debt is as of today. Exhibit W is an acceleration

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1 letter from Quicken Loans to the Baileys showing
2 that they were notified of their right to cure their
3 default.
4 Exhibit AA we've offered into evidence
5 an affidavit of my law firm's attorney's fees, and
6 Mr. Walker's offered an affidavit of his firm's
7 attorney's fees as well.
8 An affidavit of default was filed in
9 this case as to the Baileys, so they are in default.
10 An affidavit of non-military service has been
11 offered into the record as Exhibit DD, showing that
12 they are not in the military record and not entitled
13 to an appointed attorney of any sort.
14 We filed a certification on October 6,
15 2016 in this case certifying that my client has
16 complied with the 2011 Administrative Order of the
17 South Carolina Supreme Court concerning foreclosure
18 intervention.
19 On our cross-claim and counterclaim
20 we're seeking a judgment of foreclosure in the total
21 amount of \$419,109.23. And that is supported by the
22 affidavit of everybody's statement of account and
23 the affidavit of attorney's fees and costs that have
24 been offered into the record.
25 Deficiency judgment is also waived by

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1 MS. JONES: Oh, I got you.
2 MR. WALKER: -- or an appeal time
3 period.
4 MS. JONES: Yes.
5 MR. WALKER: That's all I have.
6 (EXH. 1, Joint Stipulation, was marked
7 for identification.)
8 (The preceding was concluded at 11:59
9 a.m.)
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1 our client in this case. So depending on how the
2 Court -- the Court has ruled on the issue of, you
3 know, lien priority but assuming that changes in the
4 Court of Appeals, we would be seeking the next
5 available sales date thereafter. Thank you, Your
6 Honor.
7 SPECIAL REFEREE: Thank you. That
8 concludes our hearing.
9 MR. WALKER: While we're still on the
10 record, if I could ask for clarification. We've got
11 some time periods that will start running soon, I
12 believe. Are you -- is Ms. Jones going to prepare a
13 proposed order on the summary judgment ruling?
14 SPECIAL REFEREE: Yes.
15 MR. WALKER: But that -- I don't view
16 that as running today because we don't know the
17 particulars of what that order is going to say, so I
18 just wanted to -- is that everyone's understanding?
19 MS. JONES: What are you saying doesn't
20 run?
21 MR. WALKER: Just until I get notice
22 that that order has been prepared and signed that
23 that -- that time period has not run.
24 MS. JONES: What time period?
25 MR. WALKER: Either Rule 59 --

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1 CERTIFICATE OF REPORTER
2
3 I, Lori S. Mortge, Certified Court
4 Reporter and Notary Public for the State of South
5 Carolina at Large, do hereby certify that the
6 foregoing transcript is a true, accurate, and
7 complete record.
8 I further certify that I am neither
9 related to nor counsel for any party to the cause
10 pending or interested in the events thereof.
11 Witness my hand, I have hereunto affixed
12 my official seal this 24th day of March, 2017 at West
13 Columbia, Lexington County, South Carolina.
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Lori S. Mortge, CCR

Lori S. Mortge
Certified Court
Reporter, CCR
My Commission expires
December 13, 2026

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	A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO		

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HEARING

1 (Pages 1 to 4)

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS COUNTY OF FAIRFIELD) CASE NO. : 2012-CP-20-00132 ArrowPointe Federal Credit Union,) Plaintiff,) vs.) MOTION FOR SUMMARY JUDGMENT HEARING Jimmy Eugene Baily, Laura Jean) SEPTEMBER 19, 2013 Bailey, and JPMorgan Chase Bank,) Defendants.) Motion for Summary Judgment Hearing, reported by Frances C. Moyd, Court Reporter and Notary Public in and for the State of South Carolina; before the Honorable Carol A. Tolen, Special Referee for Fairfield County, at the offices of Coleman, Tolen and Swearingen, LLC, 120 West Washington Street, Winnsboro, South Carolina, on Thursday, the 19th day of September, 2013, commencing at the hour of 9:37 a.m.	INDEX PAGE Proceedings 6 Certificate of Reporter 51 Word Index ***** EXHIBITS EXHIBITS: IDENTIFIED AT PAGE: (None proffered.) Court Reporter's note: -- indicates interruption; incomplete phrases; unfinished sentences
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APPEARANCES: Representing the Plaintiff: CHRISTY C. JONES, ESQUIRE SHERPY & JONES, P.A. 921 State Road S-32-68 Lexington, South Carolina 29072 CCJ@sherpy-jones-law.com Representing the Defendant: DREW B. WALKER, ESQUIRE ROGERS LEWIS MANN AND QUINN, LLC 1330 Lady Street Suite 400 Columbia, South Carolina 29201 dwalker@rogerslewis.com	THE COURT: Are we prepared to go forward? This is a Summary Judgment Motion with ArrowPointe Federal Credit Union v. Jimmy Eugene Bailey. Are we set? MR. WALKER: Yes, Your Honor. THE COURT: Okay. Glad to hear from you. MR. WALKER: Thank you, Your Honor. Drew Walker here on behalf of the defendant, J.P. Morgan Chase Bank, who has actually sold the loan back to Quicken Mortgage, and I can go into the procedural issues of that in a little bit. But for all intense and purposes, I represent the defendant bank here, J.P. Morgan Chase. This is a mortgage foreclosure that's brought by the plaintiff, ArrowPointe Federal Credit Union. And there are two mortgages at issue here. And as Your Honor has stated briefly, this is a mortgage priority issue. My client, the defendant bank, Quicken Mortgage, has brought a Motion for Summary Judgment under the replacement mortgage theory, asserting that it has priority, or in essence is a senior mortgage to the plaintiff's mortgage, which we contend is junior to our mortgage. And if I may, I'm going to tell you a little

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1 bit about the facts of this case and why we
2 believe that. The defendants, Jimmy Eugene
3 Bailey and Laura Jean Bailey are mutual borrowers
4 of both the plaintiff bank and the defendant
5 bank. Just to take you way back to the
6 beginning, I believe that when they purchased
7 this property here in Fairfield County, South
8 Carolina, I believe that they purchased it in
9 2001 and took out a mortgage from a company
10 called Bowater. That mortgage was paid off down
11 the road in February of 2009 by a mortgage from
12 my client, Quicken Mortgage. Neither of those
13 mortgages are in the picture anymore.

14 A little later in 2009, in October of 2009,
15 there was a Quicken Mortgage, and Quicken's
16 mortgage paid off it's February 2009 mortgage.
17 This October of 2009 Quicken Mortgage is the
18 mortgage that we contend establishes our priority
19 in this case. It was a senior mortgage at the
20 time, in October of 2009, when it was recorded it
21 was the only mortgage on the property. That fact
22 is undisputed, as are, I believe, all of the
23 facts in the case. I don't believe we have any
24 factual issues that are being argued over. I
25 think plaintiff's counsel alludes to that in

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1 their memo. This is surely a legal issue of
2 priority, which is why I think summary judgment
3 is appropriate at this time, Your Honor.

4 After October of 2009, one month later, a
5 mortgage for a line of credit was given by the
6 Plaintiff to the Defendants. It was a junior
7 mortgage. The Defendants admit in their memo
8 that they expected it to be a junior mortgage.
9 It was for repairs and additions to the home.
10 And it was a much smaller mortgage from a
11 monetary standpoint, I believe where in the
12 \$99,000 range.

13 The October of 2009 mortgage, importantly,
14 was a \$256,500 note, which is the amount that
15 appears on the mortgage as well, in addition to
16 interest. In the October of 2009 mortgage, there
17 are also in the transfer of rights in the
18 property, it states that the -- the mortgage will
19 secure all renewals, modifications and additions
20 to the note. So we argue that that puts in the
21 public record the fact that the amount of the
22 mortgage can increase. That should have been
23 known, or was known, to the Plaintiff when they
24 decided to give a second mortgage, the home
25 equity line of credit mortgage in November of

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1 2009.

2 Shortly after the November of 2009 mortgage,
3 Quicken refinanced its October of 2009 mortgage
4 and we argue that that December of 2009 mortgage
5 replaced the October of 2009 mortgage.

6 THE COURT: So we're calling this a refinance?

7 MR. WALKER: I will concede that it is a
8 refinance.

9 THE COURT: Okay.

10 MR. WALKER: It certainly refinanced the October
11 of 2009 mortgage. Now that does not mean, as I
12 think Defendant was arguing in its memo, that
13 this is not a replacement mortgage. I think
14 essentially replacement mortgages do refinance
15 the prior mortgage that they replace. Here's
16 what it was, it was a mortgage that paid off the
17 October 2009 mortgage. We got a HUD settlement
18 statement in the record that clearly shows that
19 it was paid off. And again, that fact is not
20 disputed. It paid off roughly the amount of
21 \$257,000. On the settlement statement, that
22 number is shown. So that is -- as the October
23 2009 mortgage shows, that's the \$256,500, plus
24 interest. That exact amount, Your Honor, is
25 257,000 --

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1 THE COURT: I saw your HUD.

2 MR. WALKER: Yeah. -- \$257,459.04. And so
3 December 2009, a mortgage for the face amount of
4 \$296,000 is recorded in the public record. It
5 also has a transfer of property rights and shows
6 that, you know, that number can be increased.

7 When Quicken put its replacement mortgage on
8 the record in December of 2009, it did not have
9 any knowledge or it did not have any actual
10 knowledge that the intervening mortgage had come
11 in and been placed on the record. That's in my
12 client's affidavit. However, I do not think
13 that's an important fact for us to get into here
14 today because under the replacement mortgage
15 theory, which I'll go into in more detail in a
16 moment, that's really not a -- that's not a
17 factor that's important or even mentioned.

18 I think it would -- the purpose of the
19 replacement mortgage theory is to allow senior
20 mortgage lien holders to have the flexibility to
21 enter into transactions with their borrowers, so
22 that they're not crippled in a tough market so
23 that they're not put in a position where they are
24 complete stuck and have to make the choice, the
25 tough choice of whether to foreclose or not. It

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1 allows them needed flexibility to enter into 2 these replacement mortgage transactions without 3 having to have the express permission of a junior 4 lien holder that's come in subsequently. 5 That is what I believe the Plaintiff is 6 arguing is that, hey, we needed to be involved in 7 this conversation. We needed to provide our 8 explicit permission to do this. We needed to 9 provide a legal written subordination before this 10 could be done. That's simply not the case, Your 11 Honor. Case law is very clear that that is not 12 the case in jurisdictions that have recognized 13 replacement mortgage. That is certainly not the 14 case in the restatement that outlines the 15 replacement mortgage theory and we look at some 16 of those specifics. And I've brought a copy of 17 the restatement here today, which is not 18 included, other than just being referenced. All 19 of the highlights are consistent throughout these 20 -- 21 THE COURT: Thank you. 22 MR. WALKER: -- just for your reference. Your 23 Honor, one other fact just to bring a light 24 before we delve into the law here. I think it's 25 important to note that the expectation of the	1 that replacement mortgage is another doctrine 2 that is favored in South Carolina and certainly 3 favored elsewhere. 4 And what the replacement mortgage allows you 5 to -- here's the rule, if I can beg the Court's 6 indulgent for a moment and read it. It's the 7 first highlighted portion of this restatement. 8 It says, (As read): If a senior mortgage is 9 released of record -- in our case, that would be 10 the October 2009 mortgage -- and as part of the 11 same transaction is replaced with a new mortgage 12 -- which would be the December 2009 Quicken 13 mortgage -- the latter mortgage retains the same 14 priority as its predecessor. There are two 15 exceptions. One, to the extent that any change 16 in the terms of the mortgage or the obligation it 17 secures is materially prejudicial to the holder 18 of a junior interest in the real estate, or to 19 the extent that one who is protected by the 20 Recording Act acquires an interest in the real 21 estate at the time the senior mortgage is not of 22 record. 23 Let's start with that second exception 24 first. I don't believe that that is at issue 25 here. The October 2009 mortgage was of record
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1 Plaintiff was to be in a junior position when 2 they put their mortgage on the record, when they 3 entered into this transaction with the Baileys. 4 That position did not change for a full two 5 years. They didn't realize until July of 2011 6 that this replacement mortgage existed, so they 7 still had the expectation, until they realized 8 two years down the road, they thought they were a 9 second mortgage. Then they realized, hey, we are 10 actually recorded prior to this December 2009 11 replacement mortgage by a month. So we're first 12 in time. We think we're prior. So goes my 13 explanation of their argument. 14 And Your Honor, as we all know, we're in a 15 race notice state here. The first one to the 16 courthouse that records typically has priority. 17 That's the baseline, Your Honor. There are many 18 exceptions, as we all know, to that baseline 19 rule. We've got equitable subrogation, which has 20 been a doctrine here for a very long time in 21 South Carolina. We've got purchase money 22 mortgage doctrines. We have bonafide purchasers 23 for value without notice doctrines. All of those 24 trump the baseline rule of first in time always 25 wins. That's simply not the case. We believe	1 when the December 2009 mortgage replaced it, and 2 that was part of this same transaction. I don't 3 believe that the Plaintiff is disputing that. I 4 do believe that -- I do anticipate that the 5 Plaintiff will dispute the material prejudicial 6 exception. 7 And let me tell you the two reasons why I do 8 not believe that the junior mortgagee here was 9 materially prejudiced. First, because the 10 mortgage states clearly that the mortgage secures 11 any renewals, additions or modifications which 12 puts the junior lien holder on notice as a matter 13 of public record, that the amount of the mortgage 14 can increase. So it puts them squarely on notice 15 that it can increase. There's some illustrations 16 in this restatement that we'll go through in a 17 moment that clearly outline the situation that we 18 have here, Your Honor, and it says that the 19 replacement mortgage will retain priority. And 20 if the junior mortgagee is on notice through the 21 public record that that amount can increase, then 22 it can increase. So that is the first argument. 23 Now, if the Court were to determine that 24 that is not a good argument, that our mortgage 25 doesn't say that, or that's unfair or penal to

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1 the junior mortgagee. It is very clear in the 2 illustrations in this restatement that, okay, the 3 junior mortgagee is still junior, up to the 4 amount that they had notice of. So up to the 5 amount of \$256,500 plus interest. 6 Let's take a quick look at that 7 illustration, if I can beg the Court's indulgence 8 one more time, just to look at that. You'll find 9 that on Page 4 of 15, in the top right-hand 10 corner. 11 THE COURT: Which page, please? 12 MR. WALKER: 4 of 15. 13 THE COURT: Thank you. 14 MR. WALKER: At the bottom, you see the first 15 illustration. And I will paraphrase what this 16 illustration says, and then we'll look 17 specifically at the second illustration that 18 talks about that the mortgage is only to the 19 extent of the difference. Let me explain a 20 little better than that. In this illustration, 21 we have a mortgagor who borrows \$50,000 from 22 Mortgagee 1. They give a promissory note to 23 Mortgagee 1, secured by a mortgage on Black Acre. 24 There's a fixed rate of interest to pay it over 25 15 years. The mortgage is immediately recorded.	1 that they refinanced is did they have a 30 year, 2 previously, mortgage and they're refinancing to a 3 20 year? 4 MR. WALKER: No, Your Honor. They did not change 5 the term or the duration. 6 THE COURT: I'm having trouble understanding why 7 they would do that, why they would -- 8 MR. WALKER: I think this is just to illustrate 9 that in the first instance it was 15 years, in 10 the second instance it was amortized over 20 11 years. And the premise of this restatement is 12 that it's not materially prejudicial to extend 13 the time, if the rate and the principal amount 14 are the same. That's really not germane to our 15 situation here because it was the same amount of 16 time of amortization, plus two months, I guess -- 17 THE COURT: Okay. 18 MR. WALKER: -- October to December. What is 19 germane, according to the restatement, is if the 20 principal amount is changed. The principal 21 amount here was clearly changed from 256,500 to 22 \$290,096 in the December 2009 mortgage. 23 What happens in that case? And that's what 24 Illustration 2 -- and this will just take one 25 second -- and we're still on the -- still on the
Page 14	Page 16
1 So in our instance, that would be the October 2 2009 mortgage. 3 After that, the mortgagor borrows \$10,000 4 from Mortgagee 2. That would be the Plaintiff in 5 this case in their November 2009 mortgage. That 6 mortgage is promptly recorded. Two years later, 7 the balance on Mortgagee's 1 mortgage is \$49,000, 8 so they have made a thousand dollars worth of 9 payments, and Mortgagee 1 and mortgagor agree to 10 a replacement mortgage. Mortgagee 1 releases 11 it's original mortgage of record, the October 12 2009 mortgage, and mortgagor delivers to 13 Mortgagee 1 a new promissory note for \$49,000, 14 secured by a mortgage on Black Acre. The 15 mortgage obligation carries the same fixed rate 16 of interest as its predecessor and is evenly 17 amortized over 20 years this time. A few days 18 later, Mortgagee 1 records the replacement 19 mortgage. So it gives them a few days to record 20 it in this illustration. 21 The latter mortgage is senior to Mortgagee 22 2's mortgage. The replacement mortgage, our 23 December 2009 mortgage, is senior verbatim to 24 Mortgagee 2's mortgage. 25 THE COURT: Well let me ask you this. The reason	1 first page. There's a No. 2. It starts with the 2 sentence, (As read): The facts are the same as 3 Illustration 1. So the facts are the same as 4 Illustration 1, except that the replacement 5 mortgage delivered to Mortgagee 1 secures a 6 \$60,000 obligation. So they've increased it from 7 50 to 60. 8 THE COURT: Okay. 9 MR. WALKER: Mortgagee 1's replacement mortgage 10 is senior to Mortgagee 2's mortgage, except to 11 the extent of \$11,000 and interest accruing 12 thereon. So they are still senior to the 13 mortgage to the extent of \$49,000, which is the 14 amount that the replacement mortgage paid off. 15 So that's how you establish what the priority is, 16 the amount that the replacement mortgage paid off 17 of the replaced mortgage. 18 THE COURT: Okay. 19 MR. WALKER: That amount is the \$257,000 amount 20 in the HUD. We believe that there is no question 21 if the Court finds that the replacement mortgage 22 is a doctrine that would be favored in South 23 Carolina, that we have priority up to the amount 24 of \$257,000 and some change, as it stated on the 25 HUD. We think there is a very good argument

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1 because of the language in the original mortgage 2 that they were on notice that the entire amount, 3 that that amount could increase and therefore, 4 our entire mortgage is a first lien priority. 5 Practically speaking, if the Court agrees 6 with us here today and the Plaintiff is 7 recognized as a junior mortgage, even if it's 8 only to the extent of \$256,000, then their 9 foreclosure moves forward, subject to our 10 mortgage. And they can only sell the property at 11 a judicial sale to somebody that buys it subject 12 to our mortgage. 13 So that addresses the material prejudice 14 argument, I believe, that the plaintiff wants to 15 make. But, Your Honor, you know, from a 16 practical standpoint, I think the replacement 17 mortgage doctrine in the restatement hits the 18 nail on the head. If you turn it back to Page 2 19 of 15, you'll see comments down at the bottom. 20 It's the front page, the introductory note at the 21 bottom, it says, (As read): replacement of 22 senior mortgages is commonplace. 23 If you flip to the next page in the second 24 full paragraph -- and after that statement they 25 go into some illustrations in the construction	1 that senior mortgagee's and their borrowers need 2 flexibility, especially in times like these, in 3 order to not go into foreclosure. And the 4 restatement's very clear that junior mortgagees 5 are actually put in a better situation so they're 6 not -- by allowing this flexibility, so that 7 they're not at the mercy of the senior mortgagee, 8 having to foreclose and foreclosing on their 9 interest as well. 10 It also speaks to the fact that future 11 advances, if there is a term about future 12 advances or a term that puts the junior mortgagee 13 on record notice that the amount of the mortgage 14 can increase in the replaced mortgage, that they 15 should be on notice that a replacement mortgage 16 could have a higher amount. And you have to look 17 at the terms of the mortgage. 18 In the transfer of rights property section, 19 in our mortgage, again, it clearly states that 20 additions, modifications and extensions will be 21 secured by the mortgage. And that illustration 22 -- and I'm not going to go into it into the 23 detail I went into this other one -- is on Page 5 24 of 15, or page -- it's the fourth page in our 25 handout, and it's Illustration No. 5. It should
Page 18	Page 20
1 lien industry. But if you turn to the second 2 page and you see the second paragraph, it says 3 (As read): that requiring the consent of the 4 holders of junior interest for such transactions 5 might deny the party's needed flexibility in 6 dealing with changing economic and business 7 conditions. This section aims at resolving those 8 problems in a manner that protects the legitimate 9 expectations of the holders of junior interest, 10 while at the same time, denying them ability to 11 veto workouts or other flexible restructuring 12 arrangements between mortgagor's and senior 13 lenders. 14 Well, what were the Plaintiff's 15 expectations? They expected to be a junior 16 mortgage at least to the amount of \$256,500, plus 17 interest. Has that expectation changed? No. 18 Should it change just because a mortgage was 19 replaced by the senior mortgagee? The answer to 20 that is no. They seem to insinuate in their 21 affidavit that they should have had veto power to 22 veto this work out. And only by a legal 23 subordination should the senior mortgagee and its 24 borrower been able to refinance and replace this 25 mortgage. The restatement says no. It's clear	1 be highlighted. And it goes through a situation 2 where the replaced mortgage or the October 2009 3 mortgage is for \$15,000, but the mortgage states 4 that (As read): this mortgage shall secure all 5 future loans or advances made by mortgagee to 6 mortgagor. The obligation is due, it's recorded. 7 A second mortgage for \$10,000 comes in 8 that's promptly recorded. Then a year later, the 9 October 2009 mortgage, or Mortgagee 1, agrees to 10 restructure their loan agreement and agrees to 11 lend an additional \$20,000, double the amount of 12 the first loan, so it's up to \$35,000. You got a 13 new promissory note for \$35,000, carries the same 14 interest rate, and the new principal amount is 15 increased. The mortgage promptly recorded. And 16 you see here in the illustration that Mortgage 17 1's \$35,000 mortgage is senior to Mortgagee 2. 18 In my Motion, as an attachment to the 19 Affidavit of Laura Miller from Quicken Loans, we 20 have the October 2009 mortgage. If you turn to 21 the page that says transfer of property rights, 22 it's on Page 22 of 24, says (As read): this 23 security instrument secures to lender the 24 repayment of the loan and all renewals, 25 extensions and modifications of the note.

Page 21	Page 23
1 Clearly puts the Plaintiff and any junior lien 2 holders on notice that the amounts can increase. 3 That's what we're arguing. 4 THE COURT: Let me make sure I'm -- no, I'm -- 5 MR. WALKER: Sure. 6 THE COURT: -- fine with that. I'm understanding 7 the replacement, your argument there. 8 MR. WALKER: Sure. 9 THE COURT: But I'm thinking in terms of just a 10 standard title search, how would the junior lien 11 holder know that any terms or conditions may have 12 changed? 13 MR. WALKER: The restatement states that because 14 this mortgage, which as a matter of undisputed 15 fact, was on record when they took out their -- 16 THE COURT: Junior. 17 MR. WALKER: -- their junior, that this language 18 puts them on notice that those terms can change. 19 And I do not believe that the restatement, you 20 know, speaks to that -- I don't believe that it 21 illustrate that they need to be aware that those 22 terms change, as long as they're put on notice. 23 And they made a decision whether to put a second 24 mortgage on the property or not. That decision 25 was subject to this record notice that terms can	1 this point in South Carolina, has been allowed 2 for lenders who refinance their own loan to 3 retain priority. 4 The restatement about replacement mortgage 5 is Section 7.3. The replacement about equitable 6 subrogation in the restatements is Section 7.6. 7 Section 7.6 says that (As read): A lender who 8 refinances its own loan cannot be subrogated to 9 its own priority position. Instead, that's a 10 replacement mortgage theory. And the theory 11 there is that you can't be subrogated to your own 12 position. You can replace your own position, you 13 can modify your own position, but you can't be 14 subrogated to your own position. 15 Supreme Court and Matrix said, I think 16 they're right. We're looking at the restatement. 17 We like what the restatement says in 7.6. We are 18 going to adopt that and we don't think that a 19 lender who refinances its own mortgage can be 20 equitably subrogated to that position. 21 Now we also realize that the replacement 22 mortgage theory is out there. The Petitioner, or 23 the Plaintiff in this case, did not plead 24 replacement mortgage so we're not going to speak 25 to that. And basically, you know, I think they
Page 22	Page 24
1 change between the mortgagor and the mortgagee 2 and they don't necessarily have to be involved in 3 that conversation. So when they made that 4 decision, they made it subject to the terms that 5 were on public record. That's the way, I 6 believe, that the restatement's argument goes in 7 that situation. And again, to the extent that 8 the Court does agree with the restatement in that 9 regard or to my argument in that regard, I don't 10 think that there's any question that they were on 11 notice that up to the amount of \$257,000, there's 12 a senior mortgage out there. 13 Let's talk a little bit about this 14 restatement third and the replacement mortgage 15 theory in South Carolina and why we think it 16 should be favored. I think it's fair to say that 17 the replacement mortgage doctrine has not been 18 wholesale adopted in South Carolina. I do not 19 think that this issue has been presented to the 20 Court. 21 Now recently in the Matrix argument, in the 22 Matrix cases, which was attached to the 23 Plaintiff's memo, we see some talk about 24 equitable subrogation. Now equitable subrogation 25 is essentially the same doctrine, and up until	1 insinuate that that is the appropriate way to 2 rule. In Justice Pleicones' dissent, he very 3 clearly says, obviously, replacement mortgage is 4 the theory that the majority thinks should have 5 been used, and I think it's pretty tough medicine 6 to penalize somebody for not pleading something 7 that's never been adopted in South Carolina. But 8 clearly, the majority wants to adopt it and, you 9 know, he says -- 10 THE COURT: What year is that case? 11 MR. WALKER: This is 2011. This is a recent 12 case. It deals a lot with the unauthorized 13 practice of law and a lender who doesn't use an 14 attorney to refinance his own mortgage. But it 15 also speaks very importantly to this equitable 16 subrogation and replacement mortgage issue. 17 I'll tell you what the majority says first. 18 They say, (As read): Matrix is not asserting 19 priority under a theory of replacement and 20 modification. They say they expressly pled 21 equitable subrogation in its reply. Section 7.6 22 of their statement says that, (As read): A 23 lender who refinances its own debt is not 24 entitled to equitable subrogation. Says, (As 25 read): We do not decide whether a lender that

Page 25	Page 27
1 refinances its own debt could attain priority 2 under the theory of replacement modification 3 illustrated in Section 7.3 of the restatement, 4 which is what we're looking at here today. And 5 presumably, that's because Matrix did not assert 6 priority under that theory, so the Court doesn't 7 make the decision. 8 Justice Pleicones, in his dissent, says that 9 (As read): It appears that the majority would 10 agree with me that a refinancer has a right to 11 lien priority if that refinancer uses the theory 12 of replacement and modification rather than 13 equitable subrogation. Heretofore, South 14 Carolina has used the doctrine of equitable 15 subrogation restore or refinances lien priority. 16 I would not reverse this order because it used 17 this theory rather than the newly announced 18 replacement and modification rule. This majority 19 would punish the respondent in the case for 20 failing to anticipate the majority's decision to 21 alter the theory under which respondent pled, 22 proved, obtained the result. 23 I am glad that my client is not in the 24 Matrix position. We have this case law in front 25 of us and have pled replacement mortgage. We	1 tell, and it is being looked at closely by our 2 Supreme Court, and I think they are ready to 3 adopt it. I think it's a good fit. I anticipate 4 from the memo that the Plaintiff's counter 5 arguments is that they needed to get express 6 permission and that because they're first in 7 time, they automatically win. 8 For the reasons I've stated, I think those 9 are not valid arguments in this case under this 10 doctrine of the law. Again, I think we're on the 11 same page as far as the facts go. That was 12 admitted in the Plaintiff's memo that the facts 13 are undisputed and that we're arguing the law. 14 And that's why I think this case is ripe for a 15 ruling of summary judgment, at least to the 16 extent of \$257,000. 17 Your Honor, I think it's very telling in the 18 Plaintiff's affidavit that they filed with their 19 memo, Mr. Price's affidavit, that they recognize 20 that even if they were materially prejudiced, 21 they were only materially prejudiced to a certain 22 extent. Mr. Price, in his affidavit in the very 23 last paragraph, Your Honor, states the following, 24 (As read): The refinance, the replacement 25 mortgage damaged the Credit Union's equity
Page 26	Page 28
1 think the Court would clearly adopt it. In South 2 Carolina, when there's no controlling statute or 3 case law, the Court oftentimes looks to the 4 restatements. They look to the restatement and 5 the equitable subrogation theory. They mentioned 6 the replacement mortgage. I think they would 7 adopt wholeheartedly the replacement mortgage, 8 just as Nevada, New Jersey, New York, Washington, 9 -- I've got cases from all these states that 10 have adopted these theories. I have not found a 11 single jurisdiction that has said that the 12 replacement mortgage theory or idea does not make 13 sense in our state. I suppose it could be out 14 there, but I have not located that in a national 15 search. I believe that some states, you know, 16 still rule that equitable subrogation is 17 available to a lender who refinances its own 18 mortgage, and that's simply why they don't have 19 replacement mortgage case law yet. 20 But it's very clear that this is the 21 majority opinion. This is the opinion approved 22 by the restatements. And, frankly, this opinion 23 that my client and I think very squarely falls in 24 this case and should be upheld. It's favored 25 pretty much across the nation, from what I can	1 position by \$38,540.96. I can state that the 2 Credit Union would not have approved this 3 refinance, which was recorded in December of 2009 4 and would not have signed a subrogation 5 agreement, had one been presented to it. 6 Now again, the senior mortgagee is not 7 required to get a subordination agreement. 8 They're not required to enter into that. But he 9 states that that number, \$38,540.96, is the 10 balance between \$296,000, the replacement 11 mortgage face amount, and \$257,459.04, which is 12 the amount that's on the HUD statement, which is 13 the amount that my client actually paid to have 14 this mortgage replaced. And for a junior lien 15 holder to come in and be able to turn the tables 16 and have its mortgage prior, you know, senior to 17 that amount would be just a windfall. 18 And I think that's why the restatement has 19 stated this so clearly, why it's gone through all 20 of these illustrations of how this works out. 21 And I think a decision is before the Court of 22 whether to grant a replacement mortgage in the 23 amount of \$296,000 or whether to grant us senior 24 priority in the amount of \$257,459.04. Again, I 25 would argue that it's the higher amount because

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1 of the language in the October 2009 mortgage. In 2 any event, I think it puts this foreclosure on 3 the track to, if the Plaintiff wants to continue 4 to go forward with it, that it will be sold 5 subject to our mortgage. 6 Your Honor, we are asking for a ruling to 7 that affect, that any sale by the Plaintiff of 8 this piece of property will be subject to our 9 mortgage, in asking for a decision on the 10 replacement mortgage theory, which I think very 11 cleanly and nicely fits into this situation and 12 the facts at-hand. I appreciate your time and 13 your attention on this and that's all we have 14 right now. Thank you very much. 15 THE COURT: Thank you. Be glad to hear from you, 16 ma'am. 17 MS. JONES: Christy Jones, for the Plaintiff, 18 Your Honor. I am going to try to refer to the 19 Plaintiff as the Credit Union. 20 THE COURT: Thank you. 21 MS. JONES: I'm going to try to refer to the 22 Defendant as the Bank. 23 THE COURT: Okay. 24 MS. JONES: Or maybe Chase or Quicken. 25 THE COURT: Okay.	1 borrowers, cash in hand, as a result of the 2 December mortgage of 2009. So that much is 3 clear. And that fact alone, you know, we can 4 call the December mortgage a work out. We can 5 call it a modification to help them out or 6 whatever. But the additional money makes it a 7 refinance, which that much has been conceded 8 anyhow by Chase. So it's the advance of those 9 new funds that makes this a refinance. 10 A refinance and a modification are distinct 11 from each other. When you talk about a 12 modification, you're talking about an agreement 13 between a lender and a borrower to either lower 14 the interest rate or extend the term of the loan, 15 which will in affect lower the payments, right? 16 Or even modifications have been said whereby the 17 lender agrees to reduce the principal balance. 18 When you talk about modifications, you are 19 talking about a lender who is trying to keep a 20 borrower in that property, versus foreclosing. 21 So the law looks favorably on modifications. 22 It's something that, you know, is in everyone's 23 best interest and it's something that if you do a 24 modification, you're not risking your priority 25 for that reason. But the moment you advance new
Page 30	Page 32
1 MS. JONES: I will try to refer to them 2 consistently, to help make my argument more 3 clear. Counsel for the bank is indeed correct 4 that the time line is essentially not in dispute. 5 The time line regarding the series of mortgages 6 that the Baileys gave to the two different 7 lenders is of public record, well set out, and 8 we're not about to argue about the time line of 9 the mortgages. 10 What the dispute is about is the legal 11 affect of Chase's, or the Bank's, very last 12 mortgage. When they took that out, what was the 13 affect of that mortgage. Clearly, the Credit 14 Union, when we took our mortgage from the 15 Baileys, we did expect to be in second position 16 because we performed a title search and we were 17 well aware of the bank's prior mortgage. And as 18 junior lien holders typically do, we make a 19 decision about how much we will lend, based on 20 the value of the home and the balance due to the 21 first mortgage lender. So that all goes into the 22 equation as far as the Credit Union is concerned. 23 So it's clear, and if you look at the 24 settlement statement which has been attached, 25 over \$26,000 was advanced to the Baileys, the	1 funds, you're talking about a refinance and 2 you're back into the race notice rule that South 3 Carolina has adopted and is the current law of 4 this state. 5 Matrix case is a landmark case. It's right 6 on all fours with the facts of this case. So 7 Matrix essentially, you know, ruled in favor of 8 the Plaintiff, ruled in favor of the junior lien 9 holder who was prejudiced by the first mortgagee 10 doing another mortgage. And so the facts of 11 Matrix are right on all fours with this case and, 12 you know, hold for the Credit Union, essentially. 13 And, you know, I have to take some 14 exception. Replacement mortgage theory is 15 absolutely not favored in South Carolina. A 16 suggestion that that theory is favored in South 17 Carolina is probably being a little ambitious 18 about the replacement mortgage theory. It's not 19 recognized in South Carolina. Matrix, Court did, 20 you know, sort of give a little bit of a 21 footnote, hey, you could have tried the 22 replacement mortgage theory, but that suggestion 23 does not indicate that it would have been 24 favorably ruled upon. Certainly, Justice 25 Pleicones likes the idea of it, and that much is

Page 33 1 clear form his dissent opinion. But an assertion 2 that the replacement mortgage theory is favored 3 in South Carolina is probably not exactly as 4 accurate. 5 Another point that we make out is that the 6 December 2009 mortgage that we're complaining 7 about, it was not closed by an attorney. 8 Obviously had it been closed by an attorney, 9 there would have been a title search done, they 10 would have figured out about our lien and we 11 wouldn't be here today. This all would have 12 worked out. We would have either said no, 13 absolutely not. The Baileys are in, you know, 14 they're borrowing too much money, we don't 15 approve of the \$26,000 advance. If you want to 16 lower their interest rate, if you want to extend 17 the term to help the Bailey's, you know, perform 18 under the first mortgage, great; we'll sign that. 19 But we are not letting them get themselves into a 20 deeper hole. We're not going to let them dig 21 themselves into a deeper hole, which is exactly 22 what happened and exactly why we're in 23 foreclosure in the first place. 24 In the Wachovia Bank case that we cited in 25 our memo, Wachovia versus Coffey, there's a lot	Page 35 1 not good. It wouldn't be good case law and I 2 just don't think that a replacement mortgage 3 theory would prevail in a mortgage that was not 4 closed by an attorney. You know, Wachovia's 5 conducting an unauthorized practice of law. 6 And I wanted to also -- a little bit was 7 made of some of the theories by which you can 8 knock holes into the race notice statute of South 9 Carolina. The Defendant is not asserting the 10 purchase money mortgage doctrine. The 11 Defendant's not asserting equitable subrogation 12 doctrine because Matrix shot that out of the 13 water. You know, so obviously, that's not 14 available to the Defendant to assert. And those 15 doctrines have been upheld. You know, purchase 16 money mortgage doctrine has been upheld by case 17 law, but the replacement mortgage doctrine has 18 not. 19 I also want to point out the language in 20 Chase's October 2009 mortgage, that it's inferred 21 that they could add to the principle willy-nilly, 22 based on the statement in the mortgage that says 23 that the property secures the loan plus all 24 renewals, extensions and modifications. That's 25 what it says, renewals, extensions and
Page 34 1 of language about the fact that Wachovia did not 2 employ an attorney to handle the closing and, 3 therefore, all these problems arose and now 4 Wachovia wants, you know, for the Court to bail 5 them out, when the Court has repeatedly stated 6 that they want attorneys to close mortgage loans. 7 THE COURT: Isn't that the Byars case? 8 MS. JONES: In the Byars case, I mean from -- I 9 mean, that was prior to -- and that was in the 10 1990s, I think. The Byars case has been around 11 for a long time. So there's a lot of language in 12 the Wachovia versus Coffey case, where the Court 13 pretty much tells Wachovia, look, you made this 14 decision to proceed without an attorney, which 15 has caused all these problems, and now we're not 16 bailing you out. 17 So, you know, maybe there is place for the 18 replacement mortgage theory in South Carolina. 19 You know, it doesn't -- especially when you look 20 at some of the examples, it doesn't strike you as 21 abundantly unfair, the mortgage theory doctrine. 22 But the test case for mortgage theory for 23 replacement mortgage is not a mortgage that was 24 closed without counsel. That's going to set it 25 up for all sorts of problems later, and that's	Page 36 1 modifications. It doesn't say additions. So, 2 you know, we've already stated this isn't a 3 modification; it's a refinance because of the new 4 money being advanced so modifications is knocked 5 out. 6 An extension would be -- in my mind, an 7 extension is when you extend the term of the 8 mortgage to potentially help the borrower out. 9 So it wouldn't be an extension. In a renewal, 10 you know, again, you get to this point where if 11 you're doing a renewal, you're not advancing new 12 funds under a renewal. So, you know, the October 13 2009 mortgage that is supposed to put us on 14 notice that Chase can just increase the balance 15 unilaterally, the language to support that just 16 isn't in the mortgage itself. You know, it's 17 just -- it wasn't a revolving credit mortgage, it 18 wasn't a future advance mortgage or anything like 19 that, that indicates to your junior lien holders 20 that hey, this balance is subject to change and 21 we need to account for that when we do our 22 mortgage, if we do our mortgage at all. 23 So I want to talk briefly about the policy 24 behind the whole thing. There's been a 25 suggestion made that if we don't grant the

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1 replacement mortgage doctrine, then there aren't
2 going to be any modifications or, you know, that
3 there will be less deals between lenders and
4 borrowers, to work out an existing loan. Well,
5 our refusal to grant the replacement mortgage
6 doctrine in this case does not affect work outs,
7 it does not affect modifications, it does not
8 affect extensions. Those things are all still
9 okay under the law of South Carolina because they
10 don't advance new funds. And so, you know,
11 lenders would still be as well motivated as
12 they've always been to potentially help their
13 borrowers stay in some mortgages that are having
14 difficulty performing.

15 There's been a statement that we should sort
16 of split the baby, I guess, and say that the bank
17 gets the first \$256,500, and then the credit
18 union can have whatever is left over after that
19 because that's what we were expecting when we did
20 our second mortgage, and that's an interesting
21 argument. I'm not sure -- if that is the result,
22 first of all, there would be -- that would be a
23 statement that replacement mortgage theory is now
24 the law of the State of South Carolina. And
25 after that, we would have an issue of material

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1 fact because I haven't -- and we don't know to
2 what extent that balance has been paid down. And
3 so we would need to look into that. You know,
4 obviously, I don't want that to be the ruling of
5 the Court. But if it was, I feel like there
6 would be more work to be done to equitably split
7 the baby, so, you know --

8 I want to also talk about the examples that
9 were highlighted in the restatement and how
10 they're distinguishable from our case. The first
11 example was on Page 3. And as the Court stated
12 out, it's distinguishable because in this
13 example, the principal was not increased in the
14 restatement example, whereas in our case, the
15 principal was increased. And so I understand
16 that Example 2 sort of takes it another step
17 further and tells you what would happen if the
18 principal were increased.

19 As far as Example 5, which that is on Page 5
20 of 15, Example 5 is talking about a revolving
21 credit mortgage or a future advance mortgage,
22 which the October 2009 mortgage that Chase had,
23 is neither. So, you know, two different terms
24 for the same idea, that the balance is clearly
25 going to be subject to change. So, you know, I

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1 think that's apples and oranges in this case.

2 I think, you know, just to reiterate and
3 kind of close this up and conclude it, the
4 restatement is not the law of South Carolina. No
5 court in this state has yet adopted this theory
6 or what the restatement is going forth with.
7 Matrix was a landmark case, to be sure. It's
8 right on all fours. You know, it destroy
9 equitable subrogation for lenders, hoping to
10 refinance without essentially going through the
11 process of a real closing. And I think the tone
12 of Matrix is more cautionary to lenders about --
13 just in general, when you're doing refinances,
14 take it seriously. Treat it like a real closing.
15 And so I think the tone of Matrix is more
16 cautionary, and they want us to be more careful
17 and prevent these kinds of disputes that we find
18 ourselves now.

19 So, you know, I think that in the footnotes
20 and in the kind of -- the clause is buried in
21 Matrix where they suggest that maybe the lender
22 could have proceeded on a replacement mortgage
23 theory. That's far from a rubber stamp of that
24 theory. You know, it's a suggestion and more of
25 a statement that that's not in play, versus

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1 anything else, you know.

2 So we ask that the Court deny the
3 Defendant's Motion for Summary Judgment, even
4 though there is not -- there are really not
5 material facts at issue at this point. The
6 inference in the law that we're drawing from
7 those facts do not entitle the Defendant to
8 judgment as a matter of law.
9 THE COURT: Thank you. And I know that you have
10 further argument.
11 MR. WALKER: I do. And I'll try to be brief and
12 succinct with it. The first thing I want to
13 address is the argument about an attorney not
14 closing this loan and that somehow the
15 unauthorized practice of law comes into play
16 here. Your Honor, my client has in its affidavit
17 that an attorney closed its loan. Nothing on the
18 record, nothing before the Court today, nothing
19 in discovery has been done to dispute that fact.
20 The only thing to dispute that fact were the
21 statements here today, which are unsubstantiated
22 by the record, and a sentence in an affidavit
23 from a representative of their bank, who has
24 absolutely no knowledge of the December 2009
25 mortgage closing, that upon information and

Page 41	Page 43
1 belief -- grant it, this is an affidavit that 2 needs to be affied to as to knowledge, but he 3 says upon information and belief, no attorney 4 closed this loan. 5 My client has an unrefuted statement that an 6 attorney did close its loan, which it has 7 personal knowledge of. And it says that that 8 attorney was Stacey E. Pope, formerly known as 9 Stacey Pope Gardner. Ms. Gardner, Stacey Pope 10 Gardner, an attorney in South Carolina, with no 11 disciplinary records, still an active attorney in 12 Lexington County, signed the mortgage. She 13 witnessed the mortgage of the December 2009 14 closing. Now if for some reason we want to get 15 off into the weeds about what all buyers services 16 requires, then, you know, we could do that. 17 But what we have is somebody that was a 18 member of our bar that has signed a mortgage 19 saying that she witnessed these borrowers close 20 this loan. And to the extent that she failed to 21 do anything else, if she failed to supervise the 22 title recording -- none of it -- again, none of 23 it -- this is all hypothetical, none of this has 24 been suggested -- to the extent that any of that 25 could come into play, she bought the farm when	1 know, I think that at this time -- you know, and 2 I've asked the Plaintiff, in light of the Matrix' 3 opinion, to strike that affirmative defense. And 4 if I have to move to strike it, I'm happy to do 5 it, but there's simply nothing on the record to 6 continue to push that argument. And frankly, 7 there was an attorney at the close of the loan. 8 And, you know, to suggest otherwise, I'm going to 9 need more than upon information and belief by an 10 unrelated party that an attorney wasn't used. 11 And I don't think we get into that today because 12 we don't have anything on the record. And I 13 think time to discover those facts has come and 14 gone. 15 To the extent that the Plaintiff wants to 16 try to say that there are additional material 17 facts to know where the balance of the loan is 18 today is inaccurate. The fact that we know and 19 agree to and it's really agreed to in Mr. Price, 20 the Plaintiff's affidavit, is that \$257,459.04 21 was paid on a mortgage that replaced another -- 22 was paid on the refinance. I mean, it was a 23 refinance. It wasn't a modification. It wasn't 24 a renewal. But the replacement mortgage theory 25 speaks to refinances very clearly. I mean, it's
Page 42	Page 44
1 she witnessed this mortgage. She knew that she 2 was supervising a closing. To the extent she 3 didn't do that, then, you know, I would argue 4 that that is bad lawyering rather than a lender 5 trying to sidestep the requirements that are 6 clearly out there by the Supreme Court. 7 And from a case law standpoint, Matrix makes 8 it very clear -- Matrix is a Supreme Court case, 9 Wachovia/Coffey is a prior Court of Appeals case. 10 Matrix says that any remedy for somebody 11 committing the unauthorized practice of law or 12 any penalty that we put down here today in 13 Matrix, is perspective in application only for 14 filings after the date of this opinion. The date 15 of that opinion was 2011. This mortgage was 16 filed in 2009. 17 So Matrix, in the new remedies, the landmark 18 remedies, it explains, do not come into play for 19 a 2009 mortgage. But again, Your Honor, this is 20 just -- there's nothing on the record. The 21 Plaintiff has had a year and a half to pursue 22 this affirmative defense that they filed to our 23 declaratory judgment counter claim that this is a 24 replacement mortgage. They have not done that. 25 There's nothing that's been explored and, you	1 a case in point of what this situation is. 2 The only fact that needs to be established 3 for the Court, which is established, is that 4 \$257,000 amount. Once that's established, then 5 my client's priority is established. Now to the 6 extent they're owed less, you know, I think we 7 can still make a ruling on this here today and 8 move forward with the foreclosure, with that in 9 mind. And I think it's a very clear, legal 10 decision with a lot of legal support. 11 I don't disagree that the Supreme Court has 12 not expressly adopted replacement mortgage. I 13 don't think that it's favored yet in South 14 Carolina. I think it would -- I think the tenor 15 of where the Court is and the Court's -- how they 16 have ruled in the past, would favor going ahead 17 and adopting this resolution. But I don't 18 disagree that it's not something that a Court has 19 said, yeah, we favor replacement mortgage so far. 20 I do think that they would favor replacement 21 mortgage because of the Matrix opinion and 22 because there's no controlling the law or statute 23 out there right now and we've got a restatement 24 that clearly speaks to this situation and the 25 Court just adopted a restatement, the Rule 7.6.

Page 45	Page 47
1 And, you know, I believe that the Court would 2 adopt this. And I think it decides this case, 3 Your Honor. 4 And just finally, the cash that was paid to 5 the Baileys at the December 2009 closing, I mean, 6 that's cash that my client paid to them. It 7 didn't prejudice the Defendant. Now to the 8 extent the Defendant wasn't on public record 9 notice, if the Court makes that decision, that it 10 wasn't on public record notice, that that amount 11 could be increased, then that's the Court's 12 decision to make. But the \$26,000 was additional 13 funds that my client worked with its borrower on 14 to pay it. But the replacement mortgage theory 15 says that it should at least be, you know, given 16 priority position to the 257 amount at a minimum 17 and, you know, we'd still argue that they were on 18 notice that that amount could have increased. 19 But the amount that my client paid to its 20 borrower did not prejudice the Plaintiff in any 21 way. 22 Again, I do not think that the attorney 23 issues are at issue here. I think an attorney 24 closed this loan. Nothing on the record to 25 contradict that. I think the replacement	1 don't have an issue of fact about the time line, 2 but, you know, we do have an issue of fact based 3 on what is already in the record. But other than 4 that, that's all I have to add to it. 5 THE COURT: Okay. I want to review -- I'll take 6 this under advisement. I want to review 7 everything from today. 8 MR. WALKER: Sure. 9 THE COURT: I reviewed the documents before 10 coming in, but I would like to have a second look 11 -- 12 MR. WALKER: Okay. 13 THE COURT: -- at everything in writing. 14 MS. JONES: Absolutely. 15 MR. WALKER: And, Your Honor, there's some new 16 law in front of you that I brought here today and 17 certainly would encourage you to do that. Would 18 it be okay or appropriate, I received their memo 19 Tuesday, I don't know, did that go -- 20 THE COURT: If you wish to respond, I don't have 21 a problem with that. 22 MR. WALKER: And I wasn't sure if that had gone 23 to the Court before today or if it came on 24 Tuesday. 25 MS. JONES: You mean, had it been filed?
Page 46	Page 48
1 mortgage is right to be adopted in South 2 Carolina. In the first place, it has to -- that 3 has to happen is at the Circuit Court level. I 4 would encourage the Court to do that for the 5 reasons that we stated here today, and that's all 6 I have. 7 THE COURT: Thank you. 8 MS. JONES: Your Honor, very briefly, I think the 9 prejudice is clear. You know, the prejudice is 10 clear to the Defendant, so. And I would say 11 we're completely devoid of any proof that the 12 attorney closed it. Certainly, there might have 13 been an attorney present at closing, but that, 14 there are four aspects of the loan closing 15 process set forth in buyer's service, including 16 the title search, which clearly wasn't done; we 17 know that, the closing. And we know that this 18 attorney was not in charge of the recording of it 19 as well, based on the stamp on the front of the 20 mortgage. 21 So, you know, we're not without evidence 22 that an attorney did not close it. And when I 23 say close, I do mean technically, as far as what 24 buyer's service sets out. So, you know, that's 25 an issue of fact, if anything. So, you know, we	1 MR. WALKER: The memo, yeah. I just got it. 2 MS. JONES: Yeah, it was filed on Tuesday. It 3 was filed right after it was served on you. 4 MR. WALKER: Okay. And if that's okay with the 5 Court, I'll tie this up by reply. One other 6 procedural issue, as I mentioned earlier, on the 7 mortgage -- when these priority disputes came up, 8 the mortgage was transferred from Chase back to 9 Quicken Mortgage under part of their agreement to 10 do so if an issue like this came up, is my 11 understanding. But Quicken Mortgage is now the 12 owner of the loan. I have an assignment of 13 mortgage. I've got a prepared consent order. 14 And I would just -- if it's okay, I'd like to 15 move on the record to change the caption just to 16 include Quicken -- 17 THE COURT: Oh, that's fine. 18 MR. WALKER: -- instead of -- 19 THE COURT: You don't have an objection; do you? 20 MR. WALKER: Do you have any objections? 21 MS. JONES: Well I don't have -- I would have 22 signed the consent order, I don't have authority. 23 The problem is, if counsel wants to strike an 24 equitable subrogation argument and say they will 25 never proceed on that in this case, then that's

Page 49 1 fine. That was really our concern was that the 2 whole way that equitable subrogation fell out is 3 that you weren't payment the debt -- 4 MR. WALKER: Sure. 5 MS. JONES: -- of another party. So that was my 6 concern. If you're willing to completely forego 7 that, then I can consent to the change in the 8 caption. 9 MR. WALKER: We are. Because to the extent that 10 Quicken -- Quicken was the mortgagee on all of 11 these loans. And to the extent they assigned it, 12 I don't think they can plead equitable 13 subrogation after they assigned it. 14 MS. JONES: Fine, fine 15 MR. WALKER: So I'll concede that. 16 MS. JONES: Okay. That's fine. 17 THE COURT: Okay. 18 MR. WALKER: Great. We've got consent on the 19 record. Can I just send a proposed order in to 20 you to sign? 21 THE COURT: Sure. 22 MR. WALKER: Super. 23 THE COURT: Just make sure we're all loop. 24 MS. JONES: I may have a blank copy of that 25 proposed order.	Page 51 1 CERTIFICATE OF REPORTER 2 I, FRANCES C. MOYD, COURT REPORTER AND NOTARY PUBLIC 3 IN AND FOR THE STATE OF SOUTH CAROLINA AT LARGE, HEREBY 4 CERTIFY THAT I REPORTED THE FOREGOING MOTION FOR SUMMARY 5 JUDGMENT HEARING, ON THE 19TH DAY OF SEPTEMBER, 2013, THAT 6 THE FOREGOING 50 PAGES CONSTITUTE A TRUE AND CORRECT 7 TRANSCRIPTION OF THE SAID HEARING. 8 I FURTHER CERTIFY THAT I AM NEITHER ATTORNEY NOR 9 COUNSEL FOR, NOR RELATED TO OR EMPLOYED BY ANY OF THE 10 PARTIES CONNECTED WITH THIS ACTION, NOR AM I FINANCIALLY 11 INTERESTED IN SAID CAUSE. 12 I FURTHER CERTIFY THAT THE ORIGINAL OF SAID TRANSCRIPT 13 WAS THEREAFTER SEALED BY ME AND DELIVERED TO DREW B. 14 WALKER, ESQUIRE, ROGERS, LEWIS, JACKSON, MANN & QUINN, LLC, 15 1330 LADY STREET, COLUMBIA, SOUTH CAROLINA, WHO WILL RETAIN 16 THIS SEALED ORIGINAL TRANSCRIPT AND SHALL BE RESPONSIBLE 17 FOR FILING SAME WITH THE COURT PRIOR TO TRIAL OR ANY 18 HEARING WHICH MIGHT RESULT IN A FINAL ORDER ON ANY ISSUE. 19 IN WITNESS WHEREOF, I HAVE SET MY HAND AND SEAL THIS 18TH 20 DAY OF OCTOBER, 2013. 21 22 23 FRANCES C. MOYD, COURT REPORTER 24 MY COMMISSION EXPIRES FEBRUARY 8, 2022 25
Page 50 1 MR. WALKER: I had it. 2 MS. JONES: Because this is two files at this 3 point. 4 MR. WALKER: Yeah, I left it on the other side of 5 my desk, that I didn't grab. I probably might 6 could get it signed today. 7 MS. JONES: If I have a blank one, I'll share, 8 but I can't make any promises. 9 MR. WALKER: I can email it today and copy 10 everyone on it. If you've got any objection to 11 the language in it, Christy -- 12 MS. JONES: No, no, no. 13 MR. WALKER: It's the same copy -- 14 MS. JONES: That's fine. 15 MR. WALKER: -- as the one. 16 MS. JONES: Yeah, that's fine. I don't think I 17 have it. 18 THE COURT: Is there anything else we need to 19 discuss? 20 MR. WALKER: I don't believe so. 21 THE COURT: Thank you. 22 MR. WALKER: Thank you. 23 ***** 24 (The hearing concluded at 10:43 a.m.) 25	

P R O C E E D I N G S

1 (Pages 1 to 4)

Page 3 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS COUNTY OF FAIRFIELD) C/A NO.: 2012-CP-20-00132 ArrowPointe Federal Credit) Union,) Plaintiff,) NOTICE OF MOTION AND vs.) MOTION FOR RECONSIDERATION Jimmy Eugene Bailey, Laura) MAY 26, 2015 Jean Bailey, and JPMorgan) Chase Bank,) Defendants.) A motions hearing in the above captioned was reported by Patricia G. Bachand, Court Reporter and Notary Public in and for the State of South Carolina; pursuant to Rule 30 of the South Carolina Rules of Civil Procedure; said hearing held before the Honorable Carol Tolen at the offices of Coleman & Tolen, LLC, 120 West Washington Street, Winnsboro, South Carolina, on Tuesday, the 26th day of May, 2015, scheduled for ten o'clock a.m. and commencing at the hour of ten o'clock a.m.	1 CONTENTS: 2 PAGE: 3 Exhibit Index..... 3 4 Stipulations..... 4 5 Certification of Reporter..... 18 6 Word Index 7 8 9 * * * * * 10 EXHIBIT INDEX: PAGE: 11 (None proffered.) 12 13 14 * * * * * 15 16 Court Reporter's Legend: 17 dashes [--] Intentional or purposeful interruption 18 ... Indicates trailing off 19 [ph] Denotes phonetically written 20 [sic] Written as said 21 22 23 24 25
Page 2 1 APPEARANCES: 2 3 REPRESENTING THE PLAINTIFF: 4 CHRISTY CURTIS JONES, ESQ. 5 Sherpy & Jones, PA 6 921 Corley Mill Road 7 Lexington, South Carolina 29072 8 9 REPRESENTING THE DEFENDANT JPMORGAN CHASE BANK: 10 SHAUN C. BLAKE, ESQ. 11 Rogers, Lewis, Jackson, Mann & Quinn, LLC 12 1330 Lady Street, Suite 400 13 Columbia, South Carolina 29201 14 (sblake@rogerslewis.com) 15 16 17 18 19 20 21 22 23 24 25	Page 4 1 This hearing is taken in accordance with the 2 South Carolina Rules of Civil Procedure. 3 THE COURT: My name is Carol Tolen. I'm 4 special referee on this file ArrowPointe Federal Credit 5 Union versus Jimmy Eugene Bailey and Laura Jean Bailey and 6 JPMorgan Chase Bank. I believe Quicken Loans is involved 7 also. 8 MR. WALKER: Yes, ma'am. 9 THE COURT: Okay. How's Quicken Loans? Can 10 you refresh? 11 MR. BLAKE: Yes. Yes, Your Honor. So 12 JPMorgan Chase is the named party, but has since sold the 13 loan -- 14 THE COURT: Back. 15 MR. BLAKE: -- back to Quicken Loans. 16 THE COURT: Okay. Okay. And we're here on 17 a motion for reconsideration. And present today is -- are 18 the two attorneys Mr. Walker -- 19 MR. BLAKE: I'm actually Mr. Blake. 20 THE COURT: Mr. Blake. Thank you. You're 21 with Rogers, Lewis and -- Jackson, Mann and Quinn, LLC. 22 And we have Ms. Jones who is -- help me out here. 23 MS. JONES: Sure. 24 THE COURT: With -- 25 MS. JONES: Sherpy & Jones.

Page 5	Page 7
1 THE COURT: Okay. Thank you. And, Madam 2 Court Reporter, are we ready to proceed? Do you want to 3 swear -- do we need to swear anybody in? You're just ready 4 to go? 5 MS. JONES: Yes, ma'am. 6 THE COURT: Be glad to hear your motion. 7 MR. BLAKE: Thank you, Your Honor. I 8 appreciate you taking the time to hear us. And I just 9 briefly -- I will not go back through all the facts, I 10 don't think any of the parties here dispute the facts. And 11 I think the order set forth the facts correctly. The only 12 reason that we filed this motion, today, is just to make 13 sure that we had a complete record for review, if the 14 parties decide to take this up and have the court review 15 the issue of replacement mortgage, and whether or not it's 16 the law of South Carolina. 17 And when I read your order, I was reminded 18 of an oral argument that I helped to the briefing on, and I 19 sat in the background and watched a law partner that was 20 one of my first supervisory attorneys argue, and it was in 21 the Gillett case, which is actually cited in my -- in my 22 brief as well. And Justice Beatty was very pointedly 23 pointing out during oral argument, that simply because 24 South Carolina has not explicitly recognized a cause of 25 action by name, that does not mean it's not a part of our	1 back in everyone's mind, he noted that the majority would 2 punish the respondent in this case for failing to 3 anticipate the majority's decision to alter the theory 4 under which respondent plead, proved, and obtained the 5 result below. 6 And what was specifically occurring in 7 Matrix is, that the plaintiff was -- or the lender was only 8 pursuing under a theory of equitable subrogation, as that - 9 - as that cause of action has been sort of understood and 10 crafted and -- in case law during the '80s and the '90s, 11 that -- that is cited in the decision. And what I think 12 Justice Pleicones' point was, is we have long recognized 13 that when the facts so require equity to reorganize 14 priority, it would do so. 15 And he cites in his dissenting opinion that 16 there was no -- that he believed that the majority would 17 have joined in his decision had the plaintiff -- or had the 18 lender that in case plead under the -- under the rubric of 19 what we now called replacement and modification, or this 20 replacement mortgage theory, that appears in Restatement 21 Third of Property Mortgages, Section 7.3. 22 And I found that dissent telling. Because 23 what -- neither the majority nor the dissent suggest is 24 that South Carolina does not recognize replacement 25 mortgage. The issue of Matrix was, it was not plead. And
Page 6	Page 8
1 common law, or is it actually, you know, a premise under 2 which a plaintiff may proceed in a case. 3 And so I cited -- I sort of cited the 4 Gillett case in my brief, where he does make that point 5 again in the -- in the written decision of the Supreme 6 Court, where he says it's -- we really -- we looked at the 7 underlying -- the underlying facts and not the actual name 8 of the cause of action itself. 9 And so I just wanted to respectfully put to 10 the Court for reconsideration, first, whether or not it is 11 material or not, that the Court has explicitly recognized 12 the theory of replacement mortgage, or not. 13 I do think it's clear, as highlighted by 14 Justice Pleicones dissent in the Matrix case, that South 15 Carolina has long recognized that equity will step in front 16 of our statute that determines priority, and allow equity 17 to sort of reorganize priority. In his decision, he cites 18 back to a 1927 decision, that we're all familiar with, the 19 Enterprise Bank decision. And so I think, if we step back 20 and look at what the law in South Carolina is, I do not 21 believe there's a dispute between either party, that equity 22 can reorganize priority when it's so required in equity. 23 And what Justice Pleicones said in his 24 dissent in Matrix was interesting. He pointed out, and I'm 25 going to quote, just so that I kind of put the language	1 so sort of as a -- as an introductory point, I was -- I was 2 pointing out in the -- in the brief that the equitable 3 relief that's sought is sort of longstanding. The issue 4 here in this case is whether or not the current 5 understanding of that equitable leaf -- relief under the 6 replacement mortgage theory has been recognized in South 7 Carolina. 8 And I would concede that it's not explicitly 9 stated as recognized, but I certainly think it's implied, 10 both by our court's prior decisions relying on the 11 Restatement Third of Property, and the implication in the 12 Matrix decision, that -- that had it been properly plead, 13 then it is likely that the lender would have -- would have 14 availed themselves of that theory in that case. 15 And so sort of as an introductory point, I 16 believe that you could find that replacement mortgage is in 17 fact with our common law, because -- because of our 18 historical reliance on the Restatement Third of Property 19 and other restatements as articulations of the common law 20 we recognize. 21 Moving from that point, I would think that 22 under that formulation, that the court's analysis would be 23 whether or not there's any material impairment. Because 24 under the formulation, there's no dispute that we meet the 25 elements of replacement mortgage, as stated in 7.3 of the

Page 9 1 Restatement Third. The only issue that is validly raised 2 by ArrowPointe in this cause, is whether or not there is a 3 material impairment such that equity would prevent Quicken 4 from availing itself of the relief in this case. 5 And so I sort of have two brief responses to 6 that, and I would conclude my argument. My first response 7 would be that in this case there who not be a material 8 prejudice or impairment found by the court. And the reason 9 being, in the -- what I'll call the replace mortgage, the 10 October 2009 Quicken mortgage -- that all the parties agree 11 had priority at the time it was filed, that the instrument 12 does not limit itself to the face value of the note. 13 Rather, the instrument states it secures all renewals, 14 extensions, and modifications of that note. 15 And so at the time ArrowPointe issued its 16 line of credit, and secured it, it was on notice that the - 17 - that the note itself that was secured by the replaced 18 mortgage, was subject to extension and modification, and 19 that those extensions and modifications would continue to 20 maintain a first priority position. 21 And so under that -- with that -- with that 22 actual knowledge, with that actual notice, which was 23 conceded by ArrowPointe, I believe -- I believe the equity 24 then would find that there has been no impairment. And the 25 reason I say that is this: It would be -- it would be a --	Page 11 1 subsequent loan. 2 And so in this case it would not be the full 3 \$99,000, the line of credit that would be given a first 4 priority position; it would be only to the extent they were 5 impaired. And in that case -- in this case, I think the 6 record shows it went from two fifty-seven to two ninety- 7 six, so it would be the growth from the replaced mortgage - 8 - to the replacement mortgage under the -- under the 9 replace -- under the -- I'm sorry -- under the 10 restatements' formulation, the -- ArrowPointe would only 11 have a first priority to that extent, to which they were 12 materially prejudiced or impaired. 13 And so for that reason, I would ask the 14 court to reconsider both its holding that the common law in 15 South Carolina does not recognize replacement mortgage, and 16 then under the facts in this case, to find that either 17 equity requires the replacement mortgage be given full 18 priority, or full priority except as to the -- to the 19 extent there has been some material impairment or prejudice 20 as a result of the replacement mortgage being entered into. 21 Thank you for your time. 22 THE COURT: Thank you. (To Ms. Jones) Be 23 glad to hear from you. 24 MS. JONES: Yes. Thank you. ArrowPointe's 25 position is pretty straightforward. The case cited in the
Page 10 1 so I don't believe there would be any dispute that if the 2 note had been modified rather than a new loan -- a new note 3 and a new mortgage being entered into, that it would be -- 4 it would be subject to this mortgage, it would be secured, 5 and it would have priority. I think that's clearly allowed 6 under the language in this -- in this mortgage. 7 And so it really -- it's really a -- it's 8 punishing form over substance -- it's really focusing form 9 over substance to then say, well, equity would allow 10 priority if the note had been modified, but because it was 11 replaced, well, then they've lost priority because there 12 was a new note and a new mortgage. 13 And so because they were on actual notice of 14 exposure to modifications and extensions of the existing 15 note, I would argue that equity doesn't require there to be 16 any impairment or prejudice to ArrowPointe. 17 But even if -- even if the court disagrees, 18 and even if the court finds, well, there was a \$39,000 19 increase, and in the court's opinion that is material and 20 prejudicial, and if the court were to find that these 21 extension and modifications contemplated by the original 22 note were somehow -- did not put ArrowPointe on sufficient 23 notice for equitable purposes, what the formulation under 24 7.3 does is it would provide ArrowPointe a first position 25 only to the extent that it had been impaired by the	Page 12 1 motion for reconsideration, United Carolina versus 2 Caroprop, talks about the refinance in that case in no way 3 disadvantaged the original second mortgage lender. And 4 that doesn't fall into this scenario at all, because 5 Quicken's refinance constituted new money out. New money 6 out is synonymous with a refinance to the tune of \$39,000. 7 So we urge the court not to adopt a 8 replacement mortgage theory in this case, chiefly because 9 there was new money given in the refinance. Quicken was in 10 the best position to avoid the dispute that we're in right 11 now, simply by employing the longstanding practice of 12 obtaining a subordination agreement from junior creditors, 13 if Quicken was inclined to do a refinance. 14 So, you know, the -- and when we talk about 15 Quicken's original mortgage, and whether or not it put 16 ArrowPointe Federal Credit Union on notice of the fact that 17 Quicken could, unilaterally, in the future revisit the 18 amount due under the first mortgage, that's -- that's so 19 far off from the practice and the common practice of 20 mortgage lenders, that allowing a first mortgagee to 21 revisit their first mortgage and add \$40,000 to the balance 22 of the first, and say that doesn't materially prejudice 23 subordinate lienholders, is not in line with the -- with 24 the real life practice of mortgage lending in this state. 25 The longstanding tradition of obtaining a

Page 13 1 subordination from existing creditors is for position -- 2 you know, for situations essentially like this. 3 ArrowPointe could have said, "Yes, we approve it. Here's 4 the subordination. It's of record." Then the parties 5 would never be in dispute as to priority. ArrowPointe 6 could have said, "We agree with the refinance, but we don't 7 want new money out. That materially prejudices our 8 position," and we would have been in a position to 9 negotiate that. Which again is, you know, what mortgage 10 lenders have come to expect in the state. 11 And when you read Matrix, you can pull out a 12 phrase here and you can pull out a phrase there, and you 13 can focus on what the dissent says, but if you read the 14 whole case, at the end of it you get this overarching theme 15 of not wanting mortgage lenders to take a refinance so 16 cavalierly: Don't take your modifications so cavalierly. 17 I advise my clients, routinely, if they're 18 inclined to modify a mortgage to assist in a troubled 19 borrower, that they need to make sure that they don't incur 20 new money out. If they incur new money -- if their plan is 21 the give new money out, they need to treat it like a full- 22 blown closing; obtain a new title search; obtain a 23 subordination where it's appropriate. 24 And so this Quicken failed to do. And by 25 failing to do that, it's not in a good position to avail	Page 15 1 because of the new money being out. And this is not -- 2 this is not the case to create new equitable remedies, 3 because of the new money having prejudice, materially, 4 ArrowPointe Federal Credit Union's lien position. 5 THE COURT: Thank you. 6 MR. BLAKE: Your Honor, can I briefly 7 respond? 8 THE COURT: Certainly. 9 MR. BLAKE: I did mean to correct on the 10 record, a type-o in my motion for reconsideration, by the 11 way. I believe I noted that your order was received on 12 April 1st, 2010. In fact, it was received in April 1st, 13 2015. And I just wanted to correct that -- 14 THE COURT: Fine. 15 MR. BLAKE: -- typographic error. 16 THE COURT: Fine. 17 MR. BLAKE: And I appreciate that. And the 18 only other point I would make, briefly, is that I'm not 19 aware of evidence in the case relating to either the 20 industry standard surrounding the use of subordination 21 agreements, or the cause of the Baileys default. And so 22 without some evidence or expert testimony about that, I 23 would -- I would object to the court's consideration of 24 that in its written order. 25 But I do believe there is some significant
Page 14 1 itself of a new a creative theory by which equity can come 2 in and -- and assist it with its failure to be diligent 3 under industry standards. 4 When you talk about unjust enrichment, if 5 you want to talk about what equity requires, you need to 6 remember that the law favors the diligence as well. And 7 that had Quicken been just, you know, normally diligent, we 8 would not be in this position; they would either have a 9 recorded subordination agreement, or they would not have -- 10 they would not have done the refinance. 11 So you talk about Quicken's original 12 mortgage, there's language in there about the real estate, 13 securing extensions and modifications. By Counsel's own 14 admission, this is not a modification, due to the money 15 out, and this isn't an extension either. So, you know, the 16 term was not increased, but the balance sure was. 17 And there's a reason why the Baileys are in 18 default. And maybe it's that extra \$40,000 added on their 19 mortgage. That's -- you know, if you add forty thousand to 20 my mortgage, I'm going to feel it, you know. So, you know 21 -- and we'll never know. We'll never know whether that's 22 the reason why the Baileys are in default, and we're 23 sitting here at this -- in a foreclosure case. 24 But we just -- we overall state that and 25 urge the court not to adopt the restatement mortgage theory	Page 16 1 case law, going back a very long time in South Carolina, 2 recognizing the applicability of future advance clauses, 3 and -- and contrasting with those cases where a residential 4 loan is limited by its terms to the amount of the loan. 5 And what we have -- or what at least I would -- positive 6 that we have in this case, with the replaced mortgage of 7 October 2009, is -- is language that does allow for future 8 advances and extensions of the amount of the note, versus 9 language that limits it only to the face value of \$256,000. 10 And I -- again, I -- Counsel was correct, I 11 do not content that the subsequent loan is a modification, 12 per se, but I do believe it has operated to the same 13 effect. And because ArrowPointe was on notice that, that 14 was a possibility, it was a risk they chose to take when 15 they -- when they issued a subordinate lien subject to the 16 language of the -- of the replaced mortgage, that the 17 effect is the same, had it been modified or had it been 18 replaced with -- with the -- with the replacement loan or 19 mortgage. 20 And so that is sort of the underlying basis 21 of my oral argument. Thank you. 22 MR. BLAKE: Just briefly. I would agree 23 Your Honor does not need me to tell the court what the 24 standard practice is in regards to mortgage closing. Your 25 Honor is well aware of what it is. And so I agree with

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1 that. But I do take exception to the statement that this
2 is a future advanced mortgage. This is not a revolving
3 credit mortgage. Revolving credit mortgages state at the
4 very top, in 20-point font, in bold, revolving credit
5 mortgage, the language that talks about extensions and
6 modifications does not talk about future advances. So this
7 is not a revolving credit mortgage.
8 THE COURT: Okay. Thank you.
9 MS. JONES: That's it.
10 MR. BLAKE: Thank you.
11 THE COURT: (To Mr. Blake) I'm going to deny
12 your motion.
13 MR. BLAKE: I appreciate it.
14 THE COURT: Thank you.
15 (There being nothing further, the proceedings
16 concluded at 10:20 a.m.)
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Page 18

1 CERTIFICATE OF REPORTER
2 I, PATRICIA G. BACHAND, COURT REPORTER AND NOTARY
3 PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA AT LARGE,
4 HEREBY CERTIFY THAT I REPORTED THE ABOVE CAPTIONED HEARING
5 ON TUESDAY, THE 26TH DAY OF MAY, 2015, THAT THE FOREGOING
6 17 PAGES CONSTITUTE A TRUE AND CORRECT TRANSCRIPTION.
7 I FURTHER CERTIFY THAT I AM NEITHER ATTORNEY NOR
8 COUNSEL FOR, NOR RELATED TO OR EMPLOYED BY ANY OF THE
9 PARTIES CONNECTED WITH THIS ACTION, NOR AM I FINANCIALLY
10 INTERESTED IN SAID CAUSE.
11 I FURTHER CERTIFY THAT THE ORIGINAL OF SAID TRANSCRIPT
12 WAS THEREAFTER SEALED BY ME AND DELIVERED TO DREW B.
13 WALKER, ESQ., ROGERS, LEWIS, JACKSON, MANN & QUINN, LLC,
14 1330 LADY STREET, SUITE 400, COLUMBIA, SOUTH CAROLINA, WHO
15 WILL RETAIN THIS SEALED ORIGINAL TRANSCRIPT AND SHALL BE
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21
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23 MY COMMISSION EXPIRES APRIL 9, 2017
24
25

In The Matter Of:
ArrowPointe Federal Credit Union vs
Jimmy Eugene Bailey, et al

James R. Price
February 13, 2013

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1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF FAIRFIELD

3
4 ARROWPOINTE FEDERAL CREDIT UNION,

5 Plaintiff,

6 vs.

CASE NO. 2012-CP-20-00132

7 JIMMY EUGENE BAILEY, LAURA JEAN
8 BAILEY AND JPMORGAN CHASE BANK,

9 Defendants.

10
11 DEPOSITION OF: JAMES R. (JIM) PRICE
ARROWPOINTE 30(B)(6)

12 DATE: February 13, 2013

13 TIME: 10:02 a.m.

14 LOCATION: Ellis Lawhorne
15 1501 Main Street
16 Columbia, SC

17 TAKEN BY: Counsel for the Defendant

18 REPORTED BY: Susan M. Valsecchi, RPR, CRR
19 Certified Realtime Reporter

20
21 A. WILLIAM ROBERTS, JR., & ASSOCIATES

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18 (INDEX AT REAR OF TRANSCRIPT)

STIPULATION

It is stipulated by and between Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30; that all objections as to Notice of this deposition are hereby waived; that all objections except as to form are reserved until the time of trial; and that the deponent waives reading and signing of this deposition.

* * * * *

(DFT. EXH. 1, Notice of 30(b)(6)

Deposition of ArrowPointe Federal Credit Union, was marked for identification.)

JAMES R. (JIM) PRICE

being first duly sworn, testified as follows:

EXAMINATION

BY MR. WALKER:

Q. Mr. Price, my name is Drew Walker. I'm an attorney here in Columbia, and I appreciate you being here today. We met informally off the record just a moment ago. It's nice to see you again.

Would you please provide your full name for the court reporter.

A. James R. Price.

Q. That's spelled like it sounds, I

1 assume?

2 A. Yes.

3 Q. Okay, great.

4 Mr. Price, we're here today to take a
5 30(b)(6) deposition of ArrowPointe Federal Credit
6 Union, and it's my understanding that you're an
7 employee of ArrowPointe. Is that correct?

8 A. That's correct.

9 Q. And if it's okay with you, I will just
10 refer to ArrowPointe Federal Credit Union as
11 ArrowPointe throughout this deposition.

12 It's also my understanding that you are
13 the designee to speak on behalf of the topics for
14 ArrowPointe. Is that correct?

15 A. That's correct.

16 Q. Okay. Have you ever had your
17 deposition taken before, sir?

18 A. Not that I can recall.

19 Q. Okay. So this is your first
20 deposition?

21 A. Yes, I think it is.

22 Q. Okay. Well, this is a formal court
23 proceeding. We've got a court reporter here taking
24 down notes and a transcript of what you and I are
25 talking about.

1 So even though there's not a judge
2 here, this is testimony. Now, it's a little bit
3 more informal, obviously, because we're sitting
4 here having a conversation.

5 That's what I would like to do today,
6 is just talk to you about what's going on in this
7 case and any facts that you or ArrowPointe know and
8 can shed some light on for me, so that we can move
9 this case along.

10 There's a couple of ground rules about
11 having your deposition taken that I'm going to go
12 over with you. They're pretty basic, but there's
13 three things I want you to remember.

14 One, because the court reporter is
15 taking down what we say, it helps her if we can
16 provide verbal answers. So a yes or a no, rather
17 than a head nod or an uh-huh or uh-uh.

18 Now, I'm pretty bad at that myself, so
19 if you catch me going uh-huh, can you remind me as
20 well? But I'll do my best to remind you, if you
21 say uh-huh, and the court reporter may step in as
22 well, just to help us keep our bearings there.

23 Secondly, during the deposition, even
24 though you're not sitting on a witness stand, it's
25 somewhat akin to sitting on a witness stand and you

1 are under oath. So any questions that you might
2 have need to be directed towards me.

3 This isn't an endurance contest, so
4 just let me know if you need a break to grab a
5 drink of water, collect your thoughts, use the
6 restroom, anything like that. I'm happy to do
7 that.

8 But during the breaks, that rule
9 applies as well; you can't speak with your attorney
10 during the breaks about the substance of the case
11 of what we're talking about here today. Those
12 questions need to be directed to me.

13 And if those conversations do happen,
14 then I will, you know, need to ask you about those
15 conversations. So just treat any breaks like
16 you're still on the stand.

17 And then, finally, I'm going to be
18 asking you questions. Some of them might not make
19 sense, some of them might run together. I'm famous
20 for those bad types of questions. If you don't
21 understand a question or if I'm running them
22 together too much, just ask me to clarify, ask me
23 to break it down, and I'll be happy to do that.

24 If you do provide me an answer, though,
25 I'm going to assume that you've understood the

1 question.

2 Does all of that make sense?

3 A. It does.

4 Q. Straightforward enough? Okay.

5 MR. WALKER: And, Christy, are you okay
6 with any objections being generally as to the form?

7 MS. JONES: Yeah, objections as to the
8 form, privilege, anything of that nature.

9 MR. WALKER: Okay, sure. Great.

10 BY MR. WALKER:

11 Q. And, again, Mr. Price, you are the Rule
12 30(b)(6) designee. I assume that you've seen the
13 list of topics that we're here today to discuss,
14 and I've got a list of those here as well that I'm
15 going to hand you just to make sure that you've
16 seen this document before.

17 I sent this to your attorney. I
18 imagine that she's shared this with you. And on
19 Exhibit A of this list, you're going to see four
20 topics. I just want to make sure that this is what
21 you've been designated to testify as to here today.

22 Is that correct?

23 A. Yes.

24 Q. Okay. Allow me a minute to go ahead
25 and introduce this to the court reporter as

1 Defendant's Exhibit Number 1.

2 BY MR. WALKER:

3 Q. And I believe you know this, Mr. Price,
4 but I should have stated earlier that I represent
5 one of the Defendants, that's JPMorgan Chase Bank,
6 and -- can we go off the record just for a brief
7 second?

8 (Off-the-record discussion.)

9 MR. WALKER: We can go back on the
10 record.

11 BY MR. WALKER:

12 Q. Mr. Price, as I mentioned, I represent
13 the Defendant, JPMorgan Chase Bank in this action,
14 and what I would like to talk about -- well, just
15 one more general background thing.

16 I will refer to you, y-o-u, today, and
17 I don't mean you individually, other than a few
18 background information questions.

19 When I say that, I'm talking about
20 ArrowPointe and the company that you've been
21 designated to represent. So just if you need to
22 clarify those answers or if you would like me to
23 clarify specifically what I'm asking you in regards
24 to when I say you, just let me know, I'll be happy
25 to do that.

1 But first, I would like to just get a
2 little background information about you personally,
3 where you were educated, and your employment
4 history, things of that nature.

5 Could you tell me where you were born
6 and raised.

7 A. I was born in Waynesboro, North
8 Carolina. Raised in Chesterfield, South Carolina.

9 Q. Okay, great.

10 And did you go to middle school and
11 high school in Chesterfield?

12 A. I did.

13 Q. Okay. What school was that?

14 A. Chesterfield High School and
15 Chesterfield Elementary School.

16 Q. Okay, good deal. My mother-in-law is
17 from Pageland, so I'm familiar with those parts.
18 That's the same county, right --

19 A. Yes, it is.

20 Q. -- Chesterfield County?

21 Did you graduate from Chesterfield High
22 School?

23 A. I did not.

24 Q. Did you graduate from high school?

25 A. I did not.

1 Q. What was the extent of your education
2 in high school?

3 A. 11th grade.

4 Q. Okay. And have you had any more formal
5 training since the 11th grade of high school?

6 A. Um, aside from trade-type education or
7 courses.

8 Q. Yes, sir.

9 What were those?

10 A. Well, I successfully completed the
11 American Financial Services Association Management
12 Development Program, from UNC Chapel Hill in 1992,
13 I guess.

14 I completed the Southeastern Regional
15 Credit Union training school at the University of
16 Georgia. And that was in 2008, I think, or '9.
17 It's a three-year course.

18 Q. Okay, okay. What year did you finish
19 up -- what years were you in high school, I guess
20 is a better question to ask?

21 A. I think through 1970, if my memory is
22 correct.

23 Q. And what's your date of birth?

24 A. 7/20/53.

25 Q. What did you do after high school?

1 A. Uh, I worked at a grocery store as an
2 assistant manager. I worked at a factory that was
3 called JP -- excuse me -- Burlington Industries,
4 but it was James Fabrics.

5 And then I started to work with a
6 company called Transouth Financial in March of '76.

7 Q. Okay. And tell me a little more about
8 Transouth Financial.

9 A. It's a consumer finance company -- or
10 was a consumer finance company.

11 Q. Okay. How long did you work with them?

12 A. 21 years.

13 Q. Okay. What type of work did you do
14 there, Mr. Price?

15 A. The nature of the business was
16 extending personal loans and retail financing to
17 customers.

18 Q. Okay. And were you a loan officer?

19 A. I was at one time.

20 Q. What were your different stages of --

21 A. Branch manager -- excuse me -- branch
22 representative -- assistant manager, branch
23 manager, division manager, group manager, VP of
24 training, VP in the national sales division.

25 Q. Okay, okay. And is that a regional

1 lending institution?

2 A. It was. It's no longer in business.

3 Q. Okay. And did you -- was it in
4 business when you left employment there?

5 A. It was.

6 Q. Okay. And that was around '97, or so?

7 A. Yes, it was, 1997.

8 Q. And where did you go to work in 1997?

9 A. I left there and went to NationsCredit.

10 Q. Okay. How long were you with
11 NationsCredit?

12 A. Three years.

13 Q. Three years, okay.

14 Same type of work, generally?

15 A. Yes.

16 Q. And after leaving NationsCredit, where
17 did you go?

18 A. Security Finance.

19 Q. Okay. How long were you with Security
20 Finance?

21 A. Two-and-a-half, three years.

22 Q. Okay. And then what was after Security
23 Finance?

24 A. ArrowPointe Federal Credit Union. It
25 was Bowater Carolina Federal Credit Union at that

1 time.

2 Q. Have you been with Bowater or
3 ArrowPointe since then?

4 A. Yes, since 2004.

5 Q. Okay. Tell me about your different
6 positions that you have held with Bowater and
7 ArrowPointe?

8 A. I have been responsible for loan
9 administration of branch operations since I came on
10 board in 2004.

11 Q. Okay. And that's still what you're
12 responsible for today?

13 A. Yes.

14 Q. And what's your title today?

15 A. Senior VP.

16 Q. Okay. Senior VP for anything in
17 particular, just senior vice president?

18 A. Branch operations and loan
19 administration.

20 Q. Good deal.

21 What all does that job require? What
22 are your duties?

23 A. Developing lending products, being
24 responsible for the branch operations, in terms of
25 the branch managers report to me. I approve loans

1 that are over the level of authority for the
2 lenders, being the loan officers and the branch
3 managers. Have to staff branches when there are
4 absenteeisms created due to illnesses or vacation.

5 I'm also responsible for the
6 collections in the credit union.

7 Q. Fun. I'm familiar with your line of
8 work.

9 What's your loan authority there?

10 A. I have lending authority up to
11 \$250,000.

12 Q. What does typically a branch manager
13 have?

14 A. Up to \$100,000.

15 Q. Does your bank have a limit on its
16 loans, like what -- its total authority to lend,
17 what's the in-house limit?

18 A. Well, we're a credit union; it's not a
19 bank.

20 Q. Sure.

21 A. And our maximum loan, by policy, is
22 \$250,000.

23 Q. Okay. Tell me a little bit of the
24 differences between a credit union and a bank, just
25 generally. I would like to be educated on that a

1 little bit.

2 A. We don't have shareholders. We have
3 members. The members own our credit union.

4 Q. How many members does ArrowPointe have?

5 A. Approximately -- and I'm not sure about
6 an exact number -- but it's probably somewhere
7 between 12 to 14,000.

8 Q. And do almost all or all of those
9 members have deposit accounts with ArrowPointe, I
10 would assume?

11 A. Yes, they do.

12 Q. A couple more questions just about you.
13 Have you ever testified in a trial
14 before?

15 A. I don't recall testifying in a trial.

16 Q. Okay. Do you think it's possible that
17 you might have?

18 A. I know that there was some litigation
19 that was brought against NationsCredit, and I had
20 to provide some information, but it never was a
21 formal court trial, so that's the only thing I can
22 think that would come remotely close.

23 Q. And that was some sort of civil action
24 that was --

25 A. Yes.

1 Q. -- that had Nations as one of the
2 parties?

3 A. Yes.

4 Q. And you were involved much like you are
5 in this case, just in some of the fact-finding as
6 an employee of Nations?

7 A. Yes.

8 Q. Have you ever been arrested before for
9 anything other than a minor traffic?

10 A. I was cited with disorderly conduct
11 once.

12 Q. Okay. What year was that?

13 A. I'm not sure of the exact year. It was
14 early to mid eighties.

15 Q. Okay. Were you -- I understand you
16 were charged.

17 Were you convicted of anything in that
18 charge?

19 A. I paid the fine.

20 Q. Sure.

21 All right. That was a misdemeanor?

22 A. Yes, yes.

23 Q. And you seem very competent to me to
24 testify today.

25 Is there any -- are you competent to

1 testify here today?

2 A. I would think I'm competent. There
3 might be some people that might disagree with that.

4 Q. I understand.

5 But not on any type of medication or
6 anything that would influence your answers?

7 A. No.

8 Q. When did Bowater become ArrowPointe?

9 A. We had the name change in -- if memory
10 serves me -- the spring of 2007 or 2008, I'm not
11 sure which.

12 Q. Okay. Was it a name change or was it
13 more of an acquisition?

14 A. It was a name change.

15 Q. Okay. What was the purpose of that?

16 A. Our credit union started in 1960.
17 As -- and we were sponsored by -- which credit
18 unions typically are -- by Bowater International,
19 which was a paper mill located in Catawba, South
20 Carolina.

21 This location was the second U.S.
22 location for Bowater International. The first one
23 having been constructed and opened probably in '55,
24 '56, '57, '58.

25 When that first location opened in

1 eastern Tennessee, they formed a credit
2 union -- the employees formed a credit union.

3 Well, when the second U.S. location was
4 constructed in Catawba, South Carolina, some of
5 those employees from Tennessee assisted in the
6 construction of the location in Catawba and decided
7 that a credit union would be good for Catawba.

8 So that's how we came to be known as
9 Bowater Carolina Federal Credit Union.

10 Well, in 2003 or 2004, we sought and
11 obtained permission for a community charter, which
12 means that we didn't solely have to have, as
13 membership, employees of Bowater International in
14 Catawba.

15 We could open up our credit union for
16 membership from people that lived, worked,
17 worshipped, or attended school in York or Lancaster
18 Counties.

19 Because we could not ever erase the
20 perception from the general public that you had to
21 be employed with Bowater to be a member, we decided
22 it was time for a name change.

23 Q. Okay.

24 A. That was a long answer, I'm sorry.

25 Q. No, it was a good answer.

1 What counties do y'all -- are you
2 restricted to certain counties that you can service
3 now?

4 A. Yes, yes.

5 Q. Okay.

6 A. Lancaster, York Counties and the
7 Northeast portion of Chester County.

8 Q. How about Fairfield?

9 A. No.

10 Q. And you said -- can you tell me again,
11 you said people that work, worship, or --

12 A. Live, work, worship, or attend school,
13 or have an immediate family member, a relative that
14 is a member.

15 Q. Okay. So if my mom lived in Lancaster
16 County and was a member, could I get credit from
17 y'all?

18 A. Yes.

19 Q. Okay.

20 A. You could join and we would have to
21 qualify you for credit.

22 Q. Okay. I might not be credit worthy. I
23 understand.

24 And I guess now would be probably a
25 good time to go ahead and start talking about

1 Mr. and Mrs. Bailey a little bit.

2 I assume that they are members of
3 ArrowPointe?

4 A. That's correct.

5 Q. How do they qualify to be members of
6 ArrowPointe?

7 A. Mr. Bailey was an employee of Bowater.

8 Q. Okay. Is he no longer an employee?

9 A. He's no longer an employee, that's
10 correct.

11 Q. When that employment went away, are
12 they allowed to retain their membership?

13 A. They are.

14 Q. And they're still members, I assume?

15 A. That's correct.

16 Q. What's kind of the background or
17 history of your lending relationship with
18 Mr. and Mrs. Bailey?

19 A. It's been good. Mr. Bailey's
20 membership number is 264. We started with a number
21 1. So he was one of the very first members of the
22 credit union.

23 Q. Including Bowater, correct?

24 A. Yes.

25 And he has been a very active

1 participant in the credit union, and we value his
2 relationship highly.

3 Q. When did -- so you said 264. And
4 Bowater came to the Carolinas when?

5 A. 1959 or 1960 is about -- our credit
6 union opened, I think, in March or April of 1960,
7 and we would have followed the completion of the
8 mill by just a few months.

9 Q. Okay. Do you have any idea when he
10 first became a member, datewise --

11 A. I do not.

12 Q. -- or approximate range?

13 A. I would have to assume that it was the
14 early sixties.

15 Q. Okay.

16 A. That's a guess.

17 Q. And do you have a guess about how old
18 Mr. and Mrs. Bailey are?

19 A. It would be a guess, but I would say
20 north of 65.

21 Q. Okay. And did I see somewhere that
22 maybe their daughter works for ArrowPointe or
23 worked for ArrowPointe at some point?

24 A. Did work for ArrowPointe.

25 Q. What was her name?

1 A. Angel Messer.

2 Q. Okay. And what did she do for
3 ArrowPointe?

4 A. She was a teller.

5 Q. And what was her dates of employment
6 with ArrowPointe?

7 A. I think she's been gone two or three
8 years now, so that would put her being employed
9 with us through 2009, 2010. She was with us for
10 about three or four years.

11 Q. How many employees does ArrowPointe
12 have?

13 A. Approximately 35.

14 Q. 35, okay.

15 And where are you in the chain of
16 command? Is there anybody above you?

17 A. Yes.

18 Q. Who would that be?

19 A. Tim Lyda, L-y-d-a.

20 Q. And is Tim -- Mr. Lyda -- is he the
21 CEO?

22 A. He is.

23 Q. And is that the highest position within
24 ArrowPointe?

25 A. It is.

1 Q. Would your position be second to his?

2 A. Yes.

3 Q. Okay.

4 A. It would be under his.

5 Q. Under his, okay.

6 Do you have some contemporaries where
7 your position as vice president is roughly the same
8 in the chain of command as yours?

9 A. We have a VP in HR.

10 Q. Who is that?

11 A. Tommy Burton.

12 Q. Does Mr. Burton have any involvement
13 with this loan?

14 A. No.

15 Q. Any other vice presidents at
16 ArrowPointe?

17 A. No.

18 Q. Under vice presidents, is branch
19 manager the next position?

20 A. Yes.

21 Q. Why do you think you were designated
22 today to testify on behalf of ArrowPointe as to
23 this loan?

24 A. Um, I think because I became involved
25 in this loan in July of '11, when -- as a result of

1 an e-mail sent by Mrs. Bailey to our CEO,
2 indicating that they were having financial
3 difficulties.

4 Q. So you really didn't have any -- did
5 you know that this loan existed before July of
6 2011?

7 A. Um, no, because I was not involved in
8 it when it was made.

9 Q. Sure.

10 A. But there are lots of loans that we
11 have on the books that I'm not aware of.

12 Q. I understand. Certainly.

13 So you weren't involved in the
14 underwriting or the credit analysis of this?

15 A. No.

16 Q. Okay. Who typically is involved, you
17 know, in the underwriting?

18 A. Generally the branch manager and the
19 loan officers.

20 Q. Okay. Did they have final approval or
21 does that --

22 A. If it's within their authority, yes.

23 Q. Okay. And if it's not within their
24 authority, I'm guessing that either you or Mr. Lyda
25 looks at it?

1 A. That's correct.

2 Q. Is that a requirement for it to be
3 approved between 100 and 250,000, that one of the
4 two of you sign off on it?

5 A. That's correct.

6 Q. Does the other vice president have the
7 authority to sign off on loans?

8 A. No.

9 Q. Okay. So just the two of you?

10 A. Yes.

11 Q. And I believe Mr. Lyda was actually the
12 one that approved this loan, correct?

13 A. That's correct.

14 Q. So around July of 2011 was when you
15 first became involved and knowledgeable about this
16 loan?

17 A. That's correct.

18 Q. All right. And tell me a little bit
19 about the purpose of this loan and how it came
20 about.

21 A. In reviewing the file, this loan was
22 for the purpose of home improvements, and I think
23 it was to have -- create an addition to the house,
24 because the daughter, who was our employee, was
25 moving in with her parents. And I think she may

1 have had a child.

2 Q. Okay. What type of loan was it?

3 A. This was a home equity line of credit.

4 Q. So the Baileys already owned their home
5 when y'all entered into this loan transaction with
6 them. Is that correct?

7 A. That's correct.

8 Q. Okay. And they were borrowing money to
9 make improvements on the home?

10 A. That's correct.

11 Q. Okay. I'll show you a few documents
12 that were produced to us by ArrowPointe and your
13 attorney during discovery. Most of these are just
14 documents that I imagine you are familiar with and
15 have seen before.

16 MR. WALKER: Introduce this as
17 Defendant's Exhibit Number 2.

18 (DFT. EXH. 2, ArrowPointe Open-End Home
19 Equity Credit Agreement and Truth in Lending
20 Disclosure pertaining to Jimmy E. Bailey and Laura
21 Jean Bailey, was marked for identification.)

22 BY MR. WALKER:

23 Q. And this is your credit agreement and
24 Truth in Lending Disclosure, Defendant's Exhibit
25 Number 2, that the court reporter has just handed

1 to you. You can look at that, Mr. Price.

2 If you could tell me a little bit about
3 this document and what it does.

4 A. Well, it spells out the requirements of
5 the borrower and provides the disclosures that
6 we're required to give.

7 Q. Okay. And is this the -- is this the
8 agreement with the borrower as far as, you
9 know -- I know it's not a note; it's an Open-End
10 Home Equity Credit Agreement and Truth in Lending
11 Disclosure.

12 But is it basically the contract
13 between the borrowers and ArrowPointe?

14 A. Yes.

15 Q. And do those appear to be
16 Mr. and Mrs. Bailey's signatures at the bottom?

17 A. They appear to be, yes.

18 Q. To the best of your knowledge?

19 A. To the best of my knowledge, yes, sir.

20 Q. And I notice there's not an amount on
21 here and I believe that's because it's an open-end
22 home equity line of credit. Is that correct?

23 A. That's correct.

24 MR. WALKER: Okay. These are some more
25 underwriting documents, I believe. Introduce this

1 as Plaintiff Defendant's 3.

2 (DFT. EXH. 3, a letter dated October
3 13, 2009 to O'Neil Cannon from Tim Lyda, was marked
4 for identification.)

5 BY MR. WALKER:

6 Q. This is a letter to an appraiser from
7 Mr. Lyda who is the CEO now and was the CEO in
8 2009. Is that correct?

9 A. Yes.

10 Q. How long has Mr. Lyda been the CEO?

11 A. I'm thinking he came in the year
12 2000 -- it's either '99 or 2000.

13 Q. And it looks like he is requesting an
14 appraisal. That would be typical, I'm assuming, in
15 underwriting these loans?

16 A. Yes, it would.

17 Q. And if you turn to the second page,
18 this is the order that the documents were produced
19 to us. You'll see a summary appraisal report by
20 Mr. Cannon that's dated September 11th, 2009, which
21 actually pre-dates the letter. So it looks like
22 this summary appraisal report was in your file.

23 Do you know if Mr. Cannon provided this
24 document to y'all or if you provided this document
25 with your letter of October 13th, 2009?

1 A. I don't know the answer to that. I
2 don't know how we came about having possession of
3 this. I don't know if it was provided to us by the
4 member.

5 Q. Okay. Are you fairly certain that you
6 had this document in your possession during the
7 underwriting of the loan?

8 A. Yes.

9 Q. And this appears to be an appraisal
10 that was done for Quicken Loans. Is that your
11 understanding?

12 A. Yes.

13 Q. Okay. And what was your
14 understanding -- or what was ArrowPointe's
15 understanding of Quicken Loans' involvement on this
16 piece of property, or with this home, while
17 ArrowPointe was underwriting its loan?

18 A. Well, it was our understanding that the
19 Baileys were in the process of refinancing the
20 existing first mortgage.

21 Q. Okay. What was your
22 understanding -- who was the -- the existing first
23 mortgage was in place. Who held that mortgage?

24 A. I think Bank of America held that
25 mortgage, and I think they owed them \$246,000,

1 according to what I've been able to determine.

2 Q. Okay. And it was your understanding
3 that Quicken was refinancing that first mortgage?

4 A. Yes. Maybe it's just the terminology
5 here, but I believe Quicken was making a loan to
6 pay off the existing mortgage.

7 Q. Okay. And that was the purpose
8 of -- to the best of your knowledge -- why Quicken
9 ordered this appraisal?

10 A. Yes.

11 Q. And does the appraisal show a value of
12 \$370,000?

13 A. Yes.

14 Q. Okay. And that's on the third page of
15 this exhibit and dated September 15th of 2009. Is
16 that correct?

17 A. That's correct.

18 Q. I'm sorry, I think that's on the fourth
19 page. I think I misstated that. Is that correct?

20 A. I see the \$370,000 of value, yes.

21 MR. WALKER: Okay.

22 Let's introduce this as Defendant's
23 Exhibit Number 4.

24 (DFT. EXH. 4, ArrowPointe Individual or
25 Joint Credit Form, was marked for identification.)

1 BY MR. WALKER:

2 Q. This is an individual or joint credit
3 form that Mr. and Mrs. Bailey signed that states
4 that they're applying for \$99,000 of credit on
5 October 27th of 2009. Is that accurate?

6 A. Yes.

7 Q. And it shows that they're applying for
8 joint credit and that the member's number is 264,
9 correct?

10 A. Yes.

11 Q. And so \$99,000, was that the limit of
12 the equity line of credit you're extending to them?

13 A. Yes.

14 Q. Okay.

15 (DFT. EXH. 5, handwritten notes, was
16 marked for identification.)

17 BY MR. WALKER:

18 Q. On Exhibit 5, Mr. Price, this appears
19 to be handwritten notes. Can you tell me -- this
20 was produced to us from y'all's file.

21 Do you know what this is?

22 A. Yes. This appears to be an estimate by
23 a contractor, as to speaking to the addition that
24 the Baileys were wanting to add to their home.

25 Q. Okay. Is this something you would have

1 required in your underwriting?

2 A. We would not have required it. We
3 would have retained a copy if the member supplied
4 it to us.

5 Q. Okay. And it looks like the work they
6 were going to -- the estimate for the work that
7 they were going to have done was around \$74,000?

8 A. Yes.

9 Q. It looks like this says, Steve L.
10 Reynolds, Jr., as he signed this document. Is that
11 correct?

12 A. I would assume that's his signature,
13 sir.

14 Q. Okay. I'm going to hand you another
15 appraisal from the same appraiser.

16 MR. WALKER: Introduce that as
17 Defendant's Exhibit Number 6.

18 (DFT. EXH. 6, Garvin Appraisals - an
19 appraisal dated October 14, 2009, signed by O'Neil
20 H. Cannon, II and Eugene C. Garvin, Jr., was marked
21 for identification.)

22 BY MR. WALKER:

23 Q. Can you tell me about this letter
24 accompanying your appraisal, Mr. Price?

25 A. What would you like to know, sir?

1 Q. Is this your underwriting appraisal
2 that the bank obtained for this loan?

3 A. Yes, it is.

4 Q. And what's the amount that the
5 appraiser opined as to the value?

6 A. The cover page shows a value of
7 \$500,000.

8 Q. And the date on that is October 14th,
9 2009?

10 A. That's correct.

11 Q. And I believe that he's got some
12 limiting conditions on here that state on the
13 second page towards the bottom that the subject
14 property is going to be renovated and will be in
15 very good condition overall.

16 So the subject is: Appraised subject
17 to completion of the proposed addition/renovation
18 work.

19 Was it your understanding that this
20 appraiser, which you based your loan on, it was his
21 opinion that this piece of property and its
22 improvement would be worth \$500,000 after the
23 renovations?

24 A. That's our understanding, yes.

25 Q. Okay. And you extended credit based on

1 that understanding, correct?

2 A. I think that that was a consideration.
3 That was not the total consideration.

4 MR. WALKER: Somehow I just ended up
5 with one copy of this, Christy. I believe it's the
6 Preliminary Title Report that Mr. Hamilton did on
7 the property before closing the ArrowPointe loan.

8 MS. JONES: Okay.

9 MR. WALKER: Can I introduce that one?

10 MS. JONES: Sure.

11 MR. WALKER: I only have one copy.

12 MS. JONES: That's fine.

13 MR. WALKER: Introduce that as
14 Defendant's Exhibit Number 7, please.

15 (DFT. EXH. 7, Preliminary Title Report
16 for ArrowPointe Federal Credit Union pertaining to
17 Jimmy Eugene Bailey and Laura Jean Bailey, signed
18 by Milton E. Hamilton, with attachments, was marked
19 for identification.)

20 BY MR. WALKER:

21 Q. Mr. Price, you're holding Defendant's
22 Exhibit Number 7, which is entitled Preliminary
23 Title -- what does that say?

24 A. Report.

25 Q. -- Report. Okay.

1 And who prepared that? Was this
2 prepared for your use in underwriting this loan?

3 A. Yes, it was.

4 Q. And who prepared that?

5 A. Milton E. Hamilton.

6 Q. Is Mr. Hamilton an attorney?

7 A. He is.

8 Q. Mr. Hamilton cited some existing
9 mortgages on there.

10 Do you see -- what's the date of
11 this -- of this document?

12 A. October the 12th, 2009.

13 Q. Okay. And what does he list as an
14 existing first mortgage?

15 A. A first mortgage by Laura Jean and
16 Jimmy Bailey to merge as the mortgagee and Quicken
17 Loans, as the lender, dated January 20th, 2009,
18 recorded February 6th of '09 in Record Book 941,
19 Page 45, in the amount of \$248,500.

20 Q. So at the time you closed your loan,
21 was it your understanding that that mortgage
22 existed on the property?

23 A. Yes.

24 Q. And the date that mortgage was recorded
25 was in February of 2009?

1 A. That's correct.

2 Q. Okay. Will you flip to the back page
3 of that document.

4 What does that fourth page of
5 Defendant's Exhibit 7 say?

6 A. It's the Final Title Report and the
7 mortgage to ArrowPointe, dated October the 27th of
8 '09, recorded on November the 4th of '09, in
9 Mortgage Book 973, Page 28, securing a note for
10 \$99,000.

11 Q. Okay. And does it say that that
12 mortgage -- that ArrowPointe mortgage -- is subject
13 to the exceptions and other mortgages on the
14 Preliminary Title Report that we were just
15 discussing?

16 A. Yes. It said that all is listed in the
17 Preliminary Title Report, except the mortgage from
18 the Baileys to Bowater, dated February 16th of '01
19 and recorded February 28th of '01, Mortgage Book
20 948, Page 1 in the original amount of \$153,000 has
21 been satisfied of record.

22 Q. What was the date of the Final Title
23 Report?

24 A. October the 12th of 2009.

25 Q. Okay. Was it your understanding, when

1 ArrowPointe closed this loan with the Baileys, that
2 ArrowPointe was in a second position?

3 A. Yes.

4 Q. Okay. And that was in -- I believe you
5 closed this loan on October the 27th, 2009?

6 A. That date sounds correct.

7 Q. And when you recorded your mortgage on
8 November the 4th of 2009, was it still your
9 understanding that you were in a second position?

10 A. Yes.

11 MR. WALKER: Okay. I'm just going to
12 enter this into the record. This is the
13 ArrowPointe mortgage.

14 (DFT. EXH. 8, Revolving Credit Mortgage
15 pertaining to Jimmy Eugene Bailey and Laura Jean
16 Bailey, was marked for identification.)

17 BY MR. WALKER:

18 Q. Mr. Price, does this appear to be an
19 accurate copy of the ArrowPointe mortgage dated
20 October 27th, 2009 and recorded on November the
21 4th, 2009?

22 A. Yes.

23 Q. I understand that Mr. Hamilton's
24 Preliminary Title Report listed the first mortgage,
25 being a mortgage that was recorded in February of

1 2009, and we discussed earlier that you all were
2 aware that they were getting another first mortgage
3 at that time to pay off that mortgage.

4 Was that your understanding, too?

5 A. I'm going to ask that you clarify that
6 question a little bit.

7 Q. Sure.

8 A. Now, if you're driving it based on the
9 Preliminary Title Report, there were a total of two
10 mortgages listed, one was to MERS, dated -- or
11 recorded February 6th of '09, and then there was
12 another one to Bowater Carolina that was recorded
13 February the 28th of 2001, eight years prior.

14 And that one was assigned to various
15 other parties after that fact.

16 So if you look at this preliminary
17 title opinion and go by the dates, the first
18 mortgage would appear to be the one to Bowater
19 Carolina Federal Credit Union, and the one to MERS,
20 dated eight years later, would be second.

21 Q. Okay.

22 A. So what is your question, sir?
23 I'm sorry.

24 Q. Tell me a little bit more about the
25 Bowater mortgage. Was it your understanding that

1 that was satisfied --

2 A. It is.

3 Q. -- or should have been satisfied?

4 A. Correct. It should have been
5 satisfied.

6 Q. And I think it was satisfied of record
7 in conjunction around this time by Mr. Hamilton?

8 A. Yes.

9 Q. Okay. So the February of 2009 MERS
10 mortgage would be in first position?

11 A. Yes.

12 Q. Okay. Was it your understanding -- or
13 is it your understanding now -- that that
14 mortgage -- that MERS mortgage -- was being
15 refinanced right around the same -- either
16 refinanced or paid off and satisfied by another
17 loan around that same time?

18 A. Yes, that's my understanding.

19 Q. Okay. That's your understanding now,
20 correct?

21 A. Yes.

22 Q. Was that your understanding then?

23 A. I wasn't involved then.

24 Q. Was that ArrowPointe's understanding?

25 A. Yes.

1 Q. I'm going to hand you another exhibit.

2 (DFT. EXH. 9, Settlement Statement, was
3 marked for identification.)

4 BY MR. WALKER:

5 Q. This is a Settlement Statement dated
6 October 5th, 2009.

7 MS. JONES: Excuse me, what was Number
8 8?

9 MR. WALKER: I believe it was the
10 mortgage.

11 MS. JONES: Okay. Got it.

12 MR. WALKER: And then 7, you might not
13 have.

14 MS. JONES: Is 7 the Final -- the
15 Preliminary -- oh, 7 was the one I didn't have. I
16 got you, got you. Sorry.

17 MR. WALKER: That's okay.

18 BY MR. WALKER:

19 Q. Okay. This Settlement Statement -- I
20 will represent to you that this was produced in the
21 documents from your file. This appears to be a
22 loan that was given to the Baileys from Quicken.
23 Settlement date was actually September 29th of 2009
24 to be disbursed on October 5th of 2009.

25 Did y'all -- did ArrowPointe have

1 knowledge of this transaction at the time it closed
2 its loan?

3 A. Yes, based on what I've been able to
4 determine.

5 Q. Okay. And I believe that a mortgage
6 accompanied this loan as well.

7 Is that your understanding?

8 A. You believe that mortgage accompanied
9 which loan, sir?

10 Q. Um, did this -- we'll call this the --

11 A. The Quicken mortgage?

12 Q. Yes, sir.

13 We'll call this the October Quicken
14 mortgage.

15 But was that secured by a mortgage, to
16 the best of your understanding?

17 A. Yes.

18 Q. I'm going to represent to you that that
19 mortgage is recorded in Book 971 at Page 41, in the
20 Fairfield Clerk of Court's office in the principal
21 amount of \$256,550. And it was recorded on October
22 the 20th of 2009.

23 Are you familiar with that mortgage
24 now?

25 A. Yes. It appears that that was -- the

1 mortgage by Quicken was the mortgage being extended
2 to the Baileys to pay off the existing current MERS
3 mortgage that had been recorded in February of '09
4 of that year.

5 Q. Okay. And you expected for that
6 mortgage to be in a senior position to your
7 mortgage, correct?

8 A. Yes.

9 Q. And you had that expectation in 2009
10 during the time of your loan closing?

11 A. Yes.

12 Q. And that mortgage was recorded on
13 October 20th of 2009, and I believe your loan was
14 closed on October 27th of 2009, correct?

15 A. I believe that's correct.

16 Q. So do you believe today that that
17 mortgage was senior to your mortgage?

18 A. The first Quicken mortgage of \$256,000,
19 yes, I believe was senior to our line of credit of
20 \$99,000.

21 Q. Okay. And then if you look at Line
22 1501 of the Settlement Statement, which is
23 Defendant's Number 9, you will see that \$247,761.03
24 was paid to BAC Home Loan services from the
25 proceeds of the Quicken loan.

1 Does that sound accurate?

2 A. It does.

3 Q. Okay. Is it your understanding now
4 that this October Quicken mortgage loan was paid
5 off subsequently -- has been since paid off and
6 satisfied of record?

7 A. Uh, which Quicken mortgage, sir? I'm
8 sorry, I'm getting the two confused and I
9 apologize.

10 Q. That's okay, it wasn't a very good
11 question.

12 The October 2009 Quicken mortgage --

13 A. Of \$256,000?

14 Q. Yes, sir.

15 -- is it your understanding that that
16 has been satisfied by another loan?

17 A. Yes.

18 Q. Okay. I'm going to hand you some
19 documents that we produced to you, listed as
20 JPMorgan Chase 2, as Defendant's Number 10.

21 (DFT. EXH. 10, Note - Quicken Loans,
22 was marked for identification.)

23 BY MR. WALKER:

24 Q. This is a note where the lender is
25 Quicken Loans, Inc. It's dated November 23rd of

1 2009 in the amount of \$296,000, and it's a loan to
2 Mr. and Mrs. Bailey.

3 Does that appear to be accurate?

4 A. Well, there's no identifying
5 information at the top of this note, but I do see
6 on the signatures that it appears to be the
7 Baileys' signature.

8 Q. Okay. And are they listed as -- as
9 Laura Jean Bailey and Jimmy Eugene Bailey listed as
10 the borrowers on that signature line?

11 A. That's correct.

12 Q. And the date of this note is November
13 23rd, 2009, correct?

14 A. Yes.

15 Q. And that date comes after the date that
16 your mortgage was recorded, correct?

17 A. Yes.

18 Q. Which was November 4, 2009?

19 A. I'm going to take your word for that,
20 Counselor. I don't remember. I'm sorry.

21 Q. That would be fine.

22 But you do believe that this note came
23 after your mortgage was recorded?

24 A. Yes.

25 Q. But it was right around the same time,

1 a little bit after. I guess, when did ArrowPointe
2 learn about this note and its accompanying
3 mortgage?

4 A. The second Quicken note?

5 Q. Yes, sir.

6 A. It was mid July, 2011.

7 Q. Okay. So from November of 2009 through
8 July of 2011, you had no knowledge that the October
9 Quicken mortgage had been paid off?

10 A. That's correct.

11 MR. WALKER: Okay. I'm going to go
12 ahead and introduce the mortgage -- the November
13 Quicken mortgage.

14 (DFT. EXH. 11, Mortgage, was marked for
15 identification.)

16 BY MR. WALKER:

17 Q. Defendant's Exhibit Number 11,
18 Mr. Price, does this appear to be the mortgage that
19 secured the note that's Plaintiff's Exhibit Number
20 10?

21 A. Yes, it does. I'm looking to see if
22 there was an amount on here somewhere. There we
23 go, yes. Yes, it does.

24 Q. And what's the amount on there?

25 A. \$296,000.

1 Q. And this mortgage is between the
2 borrower, Laura Jean Bailey, Jimmy Eugene Bailey,
3 and the mortgage -- I want to make sure I get the
4 language right -- and the lender, Quicken Loans
5 Inc., correct?

6 A. Yes.

7 Q. Okay. And it was recorded on December
8 the 15th of 2009, correct?

9 A. Yes.

10 Q. Which was after your ArrowPointe
11 mortgage was recorded, correct?

12 A. Yes.

13 Q. And you had no knowledge of
14 this -- ArrowPointe had no knowledge of this until
15 around July of 2011?

16 A. That's correct.

17 Q. But certainly not any time during 2009?

18 A. Not that I'm aware of, no.

19 MR. WALKER: Okay. Introduce the
20 Settlement Statement that accompanied that.

21 (DFT. EXH. 12, Settlement Statement,
22 was marked for identification.)

23 BY MR. WALKER:

24 Q. Mr. Price, in Defendant's Exhibit 12,
25 does this appear to be the Settlement Statement

1 that would have accompanied the Quicken mortgage
2 loan that was recorded -- the mortgage of which was
3 recorded in December of 2009?

4 A. Yes.

5 Q. Okay. Do you see in Line 1501 that it
6 appears that a prior Quicken loan was paid off by
7 the proceeds of this December 2009 mortgage? Is
8 that your understanding?

9 A. Yes.

10 Q. The amount of that, \$257,459.04?

11 A. Correct.

12 Q. Okay. Did it pay off the loan that you
13 understood to be in senior position when
14 ArrowPointe closed its loan in 2009?

15 A. Restate the question, please.

16 Q. Sure, sure.

17 This loan, the December 2009 Quicken
18 loan, the Settlement Statement that we're looking
19 at, it paid off a prior loan in the amount of
20 roughly \$257,000, correct?

21 A. Yes.

22 Q. Is it your understanding that that
23 prior loan that it paid off was the first mortgage
24 on the property when you all closed?

25 A. Yes. This appears to have paid off the

1 first Quicken mortgage --

2 Q. Okay.

3 A. -- of \$256,000.

4 Q. And the amount it paid off was
5 \$257,459.04, correct?

6 A. Correct.

7 Q. Okay. This mortgage that it paid off,
8 which was recorded in October of 2009, was it -- do
9 you have any reason to believe that that mortgage
10 was ever not recorded or not of record before this
11 loan satisfied it?

12 Was it your understanding until you
13 found out in July of 2011, that this loan came
14 about -- was it your understanding during that
15 whole time frame that the October 2009 Quicken
16 mortgage was still in first position and of record?

17 A. Yeah, I was under the impression that
18 that mortgage was still in existence, and had no
19 idea about this mortgage.

20 Q. Okay. So up until roughly July of
21 2011, ArrowPointe still thought they were in the
22 second position, correct?

23 A. Yes.

24 Q. Okay. I'm assuming that Quicken never
25 contacted you about a formal subordination?

1 A. No, not that I'm aware of. And I
2 haven't seen any evidence of such.

3 Q. Okay. So tell me about this discovery
4 in July of 2011 of this December 2009 Quicken
5 mortgage. How did that come to your attention?

6 A. When we received the e-mail from
7 Mrs. Bailey to our CEO that they were experiencing
8 financial difficulties, he forwarded that e-mail to
9 me, I guess just to investigate or to let me know
10 that there was an issue.

11 At that point in time, I reviewed the
12 file. I reviewed a credit report that we had on
13 file in our system, because I wanted to see how
14 much was owed on the first mortgage at that time.

15 As I was scanning down the trade lines,
16 I saw our trade line and I saw a trade line that
17 appeared to be the first mortgage and noticed that
18 ours was reporting an opening date of a month
19 before this mortgage.

20 At that point in time -- sometime
21 during that time frame is when I got in touch with
22 the closing attorney, Milton Hamilton, and
23 expressed my concern about the discrepancy in the
24 dates and asked that he update his title paper.

25 Q. I think I've got a copy of

1 Mr. Hamilton's update. And we will introduce that
2 in a second.

3 What was your understanding of his
4 report back to you?

5 A. That we were, in fact, in first
6 position.

7 Q. Okay. Do you have an idea of why that
8 was his opinion?

9 A. Because I think he examined the
10 records --

11 Q. Okay.

12 A. -- and determined that to be the fact.

13 MR. WALKER: Okay. I'm going to
14 introduce this title report.

15 (DFT. EXH. 13, a letter dated July 18,
16 2001 to Jim Price from Milton E. Hamilton regarding
17 Jimmy Eugene Bailey and Laura Jean Bailey, was
18 marked for identification.)

19 BY MR. WALKER:

20 Q. And, again, you said that this came to
21 your attention because Ms. Bailey sent Mr. Lyda an
22 e-mail about some financial difficulties?

23 A. Yes.

24 Q. So as you were looking through this,
25 you decided it was a good idea to contact

1 Mr. Hamilton to see what the status of the title
2 was on the property, correct?

3 A. Based on my review of the trade lines
4 on the credit bureau report, there was a
5 discrepancy in the opening dates, and that's why I
6 had Mr. Hamilton update his title opinion.

7 Q. And it appears on here that, since his
8 last title opinion, he uncovered the October 20th,
9 2009 Quicken mortgage, as well.

10 A. The first Quicken mortgage, yes.

11 Q. The October 2009 Quicken mortgage?

12 A. The first one, yes.

13 Q. Well, and I don't want there to be any
14 confusion there, because if you will see in the
15 second paragraph on this page, he references a
16 Quicken mortgage in February of 2009.

17 That would, I think, technically for
18 our purposes, be the first one, correct?

19 A. For your purposes, yes, it would.

20 Q. Okay. And then we've got an October
21 2009 Quicken mortgage as well?

22 A. Which would be our first Quicken
23 mortgage.

24 Q. Okay. But that one makes this title
25 report for the first time here, correct?

1 A. Yes.

2 Q. And then he also references the
3 December -- the Quicken mortgage that was recorded
4 on December 15th, 2009 in the amount of \$296,000,
5 correct?

6 A. Your third, our second.

7 Q. Okay. And he opines that, because your
8 mortgage was recorded on November 23rd, 2009,
9 ArrowPointe's mortgage; and Quicken's December
10 15th, 2009 mortgage was recorded later on December
11 15th, that you were in a first position.

12 A. Sure.

13 Q. Is that your understanding of his
14 opinion?

15 A. Yes.

16 Q. Tell me a little bit about the short
17 sale that was deliberated during the Baileys'
18 financial hard times.

19 A. My first inkling of a short sale, I
20 think, was in the original communication from
21 Mrs. Bailey to Tim, and I may be incorrect there.
22 But she had mentioned that her mortgage holder had
23 suggested a short sale. That made me very curious,
24 in that the first mortgage holder was suggesting a
25 short sale, when ArrowPointe clearly had an

1 interest in the property and would have a say in a
2 matter of a short sale.

3 Q. How did the short sale discussion
4 progress? Did she have a buyer in mind at any --

5 A. At that stage, I don't think so. I
6 think a buyer -- a potential buyer -- came into
7 play a little later on.

8 Q. Okay.

9 A. Because I think there was a contract
10 offer drawn up.

11 Q. Okay. So when she -- she lets
12 ArrowPointe know that she's contemplating a short
13 sale after discussing this with the first
14 mortgagee?

15 A. No, no. What she said was -- she
16 didn't say that she was contemplating it, it's that
17 her mortgage holder had suggested that.

18 Q. Suggested that. Okay.

19 A. I don't know whether she was
20 contemplating that or not.

21 We later found out that she was, since
22 she had the subsequent offer.

23 Q. Okay. So with that in mind, what
24 do -- what's your next move? Do you contact the
25 other mortgagee, or do you just kind of wait to

1 hear back from her?

2 A. I tried. I attempted to make contact
3 with the mortgage holder.

4 Q. Okay. And that was Chase?

5 A. Yes.

6 Q. How successful were you with that?

7 A. That didn't go so well.

8 Q. A lot of -- telephone prompts?

9 A. Well, I was told, because I was a third
10 party, that they couldn't discuss any of the
11 details of the account with me, and I told them, I
12 think, I urge you, I implore you, to update a title
13 search on this property before you take any action
14 on a short sale or foreclosure, because I question
15 your lien position. And I would like to give you
16 my name, my number, and my e-mail address.

17 And I provided that to the young lady I
18 was speaking with.

19 Q. Okay.

20 A. And I just felt that she wasn't
21 recording or documenting any of the information.

22 Q. Okay. Did she -- did anyone at Chase
23 ever get back to you after leaving --

24 A. No.

25 Q. -- that information?

1 A. No.

2 Q. So you have never spoken with Chase or
3 Quicken or anyone since then?

4 A. No.

5 Q. Did they give you any indication that
6 they thought you were right about the lien
7 positions, that they were junior?

8 A. They who?

9 Q. This young lady that you spoke to.

10 A. No.

11 Q. Okay. So those conversations didn't go
12 past that one conversation with the young lady,
13 correct?

14 A. With Chase, that's correct.

15 Q. Roughly, when was that?

16 A. Mid July, 2011.

17 Q. Okay.

18 A. It would be around the same time frame
19 that I had Milton Hamilton update the title. It
20 would have been after then.

21 Q. At that point, in your mind, were you
22 thinking that this might be something that could
23 eventually lead to litigation?

24 A. Absolutely.

25 Q. This is a series of e-mails that I'm

1 going to introduce as an exhibit that your attorney
2 produced in discovery.

3 (DFT. EXH. 14, e-mails between Barbara
4 Looper, Jim Price, and Laura Jean Bailey, was
5 marked for identification.)

6 BY MR. WALKER:

7 Q. Exhibit 14, Mr. Price, there's an
8 e-mail dated July 12, 2011 from you to Ms. Looper.
9 And you've got a question in there:

10 How will they do a short sale with us
11 having a second?

12 I think that's kind of what we've been
13 speaking about, but is that part of your analysis
14 and questions and curiosities in July of 2011?

15 A. Yes.

16 Q. Okay. And it appears that as of that
17 date, she still thought you had a second-position
18 lien, but you were beginning to investigate?

19 A. Yes.

20 Q. And Mr. Hamilton's report was --

21 A. The 14th, maybe.

22 Q. Yeah, July 18th.

23 A. Okay.

24 Q. Does that sound right?

25 A. Yes.

1 Q. Okay. So probably after this e-mail,
2 you started -- or maybe even before, but around
3 that time, you were looking at these issues,
4 correct?

5 A. Yes.

6 Q. Okay. And then if you would, turn to
7 the third page of Defendant's Exhibit Number 14,
8 you will see an e-mail from Laura Jean Bailey to
9 Tim Lyda, where she states she's been trying to
10 work with Chase. And in her first sentence she
11 says:

12 I thought I would explain what is
13 happening with my second mortgage loan.

14 Is it your understanding that
15 Mrs. Bailey was under the understanding that her
16 ArrowPointe loan was her second mortgage loan?

17 A. Yes.

18 Q. And when she refers to second, she's
19 speaking of priority position?

20 A. Yes.

21 Q. And then the first mortgage is with
22 Chase, correct?

23 A. Yes.

24 Q. The third-to-last sentence of the first
25 paragraph says: Our first mortgage is with Chase

1 Bank.

2 So she was still under the impression
3 that Chase had a first position mortgage on her
4 property as of July 12, 2011, correct?

5 A. Yes. This is the initial e-mail that I
6 think was dated July the 4th of 2011, and you've
7 referenced the third-from-last
8 paragraph -- second-from-last sentence in that
9 paragraph is where she told us Chase had suggested
10 a short sale.

11 Q. Got you.

12 (DFT. EXH. 15, printout/receipt
13 regarding mortgage information, including
14 handwritten comments, was marked for
15 identification.)

16 BY MR. WALKER:

17 Q. I'll introduce this as Defendant's
18 Exhibit Number 15, which is a document with some
19 handwritten notes on it. It looks like a printout
20 from a computer screen that's got the loan balance
21 on it. Those handwritten notes, are those your
22 handwritten notes, Mr. Price?

23 A. Yes.

24 Q. What does that say?

25 A. Payoff given to Kathy Candlers Realty

1 Company. Chase stalling and requesting close date
2 moved to 11/15/2011. Kathy says they're trying to
3 figure out a way to get back in first. The initial
4 J, 9/23/11.

5 Q. And who is they? Chase?

6 A. Yes.

7 Q. What did these -- do these handwritten
8 notes follow a conversation with Ms. Keeners?

9 A. Yes. This is to document that I had
10 that conversation with her and had given her that
11 payoff --

12 Q. Okay.

13 A. -- on that date.

14 Q. Okay. What's your recollection of that
15 conversation, other than these handwritten notes?
16 What did you guys discuss?

17 A. I'm sorry, sir, I can't really tell
18 you, other than these notes here.

19 If you look at this, you will see that,
20 under the name where it says Account Number 264,
21 name, Jimmy E. Bailey, loan suffix dash 84, on 15
22 November '11, you know, she was requesting a payoff
23 for that day and that was on -- we had this
24 conversation on 9/23.

25 So she was wanting a payoff for a date

1 in the future, and I think that's to match the
2 close date that she said Chase was stalling to.

3 Q. Chase never gave you, personally, any
4 indication that they thought they were in second
5 position, did they?

6 A. No.

7 MR. WALKER: Go off the record for a
8 minute.

9 (A brief recess was held.)

10 BY MR. WALKER:

11 Q. Okay. We're back on the record.

12 Mr. Price, just to remind you, you're
13 still under oath and we're still taking your
14 testimony here today. And we're back on the record
15 now.

16 You have brought this action for
17 foreclosure of your mortgage. Is that correct?

18 A. Yes.

19 Q. Okay. So clearly the Baileys are in
20 default on their mortgage, on their loan. Is that
21 correct?

22 A. Yes.

23 Q. Okay. What -- have y'all had any
24 communications with them, just generally, since
25 they went into default?

1 A. It would be limited. They sought
2 protection under bankruptcy, which kind of limited
3 our correspondence. And I think that action has
4 run its course and has been discharged. So I don't
5 know of any communication. We may have had some
6 that I'm unaware of.

7 Q. Okay. Is the property vacant, to the
8 best of your knowledge?

9 A. To the best of my knowledge, it is,
10 yes.

11 Q. So you don't believe they're still
12 living there?

13 A. I do not.

14 Q. Okay. Do you have any current contact
15 information for them, at the bank? I doubt you do
16 right here, right now, but...

17 A. No, I don't, but I think that we could.
18 I mean, I had some -- a cell phone number or two
19 that -- obviously, I haven't tried to reach them.

20 Q. Would you mind getting with your
21 attorney following the deposition and just getting
22 that contact information and providing it to us,
23 any cell phone numbers, current addresses, e-mails,
24 anything like that. I think I have probably got
25 her old e-mail, but if there's any other e-mails,

1 could you just let me know that?

2 A. Yes.

3 MR. WALKER: Okay. I'm going to hand
4 you some documents that we produced -- JPMorgan
5 produced to ArrowPointe and to your attorney.

6 You've probably -- you may have never
7 seen them as of today. I doubt that you saw them
8 before we produced them to you.

9 I'll introduce this as the next
10 Defendant's Exhibit.

11 (DFT. EXH. 16, Authorization to
12 Disburse Funds and to Record Documents, pertaining
13 to Borrower Bailey, signed by Stacey P. Gardner,
14 was marked for identification.)

15 BY MR. WALKER:

16 Q. This is a letter from an attorney named
17 Stacey Pope Gardner, whose name you will see at the
18 top on the letterhead.

19 Does this appear to be on Ms. Gardner's
20 letterhead, and is she representing that she's an
21 attorney?

22 A. Yes.

23 Q. And it references the loan that was
24 closed on November 23rd, 2009. That's the Quicken
25 mortgage that was recorded in December of 2009.

1 Does it appear from Ms. Gardner's
2 representations that she was -- I believe -- let me
3 start over.

4 This appears to be a letter to the
5 lender for the title company, which is most likely
6 Quicken.

7 Does that appear to be who this letter
8 is addressed to? Does it say Dear Lender/Title
9 Company?

10 A. It does says Dear Lender/Title Company,
11 yes.

12 Q. Okay. And in bold up above the
13 handwritten word Bailey, do you see where it says,
14 Authorization to disburse funds and to record
15 documents?

16 A. Yes.

17 Q. So it appears the nature of this letter
18 is providing advice to a lender from Ms. Gardner
19 about disbursing funds and recording documents. Is
20 that correct?

21 A. Yes, it does, on a borrower by the name
22 of Bailey.

23 Q. Okay. And the date of the letter is
24 November 23rd, 2009?

25 A. Yes.

1 Q. Is this marked as JPMorgan Chase, Bates
2 Number 000081?

3 A. Yes.

4 Q. Okay. Does it appear that Ms. Gardner
5 was involved in the Bailey transaction in November
6 of 2009?

7 A. Yes.

8 (DFT. EXH. 17, Closing Attorney's
9 Statement for borrowers Jimmy Eugene Bailey and
10 Laura Jean Bailey and Lender Quicken Loans, for
11 property 247 Morninglow Drive, was marked for
12 identification.)

13 BY MR. WALKER:

14 Q. The court reporter has handed you
15 Defendant's Exhibit 17, Mr. Price.

16 What's the title of this document?

17 A. Closing Attorney Statement.

18 Q. Okay. And what does the first sentence
19 below the references say?

20 A. I closed the above-mortgage loan on
21 November the 20th, 2009.

22 Q. Would you mind just reading that entire
23 paragraph, picking up with the next sentence.

24 A. Prior to the execution of the note and
25 mortgage by the borrowers, I reviewed and explained

1 to the borrowers the terms and provisions of the
2 note and mortgage. Following my explanation, the
3 borrower signed the note, mortgage, and other
4 related closing documents.

5 Q. And is this document dated November
6 23rd, 2009?

7 A. Yes, it is.

8 Q. Are the borrowers listed as Laura Jean
9 Bailey and Jimmy Eugene Bailey?

10 A. Yes, they are.

11 Q. And the lender is Quicken Loans and the
12 property address is 247 Morninglow in Winnsboro?

13 A. Correct.

14 Q. Does it appear from this document that
15 Mrs. Gardner supervised the execution and explained
16 any documents that she needed to, from the terms of
17 this document?

18 A. Yes, making the assumption that that
19 signature is that of Ms. Gardner.

20 Q. Okay. Before we wind up, anything else
21 you would like to say about this matter?

22 A. No.

23 MR. WALKER: Okay. Well, I appreciate
24 your time and it's been a pleasure meeting you.
25 That's all I have.

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MS. JONES: I don't have anything.

(The deposition was concluded at 11:33
a.m.)

1 CERTIFICATE OF REPORTER

2
3 I, Susan M. Valsecchi, Registered
4 Professional Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby certify
6 that the foregoing transcript is a true, accurate,
7 and complete record.

8 I further certify that I am neither
9 related to nor counsel for any party to the cause
10 pending or interested in the events thereof.

11 Witness my hand, I have hereunto
12 affixed my official seal this 27th day of February,
13 2013 at Columbia, Richland County, South Carolina.
14
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22

23 _____
24 Susan M. Valsecchi, RPR, CRR
25 My Commission expires
January 4, 2015

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STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

ArrowPointe Federal Credit Union,

Plaintiff,

v.

Jimmy Eugene Bailey, Laura Jean
Bailey, and DLJ Mortgage Capital,
Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS
CASE NO. 2012-CP-20-00132

JOINT STIPULATION

FAIRFIELD COUNTY
CLERK OF COURT
2017 MAR 13 PM 12:11

ArrowPointe Federal Credit Union ("AFCU") and DLJ Mortgage Capital, Inc., (DLJ") hereby jointly stipulate that AFCU hereby withdraws its Fifth Defense of "Unclean Hands" reflected in paragraphs 13 through 15 of its Reply to Answer, Counterclaims, and Cross Claim on behalf of ArrowPointe Federal Credit Union dated February 26, 2016.

Additionally, for the use in the above-captioned litigation between them and for no other purpose, the parties stipulate to the following facts:

1. The Defendants Jimmy Eugene Bailey and Laura Jean Bailey ("Baileys") hold title to the following real property, described as follows (the "Subject Property"):

All that certain piece, parcel or lot of land, together with the improvements thereon, lying, being and situate in the County of Fairfield, State of South Carolina, being shown and designated as Lot 137 of Section 22 of Lake Wateree on a plat of survey prepared for Patrick Eugene Rachels by Ashmark Land Surveyors dated February 12, 1996, and recorded in Slide 544 of Plats at Page 1233; and being bounded on the North by Lot 136; on the East by Lake Wateree; on the South by Lot 138; and on the West by right-of-way of Morninglow Drive.

This being the same property conveyed to Jimmy Eugene Bailey and Laura Jean Bailey by deed of Patrick Eugene Rachels dated September 1, 2000, and recorded September 7, 2000 in Book QM at Page 349. Subsequently, Jimmy Eugene Bailey and Laura Jean Bailey conveyed the subject property to Jimmy Eugene

Bailey and Laura Jean Bailey, as joint tenants with the right of survivorship, by deed dated October 27, 2009, and recorded November 4, 2009, in Book 973 at Page 9.

Property Address: 247 Morninglow Drive, Winnsboro, SC 29180

TMS# 095-02-02-022.

2. The Baileys gave a mortgage to Quicken Loans, Inc. ("Quicken") that was recorded on October 15, 2009 ("First Mortgage"). The First Mortgage was in a senior lien priority position on the Subject Property at the time of its recording. An authentic, accurate and admissible copy of the First Mortgage is attached hereto as **Exhibit A**.

3. The First Mortgage secured a Note in the principal amount of \$256,500.00 plus interest ("First Note"). Additionally, the "Transfer of Rights in the Property" section of the recorded First Mortgage, stated "This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note ...".

4. An authentic, accurate and admissible copy of a Settlement Statement reflecting the actual disbursement on October 5, 2009 by Quicken under the First Mortgage is attached hereto as **Exhibit B**.

5. Subsequently, the Baileys gave AFCU a mortgage securing an Open-End Home Equity Credit Agreement ("Line of Credit Mortgage") in the principal amount of \$99,000.00 to make improvements and additions to their home. The Line of Credit Mortgage was duly recorded on November 4, 2009.

6. An authentic, accurate and admissible copy of the AFCU Open-End Home Equity Credit Agreement and Truth in Lending Disclosure pertaining the Baileys is attached hereto as **Exhibit C**.

7. An authentic, accurate and admissible copy of a letter to Mr. O'Neil Cannon from Tim Lyda dated October 13, 2009 and an appraisal of the Subject Property is attached hereto as

Exhibit D.

8. An authentic, accurate and admissible copy of an Individual or Joint Credit Form signed by the Baileys is attached hereto as **Exhibit E.**

9. An authentic, accurate and admissible copy of handwritten notes regarding a proposed addition to the house on the Subject Property is attached hereto as **Exhibit F.**

10. An authentic, accurate and admissible copy of an appraisal dated October 14, 2009, regarding the Subject Property, and prepared by Garvin Appraisals is attached hereto as **Exhibit G.**

11. An authentic, accurate and admissible copy of a Preliminary Title Report for AFCU is attached hereto as **Exhibit H.**

12. An authentic, accurate and admissible copy of the Line of Credit Mortgage made to AFCU from the Baileys dated October 27, 2009, and recorded on November 4, 2009, in the Office of the Clerk of Court for Fairfield County, South Carolina in Book 973, at Page 28, in the original principal amount of \$99,000.00, is attached hereto as **Exhibit I.**

13. When AFCU obtained the Line of Credit Mortgage from the Baileys, the parties to that transaction intended the Line of Credit Mortgage to be a junior mortgage on the Subject Property second in lien priority position behind the First Mortgage.

14. The Baileys then entered into a subsequent loan transaction with Mortgage Electronic Registration Systems, Inc. as nominee for Quicken, its successors and assigns on November 23, 2009. The Baileys obtained a new loan through a Note in the principal amount of \$296,000.00 plus interest in this transaction ("Second Note"). An authentic, accurate and admissible copy of the Second Note is attached hereto as **Exhibit J.**

15. The proceeds from the Second Note were used to pay off the loan secured by the

First Mortgage in the amount of \$257,459.04. As part of the same transaction, the senior First Mortgage was released of record, and then a new mortgage in favor of Quicken was recorded on December 15, 2009 in the Office of the Clerk of Court for Fairfield County on December 15, 2009 in Mortgage Book 977 at Page 54 (the "Second Mortgage"). The First Mortgage was of record at all times until the Second Mortgage was recorded December 15, 2009. Quicken intended that the Second Mortgage replace the First Mortgage and retain Quicken's senior lien position.

16. A licensed South Carolina attorney, Stacey E Besser f/k/a Stacey Pope Gardner, supervised the loan closing for the Second Mortgage. Attorney Besser witnessed and notarized the Second Mortgage. Attorney Besser remains licensed and in good standing with the South Carolina Bar in the present day.

17. Quicken did not have actual knowledge that the Line of Credit Mortgage existed at the time it conducted the Second Mortgage transaction. Quicken was on record notice of the Line of Credit Mortgage at the time it conducted the Second Mortgage transaction. The Baileys executed a Title Company Client Acknowledgment that represented by affidavit that "there are no outstanding home improvement loans, mortgages, deeds of trust, or equity lines of credit, recorded or unrecorded" other than the First Mortgage. An authentic, accurate and admissible copy of the "Title Company Client Acknowledgment" signed by the Baileys is attached hereto as **Exhibit K**. The Baileys misrepresented the truth when they told Quicken that there are no equity lines of credit secured by the Subject Property.

18. An authentic, accurate and admissible copy of Second Mortgage made to Quicken by the Baileys on November 23, 2009, and recorded on December 15, 2009, is attached hereto as **Exhibit L**.

19. The following authentic, accurate and admissible copies of the assignments of the Second Mortgage are attached hereto:

- a. Assignment of Mortgage from Mortgage Electronic Registration Systems, Inc. as nominee for Quicken Loans, Inc., its successors and assigns, to JPMorgan Chase, National Association, dated January 6, 2012, and recorded on January 25, 2012, in the Office of the Clerk of Court for Fairfield County in Book 1059 at Page 62, attached as **Exhibit M**;
- b. Assignment of Mortgage from JPMorgan Chase, National Association, to Quicken Loans, Inc., dated April 24, 2013, and recorded on July 3, 2013, in the Office of the Clerk of Court for Fairfield County in Book 1120 at Page 74, attached as **Exhibit N**; and
- c. Assignment of Mortgage from Quicken Loans, Inc., to DLJ Mortgage Capital, Inc., dated July 1, 2014, and recorded on May 1, 2015, in the Office of the Clerk of Court for Fairfield County in Book 1189 at page 50, attached as **Exhibit O**.

20. An authentic, accurate and admissible copy of a Settlement Statement reflecting the actual disbursement on November 23, 2009 by Quicken to the Baileys is attached hereto as **Exhibit P**.

21. An authentic, accurate and admissible copy of a letter titled Authorization to Disburse Funds and to Record Documents, pertaining to the Baileys and signed by Stacey P. Gardner, Esq. and dated November 23, 2009 is attached hereto as **Exhibit Q**.

22. An authentic, accurate and admissible copy of a Closing Attorney's Statement for the Baileys and Quicken Loans, Inc. for the Subject Property, dated November 23, 2009 is attached hereto as **Exhibit R**.

23. An authentic, accurate and admissible copy of a letter from Milton E. Hamilton to Jim Price, dated July 18, 2011 is attached hereto as **Exhibit S**.

24. An authentic, accurate and admissible copy of e-mail conversations of various dates between e-mails between Barbara Looper, Jim Price, and Laura Jean Bailey is attached hereto as **Exhibit T**.

25. An authentic, accurate and admissible copy of an inquiry into the Subject Mortgage balance, dated November 15, 2011, with handwritten notes is attached hereto as **Exhibit U**.

26. As recognized by the Order dated signed January 7, 2016 in this matter, DLJ is, by virtue of the assignment from Quicken (Exhibit N), the due holder of the Second Mortgage and the loan it secures, and DLJ has standing to assert the rights of Quicken under those instruments.

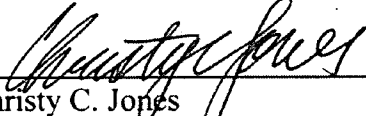
27. An original Affidavit from DLJ's loan servicer, or, if applicable, its successor assignee, setting forth the amounts currently due and owing under the loan secured by the Second Note (Exhibit K) and Second Mortgage (Exhibit M) given by the Baileys is attached hereto as **Exhibit V**.

28. An authentic, accurate and admissible copy of a letter from Quicken Loans, Inc., to the Baileys dated August 2, 2013, notifying the Baileys of their default on the loan secured by the Second Note (Exhibit K) and Second Mortgage (Exhibit M) and demanding that they cure the default is attached hereto as **Exhibit W**.

29. An original Affidavit from AFCU's employee setting forth the amounts currently due and owing under the loan secured by the Open-End Home Equity Credit Agreement and Truth in Lending Disclosure (Exhibit D) and Line of Credit Mortgage (Exhibit J) given by the Baileys is attached hereto as **Exhibit X**.

30. An authentic, accurate and admissible copy of a letter from AFCU to the Baileys dated February 21, 2012, notifying the Baileys of their default on the loan secured by the Open-End Home Equity Credit Agreement and Truth in Lending Disclosure (Exhibit D) and Line of Credit Mortgage (Exhibit J) and demanding that they cure the default is attached hereto as **Exhibit Y**.

WE SO STIPULATE



Christy C. Jones

Sherpy & Jones, P.A.

PO Box 2599

Lexington, SC 29071

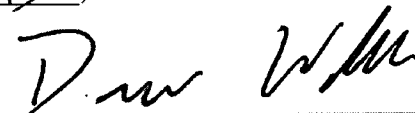
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Attorney for Plaintiff

3/13, 2017



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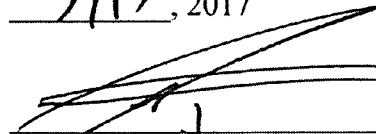
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Attorneys for Defendant DLJ Mortgage Capital, Inc.

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

ArrowPointe Federal Credit Union,

v.

Jimmy Eugene Bailey, Laura Jean Bailey,
and JPMorgan Chase Bank,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

CASE NO. 2012-CP-20-00132

2013 JUL 24 A 11:01
FAIRFIELD COUNTY
CLERK OF COURT
JO BECKHAM

**NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT**

TO: CHRISTY C. JONES, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that pursuant to Rule 56, SCRPC, the Defendant JPMorgan Chase Bank, who has assigned its mortgage to Quicken Loans, Inc. ("Quicken") and is seeking a Consent Order for Substitution as Party Defendant by separate motion, through its undersigned counsel, will move before Fairfield County Special Referee Carol A. Tolen on the 10th day after service hereof at 10:00 a.m. at 120 W. Washington, St., Winnsboro, South Carolina, or as soon thereafter as may be convenient to the Court and counsel, for an Order granting Summary Judgment in favor of Quicken as to the priority of its mortgage being in senior position. Consequently, any sale of the real property that is the subject of this action would be subject to Quicken's mortgage. This motion is based on the following:

- a) Quicken's Mortgage given by the Defendants Bailey and recorded on December 15, 2009 ("Replacement Mortgage") replaced a prior Quicken Mortgage given by the Defendants Bailey and recorded on October 15, 2009 ("Replaced Mortgage"). The Replacement Mortgage retained the senior mortgage status of the Replaced Mortgage. See Restatement Third of Property (Mortgages) § 7.3,

Replacement and Modification of Senior Mortgages: Effect on Intervening Interests; See also Affidavit of Laura A. Miller attached here as Exhibit A.

- ~~b) Plaintiff admits that it expected its mortgage securing an Open-End Home~~ Equity Credit Agreement (“Line of Credit Mortgage”) to be in a junior priority position when recorded on November 4, 2009 and continued to believe it was in junior position until 2011 upon its discovery of the Replacement Mortgage. To give the Line of Credit Mortgage priority over the Replacement Mortgage would yield an unexpected, undeserved windfall to the Plaintiff. See Pages 35-50 from the SCRCP 30(b)(6) deposition of Plaintiff, specifically the following excerpts: Page 36; Page 37, Line 3; Page 42, Line 8; Page 46, Line 16; Page 48: Line 20 attached here as Exhibit B. See also Defendant’s Amended Requests for Admission and Plaintiff’s Response to Amended First Set of Requests for Admission attached here as Exhibit C. See also Plaintiff’s response to Interrogatory #6 of Plaintiff’s Responses to Defendant’s First Set of Interrogatories attached here as Exhibit D.
- c) The Replaced Mortgage was in senior lien position and of record when the Line of Credit Mortgage was recorded. Additionally, an Order from this Court declaring the senior lien position of the Replacement Mortgage would not materially prejudice the Plaintiff who expected its Line of Credit Mortgage to be in a junior lien position. See Exhibit A.

Further, this motion is based on applicable case and statutory law, the pleadings and discovery filed herein and the South Carolina Rules of Civil Procedure. Quicken specifically

reserves the right to supplement this motion with a memorandum of law or other filings in support of its motion.

Respectfully submitted,

ADAMS AND REESE LLP

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Attorney for Defendant

Quicken Mortgage, Inc.

July 23, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

CASE NO. 2012-CP-20-00132

ArrowPointe Federal Credit Union,

Plaintiff,

vs.

Jimmy Eugene Bailey, Laura Jean Bailey, and
JPMorgan Chase Bank,

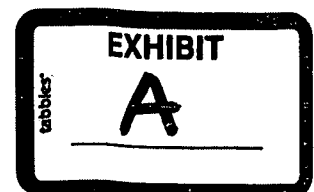
Defendant(s).

AFFIDAVIT OF LAURA A. MILLER

2013 JUL 24 A 11:01
FAIRFIELD COUNTY
CLERK OF COURT
JON BECKHART

PERSONALLY appeared before me Laura A. Miller, employee of Quicken Loans and Loss Mitigation Officer, who, upon first being duly sworn, deposes and states that:

1. I am over the age of 21 and I am competent to make this Affidavit.
2. My name is Laura A. Miller and I am an employee of Quicken Loans and a Loss Mitigation Officer.
3. As such, I have knowledge of a senior mortgage dated September 29, 2009 encumbering real estate commonly known as 247 Morningflow Dr. Winnsboro, South Carolina given by Jimmy Eugene Bailey and Laura Jean Bailey to Mortgage Electronic Registration Systems acting as a nominee for Quicken Loans ("Quicken"), which was recorded in the Fairfield County Clerk of Court's office on October 29, 2009 in Book 971 at Page 41 ("Replaced Mortgage"). The Replaced Mortgage is attached here as Exhibit A and is incorporated by reference.
4. Additionally, I have knowledge of a subsequent mortgage dated November 23, 2009 and recorded December 15, 2009 at Book 1059 at Page 62 in the Fairfield County Clerk of Court's office that encumbers the same real estate as the Replaced Mortgage, which was given



by the Baileys to Quicken ("Replacement Mortgage"). The Replacement Mortgage is attached here as Exhibit B and is incorporated by reference.

5. ~~The Replaced Mortgage was of record at all times until the Replacement Mortgage was recorded December 15, 2009.~~

6. As part of the same mortgage loan transaction, the Replaced Mortgage was released of record and was replaced with the Replacement Mortgage.

7. The Replaced Mortgage was in senior priority position at the time of its recording and the Replacement Mortgage was intended to and does retain that same priority position.

8. The Replaced Mortgage gave record notice that it secured a \$256,550.00 note plus interest and the section entitled Transfer of Rights in the Property also gave record notice to third parties that the stated amount could increase.

9. The Replacement Mortgage gives record notice that it secures a \$296,000.00 note plus interest and the section entitled Transfer of Rights in the Property also gives record notice to third parties that the stated amount could increase.

10. Quicken received a payoff of \$257,459.04 for the Replaced Mortgage loan from loan proceeds of the Replacement Mortgage loan as shown in the November 30, 2009 HUD-1 Settlement Statement on Line 1501 attached here as Exhibit C and incorporated by reference.

11. Quicken did not have actual notice or actual knowledge of a mortgage given by the Baileys to ArrowPointe Federal Credit Union securing an Open-End Home Equity Credit Agreement until after December 15, 2009.

12. Stacey E. Pope f/k/a Stacey Pope Gardner, a licensed South Carolina attorney since 2002, supervised the closing of this loan.

971-41

Recording Requested by &
When Recorded Return To:
US Recordings, Inc.
2925 Country Drive
St. Paul, MN-55117

200900002492
Filed for Record in
FAIRFIELD SC
BETTY JO BECKHAM
10-20-2009 At 02:53:11 PM.
MORTGAGE 26.00
Book 971 Page 41 - 60

Prepared By:
Jackie Peterson

Quicken Loans, Inc.
20555 Victor Parkway
Livonia, MI 48152
1-800-228-6308

3402102

[Space Above This Line For Recording Data]

3221559188

MORTGAGE

MIN 100039032215591880

3413435

2013 JUL 2
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

- (A) "Security Instrument" means this document, which is dated September 29, 2009 together with all Riders to this document.
- (B) "Borrower" is Laura Jean Bailey and Jimmy Eugene Bailey, wife and husband

Borrower is the mortgagor under this Security Instrument.

(C) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS Form 3041 1/01

2090464095

VMP-GA(SC)-08/11

Page 1 of 5

Initials:

VMP Mortgage Solutions, Inc.



001221889188 0231 139 0113

EXHIBIT

A

JPMorgan Chase 000128

(D) "Lender" is Quicken Loans Inc.

Lender is a Corporation
organized and existing under the laws of the State of Michigan
Lender's address is 20555 Victor Parkway, Livonia, MI 48152

(E) "Note" means the promissory note signed by Borrower and dated September 29, 2009
The Note states that Borrower owes Lender Two Hundred Fifty Six Thousand Five
Hundred Fifty and 00/100 Dollars
(U.S. \$256,550.00) plus interest. Borrower has promised to pay this debt in regular Periodic
Payments and to pay the debt in full not later than November 1, 2039

(F) "Property" means the property that is described below under the heading "Transfer of Rights in the
Property."

(G) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges
due under the Note, and all sums due under this Security Instrument, plus interest.

(H) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following
Riders are to be executed by Borrower (check box as applicable):

☒ Adjustable Rate Rider	☐ Condominium Rider	☐ Second Home Rider
☐ Balloon Rider	☐ Planned Unit Development Rider	☐ 1-4 Family Rider
☐ VA Rider	☐ Biweekly Payment Rider	☒ Other(s) (specify) Legal Attached

(I) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations,
ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final,
non-appealable judicial opinions.

(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other
charges that are imposed on Borrower or the Property by a condominium association, homeowners
association or similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by
check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic
instrument, computer, or magnetic tape as to order, instruct, or authorize a financial institution to debit
or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller
machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse
transfers.

(L) "Escrow Items" means those items that are described in Section 3.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid
by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i)
damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the
Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the
value and/or condition of the Property.

(N) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on,
the Loan.

(O) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the
Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its
implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to
time, or any additional or successor legislation or regulation that governs the same subject matter. As used

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

USPS-6A(SC) (08/11)

Page 2 of 15

In State:

Form 3091 1/01

003222588168 0213 11 0213

JPMorgan Chase 000129

In this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally-related mortgage loan" even if the Loan does not qualify as a "federally-related mortgage loan" under RESPA.

(Q) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, the following described property located in the County of Fairfield:

(Type of Recording Jurisdiction)

(Name of Recording Jurisdiction)

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.
SUBJECT TO COVENANTS OF RECORD.

Parcel ID Number: 095-02-02-022-000 which currently has the address of
247 Morninglow Dr (Street)
Winnsboro (City), South Carolina 29180 (Zip Code)
("Property Address"):

TO HAVE AND TO HOLD this property unto MERS (solely as nominee for Lender and Lender's successors and assigns,) and to the successors and assigns of MERS, forever, together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

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

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

1001-BA(SC) 10011

Page 3 of 15

Initials

Form 3041 1/01

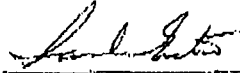


001221557100 0203 159 0315

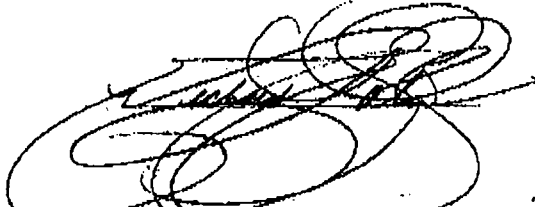
JPMorgan Chase 000130

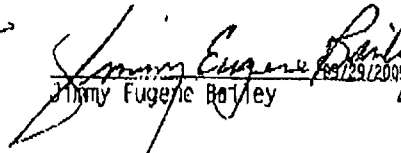
BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Signed, sealed and delivered in the presence of:


Sandra E. Eaton


Laura Jean Bailey (Seal)
Borrower


Richard L. Eaton, Jr.


Jimmy Eugene Bailey (Seal)
Borrower

(Seal)
Borrower

(Seal)
Borrower

(Seal)
Borrower

(Seal)
Borrower

(Seal)
Borrower

(Seal)
Borrower

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERG

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Form 3041 1/01



003221559188 0233 139 1413

JPMorgan Chase 000131

EXHIBIT A - LEGAL DESCRIPTION

Tax ID Number(s): 095-02-02-022-000

Land situated in the County of Fairfield in the State of SC

All that certain place, parcel or lot of land, together with the improvements thereon, lying, being and situate in the County of Fairfield, State of South Carolina, being shown and designated as Lot 137 of Section 22 of Lake Wateree on a plat of survey prepared for Patrick Eugene Rachels by Ashmark Land Surveyors dated February 12, 1998, and recorded in Slide 544 of Plate at Page 1233; and being bounded on the North by Lot 136; on the East by Lake Wateree; on the South by Lot 138; and on the West by the right-of-way of Morninglow Drive.

Derivation: This being the same property conveyed unto the Grantor herein by Deed dated February 19, 1995 and recorded in the Office of the Clerk of Court for Fairfield County in Book NV at Page 286.

Being the same property conveyed to JIMMY EUGENE BAILEY and LAURA JEAN BAILEY, by deed dated September 01, 2000 of record in Deed Book QM, Page 349, in the Fairfield County Clerk's Office. *Deed from Patrick Eugene Rachels recorded 9/7/2000*

Group Number: N/A

Commonly known as: 247 Morninglow Dr, Winnsboro, SC 29180



002951247

1632 10/12/2009 76014519/1

Return To:
Julie Carroll
Quicken Loans Inc.
20555 Victor Parkway
Livonia, MI 48152

2013 JUL 24 A 11:01

FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

Prepared By:
Alanna Weaver

3484933 →C [Space Above This Line For Recording Data] 3221934694
MORTGAGE
3496374 →R MIN 100039032219346943

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SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS Form 3041 1/01

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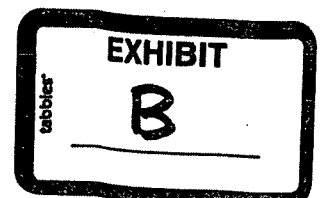
Page 1 of 16

Initials: JLB
JB

VMP Mortgage Solutions, Inc.



q03221934694 0233 288 0115



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Lender's address is 20555 Victor Parkway, Livonia, MI 48152

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00/100 Dollars

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Payments and to pay the debt in full not later than December 1, 2039

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☐ Balloon Rider	☐ Planned Unit Development Rider	☐ 1-4 Family Rider
☐ VA Rider	☐ Biweekly Payment Rider	☒ Other(s) [specify] Legal Attached

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ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final,
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association or similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by
check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic
instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit
or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller
machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse
transfers.

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(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid
by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i)
damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the
Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the
value and/or condition of the Property.

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the Loan.

(O) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the
Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its
implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to
time, or any additional or successor legislation or regulation that governs the same subject matter. As used

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

VMP-6A(SC) (0811)

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Initials: *AB*
JK

Form 3041 1/01



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in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, the following described property located in the
County of Fairfield :

[Type of Recording Jurisdiction]

[Name of Recording Jurisdiction]

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.
SUBJECT TO COVENANTS OF RECORD.

Parcel ID Number: 0950202022000
247 Morninglow Dr
Winnsboro
("Property Address"):

which currently has the address of
[Street]
[City] , South Carolina 29180 [Zip Code]

TO HAVE AND TO HOLD this property unto MERS (solely as nominee for Lender and Lender's successors and assigns,) and to the successors and assigns of MERS, forever, together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

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

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

VMP-6A(SC) (0811)

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

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

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

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Initials:

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in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the

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lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

~~Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.~~

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with

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the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable

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attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

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(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

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12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

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16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to Section 22 of this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA

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requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

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

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence, all of which shall be additional sums secured by this Security Instrument.

23. Release. Upon Payment of all sums secured by this Security Instrument, this Security Instrument shall become null and void. Lender shall release this Security Instrument. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. Homestead Waiver. Borrower waives all rights of homestead exemption in the Property to the extent allowed by Applicable Law.

25. Waiver of Appraisal Rights. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within 30 days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. TO THE EXTENT PERMITTED BY LAW, THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY. This waiver shall not apply so long as the Property is used as a dwelling place as defined in Section 12-37-250 of the South Carolina Code of Laws.

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

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

VMP-6A(SC) (0811)

Page 13 of 15

Initials:

Form 3041 1/01



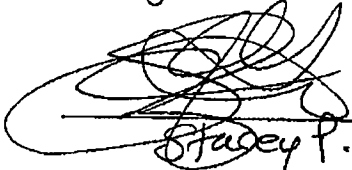
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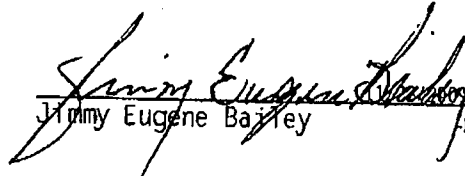
BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Signed, sealed and delivered in the presence of:


Angela Messer


Laura Jean Bailey 11/23/2009 (Seal)
-Borrower


Stacey P. Gardner


Jimmy Eugene Bailey (Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

SOUTH CAROLINA • Single Family • Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

VMP-6A(SC) (0811)

Page 14 of 16

Form 3041 1/01



003221934694 0233 288 1415

STATE OF SOUTH CAROLINA

Fairfield

County ss:

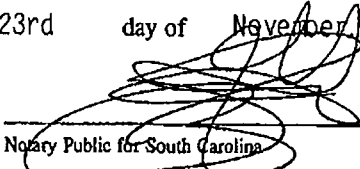
I, Stacey P. Gardner

do hereby certify that

Laura Jean Bailey and Jimmy Eugene Bailey, wife and husband

personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this 23rd day of November 2009


Notary Public for South Carolina

My Commission Expires: 7-15-2012

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

VMP-6A(SC) (0811)

Page 15 of 15

Initials: JSB

Form 3041 1/01



q03221934694 0233 288 1515

EXHIBIT A - LEGAL DESCRIPTION

Tax ID Number(s): 0950202022000

Land situated in the County of Fairfield in the State of SC

All that certain piece, parcel or lot of land, together with the improvements thereon, lying, being and situate in the County of Fairfield, State of South Carolina, being shown and designated as Lot 137 of Section 22 of Lake Wateree on a plat of survey prepared for Patrick Eugene Rachels by Ashmark Land Surveyors dated February 12, 1996, and recorded in Slide 544 of Plats at Page 1233; and being bounded on the North by Lot 136; on the East by Lake Wateree; on the South by Lot 138; and on the West by the right-of-way of Morninglow Drive.

Being the same property conveyed to JIMMY EUGENE BAILEY and LAURA JEAN BAILEY, by deed dated September 01, 2000 of record in Deed Book QM, Page 349, in the Fairfield County Clerk's Office.

Group Number: N/A

Commonly known as: 247 Morninglow Drive, Winnsboro, SC 29180

1 And who prepared that? Was this
2 prepared for your use in underwriting this loan?

3 A. Yes, it was.

4 Q. And who prepared that?

5 A. Milton E. Hamilton.

6 Q. Is Mr. Hamilton an attorney?

7 A. He is.

8 Q. Mr. Hamilton cited some existing
9 mortgages on there.

10 Do you see -- what's the date of
11 this -- of this document?

12 A. October the 12th, 2009.

13 Q. Okay. And what does he list as an
14 existing first mortgage?

15 A. A first mortgage by Laura Jean and
16 Jimmy Bailey to merge as the mortgagee and Quicken
17 Loans, as the lender, dated January 20th, 2009,
18 recorded February 6th of '09 in Record Book 941,
19 Page 45, in the amount of \$248,500.

20 Q. So at the time you closed your loan,
21 was it your understanding that that mortgage
22 existed on the property?

23 A. Yes.

24 Q. And the date that mortgage was recorded
25 was in February of 2009?

2013 JUL 24 A 11:02
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

1 A. That's correct.

2 Q. Okay. Will you flip to the back page
3 of that document.

4 What does that fourth page of
5 Defendant's Exhibit 7 say?

6 A. It's the Final Title Report and the
7 mortgage to ArrowPointe, dated October the 27th of
8 '09, recorded on November the 4th of '09, in
9 Mortgage Book 973, Page 28, securing a note for
10 \$99,000.

11 Q. Okay. And does it say that that
12 mortgage -- that ArrowPointe mortgage -- is subject
13 to the exceptions and other mortgages on the
14 Preliminary Title Report that we were just
15 discussing?

16 A. Yes. It said that all is listed in the
17 Preliminary Title Report, except the mortgage from
18 the Baileys to Bowater, dated February 16th of '01
19 and recorded February 28th of '01, Mortgage Book
20 948, Page 1 in the original amount of \$153,000 has
21 been satisfied of record.

22 Q. What was the date of the Final Title
23 Report?

24 A. October the 12th of 2009.

25 Q. Okay. Was it your understanding, when

1 ArrowPointe closed this loan with the Baileys, that
2 ArrowPointe was in a second position?

3 A. Yes.

4 Q. Okay. And that was in -- I believe you
5 closed this loan on October the 27th, 2009?

6 A. That date sounds correct.

7 Q. And when you recorded your mortgage on
8 November the 4th of 2009, was it still your
9 understanding that you were in a second position?

10 A. Yes.

11 MR. WALKER: Okay. I'm just going to
12 enter this into the record. This is the
13 ArrowPointe mortgage.

14 (DFT. EXH. 8, Revolving Credit Mortgage
15 pertaining to Jimmy Eugene Bailey and Laura Jean
16 Bailey, was marked for identification.)

17 BY MR. WALKER:

18 Q. Mr. Price, does this appear to be an
19 accurate copy of the ArrowPointe mortgage dated
20 October 27th, 2009 and recorded on November the
21 4th, 2009?

22 A. Yes.

23 Q. I understand that Mr. Hamilton's
24 Preliminary Title Report listed the first mortgage,
25 being a mortgage that was recorded in February of

1 2009, and we discussed earlier that you all were
2 aware that they were getting another first mortgage
3 at that time to pay off that mortgage.

4 Was that your understanding, too?

5 A. I'm going to ask that you clarify that
6 question a little bit.

7 Q. Sure.

8 A. Now, if you're driving it based on the
9 Preliminary Title Report, there were a total of two
10 mortgages listed, one was to MERS, dated -- or
11 recorded February 6th of '09, and then there was
12 another one to Bowater Carolina that was recorded
13 February the 28th of 2001, eight years prior.

14 And that one was assigned to various
15 other parties after that fact.

16 So if you look at this preliminary
17 title opinion and go by the dates, the first
18 mortgage would appear to be the one to Bowater
19 Carolina Federal Credit Union, and the one to MERS,
20 dated eight years later, would be second.

21 Q. Okay.

22 A. So what is your question, sir?
23 I'm sorry.

24 Q. Tell me a little bit more about the
25 Bowater mortgage. Was it your understanding that

1 that was satisfied --

2 A. It is.

3 Q. -- or should have been satisfied?

4 A. Correct. It should have been
5 satisfied.

6 Q. And I think it was satisfied of record
7 in conjunction around this time by Mr. Hamilton?

8 A. Yes.

9 Q. Okay. So the February of 2009 MERS
10 mortgage would be in first position?

11 A. Yes.

12 Q. Okay. Was it your understanding -- or
13 is it your understanding now -- that that
14 mortgage -- that MERS mortgage -- was being
15 refinanced right around the same -- either
16 refinanced or paid off and satisfied by another
17 loan around that same time?

18 A. Yes, that's my understanding.

19 Q. Okay. That's your understanding now,
20 correct?

21 A. Yes.

22 Q. Was that your understanding then?

23 A. I wasn't involved then.

24 Q. Was that ArrowPointe's understanding?

25 A. Yes.

1 Q. I'm going to hand you another exhibit.

2 (DFT. EXH. 9, Settlement Statement, was
3 marked for identification.)

4 BY MR. WALKER:

5 Q. This is a Settlement Statement dated
6 October 5th, 2009.

7 MS. JONES: Excuse me, what was Number
8 8?

9 MR. WALKER: I believe it was the
10 mortgage.

11 MS. JONES: Okay. Got it.

12 MR. WALKER: And then 7, you might not
13 have.

14 MS. JONES: Is 7 the Final -- the
15 Preliminary -- oh, 7 was the one I didn't have. I
16 got you, got you. Sorry.

17 MR. WALKER: That's okay.

18 BY MR. WALKER:

19 Q. Okay. This Settlement Statement -- I
20 will represent to you that this was produced in the
21 documents from your file. This appears to be a
22 loan that was given to the Baileys from Quicken.
23 Settlement date was actually September 29th of 2009
24 to be disbursed on October 5th of 2009.

25 Did y'all -- did ArrowPointe have

1 knowledge of this transaction at the time it closed
2 its loan?

3 A. Yes, based on what I've been able to
4 determine.

5 Q. Okay. And I believe that a mortgage
6 accompanied this loan as well.

7 Is that your understanding?

8 A. You believe that mortgage accompanied
9 which loan, sir?

10 Q. Um, did this -- we'll call this the --

11 A. The Quicken mortgage?

12 Q. Yes, sir.

13 We'll call this the October Quicken
14 mortgage.

15 But was that secured by a mortgage, to
16 the best of your understanding?

17 A. Yes.

18 Q. I'm going to represent to you that that
19 mortgage is recorded in Book 971 at Page 41, in the
20 Fairfield Clerk of Court's office in the principal
21 amount of \$256,550. And it was recorded on October
22 the 20th of 2009.

23 Are you familiar with that mortgage
24 now?

25 A. Yes. It appears that that was -- the

1 mortgage by Quicken was the mortgage being extended
2 to the Baileys to pay off the existing current MERS
3 mortgage that had been recorded in February of '09
4 of that year.

5 Q. Okay. And you expected for that
6 mortgage to be in a senior position to your
7 mortgage, correct?

8 A. Yes.

9 Q. And you had that expectation in 2009
10 during the time of your loan closing?

11 A. Yes.

12 Q. And that mortgage was recorded on
13 October 20th of 2009, and I believe your loan was
14 closed on October 27th of 2009, correct?

15 A. I believe that's correct.

16 Q. So do you believe today that that
17 mortgage was senior to your mortgage?

18 A. The first Quicken mortgage of \$256,000,
19 yes, I believe was senior to our line of credit of
20 \$99,000.

21 Q. Okay. And then if you look at Line
22 1501 of the Settlement Statement, which is
23 Defendant's Number 9, you will see that \$247,761.03
24 was paid to BAC Home Loan services from the
25 proceeds of the Quicken loan.

1 Does that sound accurate?

2 A. It does.

3 Q. Okay. Is it your understanding now
4 that this October Quicken mortgage loan was paid
5 off subsequently -- has been since paid off and
6 satisfied of record?

7 A. Uh, which Quicken mortgage, sir? I'm
8 sorry, I'm getting the two confused and I
9 apologize.

10 Q. That's okay, it wasn't a very good
11 question.

12 The October 2009 Quicken mortgage --

13 A. Of \$256,000?

14 Q. Yes, sir.

15 -- is it your understanding that that
16 has been satisfied by another loan?

17 A. Yes.

18 Q. Okay. I'm going to hand you some
19 documents that we produced to you, listed as
20 JPMorgan Chase 2, as Defendant's Number 10.

21 (DFT. EXH. 10, Note - Quicken Loans,
22 was marked for identification.)

23 BY MR. WALKER:

24 Q. This is a note where the lender is
25 Quicken Loans, Inc. It's dated November 23rd of

1 2009 in the amount of \$296,000, and it's a loan to
2 Mr. and Mrs. Bailey.

3 Does that appear to be accurate?

4 A. Well, there's no identifying
5 information at the top of this note, but I do see
6 on the signatures that it appears to be the
7 Baileys' signature.

8 Q. Okay. And are they listed as -- as
9 Laura Jean Bailey and Jimmy Eugene Bailey listed as
10 the borrowers on that signature line?

11 A. That's correct.

12 Q. And the date of this note is November
13 23rd, 2009, correct?

14 A. Yes.

15 Q. And that date comes after the date that
16 your mortgage was recorded, correct?

17 A. Yes.

18 Q. Which was November 4, 2009?

19 A. I'm going to take your word for that,
20 Counselor. I don't remember. I'm sorry.

21 Q. That would be fine.

22 But you do believe that this note came
23 after your mortgage was recorded?

24 A. Yes.

25 Q. But it was right around the same time,

1 a little bit after. I guess, when did ArrowPointe
2 learn about this note and its accompanying
3 mortgage?

4 A. The second Quicken note?

5 Q. Yes, sir.

6 A. It was mid July, 2011.

7 Q. Okay. So from November of 2009 through
8 July of 2011, you had no knowledge that the October
9 Quicken mortgage had been paid off?

10 A. That's correct.

11 MR. WALKER: Okay. I'm going to go
12 ahead and introduce the mortgage -- the November
13 Quicken mortgage.

14 (DFT. EXH. 11, Mortgage, was marked for
15 identification.)

16 BY MR. WALKER:

17 Q. Defendant's Exhibit Number 11,
18 Mr. Price, does this appear to be the mortgage that
19 secured the note that's Plaintiff's Exhibit Number
20 10?

21 A. Yes, it does. I'm looking to see if
22 there was an amount on here somewhere. There we
23 go, yes. Yes, it does.

24 Q. And what's the amount on there?

25 A. \$296,000.

1 Q. And this mortgage is between the
2 borrower, Laura Jean Bailey, Jimmy Eugene Bailey,
3 and the mortgage -- I want to make sure I get the
4 language right -- and the lender, Quicken Loans
5 Inc., correct?

6 A. Yes.

7 Q. Okay. And it was recorded on December
8 the 15th of 2009, correct?

9 A. Yes.

10 Q. Which was after your ArrowPointe
11 mortgage was recorded, correct?

12 A. Yes.

13 Q. And you had no knowledge of
14 this -- ArrowPointe had no knowledge of this until
15 around July of 2011?

16 A. That's correct.

17 Q. But certainly not any time during 2009?

18 A. Not that I'm aware of, no.

19 MR. WALKER: Okay. Introduce the
20 Settlement Statement that accompanied that.

21 (DFT. EXH. 12, Settlement Statement,
22 was marked for identification.)

23 BY MR. WALKER:

24 Q. Mr. Price, in Defendant's Exhibit 12,
25 does this appear to be the Settlement Statement

1 that would have accompanied the Quicken mortgage
2 loan that was recorded -- the mortgage of which was
3 recorded in December of 2009?

4 A. Yes.

5 Q. Okay. Do you see in Line 1501 that it
6 appears that a prior Quicken loan was paid off by
7 the proceeds of this December 2009 mortgage? Is
8 that your understanding?

9 A. Yes.

10 Q. The amount of that, \$257,459.04?

11 A. Correct.

12 Q. Okay. Did it pay off the loan that you
13 understood to be in senior position when
14 ArrowPointe closed its loan in 2009?

15 A. Restate the question, please.

16 Q. Sure, sure.

17 This loan, the December 2009 Quicken
18 loan, the Settlement Statement that we're looking
19 at, it paid off a prior loan in the amount of
20 roughly \$257,000, correct?

21 A. Yes.

22 Q. Is it your understanding that that
23 prior loan that it paid off was the first mortgage
24 on the property when you all closed?

25 A. Yes. This appears to have paid off the

1 first Quicken mortgage --

2 Q. Okay.

3 A. -- of \$256,000.

4 Q. And the amount it paid off was
5 \$257,459.04, correct?

6 A. Correct.

7 Q. Okay. This mortgage that it paid off,
8 which was recorded in October of 2009, was it -- do
9 you have any reason to believe that that mortgage
10 was ever not recorded or not of record before this
11 loan satisfied it?

12 Was it your understanding until you
13 found out in July of 2011, that this loan came
14 about -- was it your understanding during that
15 whole time frame that the October 2009 Quicken
16 mortgage was still in first position and of record?

17 A. Yeah, I was under the impression that
18 that mortgage was still in existence, and had no
19 idea about this mortgage.

20 Q. Okay. So up until roughly July of
21 2011, ArrowPointe still thought they were in the
22 second position, correct?

23 A. Yes.

24 Q. Okay. I'm assuming that Quicken never
25 contacted you about a formal subordination?

1 A. No, not that I'm aware of. And I
2 haven't seen any evidence of such.

3 Q. Okay. So tell me about this discovery
4 in July of 2011 of this December 2009 Quicken
5 mortgage. How did that come to your attention?

6 A. When we received the e-mail from
7 Mrs. Bailey to our CEO that they were experiencing
8 financial difficulties, he forwarded that e-mail to
9 me, I guess just to investigate or to let me know
10 that there was an issue.

11 At that point in time, I reviewed the
12 file. I reviewed a credit report that we had on
13 file in our system, because I wanted to see how
14 much was owed on the first mortgage at that time.

15 As I was scanning down the trade lines,
16 I saw our trade line and I saw a trade line that
17 appeared to be the first mortgage and noticed that
18 ours was reporting an opening date of a month
19 before this mortgage.

20 At that point in time -- sometime
21 during that time frame is when I got in touch with
22 the closing attorney, Milton Hamilton, and
23 expressed my concern about the discrepancy in the
24 dates and asked that he update his title paper.

25 Q. I think I've got a copy of

1 Mr. Hamilton's update. And we will introduce that
2 in a second.

3 What was your understanding of his
4 report back to you?

5 A. That we were, in fact, in first
6 position.

7 Q. Okay. Do you have an idea of why that
8 was his opinion?

9 A. Because I think he examined the
10 records --

11 Q. Okay.

12 A. -- and determined that to be the fact.

13 MR. WALKER: Okay. I'm going to
14 introduce this title report.

15 (DFT. EXH. 13, a letter dated July 18,
16 2001 to Jim Price from Milton E. Hamilton regarding
17 Jimmy Eugene Bailey and Laura Jean Bailey, was
18 marked for identification.)

19 BY MR. WALKER:

20 Q. And, again, you said that this came to
21 your attention because Ms. Bailey sent Mr. Lyda an
22 e-mail about some financial difficulties?

23 A. Yes.

24 Q. So as you were looking through this,
25 you decided it was a good idea to contact

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

ArrowPointe Federal Credit Union,

Plaintiff,

v.

Jimmy Eugene Bailey, Laura Jean
Bailey, and JPMorgan Chase Bank,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

CASE NO. 2012-CP-20-00132

**DEFENDANT JPMORGAN CHASE BANK,
NATIONAL ASSOCIATION'S AMENDED
FIRST SET OF REQUESTS FOR ADMISSION
TO THE PLAINTIFF**

TO: CHRISTY C. JONES, ATTORNEY FOR THE PLAINTIFF:

NOW COMES THE DEFENDANT, JPMorgan Chase Bank ("Defendant"), and serves upon the Plaintiff ArrowPointe Federal Credit Union ("Plaintiff"), the following Requests for Admission to be answered separately and in writing by the Plaintiff within thirty (30) days after the service hereof, pursuant to South Carolina Rules of Civil Procedure, Rule 36. Failure to admit or deny within thirty (30) days will be deemed an admission.

If any objection is made to the following requested admissions, the reasons therefore shall be stated and explained in full. The answer shall specifically deny the matter or set forth in detail the reasons why the Plaintiff cannot truthfully admit or deny the matters. A denial shall fairly meet the substance of the requested admission, and when good faith requires that the Plaintiff qualify its answer or deny only part of the matter of which an admission is requested, the Plaintiff shall specify so much of it as is true and qualify the remainder. The Plaintiff may not give lack of information or knowledge as a reason for failure to admit or deny unless it states that it has made a reasonable inquiry and that the information known or readily obtainable by the Plaintiff is insufficient to enable it to admit or deny. Further, if the Plaintiff fails to admit the genuineness of any of the above requests for admission, the Defendant will apply to the court for an order requiring the Plaintiff to pay reasonable expenses incurred in proving such, including reasonable attorney's fees, in accordance with Rule 37(c) of the South Carolina Rules of Civil Procedure.

DEFINITIONS

1. "ArrowPointe Mortgage" -- mortgage made to ArrowPointe Federal Credit Union from Jimmy E. Bailey and Laura Jean Bailey dated October 27, 2009, recorded on November 4, 2009 in the Office of the Clerk of Court for Fairfield County in Book 973 at Page 28, in the original principal amount of \$99,000.00.

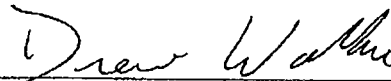


2. "December 2009 Mortgage" – mortgage made to Quicken Loans, Inc. from Jimmy Eugene Bailey and Laura Jean Bailey, dated November 23, 2009, recorded on December 15, 2009 in the Office of the Clerk of Court for Fairfield County in Book 977 at Page 54, in the original principal amount of \$296,000.00, and subsequently assigned to JP Morgan Chase Bank, National Association by Assignment of Mortgage dated January 6, 2012 and recorded January 25, 2012 in the Office of the Clerk of Court for Fairfield County in Book 1059 at Page 62.

3. "October 2009 Mortgage" – mortgage made to Quicken Loans, Inc. from Jimmy Eugene Bailey and Laura Jean Bailey, dated September 29, 2009, recorded on October 20, 2009 in the Office of the Clerk of Court for Fairfield County in Book 971 at Page 41, in the original principal amount of \$256,550.00.

REQUESTS FOR ADMISSION

4. Admit that loan proceeds from the December 2009 Mortgage were used to satisfy the October 2009 Mortgage as indicated on Line 1501 of the Settlement Statement attached hereto as Exhibit A.


Drew B. Walker (SC Bar No. 78271)
ELLIS, LAWHORNE & SIMS, P.A.
1501 Main Street, 5th Floor (29202)
PO Box 2285
Columbia, SC 29201
P: 803-254-4190
F: 803-779-4749
dwalker@ellislawhorne.com

Attorney for JPMorgan Chase Bank, N.A.

January 24, 2013
Columbia, South Carolina

Settlement Statement
Optional Form for
Transactions without Sellers

U.S. Department of Housing
and Urban Development

OMB Approval No. 2502-0491

Name & Address of Borrower:

Laura Jean Bailey, Jimmy Eugene Bailey

Name & Address of Lender:

Quicken Loans Inc. (Lender)
20555 Victor Parkway
Livonia, MI 48152

247 Morninglow Dr
Winnsboro, SC 29180

Property Location (if different from above)

247 Morninglow Dr
Winnsboro, SC 29180

Settlement Agent:
Title Source, Inc.

Place of Settlement:

247 Morninglow Dr, Winnsboro, SC 29180

Loan Number:

3221934894

Settlement Date:

11/23/09

Disbursement Date:

11/30/09

I. Settlement Charges		M. Disbursements to Others	
800. Items Payable in Connection with Loan		1601. QUICKEN	257,459.04
801. Loan Origination Fee 0.75% to Quicken Loans Inc.	\$2,220.00		
	\$ 600.00 Client POC		
802. Loan Discount Fee 1.625 % to Quicken Loans Inc.	\$ 4,810.00		
803. Appraisal Fee to:	\$ 350.00		
804. Credit Report to Credit	\$ 12.00		
805. Wire Fee to: Title Source Inc - Notary	\$ 20.00		
807. Flood Life of Loan Coverage to: First American Flood Del	\$ 5.00		
808. Flood Determination Fee to: First American Flood Data Services	\$ 10.00		
809. Underwriting Fee to: Quicken Loans Inc.	\$ 215.00		
810. Processing Fee to: Quicken Loans Inc.	\$ 895.00		
888. TSI Appraisal Services	\$ 80.00		
900. Items Required by Lender to be Paid in Advance			
901. Int. from 11/30/2008 to 12/01/2008			
902. 40.00 per day for 1 days	\$ 40.00		
903b. Homeowners Insurance Premium Previously Paid.	\$ 620.00 POC		
904b. Flood Insurance Premium Previously Paid.	\$ 2,237.00 POC		
1090. Reserves Deposited with Lender			
1001. Hazard Insurance 3 months @ \$ 51.71 per month	\$ 258.55		
1004. County Taxes 3 months @ \$ 107.87 per month	\$ 323.61		
1006. Flood Insurance 3 months @ \$ 185.42 per month	\$ 556.26		
1008. Aggregate Acct. Adjustment	\$ 476.22		
1100. Title Charges Title Commitment# 03443879			
1101. Settlement/Closing Fee to: Title Source Inc - Notary	\$ 650.00		
1103. Title Examination to: TITLE SOURCE, INC.	\$ 150.00		
1108. Title Insurance to: TITLE SOURCE, INC.	\$ 178.75		
Based on a Loan Amount of \$208,000.00.			
1113. Add'l Endorsement Fee to: TITLE SOURCE, INC.	\$ 50.00		
1116. Tax Certification Fee to: Title Source, Inc.	\$ 18.00		
1200. Government Recording and Transfer Charges			
1201b. Recording Fee Mortgage	\$ 27.00		
1300. Additional Settlement Charges			
1307. Express Mail/Courier Fees	\$ 45.00		
1308. Current Taxes Due to: FAIRFIELD COUNTY	\$ 1,292.03		
1400. Total Settlement Charges (enter on line 1602)	\$ 12,305.85		
1602. TOTAL DISBURSED (enter on line 1603)		\$ 257,459.04	

N. NET SETTLEMENT

* Fees showing with the label 'POC' will be paid outside of closing.

1600. Loan Amount

\$ 295,000.00

1601. Plus the Unused Portion of Deposit

\$ 0.00

Your remaining deposit used for part of (eq 1601) 50

1602. Minus Total Settlement Charges

\$ 12,305.85

(line 1400) \$500.00 POC

1603. Minus Total Disbursements to Others

\$ 257,459.04

(line 1620)

1604. Equals Cash to Borrower

\$ 26,235.11

(after expiration of any applicable

rescission period required by law)

Borrower(s) Signatures:

Laura Jean Bailey
Laura Jean Bailey

11/23/2009

Date

Jimmy Eugene Bailey
Jimmy Eugene Bailey

11/23/2009

Date

Date

Date



STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

CASE NO: 2012-CP-20-00132

ArrowPointe Federal Credit Union,
Plaintiff,

v.

Jimmy Eugene Bailey, Laura Jean
Bailey, and JPMorgan Chase Bank,
Defendants.

CERTIFICATE OF SERVICE

The undersigned, of the law office of Ellis Lawhorne & Sims, P.A., does certify that on **January 24, 2013**, she did cause to have served by U.S. Postal Service, regular mail with postage prepaid and return address clearly indicated, and electronic mail, a copy of the **Defendant JPMorgan Chase Bank, N.A. Revised First Set of Requests for Admission to the Plaintiff** to the following:

Christy C. Jones
Sherpy & Jones, P.A.
PO Box 2599
Lexington, SC 29071
Attorney for the Plaintiff


Jennifer A. Shirey, Paralegal
Ells, Lawhorne & Sims, P.A.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF FAIRFIELD) CIVIL ACTION NO. 2012-CP-20-00132

ArrowPointe Federal Credit Union,)
)
 Plaintiff,)
)
vs.) PLAINTIFF'S RESPONSE TO
) AMENDED FIRST SET OF REQUESTS
Jimmy Eugene Bailey; Laura Jean Bailey; and) FOR ADMISSION
JPMorgan Chase Bank,)
)
 Defendants.)
)

DEFINITIONS

1. "ArrowPointe Mortgage" – mortgage made to ArrowPointe Federal Credit Union from Jimmy E. Bailey and Laura Jean Bailey dated October 27, 2009, recorded on November 4, 2009, in the Office of the Clerk of Court for Fairfield County in Book 973 at Page 28, in the original Principal amount of \$99,000.00.
2. "December 2009 Mortgage" – mortgage made to Quicken Loans, Inc. from Jimmy Eugene Bailey and Laura Jean Bailey, dated November 23, 2009, recorded on December 15, 2009 in the Office of the Clerk of Court for Fairfield County in Book 977 at Page 54, in the original principal amount of \$296,000.00, and subsequently assigned to JP Morgan Chase Bank, National Association by Assignment of Mortgage dated January 6, 2012 and recorded January 25, 2012 in the Office of the Clerk of Court for Fairfield County in Book 1059 at Page 62.
3. "October 2009 Mortgage" – mortgage made to Quicken Loans, Inc. from Jimmy Eugene Bailey and Laura Jean Bailey, dated September 29, 2009, recorded on October 20, 2009 in the Office of the Clerk of Court for Fairfield County in Book 971 at Page 41, in the original principal amount of \$256,550.00

RESPONSES TO REQUESTS FOR ADMISSION

4. Admit that loan proceeds from the December 2009 Mortgage were used to satisfy the October 2009 Mortgage as indicated on Line 1501 of the Settlement Statement attached hereto as Exhibit A.
- a. Plaintiff admits.

By: _____

Christy C. Jones

Christy C. Jones (SC Bar No. 69434)

Sherpy & Jones, P.A.

921 Corley Mill Road

Post Office Box 2599

Lexington, South Carolina 29071

P: (803) 356-3327

F: (803) 356-3591

ccj@sherpy-jones-law.com

ATTORNEY FOR PLAINTIFF

Lexington, South Carolina

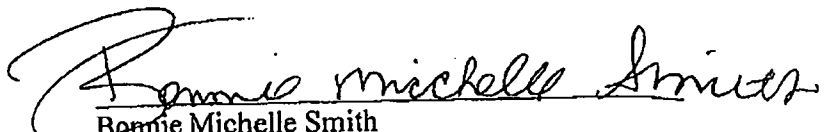
January 25, 2013

CERTIFICATE OF SERVICE

I hereby certify that on January 25th, 2013, I served a copy of the foregoing Plaintiff's

Responses to Amended First Set of Requests for Admissions. upon the attorney for the
Defendant, JPMorgan Chase Bank, by placing same in the United States mail addressed as
follows:

Drew B. Walker
Ellis, Lawhorne & Sims, P.A.
P. O. Box 2285
Columbia, South Carolina 29202


Bonnie Michelle Smith
Legal Assistant to Christy C. Jones

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF FAIRFIELD) CIVIL ACTION NO. 2012-CP-20-00132

ArrowPointe Federal Credit Union,

Plaintiff,

vs.

Jimmy Eugene Bailey; Laura Jean Bailey; and
JPMorgan Chase Bank,

Defendants.

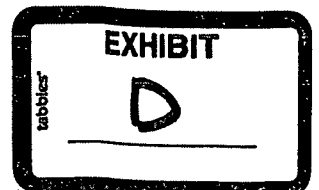
PLAINTIFF'S RESPONSE TO FIRST SET
OF INTERROGATORIES

2013 JUL 24 11:02
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BERRY

Pursuant to Rule 26 and 33 of the South Carolina Rules of Civil Procedure, JPMorgan Chase Bank ("Defendant") Hereby serves upon ArrowPointe Federal Credit Union ("Plaintiff") the following written First Set of Interrogatories to be answered separately and in writing within the time allowed under the Rules after the service of these Interrogatories:

DEFINITIONS

- A. The terms "you", "your", or "Plaintiff", means ArrowPointe Federal Credit Union and its agents, representatives, or other individuals who work or act on behalf of it either directly or indirectly.
- B. The term "person" means a natural person, a group of natural persons acting as individuals, a group of natural persons acting in a collegial capacity (e.g., as a committee, board of directors, etc.), a corporation, a partnership, a joint venture, a government or governmental agency and/or any other incorporated or unincorporated business, government or social entity.
- C. The terms "document" and "documentation" are used in their broadest sense and include graphic matter of any kind or nature, whether written, printed, typed, recorded, filmed, punched, transcribed, taped or produced or reproduced by any means. The terms "document" and "documentation" include, but are not limited to, records, emails, personal notes, cablegrams, telexes, studies, calendars, diaries, desk calendars, appointment books, agendas, minutes, pamphlets, envelopes, telephone messages, graphs, records of meetings, summaries or records of telephone conversations, summaries or records of meetings or conferences, tabulations, analyses, evaluations, projections, work papers, statements, summaries, journals, billing records and invoices. The terms "document" and "documentation" also include every other means by which information is recorded or transmitted, including, but not limited to photographs,



videotapes, tape recordings, microfilms, punch cards, computer programs, printouts, all recordings made through data processing techniques, and the written information necessary to understand and use such materials. The terms "document" and "documentation" are further defined to mean the original, any drafts, and any non-identical copies (i.e., those bearing notations or marks not found on the original).

D. The term "electronically stored information" ("ESI") is used in its broadest sense and includes any and all email attachments, word processing documents, spreadsheets, graphics, and presentation documents, images, text file, hard drives, databases, instant messages, transaction logs, audio and video files, voicemail, Internet data, computer logs, text messages, back-up materials, "native files", writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations which are stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form. The term "ESI" also means any "documents", produced in their "native form" with "metadata" in-tact and shall include both "documents" that are live on a computer or server and those that are in storage or stored either via a remote system, back-up system, hard drive or tape of any kind.

1. ~~The term "metadata" is used in the these discovery requests to include information~~ embedded in a "native file" that is not ordinarily viewable or printable from the application that generated, edited, or modified such "native file", and information generated automatically by the operation of a computer or other information technology system when "native file" is created, modified, transmitted, deleted or otherwise manipulated by a user of such system.
2. The term "native file(s) and/or "native form" means "ESI" in the electronic format of the application in which such "ESI" is normally created, viewed and/or modified.
3. "Static Image(s)" means a representation of "ESI" produced by converting a "native file" into a standard image format capable of being viewed and printed on standard computer systems. In the absence of agreement of the parties or order of Court, a "static image" should be provided in either Tagged Image File Format (TIFF or .TIF files) or Portable Document Format (PDF). If load files were created in the process of converting "native files" to "static images", or if load files may be created in the process of converting "native files" to "static images", or if load files may be created without undue burden or cost, load files should be produced together with "static images".
- E. The phrase "possession, custody, or control" means a "document" or "ESI" in your physical custody, or that you own in whole or in part; or, have a right by contract, statute, or otherwise to use, inspect, examine, or copy such document or ESI on any terms, or, have an understanding, express or implied, that you may use, inspect, examine, or copy such document or ESI on any terms, or you have, as a practical matter, the ability to use, inspect, examine, or copy such document or ESI.

- F. The terms "and" and "or" shall be interpreted conjunctively and shall not be interpreted to exclude information otherwise within the scope of the production request.
- G. References to the singular include the plural, and references to the plural include the singular.
- H. The past verb tense includes the present verb tense, and the present verb tense includes the past tense.
- I. A document or ESI that "relates to" any given subject means any document or ESI that in whole or in part constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is in any way pertinent to that subject, including without limitation, documents or ESI concerning the preparation of other documents or ESI.

INSTRUCTIONS

- A. When the phrase "describe in detail" or "specifically state" is employed in these interrogatories, please supply a full description and narrative account of the act, transaction, relationship, thing, or occurrence inquired into, and include references to the dates, places, and persons involved as well as disposition of the matter, if applicable.
- B. When the term "identify" is used in these interrogatories, please supply the following information as the context requires:
 - 1. When "identify" is used with reference to a natural person, please state his or her full name, present or last known address and telephone number, and present or last known position or business affiliation;
 - 2. When "identify" is used with respect to any other entity, please state its full name, the address of its principal place of business, and the names of its principals;
 - 3. When "identify" is used with respect to a document or ESI, please state the name or title of the document or ESI, the type of document or ESI (e.g., letter, memorandum, telegram, chart, etc.), its date, the person(s) to whom it was addressed, and the person(s) to whom it was sent. If any such document or ESI was but is no longer in your possession or subject to your control, state what disposition was made of it, and explain the circumstances surrounding, and the authorization for, such disposition, and state the date or approximate date thereof; and

4. When "identify" is used with respect to any non-written communication, please identify the natural person(s) making and receiving the communication, their respective principals or employers at the time of the communication, the date, manner, and place of the communication, and the substance of the communication.
5. Pursuant to the South Carolina Rules of Civil Procedure and law, these Requests shall be deemed continuing so as to require supplemental responses prior to trial.
6. If any information is withheld by you based upon a claim that is privileged or subject to protection as trial preparation material, provide a separate privilege log separately describing the nature of each document, ESI, communication, or thing not produced or disclosed by you.

INTERROGATORIES

1. Give the names and addresses of persons known to you to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

Tim Lyda
ArrowPointe Federal Credit Union
P.O. Box 465
Great Falls, SC 29055

Barbara Looper
ArrowPointe Federal Credit Union
P.O. Box 465
Great Falls, SC 29055

Jim Price
ArrowPointe Federal Credit Union
P.O. Box 465
Great Falls, SC 29055

Samantha Faulkenberry
ArrowPointe Federal Credit Union
P.O. Box 465
Great Falls, SC 29055

O'Neil Cannon
Garvin Appraisals
5 Calendar Court
Suite 103
Columbia, SC 29206

Milton Hamilton
Hamilton, Delleney, & Grier, P.A.
128 Center Street
Chester, SC 29706

Kathy Canders
Weichart Realtors
Real Estate Closing Coordinators, Inc.
7818 Exeter Lane
Columbia, SC 29223

Laura Jean Bailey
1981 Brookstone Way #108
Rock Hill, SC 29732

Jimmy Eugene Bailey
1981 Brookstone Way #108
Rock Hill, SC 29732

J.D. Crook Insurance Agency
1676 Celanese Rd.
Rock Hill, SC 29732-1729

2. For each person known to you to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the Defendant of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

Tim Lyda – Chief Executive Officer at ArrowPointe Federal Credit Union

Barbara Looper – Branch Manager at ArrowPointe Federal Credit Union

Jim Price – VP of Lending / Branch Operations at ArrowPointe Federal Credit Union

Samantha Faulkenberry – Collector at ArrowPointe Federal Credit Union

O'Neil Cannon – Appraiser – Appraisal of the property in controversy

Milton Hamilton – provided initial title report, final title report, and a title opinion on July 18, 2011

Kathy Canders – Realtor for the Baileys on the failed short sale

Laura Jean Bailey - Debtor

Jimmy Eugene Bailey - Debtor

J.D. Crook Insurance Agency – Home owner's insurance agency utilized by the Baileys

3. Set forth a list of photographs, plats, sketches, or other prepared documents and/or ESI in your possession that relate to the claim or defense in this case.

Photographs, floor plan, and map are included in appraisals – attached to Response to Request for Production.

4. Set forth an itemized statement of all damages claimed to have been sustained by you in your pleadings.

Principal on the Loan: \$98,136.95

Interest accrued: \$6,121.88

Total Damages: \$104,258.83

5. List the names and addresses of any expert witnesses whom you propose to use as a witness at the trial of the case.

At this time we do not propose the use of any expert witnesses, but reserve the right to amend.

6. Specifically state whether you expected your mortgage to be in a junior lien position when you originated the loan that is the subject matter of your instant foreclosure.

As of October 27, 2009, through the date of recording, November 4, 2009, ArrowPointe held the expectation of being the junior lean holder.

7. Describe in detail the purpose of your loan to the Defendants Jimmy and Laura Bailey.

The purpose of the loan to Defendant's was additions and necessary repairs to the property.

8. Describe in detail when you first learned of Defendant JPMorgan's November 23, 2009 loan to Defendants Jimmy and Laura Bailey.

ArrowPointe Federal Credit Union did not learn of the Mortgage dated November 24, 2009 until after it was recorded on December 15, 2009.

We reserve the right to continuously supplement these answers as new information becomes available.

By: _____

Christy C. Jones

Christy C. Jones (SC Bar No. 69434)

Sherpy & Jones, P.A.

921 Corley Mill Road

Post Office Box 2599

Lexington, South Carolina 29071

P: (803) 356-3327

F: (803) 356-3591

ccj@sherpy-jones-law.com

ATTORNEY FOR PLAINTIFF

Lexington, South Carolina

August 23, 2012

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

ArrowPointe Federal Credit Union,
Plaintiff,

v.

Jimmy Eugene Bailey, Laura Jean
Bailey, and JPMorgan Chase Bank,
Defendants.

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

CASE NO. 2012-CP-20-00132

**MEMORANDUM IN SUPPORT OF
DEFENDANT JPMORGAN CHASE BANK
MOTION FOR SUMMARY JUDGMENT**

2013 OCT 2 PM 3:10
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO KRAM

The Defendant JP Morgan Chase Bank, who has assigned its mortgage to Quicken Loans, Inc. ("Quicken") and has filed a Consent Order for Substitution as Party Defendant by separate motion, by and through its undersigned counsel, submits this brief in support of its motion for summary judgment as to the priority of Quicken's mortgage.

INTRODUCTION

Plaintiff ArrowPointe Federal Credit Union ("AFCU") brought this mortgage foreclosure action on real property in Fairfield County as described in its Complaint ("Subject Property"). Quicken also holds a mortgage secured by the Subject Property and claims priority under the doctrine of replacement mortgage discussed in the instant motion and memorandum. The instant motion asks the Court to enter an order establishing the senior priority of Quicken's mortgage and, if an order of foreclosure is ultimately granted to AFCU, that the Subject Property be sold subject to Quicken's mortgage.

FACTS

The Defendants Jimmy Eugene Bailey and Laura Jean Bailey ("Baileys") gave a mortgage to Quicken that was recorded on October 15, 2009 ("Replaced Mortgage"). The Replaced Mortgage was in senior position at the time of recording. The Replaced Mortgage secured a Note in the principal amount of \$256,500.00 plus interest. In the "Transfer of Rights in the Property" section of the recorded Replacement Mortgage, the following record notice was provided to all subsequent mortgagees, including AFCU, and the public at large: "This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications

of the Note..." ("Future Advance Clause").

Subsequent to the Replaced Mortgage transaction, the Baileys gave AFCU a mortgage securing an Open-End Home Equity Credit Agreement ("Line of Credit Mortgage") in the principal amount of \$99,000.00 to make improvements and additions to their home. The Line of Credit Mortgage was recorded on November 4, 2009. AFCU acknowledges that it expected its mortgage to be in junior priority position when it was recorded. See Exhibits B, C and D of Quicken's Motion for Summary Judgment and Plaintiff's Memorandum in Opposition to the Motion.

The Baileys entered into a subsequent loan transaction with Quicken on November 23, 2009 ("Replacement Mortgage Transaction") and obtained a new loan in the principal amount of \$296,000.00. Proceeds from this loan were used to pay off the Replaced Mortgage in the amount of \$257,459.04 ("Payoff"). See Exhibit A to Plaintiff's Motion. As part of the same transaction, the senior Replaced Mortgage was released of record and was replaced with a new mortgage recorded on December 15, 2009 ("Replacement Mortgage") that was intended to replace the Replaced Mortgage and retain senior lien position. See Exhibit A to the Motion. Quicken did not know that the Line of Credit Mortgage existed at the time of the Replacement Mortgage. See Id.

A licensed South Carolina attorney, Stacey E. Pope f/k/a Stacey Pope Gardner, supervised the loan closing. See the Affidavit of Laura Miller and its attached exhibits attached to the Motion as Exhibit A, as well as the "Closing Attorney's Statement", the November 23, 2009 letter from Stacey Pope Gardner, Esq. and the deposition excerpt of James R. Price attached to this Memorandum as Exhibit A. Attorney Pope witnessed and notarized the Replacement Mortgage See Id. Attorney Pope remains licensed and in good standing with the South Carolina Bar in the present day. See Id. The Baileys executed a Title Company Client Acknowledgment that represented by affidavit that "there are no outstanding home improvement loans, mortgages, deeds of trust, or equity lines of credit, recorded or unrecorded" other than the Replaced Mortgage. See "Title Company Client Acknowledgment" Bates Labeled JPMorgan Chase 000087 and attached to this Memorandum as Exhibit B. The Baileys misrepresented the truth when they told Quicken that there are no equity lines of credit secured by the Subject Property.

These facts are undisputed and established in the record. AFCU acknowledges the chronology and transactions set forth above in its memorandum, as well the fact that "it was in second position when the Baileys granted a mortgage to the Credit Union (AFCU)." See AFCU's

Memorandum in opposition to this Motion. Further, AFCU acknowledges that the dispute regarding the priority of liens outlined above is legal in nature. See Id. For these reasons, the Court can apply these undisputed facts in the light most favorable to the non-moving AFCU and determine as a matter of law whether Quicken's Replacement Mortgage receives priority.

LEGAL STANDARD

Summary judgment should be granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. S.C. R. Civ. P. 56(c). In determining whether any triable issue of fact exists, the evidence and all inferences, which can reasonably be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. BPS, Inc. v. Worthy, 362 S.C. 319, 325, 608 S.E.2d 155, 158 (Ct. App. 2005). All ambiguities, conclusions, and inferences rising from the evidence must be construed most strongly against the moving party. Id. at 325, 608 S.E.2d at 159. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Bennett v. Investors Title Ins. Co., 370 S.C. 561, 569, 635 S.E.2d 660, 664 (Ct. App. 2006).

"Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). "With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility 'may be discharged by "showing" -that is, pointing out to the [trial] court- that there is an absence of evidence to support the nonmoving party's case.' " Id. (alteration in original) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). "The moving party need not 'support its motion with affidavits or other similar materials *negating* the opponent's claim.'" Id. (quoting Celotex, 477 U.S. at 323,); see also Richardson v. State-Record Co., 330 S.C. 562, 499 S.E.2d 822 (Ct.App.1998).

Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial. Baughman, 306 S.C. at 115, 410 S.E.2d at 545. The South Carolina Supreme Court, clarifying prior case law, has held that in certain cases a nonmoving party must present more than a mere scintilla of evidence to survive summary judgment:

Accordingly, we hold that in cases applying the preponderance of the evidence

burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. However, in cases requiring a heightened burden of proof or in cases applying federal law, we hold that the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment.

Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003).

LEGAL ANALYSIS

I. The Replacement Mortgage Theory

The Restatement Third of Property recognizes the Replacement of Senior Mortgages and its Effect on Intervening Interests as follows:

(a) If a senior mortgage is released of record and, as part of the same transaction, is replaced with a new mortgage, the latter mortgage retains the same priority as its predecessor, except

(1) to the extent¹ that any change in the terms of the mortgage or the obligation it secures is materially prejudicial to the holder of a junior interest in the real estate, or

(2) to the extent that one who is protected by the recording act acquires an interest in the real estate at a time that the senior mortgage is not of record.

See REST 3d PROP-MORT Section 7.3.

The Comments to this Restatement section acknowledge that the replacement of senior mortgages is commonplace in lending transactions involving real property. See Comment a. Further, the commentators state that “[r]equiring the consent of junior interests for such transactions might deny the parties needed flexibility in dealing with changing economic and business conditions. This section aims at resolving those problems in a manner that protects the legitimate expectations of the holders of junior interests, while at the same time denying them the ability to veto workouts or other flexible restructuring arrangements between mortgagors and senior lenders.” See Id. Simply put, junior mortgagees do not have veto authority on a financing transaction between a senior mortgagee and its borrower. The junior mortgagee’s position should

¹ See Illustration 2 of Restatement 3d Prop-Mort Section 7.3 that elaborates on the retention of priority for senior mortgages that are replaced, but only to the extent of the payoff of the replaced mortgage, in instances when the junior lien holder does not have record notice of the potential for future advances that may affect the principal amount.

not worsen due to the transaction, but the senior mortgagee will retain priority to the extent of the replaced mortgage.

Additionally, if the original mortgage validly secures future advances in its recorded mortgage, then the intervening lienholder is on notice that the senior debt can increase and should temper its lending decisions accordingly. See Reporters' Note, comment d, REST 3d PROP-MORT Section 7.3.

II. Replacement Mortgage in South Carolina

The South Carolina Supreme Court adopted the Restatement Third of Property Mortgages Section 7.6 in its majority opinion in Matrix Fin. Services Corp. v. Frazer, 394 S.C. 1354, 714 S.E.2d 532 (2011). This Restatement section recognizes an equitable doctrine known as equitable subrogation, which is an exception to the race notice statute that typically determines priority by the earlier date of recording. Much like Replacement Mortgage, Section 7.6 allows a refinancing lender that is different from the original senior mortgagee to retain its priority to the extent the subrogee pays off the prior mortgage. See Id.

Prior to the Restatement Third, many states allowed the same lender to refinance its own mortgage, including South Carolina, and retain priority through the doctrine of equitable subrogation. The Restatement opines that, for practical purposes and by definition, a lender cannot be subrogated to itself. Therefore, the commentators conclude that Replacement Mortgage is the more appropriate doctrine for a mortgagee to retain priority through a new loan that pays off its own prior loan. REST 3d PROP-MORT Section 7.6.

Seeing no practical difference other than the titles of these two theories, some states still allow a lender to refinance its own mortgage and retain priority over junior mortgagees under the title of equitable subrogation. However, following the guidance of the Restatement Third commentators, South Carolina's Supreme Court in Matrix, supra, opted to adopt the Restatement Third of Property Mortgages Section 7.6 while acknowledging the Restatement Third of Property Mortgages Section 7.3 that discusses Replacement Mortgage. The Matrix majority alludes to the Replacement Mortgage theory in dicta but does not make a ruling based on the principle because "Matrix is not asserting priority under a theory of replacement and modification." See Id. at 534.

In discerning the logic of the majority with regard to Replacement Mortgage, the dissenting opinion of Justice Pleicones sheds light on the majority's seeming propensity to favor Replacement Mortgage in South Carolina. "It appears that the majority would agree with me that a refinancer

has a right to lien priority, if that refinancer uses the theory of “replacement and modification” rather than equitable subrogation. Heretofore, South Carolina has used the doctrine of equitable subrogation to restore a refinancer’s lien to priority, and I would not reverse this because (Matrix) used this theory rather than the **newly announced “replacement and modification” rule**. Matrix, supra, at 535 (emphasis added). While the majority did not, admittedly, specifically announce a new rule in its opinion, Justice Pleicones clearly received the impression that the majority favors Replacement Mortgage and would adopt it with the appropriate procedural backdrop.

III. Replacement Mortgage in Sister Jurisdictions

Since the Restatement Third’s publication in 1997, a number of jurisdictions have already adopted Restatement Section 7.3 on Replacement Mortgages. Quicken is unaware of a jurisdiction that has rejected this section or the principles it espouses.

In Sovereign Bank v. Gillis, 2013 WL 3329289 (NJ 2013), the Superior Court of New Jersey’s Appellate Division adopts Restatement Section 7.3 on Replacement and Modification in the context of a refinancer of its own loan to replace priority. The court notes that there are certain equitable considerations to be taken into account when looking at the general propositions of a race-notice state, like New Jersey (and South Carolina). “An exception to the normal “race-notice” determination of mortgage priorities can sometimes occur when a third party advances money to pay off a mortgage.” Id. at 4. In adopting Replacement Mortgage, this court takes the third party analysis a step further by granting priority to a refinancer of its own loan under the principles of Replacement Mortgage. Id. at 7. The court also opines that a replacement mortgagee’s actual knowledge of the intervening lien is not detrimental to replacement priority so long as the intervening junior mortgagee is not materially prejudiced. Id. One of the stated purposes for the adoption of Replacement Mortgage was to avoid the junior mortgagee from “reaping an undeserved windfall” by virtue of the senior mortgage paid off by the new mortgagee. See Id.

Appellate courts from Michigan and Arizona have also adopted replacement mortgage and specifically Restatement Section 7.3 on Replacement and Modification. See CitiMortgage, Inc. v. MERS, 295 Mich.App. 72 (2011) (holding “...because Section 7.3 of the Restatement reflects the present law in Michigan, we hereby adopt it.”); see also Brimet II, LLC v. Destiny Homes Marketing, LLC, 231 Ariz. 457 (2013) (holding “When the lenders are of the same identity, priorities are determined under replacement and not equitable subrogation.”).

Illinois courts have espoused the principles of replacement mortgage for over 100 years. See UnionBank v. Thrall, 374 Ill.App.3d 785 (2007).

...the trial court erred in holding that “first in time, first in right” is the only legal principle properly applicable to this case ... Indeed, the legal doctrine (the replacement mortgage party) invoked has existed in Illinois case law for over 100 years, and it is not limited to the third-party situation described by Union. In Shaver, the supreme court held that a lender’s refinancing of a debt secured by a mortgage, coupled with a simultaneous release of the original mortgage held by the lender, did not disturb the previous priority of liens on the land, where an intervening lienor took his lien with knowledge of the original mortgage ... The authors of the Restatement (Third) of Property prefer the term “replacement of senior mortgages”...Regardless of the label, however, it is clear that the doctrine remains valid under Illinois law and (the replacement mortgage party) properly raised it before the trial court.

Id. at 789-792. The appellate courts of New York have also adopted the principles of replacement mortgage. See Citibank, N.A. v. Kenney, 17 A.D.3d 305 (2005) (see Headnote 1). The United States District Court for the District of Nevada found that Nevada law would recognize the doctrine of replacement and specifically references Restatement Third of Property Section 7.3. See Freedom Mort. Corp. v. Trovare Homeowner’s Assoc., Slip Copy 2013 Order on Plf’s Mot. To Reconsider (commenting “Replacement is an equitable doctrine which resolves priority disputes between the holder of a replacement mortgage and an intervening interest. Its function is to preserve the original expectations of the parties, prevent windfalls to an intervening junior lienholder, and allow borrowers to obtain refinancing.”).

Finally, Restatement Section 7.3 has case citations from the following jurisdictions that apply the Restatement in determining the holdings of their decisions: Kentucky, Oklahoma, Texas, Washington, Utah and Missouri.

In sum, the doctrine of Replacement Mortgage priority in the Restatement Third of Property is widely-recognized and favored in courts across the country.

IV. Replacement Mortgage in the Instant Matter

In the instant case, Quicken argues that its Replacement Mortgage retains priority through the doctrine of Replacement Mortgage because it paid off the underlying debt of the Replaced Mortgage and took its priority position as part of the Replacement Mortgage Transaction. The Payoff is not disputed by AFCU and is made clear by the record. See Exhibit A of the Motion.

The Replacement Mortgage theory lists two exceptions: (1) material prejudice and (2) the replaced mortgage not being of record when the intervening lien is recorded. The second exception is not at issue here because AFCU admits the Replaced Mortgage was recorded at the time it recorded its Line of Equity Mortgage and that it had the expectation of being in a junior lien position. See Plaintiff's Memorandum and its attached exhibit of the Affidavit of James Price.

However, the Plaintiff argues that (1) its consent and approval were necessary for the Replacement Mortgage transaction and (2) it was materially prejudiced by the Replacement Mortgage's principal amount being increased to \$296,000.00 plus interest from \$256,500.00 plus interest. First, if the Court acknowledges the applicability of the Restatement Section 7.3, then the Restatement makes it clear that the intervening junior creditor's permission is not needed. See Comment a, supra, (stating "[r]equiring the consent of junior interests for such transactions might deny the parties needed flexibility in dealing with changing economic and business conditions.").

Analysis of the material prejudice argument raised by Plaintiff is as follows:

A. Applicability of the Future Advance Clause in the Replaced Mortgage

The Replaced Mortgage, which irrefutably held priority, contained the Future Advance Clause, supra, that put AFCU on notice that "all renewals, extensions and modifications of the Note..." were secured by the Replaced Mortgage. Essentially, AFCU knew or should have known during its underwriting by virtue of the publicly recorded Future Advance Clause that additional sums of money could be advanced by Quicken to the Baileys and given priority. While AFCU may argue that this unilateral ability between the senior mortgagee and its borrower is penal, the Restatement disagrees. If the original mortgage validly secures future advances in its recorded mortgage, then the intervening lienholder is on notice that the senior debt can increase and should temper its lending decisions accordingly. See Reporters' Note, comment d, REST 3d PROP-MORT Section 7.3.

The Plaintiff makes a semantic argument that the Replacement Mortgage was not a "renewal, extension or modification". However, the Restatement aims to arrive at the equitably appropriate result. If the junior mortgagee had notice that future advances could be made in any fashion, the fact that it was a new loan is immaterial. A noteworthy treatise and case law support this theory on postmortgage transactions affecting priority.

As a general rule, entering satisfaction of a mortgage and taking a new one, when designated by the parties to be merely a continuation of the first

mortgage and when the two acts are practically simultaneous or parts of the same transaction, is not an extinguishment of the mortgage but merely a renewal and does not give priority to an intervening judgment or mortgage creditor of the mortgagor, especially where it is done in good faith, in ignorance of the existence of the intervening lien, and without any intention to release the lien of the mortgage.

59 C.J.S. Section 320, Renewal or Substitution of Mortgages. The Corpus Juris Secundum commentators view the Quicken transaction as a virtual renewal, which places it under the gambit of the Future Advance Clause, and certainly under the spirit of Restatement Section 7.3. A New Jersey court has applied similar rationale: "This "new loan" was in effect a "modification" as well as a "renewal" ... the court finds that the proceeds of the (Replacement) mortgage were used to take the place of the original (replaced) mortgage, which was a superior lien by recordation and by agreement to plaintiff's mortgages." See UPS Capital Business Credit v. Abbey, 408 N.J. Super. 524 (2009) at 528-529. The Restatement's Illustration 5 outlines a similar scenario regarding priority when a future advance clause is present.²

Because AFCU had notice at the time of its underwriting that future advances could be made by Quicken, the Replacement Mortgage should be given full priority because the expectations of AFCU did not change and it has not been materially prejudiced. For these reasons, Quicken should be granted priority and any potential foreclosure sale of the Subject Property should be subject to the Replacement Mortgage.

B. Alternative analysis of extent of material prejudice – the difference between the Payoff and the Replacement Mortgage principal balance

Assuming, arguendo, that the Court applies the legal doctrine of Replacement Mortgage to the language in the Future Advance Clause of the Replaced Mortgage and determines that material prejudice exists, the extent of the prejudice must be determined in order to rule on priority. While Quicken denies this is the appropriate analysis, it provides this discussion in the alternative. Because : (1) the language in the Future Advance Clause speaks for itself and (2) the Payoff is uncontroverted, there are no issues of material fact and a legal determination can be made by application of those facts as a matter of law.

² Illustration 5: Mortgagor borrows \$15,000 from Mortgagee-1 and gives Mortgagee-1 a promissory note for that amount secured by a mortgage on Blackacre. The mortgage states "this mortgage shall also secure all future loans or advances made by Mortgagee to Mortgagor." The obligation is due and payable in five years. The mortgage is immediately recorded. Two months later, Mortgagor borrows \$10,000 from Mortgagee-2 and gives Mortgagee-2 a promissory note for that amount secured by a mortgage on Blackacre. The latter mortgage is promptly recorded. A year later, Mortgagor and Mortgagee-1 agree to restructure their loan agreement. As a result of this agreement, Mortgagee-1 lends an additional \$20,000 to Mortgagor. Mortgagee-1 then releases its original mortgage of record and, a few days later, Mortgagor delivers to Mortgagee-1 a \$35,000 promissory note secured by a mortgage on Blackacre. The latter mortgage obligation carries the same interest rate and the full \$35,000 is due and payable five years thereafter. It does not secure future advances. The mortgage is promptly recorded. Mortgagee-1's \$35,000 mortgage is senior to Mortgagee-2's.

In Paragraph 20 of Exhibit A to AFCU's Memorandum, AFCU's Vice President admits that the extent of its prejudice is \$38,540.96. This amount reflects the difference between the amount of the Replacement Mortgage and the Payoff. ($\$2960,000 - \$257,459.04 = \$38,540.96$). The first sentence of the Paragraph makes reference to cash loan proceeds given to the Baileys by Quicken (\$26,235.11), which is wholly irrelevant to priority since these were funds paid for by Quicken. Relevantly, Mr. Price quantifies the extent of his alleged damages from the Replacement Mortgage Transaction: "The refinance damaged the Credit Union's equity position by \$38,540.96." See Exhibit A to AFCU's Memorandum, Para. 20. Under no circumstance could AFCU argue that it was damaged to an extent greater than this amount under the Restatement analysis. The Restatement's Illustration 2 is analogous to the set of facts outlined (alternatively) here.³

Quicken argues alternatively that AFCU has not been materially prejudiced in an amount greater than \$38,540.96. For that reason, any foreclosure sale in this matter should be subject to the non-prejudicial amount of the Replacement Mortgage (\$257,459.04), which would remain as a senior mortgage on the Subject Property following the sale. Further and to the extent AFCU's sale proceeds exceeded AFCU's debt, Quicken would have a junior lien on the Subject Property in the amount of \$38,540.96 plus interest, costs, fees and other amounts due under its promissory note. Quicken would be entitled to surplus proceeds in that amount in the event of this alternate scenario and ruling by this Court.

C. Final analysis on Replacement Mortgage in this case

"The purpose of subrogation (replacement here) is to prevent a junior lien holder from converting the mistake of the lender into a magical gift for himself." Matrix, supra, dissenting opinion, J. Pleicones, (citing United States v. Baran, 996 F.2d 25 (2nd Cir. 1993)). Here, the mistake

³ **Illustration 1, with the caveat of Illustration 2, below:** Mortgagor borrows \$50,000 from Mortgagee-1 and gives Mortgagee-1 a promissory note for that amount secured by a mortgage on Blackacre. The mortgage obligation carries a fixed rate of interest and is to be amortized by fixed payments over 15 years. The mortgage is immediately recorded. Thereafter, Mortgage borrows \$10,000 from Mortgagee-2 and gives Mortgagee-2 a promissory note for that amount secured by a mortgage on Blackacre. The latter mortgage is promptly recorded. Two years later, when the balance on Mortgagee-1's mortgage is \$49,000, Mortgagor and Mortgagee-1 agree to a replacement mortgage. Mortgagee-1 releases its original mortgage of record and Mortgagor delivers to Mortgagee-1 a new promissory note for \$49,000 secured by a mortgage on Blackacre. The mortgage obligation carries the same fixed rate of interest as its predecessor and is evenly amortized over 20 years. A few days later, Mortgagee-1 records the replacement mortgage. The latter mortgage is senior to Mortgagee-2's mortgage. **Illustration 2:** The facts are the same as Illustration 1, except that the replacement mortgage delivered to Mortgagee-1 secures a \$60,000 obligation. Mortgagee-1's replacement mortgage is senior to Mortgagee-2's mortgage except to the extent of \$11,000 and accruing interest thereon.

would seemingly be Quicken's failure to locate the publicly recorded Line of Credit Mortgage and ask AFCU for a legal subordination document. Equitable principles excuse this alleged negligence and allow the senior mortgagee to retain its priority. Even if Quicken had actual knowledge of the Line of Credit Mortgage, the Restatement 7.3 of Replacement Mortgages does not require AFCU's permission or allow AFCU "the ability to veto workouts or other flexible restructuring arrangements between mortgagors and senior lenders." See Restatement 7.3, supra, comment a; see also, Sovereign Bank supra at 7. Recognizing Quicken's priority here under these equitable principals: (a) reduces foreclosures and facilitates refinancing, (b) reduces title insurances premiums and (c) accomplishes the equitable maxim that no one (AFCU) should be enriched by another's loss. See Matrix, dissent, supra; see also, Sovereign Bank, supra, at 6.

AFCU should not receive a magical gift. The equitable principles espoused in the Restatement Third of Property regarding Replacement Mortgages should be applied here in order to establish the priority of the Replacement Mortgage.

V. AFCU's accusations of a non-attorney closing are without merit, unsupported by the facts, and fail as a matter of law.

The Replacement Mortgage was recorded on December 15, 2009. The August 8, 2011 substituted opinion in Matrix, supra, held that loan closings without attorney supervision would preclude lenders from obtaining equitable relief. *The holding was prospective only.* See Id. (emphasis added). This prospective-only application was reinforced and explained explicitly in BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 731 S.E.2 547 (2012). The Court states "we would "apply this ruling (Matrix) to all filing dates after the issuance of this opinion," which was August 8, 2011. To the extent some confusion apparently exists as to what filing date Matrix referred to, we clarify now that it is the date the document a party seeks to enforce was filed. Here, Systems' mortgage was recorded on April 20, 2007, well before the issuance of Matrix. Thus, regardless of whether an attorney participated in the closing of Mortgage 2, BAC would be barred from recovery by the illegality." Here, AFCU apparently has not read these cases as it continues to push this argument at the summary judgment stage. Because the Replacement Mortgage was filed on December 15, 2009, prior to the 2011 Matrix opinion, AFCU's assertion of the illegality is barred as a matter of law.

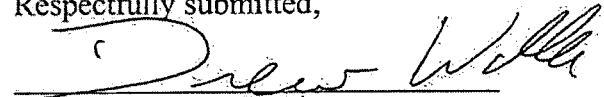
Additionally, a licensed attorney, Stacey Pope Gardner, supervised this loan closing as demonstrated in the Facts section of this Memorandum and as supported in the documents filed

with this Motion and Memorandum. See the Affidavit of Laura Miller and its attached exhibits attached to the Motion as Exhibit A, as well as the "Closing Attorney's Statement", the November 23, 2009 letter from Stacey Pope Gardner, Esq. and the deposition excerpt of James R. Price attached to this Memorandum as Exhibit A. Finally, AFCU has not provided any factual evidence for the court to consider with regards to its bald assertion that an attorney did not close this loan even if the determination was not barred as a matter of law by Matrix and Kinder.

CONCLUSION

For the reasons stated herein, Quicken asks this Court for an Order acknowledging its senior lien position on the Subject Property and holding that any foreclosure sale of the Subject Property in this action be sold subject to the Replacement Mortgage.

Respectfully submitted,



Drew B. Walker (SC Bar No. 78271)
ROGERS LEWIS JACKSON MANN &
QUINN, LLC
1330 Lady Street, Suite 400
Columbia, SC 29201
P: 803-256-1268
F: 803-252-3653
dwalker@rogerslewis.com

Attorney for Defendant
JPMorgan Chase Bank

September 30, 2013
Columbia, South Carolina

EXHIBIT A

2013 OCT 2 AM 10 40
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

CLOSING ATTORNEY'S STATEMENT

Borrower(s): Laura Jean Bailey
Jimmy Eugene Bailey

Property Address: 247 Morninglow Dr
Winnsboro, SC 29180

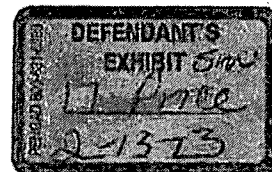
Lender: Quicken Loans Inc.

Date of Mortgage Loan: November 23, 2009

I closed the above mortgage loan on November 23, 2009. Prior to the execution of the Note and Mortgage by the Borrower(s), I reviewed and explained to the Borrower(s) the terms and provisions of the Note and Mortgage. Following my explanation, the Borrower(s) signed the Note, Mortgage and other related closing documents.


Closing Attorney

11-23-09
Date



2005/05 clatg.pdf



JPMorgan Chase 000083

Stacey Pope Gardner, Esq., LLC

Attorney at Law

803-394-6443 (telephone)

405 Frank Moorer Drive
Swansea, South Carolina 29160
spgardner@yahoo.com

803-794-5099 (facsimile)

11-23, 2009

Authorization to Disburse Funds and to Record Documents

Re: Borrowers
Order No.

Bailey

Dear Lender/ Title Company:

Enclosed please find the completed loan document package for the above referenced order, which closed on 11-23-09. Any documents faxed or copied have been placed in the rear of the stack. Otherwise, they have been kept in order received. You are now authorized to disburse the settlement proceeds in accordance with the settlement statement upon the expiration of any applicable rescission period. All funds must be distributed in the exact amount and to the named payees strictly in accordance with the information provided on the HUD-1 or HUD-1A. Please provide me with a ledger or other documentation confirming the disbursement of the funds in accordance with the settlement statement, so that I may confirm the disbursements have been made correctly.

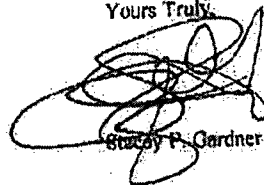
You are now authorized to process the recording of executed mortgage(s) and other recordable documents which may include any Assignments or Subordinations, if applicable, the Deed, if applicable, and any "piggy back" mortgages. The new mortgage must be recorded with the Camden County Register of Deeds. Below are detailed instructions for that recording based on state statutes and county ordinances:

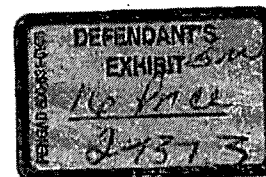
- Documents must have original signatures.
- Filing Fees for the mortgage are \$10 for the first four pages and \$1 for each additional page of the mortgage including any exhibit pages.
- Filing Fees for the Satisfaction is a \$5 flat rate.
- You should enclose a return envelope with sufficient postage for the original mortgage. The original will be returned after it is microfilmed for the archival in the county where it is recorded. This normally takes between four and eight weeks. Due to the amount of time it takes for the county to return the original, I recommend that at the time of filing, you send an additional copy to be clocked and returned with its own self-addressed, metered envelope.
- Mortgages must have a legal description with a derivation clause. The derivation clause shall include the Name of the original Grantor, the Recording Date AND/OR Book and Page number of the Deed which originally conveyed the property to the Grantor. S.C. Code Ann. § 30-5-35.
- Mortgages must have address of grantee and mortgagee to be recorded.
- Any deed executed in conjunction with the transaction should be recorded prior to the mortgage(s) and where there are multiple mortgages, they should be recorded in order of desired priority (i.e. first mortgage should be recorded first).

This letter ends my responsibility in the matters of recordation and disbursement. Please contact me immediately if you have any questions.

With warm regards, I am,

Yours Truly,


Stacey P. Gardner



JPMorgan Chase 000081

1 could you just let me know that?

2 A. Yes.

3 MR. WALKER: Okay. I'm going to hand
4 you some documents that we produced -- JPMorgan
5 produced to ArrowPointe and to your attorney.

6 You've probably -- you may have never
7 seen them as of today. I doubt that you saw them
8 before we produced them to you.

9 I'll introduce this as the next
10 Defendant's Exhibit.

11 (DFT. EXH. 16, Authorization to
12 Disburse Funds and to Record Documents, pertaining
13 to Borrower Bailey, signed by Stacey P. Gardner,
14 was marked for identification.)

15 BY MR. WALKER:

16 Q. This is a letter from an attorney named
17 Stacey Pope Gardner, whose name you will see at the
18 top on the letterhead.

19 Does this appear to be on Ms. Gardner's
20 letterhead, and is she representing that she's an
21 attorney?

22 A. Yes.

23 Q. And it references the loan that was
24 closed on November 23rd, 2009. That's the Quicken
25 mortgage that was recorded in December of 2009.

1 Does it appear from Ms. Gardner's
2 representations that she was -- I believe -- let me
3 start over.

4 This appears to be a letter to the
5 lender for the title company, which is most likely
6 Quicken.

7 Does that appear to be who this letter
8 is addressed to? Does it say Dear Lender/Title
9 Company?

10 A. It does says Dear Lender/Title Company,
11 yes.

12 Q. Okay. And in bold up above the
13 handwritten word Bailey, do you see where it says,
14 Authorization to disburse funds and to record
15 documents?

16 A. Yes.

17 Q. So it appears the nature of this letter
18 is providing advice to a lender from Ms. Gardner
19 about disbursing funds and recording documents. Is
20 that correct?

21 A. Yes, it does, on a borrower by the name
22 of Bailey.

23 Q. Okay. And the date of the letter is
24 November 23rd, 2009?

25 A. Yes.

1 Q. Is this marked as JPMorgan Chase, Bates
2 Number 000081?

3 A. Yes.

4 Q. Okay. Does it appear that Ms. Gardner
5 was involved in the Bailey transaction in November
6 of 2009?

7 A. Yes.

8 (DFT. EXH. 17, Closing Attorney's
9 Statement for borrowers Jimmy Eugene Bailey and
10 Laura Jean Bailey and Lender Quicken Loans, for
11 property 247 Morninglow Drive, was marked for
12 identification.)

13 BY MR. WALKER:

14 Q. The court reporter has handed you
15 Defendant's Exhibit 17, Mr. Price.

16 What's the title of this document?

17 A. Closing Attorney Statement.

18 Q. Okay. And what does the first sentence
19 below the references say?

20 A. I closed the above-mortgage loan on
21 November the 20th, 2009.

22 Q. Would you mind just reading that entire
23 paragraph, picking up with the next sentence.

24 A. Prior to the execution of the note and
25 mortgage by the borrowers, I reviewed and explained

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Member Directory

Member Profile

Name:	Ms. Stacey E Pope
Company:	
Address:	405 Frank Moorer Dr.
Address (cont):	
City, State Zip:	Swansea, SC 29160
Email Address:	stacey.pope.esq@gmail.com
Phone:	
Fax:	
County:	Lexington
SC Bar Admission:	11/18/2002
Law School:	University of South Carolina School of Law
Graduating Year:	2002
Website:	
Membership Class:	Regular Member
Membership Status:	Good Standing

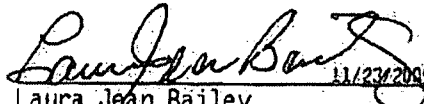
Discipline/Administrative Actions if Any

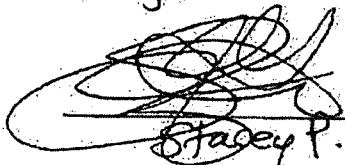
This person has no disciplinary actions.

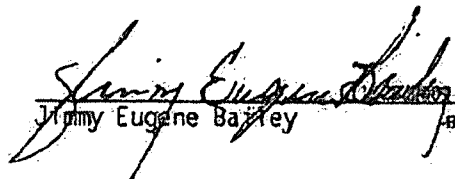
BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Signed, sealed and delivered in the presence of:


Angela Masser


Laura Jean Bailey 11/23/2009 (Seal)
Borrower


Stacey P. Gardner


Jimmy Eugene Bailey (Seal)
Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

6A(9C) (0211)

Page 14 of 18

Form 3041 1/01



003221934694 0223 288 1415

STATE OF SOUTH CAROLINA

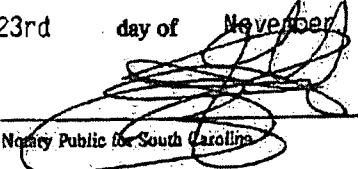
Fairfield

County ss:

I, Stacey P. Gardner do hereby certify that
Laura Jean Bailey and Jimmy Eugene Bailey, wife and husband

personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this 23rd day of November 2009


Notary Public for South Carolina

My Commission Expires: 7-15-2012

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

8A(SC) (0811)

Page 16 of 16

Initials: SP

Form 3041 1/01



003221934694 0233 200 1515

EXHIBIT B

2013 OCT 2 AM 10:40
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

Loan #

Title Company Client Acknowledgement

State of: **SC**
County of: **Fairfield**

Title Company: **TITLE SOURCE, INC.**
Title File Number: [REDACTED]

INDEMNITY: I/WE AGREE TO PAY TO THE LENDER AND/OR TITLE INSURANCE UNDERWRITER THAT ISSUES THE TITLE INSURANCE POLICY INSURING THIS LOAN TRANSACTION, THEIR SUCCESSORS AND/OR ASSIGNS, ANY AND ALL LIENS, CLAIMS AND COSTS THAT ARE CURRENTLY AGAINST THE PROPERTY DESCRIBED BELOW OR THAT MAY BE PLACED UPON THE PROPERTY THROUGH MY/OUR ACTION(S) PRIOR TO THE CLOSING OF THIS TRANSACTION AND RECORDING OF THE DEED AND/OR MORTGAGE.

The undersigned, hereby acknowledge the following:

1. That they are the true and lawful owners in fee of the following:

Land situated in the City of Winnsboro, Fairfield County, SC.

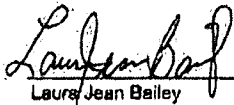
SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.
SUBJECT TO COVENANTS OF RECORD.

2. That no other person(s) have any interest and title, in equity or otherwise, in and to said premises unless hereinafter stated, and that the undersigned is not holding title for another in fulfillment of any trust or agreement or for the benefit of any other person, firm or corporation.
3. That no improvements or alterations have been made to the said premises within the past four months and that no claims of laborers or material men remain unpaid and that no material incorporated into the premises is subject to any security interest.
4. That the premises are in the possession of Laura Jean Bailey and Jimmy Eugene Bailey, wife and husband, and to the best of the undersigned knowledge, no claims have been asserted by other parties as to the premises, and no dispute exists between the undersigned and others concerning the title to the premises or the boundary lines of the same nor as to the location of the improvements upon the premises or the adjoining, and that applicable building and use restrictions are not being violated.
5. That the undersigned is over the age of eighteen (18) years.
6. That no proceeding in bankruptcy or receivership have been instituted by or against the undersigned which are now pending, nor have the undersigned made any assignment for the benefit of creditors which is in effect as to the said premises.
7. That the undersigned know of no lien(s), tax suit or pending suits by other governing bodies, federal or state, of any kind or nature which now constitutes a charge on the said premises.
8. That there are no outstanding home improvement loans, mortgages, deeds of trust, or equity lines of credit, recorded or unrecorded, except as follows:

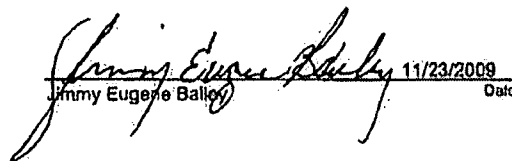
Lender Name: QUICKEN Loan Amount: \$257,458.04

9. That this affidavit is made for the purpose of inducing TITLE SOURCE, INC. to issue its title policy covering the said premises.

Acknowledged this 23rd day of November, 2009.


Laura Jean Bailey

11/23/2009
Date


Jimmy Eugene Bailey

11/23/2009
Date

Date

Date

2102588482

2006/05 ownaffd.pcl



003221934498 0408 308 0101

JPMorgan Chase 000087

000250

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF FAIRFIELD) CASE NO. 2012-CP-20-00132

ArrowPointe Federal Credit Union,

Plaintiff,

VS.

Jimmy Eugene Bailey, Laura Jean Bailey, and
JPMorgan Chase Bank,

Defendants.

PLAINTIFF ARROWPOINTE
FEDERAL CREDIT UNION'S
MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

The Plaintiff, ArrowPointe Federal Credit Union (“Credit Union”), hereby submits this Memorandum in Opposition to Defendant JPMorgan Chase Bank’s Motions for Summary Judgment.

FACTS

In review of the discovery conducted in the case and the Memorandum of Support submitted by Defendant JPMorgan Chase ("Chase"), as well as the Affidavit of James R. Price (Exhibit A), the facts of the case are as follows:

1. On September 29, 2009, Defendants Jimmy and Laura Bailey refinanced an existing mortgage on the property described in Plaintiff's Complaint. The lender was Quicken Loans, Inc.
2. This mortgage was recorded on October 20, 2009.
3. On October 27, 2009, Jimmy and Laura Bailey gave a mortgage to the Credit Union.
4. This mortgage was recorded November 4, 2009. The Credit Union was aware of the prior mortgage to Quicken during the closing of the Credit Union's mortgage.

5. On November 23, 2009, Jimmy and Laura Bailey again refinanced their mortgage with Quicken Loans, Inc.

6. This second refinance was recorded December 15, 2009. This is the mortgage that the Credit Union is complaining about because the Credit Union was never given notice of it, and the Credit Union was never asked to subordinate its mortgage, and because the refinance created a substantial disadvantage to the Credit Union's interests and left the Credit Union in a far worse position.

LAW AND ANALYSIS

I. Summary Judgment Standard

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. In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. . . . All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. . . . Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts.

BPS, Inc. v. Worthy, 608 S.E.2d 155, 362 S.C. 319 (S.C. Ct. App. 2005).

II. Summary of Defendant's Argument

The argument set forth by the Defendant Chase, in summary, is as follows: Chase's mortgage recorded on December 15, 2009 is a replacement mortgage, and not a refinance, of the mortgage given to Chase's predecessor in interest, Quicken Loans, Inc. Because Chase's mortgage recorded on December 15, 2009 is not a refinance, intervening lienholders are not entitled to the normal priority granted according to the date the instruments are recorded. The Credit Union responds as follows:

III. Plaintiff's Response to Defendant's Argument

There is no dispute in the timeline set forth above. There is no dispute that the Credit Union knew that it was in second position when the Baileys granted a mortgage to the Credit Union. The dispute is the legal effect of the events that occurred after the date of the Credit Union's mortgage, recorded on November 4, 2009.

Defendant Chase did not obtain a Subordination Agreement from the Credit Union when it refinanced its mortgage which was recorded December 15, 2009 ("December, 2009 mortgage"). Therefore, Defendant Chase lost its priority and is now in second position. Matrix v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (S.C. 2011). Because Defendant Chase advanced significant additional money to the borrowers in its December, 2009 mortgage, the Credit Union was substantially and materially prejudiced. (Affidavit of James R. Price, Exhibit A). (Settlement Statement for December, 2009 mortgage, Exhibit C). An increase in the principal amount secured by a replacement mortgage is generally deemed to be materially prejudicial to an intervening lienholder such as the Credit Union. Restatement (Third) of Property; Mortgages § 7.3(a)(2), comment b. When the "replacement" mortgage has materially prejudiced an intervening lienholder, the "replacement" mortgage is not entitled to the priority of the mortgage it is hoped to replace. Restatement (Third) of Property; Mortgages § 7.3.

Defendant Chase is requesting relief based on the Restatement and not existing precedent. Given that Chase's December, 2009 mortgage was not closed by an attorney, the Defendant is barred by principals of equity from asserting that additional relief outside of precedent should be crafted to accommodate Chase. Wachovia Bank, N.A. v. Coffey, 071013 SC (July 10, 2013).

CONCLUSION

The Defendant's Motion for Summary Judgment should be denied. When the evidence and all inferences which can reasonably be drawn are viewed in the light most favorable to the Credit Union, and when all ambiguities, conclusions, and inferences arising from the evidence are construed most strongly against Chase, the Chase is not entitled to a judgment as a matter of law. The Court should find that Chase's December, 2009 mortgage is not entitled to priority over the Credit Union's mortgage as a matter of law.

RESPECTFULLY SUBMITTED

SHERPY & JONES, P.A.

By: Christy C. Jones
Christy C. Jones
Post Office Box 2599
Lexington, South Carolina 29071
(803) 356-3327
Attorneys for Plaintiff

September 17th, 2013
Lexington, South Carolina

EXHIBIT A

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF FAIRFIELD) CIVIL ACTION NO. 2012-CP-20-00132

ArrowPointe Federal Credit Union,

Plaintiff,

vs.

Jimmy Eugene Bailey; Laura Jean Bailey; and
JPMorgan Chase Bank,

Defendants.

AFFIDAVIT OF JAMES R. PRICE

PERSONALLY APPEARED before me James R. Price, who being duly sworn, states that he is employed by Plaintiff as its Senior Vice President and as a collections manager for the Plaintiff; that he has personal knowledge of the facts set forth below; that he is authorized to make this affidavit; that he knows, understands and has competency to testify to the matters stated in this Affidavit; and that the following is correct within his personal knowledge:

1. ArrowPointe Federal Credit Union ("Credit Union") is a federally-chartered credit union, and its principal place of business is in Catawba, South Carolina. As a credit union, its members are owners of the Credit Union and share in the profits and losses of the Credit Union.

2. I have been able to determine the following from the title searches and reports provided to me and from the recorded mortgages themselves:

3. On September 29, 2009, Jimmy and Laura Bailey refinanced an existing mortgage. The lender was Quicken Loans, Inc.

4. This mortgage was recorded on October 20, 2009.

5. On October 27, 2009, Jimmy and Laura Bailey, gave a mortgage to the Credit Union.

6. This mortgage was recorded November 4, 2009. The Credit Union was aware of the prior mortgage to Quicken during the closing of the Credit Union's mortgage.

7. On November 23, 2009, Jimmy and Laura Bailey again refinanced their mortgage with Quicken Loans, Inc.

8. This second refinance was recorded December 15, 2009. This is the mortgage that the Credit Union is complaining about because the Credit Union was never given notice of it, and the Credit Union was never asked to subordinate its mortgage, and because the refinance worked a substantial disadvantage to the Credit Union's interests and left the Credit Union in a far worse position.

9. Among other things, the Credit Union is in the business of making first and second-lien mortgage loans to its members in South Carolina.

10. It is the policy that each and every South Carolina mortgage loan funded by the Credit Union is closed by an attorney licensed to practice law in the State of South Carolina.

11. When the Credit Union conducts a refinance of one of its mortgage loans, it also engages an attorney licensed to practice law in the State of South Carolina to handle the closing.

12. From time to time, a member who has a second mortgage with the Credit Union will want to refinance his or her first mortgage that is outstanding with another lender. In such instances, the lender proposing to refinance the first mortgage presents the Credit Union with a proposed Subordination Agreement. I personally review all requests from other lenders holding prior mortgages wishing to refinance for consent or rejection of proposed Subrogation Agreements.

13. As part of my review, I routinely review the anticipated costs of the refinance to the member/borrower, by reviewing the proposed Settlement Statement. I also examine the potential

benefits to the member/borrower that the refinance may offer. I also review the status of the member's existing loan with the Credit Union and the value of the real estate serving as collateral during this process.

14. Conversely, when the Credit Union conducts a refinance of any of its mortgages, the Credit Union's closing attorney conducts a title search. If subordinate lienholders are located, the Credit Union forwards a proposed Subordination Agreement to the subordinate lienholders which were identified by the licensed attorney handling the closing. If this is not accomplished, the refinance will not proceed.

15. The Credit Union never received notice that Defendant JPMorgan Chase Bank, or any of its agents or assignees, were refinancing the Chase mortgage, which was recorded on December 15, 2009.

16. Upon information and belief, the Chase refinance/ mortgage recorded on December 15, 2009 was not handled by an attorney or closed with the assistance or supervision of an attorney.

17. The Credit Union's policies and procedures regarding mortgage loan closings came about for three reasons. The first is to avoid potential priority disputes with other lenders. The second reason is that the Credit Union is often a mortgage lender in second position, and it believes that junior mortgagees deserve to approve or deny refinances of prior mortgages based on the proposed changes to the original mortgage loan. The third is that the law of the State of South Carolina requires it of a lender hoping to maintain its priority.

18. The refinance accomplished by the Chase mortgage which was recorded on December 15, 2009 did not work an advantage to the Credit Union. As I stated, I was not afforded

the opportunity to review the Settlement Statement prior to Chase's refinance mortgage recorded December 15, 2009 because the Credit Union was never advised of the proposed Chase refinance, which was recorded December 15, 2009.

19. Upon review of the Settlement Statement, the underwriting fee of \$915.00, the processing fee of \$895.00, settlement fee of \$650 (to a notary, not an attorney), in addition to the origination fee of \$1,720.00 and the loan discount fee of \$4,810.00 all in conjunction seem too high to be beneficial to the Credit Union, or beneficial for the members for that matter.

20. Most importantly, the members, Jimmy and Laura Bailey, were advanced \$26,235.11 cash in this refinance. This works a substantial disadvantage to the Credit Union as a lienholder on this property. The refinance damaged the Credit Union's equity position by \$38,540.96. I can state that the Credit Union would not have approved Chase's refinance of the mortgage, which was recorded December 15, 2009, and the Credit Union would not have signed a Subordination Agreement had one been presented to the Credit Union or to me.

SWORN to before me this 16th
day of September, 2013.

Joan Usher
Notary Public for SC; My Commission Expires: _____

James R. Price
James R. Price

My Commission Expires
January 14, 2020

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714 S.E.2d 532 (S.C. 2011)

394 S.C. 134

MATRIX FINANCIAL SERVICES
CORPORATION, Respondent,

v.

Louis M. FRAZER, Linda S. Frazer, Matthew
Kundinger, and Parks Grove Homeowners
Association, Inc., Defendants,

of whom Matthew Kundinger is the, Appellant.

No. 26859.

Supreme Court of South Carolina.

August 8, 2011

Heard April 21, 2009.

David Alan Wilson, of Horton Drawdy Ward &
Jenkins, of Greenville, and Edward Scott Sanders, of
Greenville, for Appellant.

Earle G. Prevost and Michael J. Giese, both of
Leatherwood Walker Todd & Mann, of Greenville, for
Respondent.

TOAL, Chief Justice.

Matthew Kundinger (Appellant) enrolled a default
judgment against Louis and Linda Frazer (the Frazers)
before the Frazers closed a refinance mortgage with
Matrix Financial Services Corporation (Matrix). In

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Matrix's foreclosure action, the master-in-equity granted
Matrix equitable subrogation, giving the refinance
mortgage priority over Appellant's judgment lien. We
certified the case pursuant to Rule 204(b), SCACR, and
reversed in *Matrix Financial Services Corp. v. Frazer*,
No. 26859, 2010 WL 3219472 (S.C. Sup. Ct. Aug. 16,
2010). This Court granted a petition for rehearing and we
now withdraw that opinion and substitute this opinion,
which also reverses the master-in-equity's grant of
equitable subrogation.

FACTS/PROCEDURAL BACKGROUND

In 1998, Appellant brought suit against the Frazers
in California. In 2000, the Frazers moved to South
Carolina, and defaulted in Appellant's California lawsuit.

In January 2001, the Frazers purchased a home in

Greenville County. That mortgage was assigned to
Matrix in June 2001. In September 2001, Matrix and the
Frazers entered into a loan commitment to refinance the
January 2001 mortgage. A title search was conducted on
September 18, 2001. The parties closed the refinance loan
on November 26, 2001, but the new mortgage was not
recorded until April 3, 2002.

Meanwhile, on September 4, 2001, Appellant
obtained a default judgment against the Frazers in
California, and enrolled that judgment in Greenville
County on October 31, 2001.

The Frazers filed bankruptcy, and Matrix sought to
foreclose its November 2001 refinance mortgage.
Appellant counterclaimed, alleging his judgment had
priority over Matrix's mortgage because it had been
recorded first. Matrix, attempting to gain the primary
priority position, then sought to have the refinance
mortgage equitably subrogated to the rights of the
January 2001 mortgage. The master-in-equity granted
Matrix's request, and Appellant appeals that order.

ISSUES

I. Did the master-in-equity err in granting Matrix
equitable subrogation to the rights of the January 2001
mortgage, giving Matrix priority over Appellant's
judgment lien?

II. Does the doctrine of unclean hands prevent Matrix
from receiving the remedy of equitable subrogation?

ANALYSIS

I. Equitable Subrogation

Appellant argues the master-in-equity erred in
holding Matrix was entitled to equitable subrogation. We
agree.

The requirements a mortgagee must meet to qualify
for equitable subrogation are: (1) the party claiming
subrogation has paid the debt; (2) the party was not a
volunteer, but had a direct interest in the discharge of the
debt or lien; (3) the party was secondarily liable for the
debt or for the discharge of the lien; (4) no injustice will
be done to the other party by the allowance of equitable
subrogation; and (5) the party asserting the doctrine did
not have actual notice of the prior mortgage. *Dedes v.*
Strickland, 307 S.C. 155, 158, 414 S.E.2d 134, 136
(1992).

In *Dedes*, a bank refinanced its initial mortgage and
sought to be equitably subrogated to the rights of that
mortgage to gain priority over the rights of an intervening
mortgagee. The Court held that the bank could not meet
the elements of equitable subrogation because it merely
paid " itself [the] outstanding debt by refinancing the

balance owed" and had no "direct interest necessitating discharge of the debt...." *Id.* at 159, 414 S.E.2d at 136. The Court further stated, "The record is silent as to what secondary liability [the bank] could have had for [the mortgagor's] debt secured by its own first mortgage lien." *Id.* While the *Dedes* Court appears to have conflated the requirements of secondary liability and a direct interest in discharging the debt,[1] the heart of

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its reasoning was that the bank could not be subrogated to the rights of its own prior mortgage. This conclusion comports with the general view that equitable subrogation contemplates a third party satisfying the original mortgage, not the same party to whom the original debt is owed. See Restatement (Third) of Property (Mortgages) § 7.6 cmt.e (1995) ("Obviously subrogation cannot be involved unless the second loan is made by a different lender than the holder of the first mortgage; one cannot be subrogated to one's own previous mortgage."); Black's Law Dictionary (9th ed. 2009) ("Subrogation: The substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor.").

Thus, equitable subrogation is simply not a remedy available to a lender that refinances the original debt owed to it. This seems to yield the proper result, as opposed to the mangled logic that comes about when reasoning that a lender refinancing the original debt owed to it cannot prove secondary liability or a direct interest in discharging the debt. Matrix is not asserting priority under a theory of replacement and modification. Matrix expressly pled equitable subrogation in its reply to Appellant's counterclaim. Both *Dedes*, controlling South Carolina precedent, and section 7.6 of the Restatement stand for the proposition that a lender that refinances its own debt is not entitled to equitable subrogation. We do not decide whether a lender that refinances its own debt could attain priority under the theory of replacement and modification illustrated in section 7.3 of the Restatement (Third) of Property (Mortgages).

II. Unclean Hands

Appellant also argues Matrix is not entitled to an equitable remedy because it closed the refinance loan unlawfully, and thus has unclean hands. We do not believe the doctrine of unclean hands is the appropriate basis for resolution of this case. However, we do agree that even if Matrix met the requirements for equitable subrogation, Matrix would be precluded from receiving that remedy because of its unauthorized practice of law.

All real estate and mortgage loan closings must be supervised by an attorney. *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003); *State v. Buyers Serv. Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987). Performing a title

search, preparing title and loan documents, and closing a loan without the supervision of an attorney constitutes the unauthorized practice of law. *Buyers Serv.*, 292 S.C. at 430-34, 357 S.E.2d at 17-19.

In *Wachovia Bank v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct.App.2010), Wachovia closed a home equity loan without the supervision of an attorney and later instituted foreclosure proceedings. Our court of appeals held that Wachovia, having committed the unauthorized practice of law in closing the loan without attorney supervision, came to the court with unclean hands and thus was barred from seeking equitable relief. In so holding, the court of appeals said:

The unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also to the public at large for the reason so cogently stated in *Buyers*:

The reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is not for the economic protection of the legal profession. Rather, it is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law.

Coffey, 389 S.C. at 76, 698 S.E.2d at 248 (citing *State v. Buyers Serv. Co.*, 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987)).

Similarly, in this case Matrix hired LandAmerica OneStop to perform the title search, prepare the documents, and close the refinance loan— all admittedly without the supervision of a licensed attorney. Thus, Matrix committed the unauthorized practice

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of law in closing the refinance mortgage, clearly violating South Carolina law.[2] Matrix now comes to this Court, seeking equitable relief, based upon a mortgage contract it entered into in violation of the laws of this state.

This Court has previously held the presence of attorneys in real estate loan closings is for the protection of the public and that "protection of the public is of paramount concern" in loan closings. *Buyers Serv.*, 292 S.C. at 433, 357 S.E.2d at 19. Enforcing this requirement will come as no surprise to any lender. Lenders cannot ignore established laws of this state and yet expect this Court to overlook their unlawful disregard. We take this opportunity to definitively state that a lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law. We apply this ruling to all filing dates after the issuance of this opinion.

CONCLUSION

For the above reasons, we hold Matrix is not entitled to equitable subrogation. The master-in-equity's order is

REVERSED.

BEATTY, J., and Acting Justice JOHN H. WALLER, JR., concur. KITTREDGE, J., concurring in result in a separate opinion. PLEICONES, J., dissenting in a separate opinion.

Justice KITTREDGE.

I concur in result. I join Chief Justice Toal and vote to reverse due to Matrix's unauthorized practice of law. I would not reach the issue of whether Matrix otherwise satisfied the requirements of equitable subrogation. Concerning the majority's broader holding voiding a real estate mortgage secured through the unauthorized practice of law, I join today's result because of its prospective-only application.

Justice PLEICONES.

I respectfully dissent. I would affirm the master's order equitably subrogating Matrix's refinanced mortgage to its original mortgage, and would not impose the draconian remedy of denying equitable relief to lenders who "fail[...] to have attorney supervision during the loan process as required by law."

A. Equitable Subrogation

Equitable subrogation is a remedy favored by the courts, and it is to be liberally and expansively applied. *So. Bank and Trust Co. v. Harrison Sales Co., Inc.*, 285 S.C. 50, 328 S.E.2d 66 (1985). The doctrine:

is founded on the fictional premise that an obligation extinguished by a payment made by a third person is to be treated as still subsisting for the benefit of such third person, whereby he is substituted to the rights of the creditor when he has made such payment. *St. Paul & Mercury Indem. Co. v. Donaldson*, 225 S.C. 476, 83 S.E.2d 159 (1954) citing *Aetna Life Ins. Co. of Hartford v. Town of Middleport*, 124 U.S. 534, 8 S.Ct. 625, 31 L.Ed. 537 (1888).

"The purpose of subrogation is to prevent a junior lien holder from converting the mistake of the lender into a magical gift for himself." *United States v. Baran*, 996 F.2d 25 (2nd Cir.1993) (internal citation omitted).

It appears that the majority would agree with me that a refinancer has a right to lien priority, if that refinancer uses the theory of "replacement and modification" rather than

equitable subrogation. Heretofore, South Carolina has used the doctrine of equitable subrogation to restore a refinancer's lien to priority, and I would not reverse this order because it used this theory rather than the newly announced "replacement and modification" rule.

In 1927, this Court held that a lender who pays the original mortgage itself, or furnishes money to the mortgagor to pay off an existing mortgage, pursuant to an agreement by which the lender will give a new mortgage, has the equitable right to be subrogated to the paid-off mortgage. *Enterprise Bank v. Fed. Land Bank*, 139 S.C. 397, 138 S.E. 146 (1927). In this situation, the lender furnishing the money is not a volunteer, and becomes secondarily liable for the discharge of the first mortgage under the instruments creating the new mortgage which require the satisfaction of the first mortgage as a condition of the giving of the second. *Id.*: [3] see also *James v. Martin*, 150 S.C. 75, 147 S.E. 752 (1929) (applying *Enterprise Bank* and quoting: One satisfying a lien note at the request of the property owner, upon the understanding that he is to have new security upon the property released, acting in ignorance of a second mortgage lien upon the property, although it is on record, is entitled to subrogation to the rights of the first lien holder?).

As the Washington Supreme Court explained, several considerations support a rule that, absent material prejudice to a junior lienholder, equitable subrogation should be automatically available to a mortgage refinancer who can show it expected to have first priority:

- 1) Equitable subrogation preserves priorities by keeping mortgages and other liens in their proper recordation order;
- 2) Equitable subrogation accomplishes substantial justice and rests on the maxim that no one (here, the junior lienholder) should be enriched by another's loss;
- 3) Facilitating refinancing helps prevent foreclosures; and
- 4) A liberal equitable subrogation policy reduces title insurance premiums. [4] *Bank of America v. Prestance Corp.*, 160 Wash.2d 560, 160 P.3d 17 (2007).

The majority would punish the respondent in this case for failing to anticipate the majority's decision to alter the theory under which respondent pled, proved, and obtained the result it sought below. I would affirm the master's decision to equitably subrogate Matrix's second mortgage to its first, a result which is consistent with both our existing law and sound public policy. *Cf.* Rule 220(c), SCACR (court may affirm for any reason appearing in the record).

B. Unclean Hands

The majority also would expand the relief afforded by the Court of Appeals to a mortgagor who has been the

"victim of the unauthorized practice of law" to all lienholders of that mortgagor. See *Wachovia Bank v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct.App.2010) cert. pending (mortgagee cannot foreclose mortgage where loan closed without attorney supervision); compare *Hambrick v. GMAC Mort. Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct.App.2006) cert. dismissed April 5, 2007 (mortgagor has no private right of action against mortgagee for the unauthorized practice of law). The purpose of equitable subrogation/replacement and modification is to prevent a windfall to a junior lienholder. I cannot square the policy underlying this purpose with the Court's proclamation that refusing equitable relief to "bad" lenders will somehow protect the public at loan closings. I see only detriment to the borrowing public [5] and a windfall to junior lienholders in

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this decision which would deny all equitable relief to any "lender who fail[s] to have attorney supervision during the loan process as required by our law ... [in] all filing dates [6] after the issuance of this opinion."

CONCLUSION

I respectfully dissent and would affirm the Master's order.

Notes:

[1] The logic surrounding the elements of secondary liability and direct interest has been tortured in our case law because the current definition does not distinguish between a party who pays off the prior debt and a party who advances funds to the debtor for the purpose of paying off the prior debt. Judge Howard's concurrence in *Dodge City of Spartanburg, Inc. v. Jones*, 317 S.C. 491, 454 S.E.2d 918 (Ct.App.1995), explains the difficulties our courts have encountered concerning this issue. While we disagree with Judge Howard's conclusion that the lender in *Dodge City* could receive equitable subrogation when it refinanced the debt already owed to it, we agree with his analysis that a lender who either pays the debt itself or provides the debtor funds with the understanding the debtor will satisfy the obligation may seek equitable subrogation.

[2] *Buyers Service* established in 1987 that attorney supervision is required for the four steps in the residential real estate loan and mortgage process: preparation of deeds, notes, and other instruments; preparation of title abstracts; the closing; and recording the instruments. 292 S.C. at 430-34, 357 S.E.2d at 17-19. No language, analysis, or discussion in *Buyers Service* indicates the Court intended to limit the holding to purchase money mortgages. In *Doe v. McMaster*, the petitioner suggested to the Court that *Buyers Service*'s holding did not apply

because the buyer and lender were refinancing an existing mortgage rather than purchasing new property. 355 S.C. at 312, 585 S.E.2d at 776. The Court said, "This distinction is without significance" because "[i]n refinancing a real estate mortgage the four steps in the initial purchase still exist." *Id.* *Doe v. McMaster* did not change the landscape regarding refinance loans, but simply stated the existing law.

[3] It appears that the lender in *Dedes v. Strickland*, 307 S.C. 155, 414 S.E.2d 134 (1992) was denied equitable subrogation because it failed to present evidence that its refinancing was conditioned upon the repayment of the first loan. *Id.* at 159, 414 S.E.2d at 136.

[4] Citing Nelson & Whitman, *Adopting Restatement Mortgage Subrogation Principles: Saving Billions of Dollars for Refinancing Homeowners*, 2006 BYU L.Rev. 305.

[5] I suspect that many mortgagees, denied hope of equitable relief, including the ability to foreclose if an attorney should fail to supervise any of the acts required of him in a loan closing, will choose not to do business in South Carolina, or choose to increase fees to cover potential unrecoverable liabilities.

[6] I am unsure what filing date the majority is referring to in this passage.

Wachovia Bank, N.A., Petitioner,

v.

Ann T. Coffey and Bank of America, N.A.,
Respondents. Appellate Case No. 2010-174086

No. 27282

Supreme Court of South Carolina

July 10, 2013

Heard Date: October 31, 2012

Appeal From Beaufort County Marvin H. Dukes,
III, Master In-Equity

Sarah Patrick Spruill, of Haynsworth Sinkler Boyd,
PA of Greenville, Hamilton Osborne, Jr. and James Y.
Becker of Haynsworth Sinkler Boyd, PA of Columbia, all
for Petitioner.

Gregory Milam Alford and Curtis Lee Coltrane,
both of Alford Wilkins and Coltrane, LLC of Hilton Head
Island, for Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

TOAL, CHIEF JUSTICE

We granted certiorari in this case to review a court of appeals' decision finding that Wachovia Bank, N.A. (Petitioner) committed the unauthorized practice of law in closing a home equity loan in 2001, and that Petitioner's unclean hands barred it from any equitable relief. We affirm as modified.

FACTS/PROCEDURAL BACKGROUND

In 2001, Michael Coffey (Husband) obtained a home-equity line of credit from Petitioner. Husband signed a mortgage prepared by Petitioner's employees that purported to encumber Husband's Hilton Head Island home (the property). The mortgage contained the express language that Husband lawfully owned the property, and held the right to mortgage the property. However, Husband did not possess any interest in the property. In fact, Ann Coffey (Wife) held sole title to the property. Wife did not participate in the loan transaction and had no knowledge of Husband's transaction with Petitioner. Petitioner did not perform a title search to determine ownership of the property at time of the transaction. Additionally, Petitioner prepared the loan documents and closed the loan transaction without the participation or supervision an attorney licensed to practice law in South Carolina.

Husband subsequently purchased a sailboat, and financed the purchase through a \$125,000 draw on the line of credit. Husband placed title to the sailboat in the name of A&M Partners, a corporation Husband and Wife jointly owned, and of which they served as President and Vice-President, respectively. Husband made regular payments on the line of credit from July 2001 until his death on March 21, 2005. Husband made these payments using funds from a personal checking account he shared with Wife. Following Husband's death, Wife continued making monthly payments using the same checking account. In September 2005, Wife discovered documents showing a loan or mortgage on the sailboat. Wife wrote "boat loan," or "boat" on the memo line of at least three checks she sent to Wachovia in September and November 2005.

That same year, Wife also began efforts to sell the boat with the assistance of her daughter, Maureen Coffey-Edri (Daughter). In December 2005, Daughter provided St. Barts Yachts (St. Barts), a yacht broker, with loan information for the sailboat showing a payoff amount due to Petitioner in the amount of \$125,643.30. An employee of St. Barts prepared a draft "Seller's Disbursement Summary," showing a sale price of \$112,000, with a \$125,600 "payoff" to Petitioner. This payoff amount required a balance due from Wife of \$25,525. However, when Wife asked a St. Barts employee to check on the status of the loan, the employee informed her that there was no lien or mortgage on the sailboat. Wife believed the sailboat was "paid for," and never inquired with Petitioner about the line of credit or any other possible encumbrances on the sailboat. Wife sold the sailboat in January 2006 for \$112,000 and received \$100,075 from the sale. Wife deposited the proceeds in her personal bank account and did not make any further payments to Petitioner.

In June 2006, Petitioner filed a foreclosure action in the circuit court against Husband's estate, Wife, both individually and as personal representative of Husband's estate, and three of the couple's five children. In September 2006, Wife filed an inventory and appraisal of Husband's estate with the Beaufort County Probate Court. This inventory and appraisal acknowledged Husband and Wife's joint ownership of the boat. Petitioner then filed an amended complaint in 2008 naming Wife and Bank of America, N.A. as the only defendants. Petitioner sought to foreclose on the mortgage signed by Husband and included causes of action for equitable lien, prejudgment interest, restitution, ratification, quantum meruit, and quasi-contract. Petitioner filed a motion for summary judgment, and Wife filed a cross-motion for summary judgment on all of Petitioner's claims.

The master-in-equity denied Petitioner's motion for summary judgment on its claims against Wife, and granted Wife summary judgment on all of the claims

asserted by Petitioner. The master-in-equity held, *inter alia*:

I am troubled by the concept that [Wife] sold the sailboat and retained the proceeds and that there is some perception of unfairness to Petitioner. However, in this court's opinion, Petitioner is the architect of its own problem. Petitioner prepared the loan documents and closed the loan with Husband without an attorney. Had Petitioner retained an attorney to prepare the loan documents and performed a title search, which should have been done, it would have known Husband did not own the subject [p]roperty to be mortgaged. This case would not have been filed and Petitioner's mistake would have been caught. It now attempts to seek equitable relief for its own mistake. Its own mistake arose by its own acts.

(emphasis added).

Petitioner appealed, and the court of appeals affirmed. *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010). The court of appeals held that Petitioner's actions constituted the unauthorized practice of law, and therefore, barred its equitable and legal claims. *Id.* at 76-77, 698 S.E.2d at 248 ("We therefore reach the inescapable conclusion that [Petitioner] has come to court with unclean hands and is barred from seeking equitable relief . . . [Petitioner's] legal causes of action are barred as well") (citations omitted).

This Court granted Petitioner's request for certiorari pursuant to Rule 242, SCACR.

ISSUES PRESENTED

I. Whether the court of appeals erred in holding that Wachovia was on notice that its conduct constituted the unauthorized practice of law and that Wachovia had unclean hands.

II. Whether the court of appeals erred in stating that Petitioner's legal remedies were barred.

III. Whether the holding of the court of appeals conflicts with that court's prior holding that a trial court does not have jurisdiction to determine the unauthorized practice of law.

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56, SCRCP." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted). Rule 56, SCRCP provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC*, 387 S.C. at 235, 692 S.E.2d at 505. (citation omitted).

LAW/ANALYSIS

Petitioner's arguments, and to a significant degree the lower court decisions in this case, center on whether Petitioner's alleged unauthorized practice of law bars equitable and legal relief. However, this is not the dispositive question in this case. Instead, the pertinent inquiry is whether Petitioner may foreclose on an invalid mortgage.

As explained, *supra*, Husband obtained a \$125,000 home equity line of credit from Petitioner, and secured the loan with the couple's residence, which was titled in Wife's name only. Petitioner failed to verify Husband's interest in the couple's residence. Therefore, Petitioner never possessed a valid mortgage on the property and cannot pursue an action against Wife related to that mortgage. *See, e.g., Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997) ("A mortgage foreclosure is an action in equity.").^[1]

We do not agree with the view that what "ought to be done" is to place responsibility for Petitioner's mistake on to Wife. The dissent offers an incorrect summation of today's decision, stating that we find Petitioner is not entitled to equitable relief because of a mere "mistake." To the contrary, equity should not be used to validate Husband's decision to mortgage a property for which he held no interest, and Petitioner's choice to simply take Husband at his word, and then attempt to charge Wife with responsibility for that blunder. This finding comports with well-settled equitable principles and poses no new "bar" or "universal rule" as the dissent asserts.

Thus, the master-in-equity properly granted summary judgment in favor of Wife. We need not discuss the remaining issues presented by the parties. *See Fitch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

For the foregoing reasons, the court of appeals decision is

AFFIRMED AS MODIFIED.

BEATTY and KITTREDGE, JJ., concur.

PLEICONES, J., dissenting in a separate opinion in which HEARN, J., concurs

I respectfully dissent and would remand the matter to the Court of Appeals. Petitioner (Wachovia) sought to recover the proceeds from respondent Coffey's sale of the boat under several equitable theories: mortgage foreclosure, unjust enrichment, equitable mortgage, restitution, ratification, quantum merit, or quasi-contract. While the majority may well be correct that Wachovia's foreclosure action fails because the purported mortgage was invalid, it is the unavailability of recovery under that cause of action that is the predicate for Wachovia's other theories. In footnote 1, the majority makes explicit its philosophy that equity acts to punish those who make a mistake. *See also Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 434, 714 S.E.2d 532 (2011). In my view, equity exists to correct mistakes and prevent windfalls. *E.g., McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998) (unjust enrichment/constructive trust used to recover money from innocent third party where third party would be unjustly enriched by a windfall actually owed to plaintiff). The majority offers no explanation why the lender should be denied the opportunity to recover the money it lent other than that it made an error.

We granted certiorari to review a Court of Appeals' decision that affirmed the trial court's grant of summary judgment to respondent. The Court of Appeals held that because Wachovia committed the unauthorized practice of law (UPL) in closing a home equity loan in 2001, its unclean hands barred it from any equitable relief. Further, the Court of Appeals held Wachovia's UPL barred it from any legal remedies. I would reverse the equitable ruling under *BAC Home Loan Servicing LP v. Kinder*, 398 S.C. 619, 731 S.E.2d 547 (2012), which clarified that UPL bars equitable remedies[2] only when the transaction occurred after August 8, 2011. Further, I would vacate the dicta stating that UPL also bars Wachovia from any legal relief, as no legal relief was sought by Wachovia in this case. Since the trial court's order granting respondent summary judgment on Wachovia's theories of unjust enrichment/restitution/quasi-contract, mortgage ratification and foreclosure, equitable lien, and prejudgment interest rest on several grounds other than UPL, I would remand the case to the Court of Appeals to consider the issues raised by Wachovia on appeal but left unaddressed by its original decision.

The majority holds Wachovia is not entitled to equitable relief because it made a mistake. I cannot tell whether this new bar is applicable only to commercial lenders, or if it is a universal rule. Further, the majority leaves standing the dicta in the Court of Appeals' opinion to the effect that UPL bars a lender from legal as well as equitable remedies. While I am concerned about the impact of the majority's decision on lenders especially, I am even more apprehensive about its impact on the status of equity generally in South Carolina.

Notes:

[1] We respectfully disagree with the dissent's view that Petitioner may rely on equitable principles to foreclose on an invalid mortgage. One of equity's most important aspects is the principle of "right and fair dealing," between *parties* to particular transaction. *See, e.g., Kelly v. McCray*, 278 S.C. 88, 90, 292 S.E.2d 587, 589 (1982) (agreeing with the lower court that equity prevented the respondent from rendering *her own* agreement unenforceable). However, equitable maxims do not operate to place burdens on individuals made party to a particular transaction through no fault or expressed interest of their own, or, as in this case, through the fault and mistake of others. *Cf. Henry L. McClintock, McClintock on Equity*, at 52 (2d. 1948) (listing the equitable maxims, "(1) equity regards as done what ought to be done; (2) equity looks to intent, rather than to form; . . . [(3)] equity imputes an intention to fulfill an obligation; [(4)] equity will not suffer a wrong without a remedy; and [(5)] equity follows the law." (citation omitted) (alterations added)); *see also Regions Bank v. Wingard Props. Inc.*, 394 S.C. 241, 249, 715 S.E.2d 348, 352 (Ct. App. 2011) ("Maxims developed, at least in part, to reflect the attempt by the courts of equity to create guiding principles, in the same way that the legal courts developed binding precedent.").

The dissent focuses too narrowly on the notion that Petitioner committed an "error," to the exclusion of Petitioner's and Husband's *actual* conduct in this case.

We stress that sophisticated financial institutions that prepare mortgages purporting to encumber a customer's property must ensure that the customer in fact holds a legal interest in that property so as to protect all pertinent interests. Concomitantly, South Carolina courts should not stretch equitable principles to unfairly place fault on parties who did not contribute to the underlying transaction. *See, e.g., McClintock on Equity*, at 320 ("Where *the parties* have manifested an intention that the real property *of one of them* shall be especially set aside as security for the payment of an obligation due to the other, equity will give effect to the intention by treating the property as though it had been validly mortgaged." (emphasis added)). We earnestly appreciate the dissent's concerns. However, we would be more concerned with an equitable doctrine so broad as to allow lenders to ameliorate their complete failure to exercise proper due diligence at the expense of third parties.

[2] It is with some irony I note that the UPL ruling announced in *Matrix Fin. Serv. Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2001) is intended to protect borrowers from lenders. Here, viewing the facts in the light most favorable to Wachovia, it appears the lender

was taken advantage of by a long-time client.

EXHIBIT C

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

ArrowPointe Federal Credit Union,

v.

Jimmy Eugene Bailey, Laura Jean Bailey,
and JPMorgan Chase Bank,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

2015 APR 13 AM 11:41 CASE NO. 2012-CP-20-00132

FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

**NOTICE OF MOTION AND
MOTION FOR RECONSIDERATION**

TO: CHRISTY C. JONES, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that pursuant to Rule 59(e), SCRCP, the Defendant JPMorgan Chase Bank, who has assigned its mortgage to Quicken Loans, Inc. ("Quicken"), will move before Fairfield County Special Referee Carol A. Tolen on the 10th day after service hereof at 10:00 a.m. at 120 W. Washington, St., Winnsboro, South Carolina, or as soon thereafter as may be convenient to the Court and counsel, for an order granting reconsideration of her Order Denying Defendant JPMorgan Chase Bank's Motion for Summary Judgment (the "Order") and for the issuance of a new order granting Summary Judgment in favor of Quicken as to the priority of its mortgage being in senior position. Consequently, any sale of the real property that is the subject of this action would be subject to Quicken's mortgage. This motion is based upon the arguments raised by Quicken in its Motion for Summary Judgment and supporting arguments, which are hereby incorporated by reference, and additionally based on the following comments and authorities.

STANDARD

"[I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court 'alter or amend the judgment,' but also as a vehicle to seek 'reconsideration' of issues and arguments. Elam v. S. Carolina Dep't of Transp., 361 S.C. 9, 21-22, 602 S.E.2d 772, 778-79 (2004).

“A motion under Rule 59(e) long has been viewed as ‘motion for reconsideration’ despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented.” *Id.* (citing Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992) (“purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits”); Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003) (an example of the many cases in which trial and appellate courts describe a Rule 59(e) motion as a “motion to reconsider” or “motion for reconsideration”); James Flanagan, *South Carolina Civil Procedure* 474-475 (2d ed. 1996). “There is nothing inherently unfair in allowing a party one final chance not only to call the court’s attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity.” *Id.* at 21-22, 602 S.E.2d at 779.

ANALYSIS

Quicken received the Order by mail on April 1, 2010. In the Order this court correctly did not find that there is any material dispute of fact, as ArrowPointe Federal Credit Union (“AFCU”) acknowledges the chronology and transactions set forth by Quicken in its prior memorandum. AFCU also recognized that “it was in second position when the Baileys granted a mortgage to the Credit Union (AFCU).” See AFCU’s Memorandum in opposition to Quicken’s Motion for Summary Judgment. Further, AFCU acknowledges that the dispute regarding the priority of liens outlined above is legal in nature.

However, Quicken respectfully contends that the court failed to consider the following principals and therefore erred as a matter of law when denying Quicken’s Motion for Summary Judgment ruling as a matter of law that:

“[T]he replacement mortgage theory is not the law of the State of South Carolina and should not apply in this case. Therefore, as a matter of law, Defendant Chase’s mortgage recorded on December 15, 2009 does not take priority over the Plaintiff’s mortgage which was recorded first, on November 4, 2009.”

The notion that South Carolina’s common law is broader than simply the causes of action explicitly named in South Carolina’s prior cases is clear from prior South Carolina’s decisions. Indeed, South Carolina has previously recognized that its common law is often “rooted” in the RESTATEMENTS. *See, e.g., Johnson v. Robert E. Lee Acad., Inc.*, 401 S.C. 500, 504, 737 S.E.2d 512, 514 (Ct. App. 2012) (“The recognition of a voluntarily assumed duty in South Carolina jurisprudence³ is rooted in the Restatement of Torts....”); *see also, Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 527, 119 S. Ct. 2118, 2121, 144 L. Ed. 2d 494 (1999) (“The Court’s discussion of this question is informed by the general common law of agency, as codified in the Restatement (Second) of Agency....”) South Carolina has specifically relied on provisions of the RESTATEMENT (THIRD) OF PROPERTY (2000 and Supp. 2006) in articulating South Carolina’s common law. *See Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 138, 714 S.E.2d 532, 534 (2011) (quoting the Restatement (Third) of Property (Mortgages); *see also Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 416, 633 S.E.2d 136, 139 (2006); *Matthews v. Dennis*, 365 S.C. 245, 249, 616 S.E.2d 437, 439 (Ct.App.2005); *Howard v. Nasser*, 364 S.C. 279, 288, 613 S.E.2d 64, 68 (Ct.App.2005); *Goodwin v. Johnson*, 357 S.C. 49, 55, 591 S.E.2d 34, 37 (Ct.App.2003).

Moreover, Quicken respectfully contends that the court mistakenly focuses on whether the South Carolina Supreme Court has adopted a cause of action or theory entitled “Replacement Mortgage.” However, the RESTATEMENT’S or the common law’s current title for a parties’ theory of recovery is irrelevant. As the South Carolina Supreme Court has recognized, “The facts alleged, not just the name of the cause of action used, should be examined in assessing whether a valid claim has been asserted.” *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 459-60,

684 S.E.2d 756, 760 (2009). South Carolina has long recognized that equity provides a lender, such as Quicken, relief when it claims a right to subordinate another, such as AFCU, after paying off a first position mortgage over a lender who knowingly took a second position mortgage and has otherwise done nothing to advance its priority. See United Carolina Bank v. Caroprop, Ltd., 316 S.C. 1, 4, 446 S.E.2d 415, 417 (1994) (“Finally, our holding imposes no injustice upon First South, it having knowingly taken a *second* mortgage from Caroprop. Auten's payment of the Interstate mortgage in no way disadvantages First South, which has done nothing to advance its priority.”) It is likely for this reason that the Court did not state that South Carolina does not recognize the theory of “replacement mortgage” now articulated in Section 7.3 of the RESTATEMENT (THIRD) OF PROPERTY (Mortgages).

Finally, in the event that this court is not persuaded that the principal now referred to as “replacement mortgage” is not currently a part of the common law of South Carolina, then this court should take the opportunity to recognize “replacement mortgage.” The South Carolina Supreme Court has stated: “The common law changes when necessary to serve the needs of the people and we have not hesitated to act in the past when it has become apparent that the public policy of this State is offended by outdated rules of law.” Marcum v. Bowden, 372 S.C. 452, 458, 643 S.E.2d 85, 88 (2007) (quoting Russo v. Sutton, 310 S.C. 200, 422 S.E.2d 750 (1992)). Similarly, “equity exists to correct mistakes and prevent windfalls.” Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 427, 746 S.E.2d 35, 39 (2013) (Pleicones, J. dissenting); e.g. McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct.App.1998) (unjust enrichment/constructive trust used to recover money from innocent third party where third party would be unjustly enriched by a windfall actually owed to plaintiff).

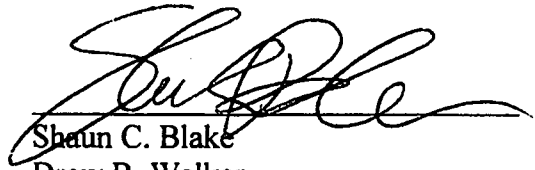
It would be an inequitably windfall for this court to construe our common law to allow a lender who knowingly took a second position mortgage and who took no action to improve its priority to become a first priority mortgage through a technicality when a lender refinances the first priority, original debt owed to it. “[S]uch crude application of the principles of the common law must yield to common sense.” State v. Langford, 55 S.C. 322, 33 S.E. 370, 371 (1899). Allowing AFCU to obtain a windfall and a first priority position under these circumstances is a result that defies common sense.

If the court considers this case as the formal recognition of “replacement mortgage”, this recognition is not “a break from precedent” and therefore should be given retroactive application because of the court’s long-standing practice of providing equitable relief to subrogate lenders who otherwise would obtain an inequitable windfall by advancing priority upon the payoff of a first priority lien, the recognition of replacement mortgage should have retroactive application. Miranda C. v. Nissan Motor Co., 402 S.C. 577, 588, 741 S.E.2d 34, 40 (Ct. App. 2013); *see also Carolina Chloride, Inc.*, 391 S.C. at 433–34, 706 S.E.2d at 503 (finding judicial decision should be applied retroactively when it created no new right or cause of action; rather, it abandoned former test and restated the focus for what a landowner must prove to entitle him to damages in an inverse condemnation action); *Osborne v. Adams*, 346 S.C. 4, 12–13, 550 S.E.2d 319, 323–24 (2001) (finding retroactive application of case law clarifying which professional relationships created a non-delegable duty in common law negligence cases was appropriate because case law neither created a new cause of action nor abolished any existing immunities).

CONCLUSION

For the reasons articulated herein, Quicken respectfully requests that the court reconsider the Order and enter a new order granting its Motion for Summary Judgment.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Shaun C. Blake', written over a horizontal line.

Drew B. Walker

ROGERS LEWIS JACKSON MANN &
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Attorney for Defendant JPMorgan Chase Bank

April 10, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

) IN THE COURT OF COMMON PLEAS
)
) CIVIL ACTION NO. 2012-CP-20-132

ArrowPointe Federal Credit Union,

Plaintiff,

vs.

Jimmy Eugene Bailey; Laura Jean Bailey;
and DLJ Mortgage Capital, Inc.,

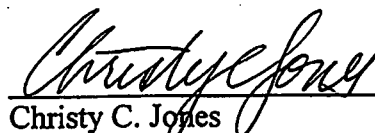
Defendants.

)
)
)
) NOTICE OF MOTION AND MOTION FOR
) SUMMARY JUDGMENT
)
)
)
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TO: DREW WALKER AND SEAN M. FOERSTER, ATTORNEYS FOR DEFENDANT
DLJ MORTGAGE CAPITAL, INC.:

You are hereby notified that within 10 days of service of this Motion, or at a time set by the Court, the Plaintiff will move for an Order granting Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. There is no genuine issue as to any material fact such that the Plaintiff is entitled to a judgment as a matter of law determining the Plaintiff's mortgage to be superior to Defendant DLJ's mortgage. This Motion is based on the arguments, exhibits, affidavits, and facts set forth in the Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment.

SHERPY & JONES, P.A.



Christy C. Jones
Post Office Box 2599
Lexington, South Carolina 29071
(803) 356-3327
ATTORNEYS FOR PLAINTIFF

Lexington, South Carolina

October 12, 2016

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF FAIRFIELD) CIVIL ACTION NO. 2012-CP-20-132

ArrowPointe Federal Credit Union,

 Plaintiff,

vs.

Jimmy Eugene Bailey; Laura Jean Bailey;
and DLJ Mortgage Capital, Inc.,

 Defendants.

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

The Plaintiff, ArrowPointe Federal Credit Union ("Credit Union"), hereby submits this Memorandum in Support of Plaintiff's Motion for Summary Judgment.

INTRODUCTION

Plaintiff filed a Complaint for foreclosure of its real property mortgage, which secures a loan from Plaintiff to the Defendants, Jimmy Eugene Bailey and Laura Jean Bailey. The Plaintiff requested the Court to sell the property serving as collateral for the mortgage loan. Plaintiff initially named JP Morgan Chase as a defendant, based on a mortgage given to Chase by Jimmy Eugene Bailey and Laura Jean Bailey, such mortgage being filed subsequent to Plaintiff's mortgage.

During the course of litigation, JP Morgan Chase assigned its mortgage to Quicken Loans, by assignment dated April 24, 2013 and recorded July 3, 2013. Thereafter, Quicken Loans assigned its mortgage to DLJ Mortgage Capital, Inc., by assignment dated July 1, 2014, recorded May 1, 2015. Defendant DLJ Mortgage Capital, Inc. filed an Answer and Counterclaim to the Plaintiff's Complaint, claiming that its mortgage has priority over Plaintiff's mortgage. Plaintiff has filed a Reply, and Defendant DLJ Mortgage Capital, Inc. has amended

its Counterclaim to include a cross claim cause of action for foreclosure against the Defendants Jimmy and Laura Bailey.

The Credit Union will show that there are no genuine issues of fact to be decided and that the Credit Union is entitled to judgment declaring its mortgage is entitled to primary priority as a matter of law.

STATEMENT OF FACTS

The parties do not dispute the following timeline of events. The sequence of the loans is agreed to by the parties, and the recorded mortgages are of public record. Therefore, the Court can apply the law to the undisputed facts to determine priority between the two mortgagees in this case.

In review of the discovery conducted in the case and the Memorandum of Support of Defendant's Motion for Summary Judgment, submitted by Defendant DLJ Mortgage Capital, Inc. (referred to herein as "DLJ"), as well as the Affidavit of James R. Price (Exhibit A), which was previously submitted with Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, the facts of the case are as follows:

On September 29, 2009, Defendants Jimmy and Laura Bailey refinanced an existing mortgage on their real property, which is described in the Plaintiff's Complaint and Lis Pendens. The lender was JP Morgan Chase, Inc. This loan is referred herein to as "Refi 1 Loan." The principal amount loaned to Mr. and Mrs. Bailey at this time was \$256,500.00. Defendant's Memorandum in Support of Defendant JPMorgan Chase Bank's Motion for Summary Judgment Facts.

The mortgage for Refi 1 Loan was recorded on October 20, 2009. When Refi 1 Loan was recorded, it was in primary position.

On October 27, 2009, the Credit Union gave a loan to Jimmy and Laura Bailey. This loan is referred to herein as "CU Loan." The principal amount Credit Union loaned to Mr. and Mrs. Bailey at this time was \$99,000.00. Id.

In order to secure the payment of the CU Loan, Jimmy and Laura Bailey made, executed, and delivered to the Credit Union a mortgage covering the property described in Plaintiff's foreclosure Complaint and Lis Pendens. The mortgage for the CU Loan was recorded November 4, 2009. Id. The Credit Union was aware of the Refi 1 Loan during the closing of the Credit Union's mortgage. At that time, the Credit Union expected its mortgage loan to be in second position, junior and subordinate to the Refi 1 Loan.

On November 23, 2009, Jimmy and Laura Bailey again refinanced their mortgage with JP Morgan Chase. This loan is referred to herein as "Refi 2 Loan." The principal amount of this refinanced loan was \$296,000.00. This was an increase in the amount borrowed from Refi 1 Loan of \$39,500.00. Even though DLJ's predecessor in interest was on notice of the CU Loan at this time, by virtue of Credit Union's recorded mortgage, DLJ claims that it did not know about the CU Loan at this time. Id.

The second refinance mortgage for Refi 2 Loan was recorded December 15, 2009.

Credit Union was not aware of the Refi 2 Loan when the Refi 2 Loan was being made, closed, and recorded. Credit Union was not asked to subordinate its mortgage to the mortgage for the Refi 2 Loan. The Credit Union has not subordinated its mortgage to the mortgage for the Refi 2 Loan. Affidavit of James R. Price, ¶ 8.

ISSUE:

The instant dispute is which mortgage loan has priority: Refi 2 Loan or CU Loan. Credit Union contends that CU Loan has priority over Refi 2 Loan because the mortgage for the CU Loan

was recorded before the mortgage for the Refi 2 Loan. The Credit Union also argues that it is entitled to priority over the Refi 2 Loan because: 1) the Credit Union was never given notice of Refi 2 Loan, 2) the Credit Union was never asked to subordinate its mortgage to Refi 2 Loan, and 3) because Refi 2 Loan created a substantial disadvantage to the Credit Union's interests and left the Credit Union in a far worse position, because the Refi 2 Loan advanced \$39,500.00 of additional funds to the Defendants Jimmy and Laura Bailey.

The Credit Union's Motion for Summary Judgment requests the Court to find that the Credit Union's mortgage, which was recorded before Refi 2 Loan, should have priority over Defendant DLJ's Refi 2 Loan. Any sale foreclosing Credit Union's mortgage should not be subject to Defendant DLJ's Refi 2 Loan.

LAW AND ANALYSIS

I. Summary Judgment Standard

Summary Judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. S.C.R.Civ.P. 56. All evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences resolved in the same manner. Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 392 S.E.2d 460 (1990). Nonetheless, a court "cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." Hopson v. Clary, 321 S.C. 312, 314 S.E.2d 305, 307 (Ct. App. 1996).

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. In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. . . . All ambiguities, conclusions, and inferences arising from the

evidence must be construed most strongly against the moving party. . . . Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts.

BPS, Inc. v. Worthy, 608 S.E.2d 155, 362 S.C. 319 (S.C. Ct. App. 2005).

II. Plaintiff's Argument

There is no dispute in the timeline set forth above. There is no dispute that the Credit Union knew that it was in second position when the Baileys granted a mortgage to the Credit Union. The dispute is the legal effect of the events that occurred after the date of the CU Loan. The Credit Union argues that the subsequent refinance of DLJ's mortgage loan altered the priority between the parties, such that the Credit Union's mortgage, being recorded first, has first priority.

III. No Equitable Subrogation

Defendant DLJ did not obtain a Subordination Agreement from the Credit Union when it closed the Refi 2 Loan. Affidavit of James R. Price, ¶ 8. Therefore, Defendant DLJ lost its primary priority and is now in second position. See Matrix v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (S.C. 2011).

In Matrix, the lender refinanced its own mortgage after a judgment lien attached against the property that would eventually be foreclosed. The judgment creditor argued its judgment lien had priority over the subsequent mortgage held by the lender, Matrix, because the judgment creditor's lien was filed before Matrix's refinanced mortgage. Matrix argued that when it refinanced its own mortgage, it became equitably subrogated to the rights of its original mortgage that was recorded before the judgment lien. The Supreme Court of South Carolina held that the lender was not entitled to equitable subrogation in the case, because equitable

subrogation "contemplates a third party satisfying the original mortgage, not the same party to whom the original debt is owed." Id. at 137, 714 S.E.2d at 534.

In the instant case, DLJ's predecessor in interest, Chase, refinanced its own mortgage. Therefore, it is not able to claim priority using a theory of equitable subrogation. Matrix destroyed equitable subrogation theories for refinancing lenders, at least when they are refinancing their own mortgage loans, as is the case here.

IV. No Replacement Mortgage

The Defendant DLJ has argued that Refi 2 Loan is a replacement mortgage, and not a refinance, of the Refi 1 Loan, which mortgage was given to DLJ's predecessor in interest, Chase. DLJ argues that because the Refi 2 Loan is not a refinance, intervening lienholders such as the Credit Union are not entitled to the normal priority granted according to the date that the competing mortgages are recorded.

The theory of replacement mortgage is espoused not in the case law or statutory law of South Carolina, but in the Restatement Third of Property. According to the Restatement, a replacement mortgage can retain the original priority of the mortgage that is being replaced, except to the extent that the replacement mortgage changes the terms of the original mortgage or if the replacement mortgage is materially prejudicial to any existing subordinate lienholders. REST 3d PROP-MORT § 7.3.

The terms of the Refi 2 Loan are different than the terms of Refi 1 Loan. The principal balance is \$39,500.00 greater. The Baileys cashed out supposed equity, using a loan-to-value ratio that did not include the Credit Union's mortgage loan. There were substantial closing costs associated with the Refi 2 Loan. Affidavit of James R. Price, ¶ 19.

Because Defendant DLJ advanced significant additional money to the borrowers in its mortgage for the Refi 2 Loan, the Credit Union was substantially and materially prejudiced. (Affidavit of James R. Price, Exhibit A). An increase in the principal amount secured by a replacement mortgage is generally deemed to be materially prejudicial to an intervening lienholder such as the Credit Union. Restatement (Third) of Property; Mortgages § 7.3(a)(2), comment b. When the “replacement” mortgage has materially prejudiced an intervening lienholder, the “replacement” mortgage is not entitled to the priority of the mortgage it is hoping to replace. Restatement (Third) of Property; Mortgages § 7.3.

The commentary to this provision suggests that public policy favors workouts and flexible restructuring to benefit current borrowers. Id. However, in this case, the Refi 2 Loan did not result in more favorable terms to the borrowers, the Baileys. On the contrary, the Baileys cashed out supposed equity in the amount of \$39,500.00, which only served to increase the amount that they owed and made their eventual default more likely. These are not the hallmarks of a workout loan. DLJ argues that the cash out to the Baileys is irrelevant because the lender Quicken paid for the cash out to the Baileys. This misses the thrust of the point: that advancing these additional funds would extremely prejudice the Credit Union’s ability to receive payment if the real property is sold, foreclosed, or destroyed. Equitable principals such as reducing foreclosures are not accomplished by increasing the amount owed to the first mortgagee by \$39,500.00.

Defendant DLJ’s argument is based on the Restatement and not existing precedent. The Restatement is not the law of South Carolina, and no appellate court has yet adopted the concept of replacement mortgages.

DLJ argues that Credit Union was on notice that the principal balance of the Refi 1 Loan could increase under the terms of the Refi 1 Loan mortgage. The pertinent part of the Refi 1 Loan mortgage states that it secures the instant Note and "any renewal, extension or modification." DLJ uses this language to call the Refi 1 Loan a Future Advance Clause. A future advance clause is located in Revolving Credit Mortgages and Home Equity Lines of Credit, not in the instant Refi 1 Loan Mortgage.

Credit Union hereby abandons its assertion that an attorney did not close Refi 2 Loan. Credit Union previously made that assumption based on the fact that a title search apparently was not conducted in association with Refi 2 Loan; however, facts developed in discovery have indicated that an attorney did close the Refi 2 Loan, whether or not such attorney conducted a title search.

Credit Union does not argue that it must agree to Defendant DLJ's Refi 2 Loan. Credit Union agrees that it did not need to approve or bless such a loan, but if DLJ wanted to retain its priority, DLJ needed Credit Union's subordination. Without such a result, the four major steps an attorney must take in a mortgage loan closing in South Carolina would not have been set out in Buyers Services, and reiterated time and again in other cases. State v. Buyers Serv. Co., 292 S.C. 426, 357 S.E.2d 15 (1987); Wachovia Bank v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct.App. 2010); Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2003).

Buyers Services states that one of the four things that an attorney does when closing a mortgage loan secured by real property is search the title of the real property. This would not be a requirement if DLJ's replacement mortgage is adopted. Using DLJ's argument, lenders seeking to refinance their own mortgage loans would not need to search title, because intervening interests can be superseded. Buyers Services does not set forth three steps to closing

refinanced mortgage loans; it sets forth four steps. If the Court accepts the theory of replacement mortgage, such a holding would not only erode customary procedures of real estate practitioners, but it would also erode the holdings of the Buyers Services line of cases.

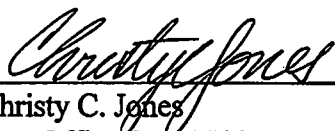
CONCLUSION

The Plaintiff's Motion for Summary Judgment should be granted because there is no genuine issue of material fact, such that the Plaintiff is entitled to judgment as a matter of law. The Plaintiff and Defendant DLJ both agree to the timing of the various mortgages and refinances. Even when the evidence is viewed in the light most favorable to DLJ, the Credit Union is entitled to a judgment as a matter of law. The Court should find that Credit Union's mortgage is entitled to priority over DLJ's Refi 2 Loan as a matter of law.

RESPECTFULLY SUBMITTED

SHERPY & JONES, P.A.

By: _____


Christy C. Jones
Post Office Box 2599
Lexington, South Carolina 29071
(803) 356-3327
Attorneys for Plaintiff

October 12, 2016
Lexington, South Carolina

2013 SEP 17 AM 10 20

FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

EXHIBIT A

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF FAIRFIELD) CIVIL ACTION NO. 2012-CP-20-00132

ArrowPointe Federal Credit Union,

Plaintiff,

vs.

Jimmy Eugene Bailey; Laura Jean Bailey; and
JPMorgan Chase Bank,

Defendants.

AFFIDAVIT OF JAMES R. PRICE

PERSONALLY APPEARED before me James R. Price, who being duly sworn, states that he is employed by Plaintiff as its Senior Vice President and as a collections manager for the Plaintiff; that he has personal knowledge of the facts set forth below; that he is authorized to make this affidavit; the he knows, understands and has competency to testify to the matters stated in this Affidavit; and that the following is correct within his personal knowledge:

1. ArrowPointe Federal Credit Union ("Credit Union") is a federally-chartered credit union, and its principal place of business is in Catawba, South Carolina. As a credit union, its members are owners of the Credit Union and share in the profits and losses of the Credit Union.

2. I have been able to determine the following from the title searches and reports provided to me and from the recorded mortgages themselves:

3. On September 29, 2009, Jimmy and Laura Bailey refinanced an existing mortgage. The lender was Quicken Loans, Inc.

4. This mortgage was recorded on October 20, 2009.

5. On October 27, 2009, Jimmy and Laura Bailey, gave a mortgage to the Credit Union.

6. This mortgage was recorded November 4, 2009. The Credit Union was aware of the prior mortgage to Quicken during the closing of the Credit Union's mortgage.

7. On November 23, 2009, Jimmy and Laura Bailey again refinanced their mortgage with Quicken Loans, Inc.

8. This second refinance was recorded December 15, 2009. This is the mortgage that the Credit Union is complaining about because the Credit Union was never given notice of it, and the Credit Union was never asked to subordinate its mortgage, and because the refinance worked a substantial disadvantage to the Credit Union's interests and left the Credit Union in a far worse position.

9. Among other things, the Credit Union is in the business of making first and second-lien mortgage loans to its members in South Carolina.

10. It is the policy that each and every South Carolina mortgage loan funded by the Credit Union is closed by an attorney licensed to practice law in the State of South Carolina.

11. When the Credit Union conducts a refinance of one of its mortgage loans, it also engages an attorney licensed to practice law in the State of South Carolina to handle the closing.

12. From time to time, a member who has a second mortgage with the Credit Union will want to refinance his or her first mortgage that is outstanding with another lender. In such instances, the lender proposing to refinance the first mortgage presents the Credit Union with a proposed Subordination Agreement. I personally review all requests from other lenders holding prior mortgages wishing to refinance for consent or rejection of proposed Subrogation Agreements.

13. As part of my review, I routinely review the anticipated costs of the refinance to the member/borrower, by reviewing the proposed Settlement Statement. I also examine the potential

benefits to the member/borrower that the refinance may offer. I also review the status of the member's existing loan with the Credit Union and the value of the real estate serving as collateral during this process.

14. Conversely, when the Credit Union conducts a refinance of any of its mortgages, the Credit Union's closing attorney conducts a title search. If subordinate lienholders are located, the Credit Union forwards a proposed Subordination Agreement to the subordinate lienholders which were identified by the licensed attorney handling the closing. If this is not accomplished, the refinance will not proceed.

15. The Credit Union never received notice that Defendant JPMorgan Chase Bank, or any of its agents or assignees, were refinancing the Chase mortgage, which was recorded on December 15, 2009.

16. Upon information and belief, the Chase refinance/ mortgage recorded on December 15, 2009 was not handled by an attorney or closed with the assistance or supervision of an attorney.

17. The Credit Union's policies and procedures regarding mortgage loan closings came about for three reasons. The first is to avoid potential priority disputes with other lenders. The second reason is that the Credit Union is often a mortgage lender in second position, and it believes that junior mortgagees deserve to approve or deny refinances of prior mortgages based on the proposed changes to the original mortgage loan. The third is that the law of the State of South Carolina requires it of a lender hoping to maintain its priority.

18. The refinance accomplished by the Chase mortgage which was recorded on December 15, 2009 did not work an advantage to the Credit Union. As I stated, I was not afforded

the opportunity to review the Settlement Statement prior to Chase's refinance mortgage recorded December 15, 2009 because the Credit Union was never advised of the proposed Chase refinance, which was recorded December 15, 2009.

19. Upon review of the Settlement Statement, the underwriting fee of \$915.00, the processing fee of \$895.00, settlement fee of \$650 (to a notary, not an attorney), in addition to the origination fee of \$1,720.00 and the loan discount fee of \$4,810.00 all in conjunction seem too high to be beneficial to the Credit Union, or beneficial for the members for that matter.

20. Most importantly, the members, Jimmy and Laura Bailey, were advanced \$26,235.11 cash in this refinance. This works a substantial disadvantage to the Credit Union as a lienholder on this property. The refinance damaged the Credit Union's equity position by \$38,540.96. I can state that the Credit Union would not have approved Chase's refinance of the mortgage, which was recorded December 15, 2009, and the Credit Union would not have signed a Subordination Agreement had one been presented to the Credit Union or to me.

SWORN to before me this 16th
day of September, 2013.

Joan Usher
Notary Public for SC; My Commission Expires: _____

James R. Price
James R. Price

My Commission Expires
January 14, 2020

EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

CASE NO. 2012-CP-20-00132

ArrowPointe Federal Credit Union,

Plaintiff,

v.

Jimmy Eugene Bailey, Laura Jean
Bailey, and JPMorgan Chase Bank,

Defendants.

**MEMORANDUM IN SUPPORT OF
DEFENDANT JPMORGAN CHASE BANK'S
MOTION FOR SUMMARY JUDGMENT**

The Defendant JP Morgan Chase Bank, who has assigned its mortgage to Quicken Loans, Inc. ("Quicken") and has filed a Consent Order for Substitution as Party Defendant by separate motion, by and through its undersigned counsel, submits this brief in support of its motion for summary judgment as to the priority of Quicken's mortgage.

INTRODUCTION

Plaintiff ArrowPointe Federal Credit Union ("AFCU") brought this mortgage foreclosure action on real property in Fairfield County as described in its Complaint ("Subject Property"). Quicken also holds a mortgage secured by the Subject Property and claims priority under the doctrine of replacement mortgage discussed in the instant motion and memorandum. The instant motion asks the Court to enter an order establishing the senior priority of Quicken's mortgage and, if an order of foreclosure is ultimately granted to AFCU, that the Subject Property be sold subject to Quicken's mortgage.

FACTS

The Defendants Jimmy Eugene Bailey and Laura Jean Bailey ("Baileys") gave a mortgage to Quicken that was recorded on October 15, 2009 ("Replaced Mortgage"). The Replaced Mortgage was in senior position at the time of recording. The Replaced Mortgage secured a Note in the principal amount of \$256,500.00 plus interest. In the "Transfer of Rights in the Property" section of the recorded Replacement Mortgage, the following record notice was provided to all subsequent mortgagees, including AFCU, and the public at large: "This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications

of the Note..." ("Future Advance Clause").

Subsequent to the Replaced Mortgage transaction, the Baileys gave AFCU a mortgage securing an Open-End Home Equity Credit Agreement ("Line of Credit Mortgage") in the principal amount of \$99,000.00 to make improvements and additions to their home. The Line of Credit Mortgage was recorded on November 4, 2009. AFCU acknowledges that it expected its mortgage to be in junior priority position when it was recorded. See Exhibits B, C and D of Quicken's Motion for Summary Judgment and Plaintiff's Memorandum in Opposition to the Motion.

The Baileys entered into a subsequent loan transaction with Quicken on November 23, 2009 ("Replacement Mortgage Transaction") and obtained a new loan in the principal amount of \$296,000.00. Proceeds from this loan were used to pay off the Replaced Mortgage in the amount of \$257,459.04 ("Payoff"). See Exhibit A to Plaintiff's Motion. As part of the same transaction, the senior Replaced Mortgage was released of record and was replaced with a new mortgage recorded on December 15, 2009 ("Replacement Mortgage") that was intended to replace the Replaced Mortgage and retain senior lien position. See Exhibit A to the Motion. Quicken did not know that the Line of Credit Mortgage existed at the time of the Replacement Mortgage. See Id.

A licensed South Carolina attorney, Stacey E. Pope f/k/a Stacey Pope Gardner, supervised the loan closing. See the Affidavit of Laura Miller and its attached exhibits attached to the Motion as Exhibit A, as well as the "Closing Attorney's Statement", the November 23, 2009 letter from Stacey Pope Gardner, Esq. and the deposition excerpt of James R. Price attached to this Memorandum as Exhibit A. Attorney Pope witnessed and notarized the Replacement Mortgage See Id. Attorney Pope remains licensed and in good standing with the South Carolina Bar in the present day. See Id. The Baileys executed a Title Company Client Acknowledgment that represented by affidavit that "there are no outstanding home improvement loans, mortgages, deeds of trust, or equity lines of credit, recorded or unrecorded" other than the Replaced Mortgage. See "Title Company Client Acknowledgment" Bates Labeled JPMorgan Chase 000087 and attached to this Memorandum as Exhibit B. The Baileys misrepresented the truth when they told Quicken that there are no equity lines of credit secured by the Subject Property.

These facts are undisputed and established in the record. AFCU acknowledges the chronology and transactions set forth above in its memorandum, as well the fact that "it was in second position when the Baileys granted a mortgage to the Credit Union (AFCU)." See AFCU's

Memorandum in opposition to this Motion. Further, AFCU acknowledges that the dispute regarding the priority of liens outlined above is legal in nature. See Id. For these reasons, the Court can apply these undisputed facts in the light most favorable to the non-moving AFCU and determine as a matter of law whether Quicken's Replacement Mortgage receives priority.

LEGAL STANDARD

Summary judgment should be granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. S.C. R. Civ. P. 56(c). In determining whether any triable issue of fact exists, the evidence and all inferences, which can reasonably be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. BPS, Inc. v. Worthy, 362 S.C. 319, 325, 608 S.E.2d 155, 158 (Ct. App. 2005). All ambiguities, conclusions, and inferences rising from the evidence must be construed most strongly against the moving party. Id. at 325, 608 S.E.2d at 159. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Bennett v. Investors Title Ins. Co., 370 S.C. 561, 569, 635 S.E.2d 660, 664 (Ct. App. 2006).

"Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537 545 (1991). "With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility 'may be discharged by "showing" -that is, pointing out to the [trial] court- that there is an absence of evidence to support the nonmoving party's case.' " Id. (alteration in original) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). "The moving party need not 'support its motion with affidavits or other similar materials *negating* the opponent's claim.'" Id. (quoting Celotex, 477 U.S. at 323,); see also Richardson v. State-Record Co., 330 S.C. 562, 499 S.E.2d 822 (Ct.App.1998).

Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial. Baughman, 306 S.C. at 115, 410 S.E.2d at 545. The South Carolina Supreme Court, clarifying prior case law, has held that in certain cases a nonmoving party must present more than a mere scintilla of evidence to survive summary judgment:

Accordingly, we hold that in cases applying the preponderance of the evidence

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

CASE NO. 2012-CP-20-00132

ArrowPointe Federal Credit Union,

Plaintiff,

v.

Jimmy Eugene Bailey, Laura Jean
Bailey, and DLJ Mortgage Capital,
Inc.,

Defendants.

**DEFENDANT DLJ MORTGAGE CAPITAL,
INC.'S MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT**

FAIRFIELD COUNTY
CLERK OF COURT
JUN 13 PM 12:13

The Defendant DLJ Mortgage Capital, Inc., by and through its undersigned counsel, submits this legal brief and memorandum in opposition to Plaintiff's Motion for Summary Judgment.

INTRODUCTION

Plaintiff ArrowPointe Federal Credit Union ("AFCU") brought this mortgage foreclosure action on real property in Fairfield County as described in its Complaint ("Subject Property"). DLJ also holds a mortgage secured by the Subject Property and claims priority under the doctrine of replacement mortgage. Plaintiff's motion for summary judgment must be denied as explained below.

STIPULATED FACTS

ArrowPointe Federal Credit Union ("AFCU") and DLJ Mortgage Capital, Inc. ("DLJ"), the only parties appearing in this action, have agreed to a Joint Stipulation with Exhibits A-Y incorporated therein with the references to Exhibits herein being the same and incorporated herein unless expressly stated otherwise, do agree and stipulate to the facts as follows:

1. The Defendants Jimmy Eugene Bailey and Laura Jean Bailey ("Baileys") hold title to the following real property, described as follows (the "Subject Property"):

All that certain piece, parcel or lot of land, together with the improvements thereon,

lying, being and situate in the County of Fairfield, State of South Carolina, being shown and designated as Lot 137 of Section 22 of Lake Wateree on a plat of survey prepared for Patrick Eugene Rachels by Ashmark Land Surveyors dated February 12, 1996, and recorded in Slide 544 of Plats at Page 1233; and being bounded on the North by Lot 136; on the East by Lake Wateree; on the South by Lot 138; and on the West by right-of-way of Morninglow Drive.

This being the same property conveyed to Jimmy Eugene Bailey and Laura Jean Bailey by deed of Patrick Eugene Rachels dated September 1, 2000, and recorded September 7, 2000 in Book QM at Page 349. Subsequently, Jimmy Eugene Bailey and Laura Jean Bailey conveyed the subject property to Jimmy Eugene Bailey and Laura Jean Bailey, as joint tenants with the right of survivorship, by deed dated October 27, 2009, and recorded November 4, 2009, in Book 973 at Page 9.

Property Address: 247 Morninglow Drive, Winnsboro, SC 29180
TMS# 095-02-02-022.

2. The Baileys gave a mortgage to Quicken Loans, Inc. ("Quicken") that was recorded on October 15, 2009 ("First Mortgage"). The First Mortgage was in a senior lien priority position on the Subject Property at the time of its recording. An authentic, accurate and admissible copy of the First Mortgage is incorporated herein as **Exhibit A**.

3. The First Mortgage secured a Note in the principal amount of \$256,500.00 plus interest ("First Note"). Additionally, the "Transfer of Rights in the Property" section of the recorded First Mortgage, stated "This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note ...".

4. An authentic, accurate and admissible copy of a Settlement Statement reflecting the actual disbursement on October 5, 2009 by Quicken under the First Mortgage is incorporated herein as **Exhibit B**.

5. Subsequently, the Baileys gave AFCU a mortgage securing an Open-End Home Equity Credit Agreement ("Line of Credit Mortgage") in the principal amount of \$99,000.00 to

make improvements and additions to their home. The Line of Credit Mortgage was duly recorded on November 4, 2009.

6. An authentic, accurate and admissible copy of the AFCU Open-End Home Equity Credit Agreement and Truth in Lending Disclosure pertaining the Baileys is incorporated herein as **Exhibit C**.

7. An authentic, accurate and admissible copy of a letter to Mr. O'Neil Cannon from Tim Lyda dated October 13, 2009 and an appraisal of the Subject Property is incorporated herein as **Exhibit D**.

8. An authentic, accurate and admissible copy of an Individual or Joint Credit Form signed by the Baileys is incorporated herein as **Exhibit E**.

9. An authentic, accurate and admissible copy of handwritten notes regarding a proposed addition to the house on the Subject Property is incorporated herein as **Exhibit F**.

10. An authentic, accurate and admissible copy of an appraisal dated October 14, 2009, regarding the Subject Property, and prepared by Garvin Appraisals is incorporated herein as **Exhibit G**.

11. An authentic, accurate and admissible copy of a Preliminary Title Report for AFCU is incorporated herein as **Exhibit H**.

12. An authentic, accurate and admissible copy of the Line of Credit Mortgage made to AFCU from the Baileys dated October 27, 2009, and recorded on November 4, 2009, in the Office of the Clerk of Court for Fairfield County, South Carolina in Book 973, at Page 28, in the original principal amount of \$99,000.00, is incorporated herein as **Exhibit I**.

13. When AFCU obtained the Line of Credit Mortgage from the Baileys, the parties to that transaction intended the Line of Credit Mortgage to be a junior mortgage on the Subject Property second in lien priority position behind the First Mortgage.

14. The Baileys then entered into a subsequent loan transaction with Mortgage Electronic Registration Systems, Inc. as nominee for Quicken, its successors and assigns on November 23, 2009. The Baileys obtained a new loan through a Note in the principal amount of \$296,000.00 plus interest in this transaction ("Second Note"). An authentic, accurate and admissible copy of the Second Note is incorporated herein as **Exhibit J**.

15. The proceeds from the Second Note were used to pay off the loan secured by the First Mortgage in the amount of \$257,459.04. As part of the same transaction, the senior First Mortgage was released of record, and then a new mortgage in favor of Quicken was recorded on December 15, 2009 in the Office of the Clerk of Court for Fairfield County on December 15, 2009 in Mortgage Book 977 at Page 54 (the "Second Mortgage"). The First Mortgage was of record at all times until the Second Mortgage was recorded December 15, 2009. Quicken intended that the Second Mortgage replace the First Mortgage and retain Quicken's senior lien position.

16. A licensed South Carolina attorney, Stacey E Besser f/k/a Stacey Pope Gardner, supervised the loan closing for the Second Mortgage. Attorney Besser witnessed and notarized the Second Mortgage. Attorney Besser remains licensed and in good standing with the South Carolina Bar in the present day.

17. Quicken did not have actual knowledge that the Line of Credit Mortgage existed at the time it conducted the Second Mortgage transaction. Quicken was on record notice of the Line of Credit Mortgage at the time it conducted the Second Mortgage transaction. The Baileys executed a Title Company Client Acknowledgment that represented by affidavit that "there are no

outstanding home improvement loans, mortgages, deeds of trust, or equity lines of credit, recorded or unrecorded" other than the First Mortgage. An authentic, accurate and admissible copy of the "Title Company Client Acknowledgment" signed by the Baileys is incorporated herein as **Exhibit K**. The Baileys misrepresented the truth when they told Quicken that there are no equity lines of credit secured by the Subject Property.

18. An authentic, accurate and admissible copy of Second Mortgage made to Quicken by the Baileys on November 23, 2009, and recorded on December 15, 2009, is incorporated herein as **Exhibit L**.

19. The following authentic, accurate and admissible copies of the assignments of the Second Mortgage are incorporated herein:

- a. Assignment of Mortgage from Mortgage Electronic Registration Systems, Inc. as nominee for Quicken Loans, Inc., its successors and assigns, to JPMorgan Chase, National Association, dated January 6, 2012, and recorded on January 25, 2012, in the Office of the Clerk of Court for Fairfield County in Book 1059 at Page 62, attached as **Exhibit M**;
- b. Assignment of Mortgage from JPMorgan Chase, National Association, to Quicken Loans, Inc., dated April 24, 2013, and recorded on July 3, 2013, in the Office of the Clerk of Court for Fairfield County in Book 1120 at Page 74, attached as **Exhibit N**; and
- c. Assignment of Mortgage from Quicken Loans, Inc., to DLJ Mortgage Capital, Inc., dated July 1, 2014, and recorded on May 1, 2015, in the Office of the Clerk of Court for Fairfield County in Book 1189 at page 50, attached as **Exhibit O**.

20. An authentic, accurate and admissible copy of a Settlement Statement reflecting the actual disbursement on November 23, 2009 by Quicken to the Baileys is incorporated herein as **Exhibit P**.

21. An authentic, accurate and admissible copy of a letter titled Authorization to Disburse Funds and to Record Documents, pertaining to the Baileys and signed by Stacey P. Gardner, Esq. and dated November 23, 2009 is incorporated herein as **Exhibit Q**.

22. An authentic, accurate and admissible copy of a Closing Attorney's Statement for the Baileys and Quicken Loans, Inc. for the Subject Property, dated November 23, 2009 is incorporated herein as **Exhibit R**.

23. An authentic, accurate and admissible copy of a letter from Milton E. Hamilton to Jim Price, dated July 18, 2011 is incorporated herein as **Exhibit S**.

24. An authentic, accurate and admissible copy of e-mail conversations of various dates between e-mails between Barbara Looper, Jim Price, and Laura Jean Bailey is incorporated herein as **Exhibit T**.

25. An authentic, accurate and admissible copy of an inquiry into the Subject Mortgage balance, dated November 15, 2011, with handwritten notes is incorporated herein as **Exhibit U**.

26. As recognized by the Order dated signed January 7, 2016 in this matter, DLJ is, by virtue of the assignment from Quicken (Exhibit N), the due holder of the Second Mortgage and the loan it secures, and DLJ has standing to assert the rights of Quicken under those instruments.

27. An original Affidavit from DLJ's loan servicer, or, if applicable, its successor assignee, setting forth the amounts currently due and owing under the loan secured by the Second Note (Exhibit K) and Second Mortgage (Exhibit M) given by the Baileys is incorporated herein as **Exhibit V**.

28. An authentic, accurate and admissible copy of a letter from Quicken Loans, Inc., to the Baileys dated August 2, 2013, notifying the Baileys of their default on the loan secured by the Second Note (Exhibit K) and Second Mortgage (Exhibit M) and demanding that they cure the default is incorporated herein as **Exhibit W**.

29. An original Affidavit from AFCU's employee setting forth the amounts currently due and owing under the loan secured by the Open-End Home Equity Credit Agreement and Truth in Lending Disclosure (Exhibit D) and Line of Credit Mortgage (Exhibit J) given by the Baileys is incorporated herein as **Exhibit X**.

30. An authentic, accurate and admissible copy of a letter from AFCU to the Baileys dated February 21, 2012, notifying the Baileys of their default on the loan secured by the Open-End Home Equity Credit Agreement and Truth in Lending Disclosure (Exhibit D) and Line of Credit Mortgage (Exhibit J) and demanding that they cure the default is incorporated herein as **Exhibit Y**.

LEGAL STANDARD

Summary judgment is a drastic remedy and should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues. Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003). Under South Carolina law, "summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of any material fact that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839,841 (Ct. App. 1986) (See also, S.C.R.Civ.P. Rule 56).

In determining whether any triable issue of fact exists, the evidence and all inferences, which can reasonably be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. BPS, Inc. v. Worthy, 362 S.C. 319, 325, 608 S.E.2d 155, 158 (Ct. App. 2005). All ambiguities, conclusions, and inferences rising from the evidence must be construed most strongly against the moving party. Id. at 325, 608 S.E.2d at 159. The South Carolina Supreme

Court recently clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. In Hancock v. Mid-South Management Co., Inc., 678 S.E.2d 801, 803 (2009), the court held that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment."

LEGAL ANALYSIS

I. Facts and Evidence

Plaintiff's motion for summary judgment was made prior to the parties' agreement and stipulation to the facts set forth herein. The facts that are now stipulated to, and the evidence that is now before the Court in the form of those facts and the attached exhibits, are sufficient to require denial of Plaintiff's motion for summary judgment. When the Court considers the evidence presented, and all inferences which can reasonably be drawn therefrom, in the light most favorable to the non-moving party, with all ambiguities, conclusions, and inferences construed against Plaintiff, it becomes clear that Plaintiff's motion for summary judgment must be denied.

DLJ has presented evidence that establishes the Second Mortgage was intended to, and in fact did replace the First Mortgage. The proceeds from the Second Note, were used to pay off the loan secured by the First Mortgage, and as part of the same transaction, the First Mortgage was released of record and the Second Mortgage was recorded.

The facts at issue before this Court are not completely reflected in Plaintiff's motion for summary judgment. Taking the facts as they are now stipulated to, DLJ has shown more than the scintilla of evidence that is required by South Carolina law in order to defeat Plaintiff's motion. Furthermore, the theory of Replacement Mortgage has more applicability in South Carolina than Plaintiff's motion for summary judgment suggests, and in fact has been recognized in South Carolina's trial courts as further discussed below.

II. The Replacement Mortgage Theory

The Restatement Third of Property recognizes the Replacement of Senior Mortgages and its Effect on Intervening Interests as follows:

(a) If a senior mortgage is released of record and, as part of the same transaction, is replaced with a new mortgage, the latter mortgage retains the same priority as its predecessor, except

(1) to the extent¹ that any change in the terms of the mortgage or the obligation it secures is materially prejudicial to the holder of a junior interest in the real estate, or

(2) to the extent that one who is protected by the recording act acquires an interest in the real estate at a time that the senior mortgage is not of record.

See REST 3d PROP-MORT Section 7.3.

The Comments to this Restatement section acknowledge that the replacement of senior mortgages is commonplace in lending transactions involving real property. See Comment a. Further, the commentators state that “[r]equiring the consent of junior interests for such transactions might deny the parties needed flexibility in dealing with changing economic and business conditions. This section aims at resolving those problems in a manner that protects the legitimate expectations of the holders of junior interests, while at the same time denying them the ability to veto workouts or other flexible restructuring arrangements between mortgagors and senior lenders.” See Id. Simply put, junior mortgagees do not have veto authority on a financing transaction between a senior mortgagee and its borrower. The junior mortgagee’s position should not worsen due to the transaction, but the senior mortgagee will retain priority to the extent of the replaced mortgage.

Additionally, if the original mortgage validly secures future advances in its recorded mortgage, then the intervening lienholder is on notice that the senior debt can increase and should temper its lending decisions accordingly. See Reporters’ Note, comment d, REST 3d PROP-MORT Section 7.3.

III. Replacement Mortgage in South Carolina

The South Carolina Supreme Court adopted the Restatement Third of Property Mortgages Section 7.6 in its majority opinion in Matrix Fin. Services Corp v. Frazer, 394 S.C. 1354, 714

¹ See Illustration 2 of Restatement 3d Prop-Mort Section 7.3 that elaborates on the retention of priority for senior mortgages that are replaced, but only to the extent of the payoff of the replaced mortgage, in instances when the junior lien holder does not have record notice of the potential for future advances that may affect the principal amount.

S.E.2d 532 (2011). This Restatement section recognizes an equitable doctrine known as equitable subrogation, which is an exception to the race notice statute that typically determines priority by the earlier date of recording. Much like Replacement Mortgage, Section 7.6 allows a refinancing lender that is different from the original senior mortgagee to retain its priority to the extent the subrogee pays off the prior mortgage. See Id.

Prior to the Restatement Third, many states allowed the same lender to refinance its own mortgage, including South Carolina, and retain priority through the doctrine of equitable subrogation. The Restatement opines that, for practical purposes and by definition, a lender cannot be subrogated to itself. Therefore, the commentators conclude that Replacement Mortgage is the more appropriate doctrine for a mortgagee to retain priority through a new loan that pays off its own prior loan. REST 3d PROP-MORT Section 7.6.

Seeing no practical difference other than the titles of these two theories, some states still allow a lender to refinance its own mortgage and retain priority over junior mortgagees under the title of equitable subrogation. However, following the guidance of the Restatement Third commentators, South Carolina's Supreme Court in Matrix, supra, opted to adopt the Restatement Third of Property Mortgages Section 7.6 while acknowledging the Restatement Third of Property Mortgages Section 7.3 that discusses Replacement Mortgage. The Matrix majority alludes to the Replacement Mortgage theory in dicta but does not make a ruling based on the principle because "Matrix is not asserting priority under a theory of replacement and modification." See Id. at 534.

In discerning the logic of the majority with regard to Replacement Mortgage, the dissenting opinion of Justice Pleicones sheds light on the majority's seeming propensity to favor Replacement Mortgage in South Carolina. "It appears that the majority would agree with me that a refinancer has a right to lien priority, if that refinancer uses the theory of "replacement and modification" rather than equitable subrogation. Heretofore, South Carolina has used the doctrine of equitable subrogation to restore a refinancer's lien to priority, and I would not reverse this because (Matrix) used this theory rather than the **newly announced "replacement and modification" rule.** Matrix, supra, at 535 (emphasis added). While the majority did not, admittedly, specifically announce a new rule in its opinion, Justice Pleicones clearly received the impression that the majority favors Replacement Mortgage and would adopt it with the appropriate procedural backdrop.

Recently, the Master-in-Equity for Beaufort County considered similar facts and legal arguments in a motion for summary judgment and found that the equitable principles of

Replacement Mortgage should be applied to establish the priority of the replacement mortgage at issue. See Order of the Honorable Marvin H. Dukes, III, attached herein as **Exhibit Z**. Thus, it appears that South Carolina courts are willing to apply the equitable principles espoused in the Restatement Third of Property regarding Replacement Mortgages.

IV. Replacement Mortgage in Sister Jurisdictions

Since the Restatement Third's publication in 1997, a number of jurisdictions have already adopted Restatement Section 7.3 on Replacement Mortgages. DLJ is unaware of a jurisdiction that has rejected this section or the principles it espouses.

In Sovereign Bank v. Gillis, 2013 WL 3329289 (NJ 2013), the Superior Court of New Jersey's Appellate Division adopts Restatement Section 7.3 on Replacement and Modification in the context of a refinancer of its own loan to replace priority. The court notes that there are certain equitable considerations to be taken into account when looking at the general propositions of a race-notice state, like New Jersey (and South Carolina). "An exception to the normal "race-notice" determination of mortgage priorities can sometimes occur when a third party advances money to pay off a mortgage." Id. at 4. In adopting Replacement Mortgage, this court takes the third party analysis a step further by granting priority to a refinancer of its own loan under the principles of Replacement Mortgage. Id. at 7. The court also opines that a replacement mortgagee's actual knowledge of the intervening lien is not detrimental to replacement priority so long as the intervening junior mortgagee is not materially prejudiced. Id. One of the stated purposes for the adoption of Replacement Mortgage was to avoid the junior mortgagee from "reaping an undeserved windfall" by virtue of the senior mortgage paid off by the new mortgagee. See Id.

Appellate courts from Michigan and Arizona have also adopted replacement mortgage and specifically Restatement Section 7.3 on Replacement and Modification. See CitiMortgage, Inc. v. MERS, 295 Mich.App. 72 (2011) (holding "...because Section 7.3 of the Restatement reflects the present law in Michigan, we hereby adopt it."); see also Brimet II, LLC v. Destiny Homes Marketing, LLC, 231 Ariz. 457 (2013) (holding "When the lenders are of the same identity, priorities are determined under replacement and not equitable subrogation.").

Illinois courts have espoused the principles of replacement mortgage for over 100 years. See UnionBank v. Thrall, 374 Ill.App.3d 785 (2007).

...the trial court erred in holding that "first in time, first in right" is the only

legal principle properly applicable to this case ... Indeed, the legal doctrine (the replacement mortgage party) invoked has existed in Illinois case law for over 100 years, and it is not limited to the third-party situation described by Union. In Shaver, the supreme court held that a lender's refinancing of a debt secured by a mortgage, coupled with a simultaneous release of the original mortgage held by the lender, did not disturb the previous priority of liens on the land, where an intervening lienor took his lien with knowledge of the original mortgage ... The authors of the Restatement (Third) of Property prefer the term "replacement of senior mortgages"...Regardless of the label, however, it is clear that the doctrine remains valid under Illinois law and (the replacement mortgage party) properly raised it before the trial court.

Id. at 789-792. The appellate courts of New York have also adopted the principles of replacement mortgage. See Citibank, N.A. v. Kenney, 17 A.D.3d 305 (2005) (see Headnote 1). The United States District Court for the District of Nevada found that Nevada law would recognize the doctrine of replacement and specifically references Restatement Third of Property Section 7.3. See Freedom Mort. Corp. v. Trovare Homeowner's Assoc., Slip Copy 2013 Order on Plf's Mot. To Reconsider (commenting "Replacement is an equitable doctrine which resolves priority disputes between the holder of a replacement mortgage and an intervening interest. Its function is to preserve the original expectations of the parties, prevent windfalls to an intervening junior lienholder, and allow borrowers to obtain refinancing.").

Finally, Restatement Section 7.3 has case citations from the following jurisdictions that apply the Restatement in determining the holdings of their decisions: Kentucky, Oklahoma, Texas, Washington, Utah and Missouri.

In sum, the doctrine of Replacement Mortgage priority in the Restatement Third of Property is widely-recognized and favored in courts across the country.

V. Replacement Mortgage in the Instant Matter

In the instant case, DLJ argues that its Replacement Mortgage retains priority through the doctrine of Replacement Mortgage because it paid off the underlying debt of the Replaced Mortgage and took its priority position as part of the Replacement Mortgage Transaction. The Payoff is not disputed by AFCU and is made clear by the record. See Paragraph 15 of the Stipulated Facts.

The Replacement Mortgage theory lists two exceptions: (1) material prejudice and (2) the

replaced mortgage not being of record when the intervening lien is recorded. The second exception is not at issue here because AFCU admits the Replaced Mortgage was recorded at the time it recorded its Line of Equity Mortgage and that it had the expectation of being in a junior lien position. See Paragraphs 2 and 13 of the Stipulation of Facts.

If the Court acknowledges the applicability of the Restatement Section 7.3, then the Restatement makes it clear that the intervening junior creditor's permission is not needed. See Comment a, supra, (stating " [r]equiring the consent of junior interests for such transactions might deny the parties needed flexibility in dealing with changing economic and business conditions.").

Analysis of the material prejudice exception is as follows:

A. Applicability of the Future Advance Clause in the Replaced Mortgage

The Replaced Mortgage, which irrefutably held priority, contained the Future Advance Clause, supra, that put AFCU on notice that "all renewals, extensions and modifications of the Note..." were secured by the Replaced Mortgage. Essentially, AFCU knew or should have known during its underwriting by virtue of the publicly recorded Future Advance Clause that additional sums of money could be advanced by Quicken to the Baileys and given priority. While AFCU may argue that this unilateral ability between the senior mortgagee and its borrower is penal, the Restatement disagrees. If the original mortgage validly secures future advances in its recorded mortgage, then the intervening lienholder is on notice that the senior debt can increase and should temper its lending decisions accordingly. See Reporters' Note, comment d, REST 3d PROP-MORT Section 7.3.

The Plaintiff makes a semantic argument that the Replacement Mortgage was not a "renewal, extension or modification". However, the Restatement aims to arrive at the equitably appropriate result. If the junior mortgagee had notice that future advances could be made in any fashion, the fact that it was a new loan is immaterial. A noteworthy treatise and case law support this theory on postmortgage transactions affecting priority.

As a general rule, entering satisfaction of a mortgage and taking a new one, when designated by the parties to be merely a continuation of the first mortgage and when the two acts are practically simultaneous or parts of the same transaction, is not an extinguishment of the mortgage but merely a renewal and does not give priority to an intervening judgment or mortgage creditor of the mortgagor, especially where it is done in good faith, in ignorance of the existence of the intervening lien, and without any intention to release the lien of the mortgage.

59 C.J.S. Section 320, Renewal or Substitution of Mortgages. The Corpus Juris Secundum commentators view the Quicken transaction as a virtual renewal, which places it under the gambit of the Future Advance Clause, and certainly under the spirit of Restatement Section 7.3. A New Jersey court has applied similar rationale: "This "new loan" was in effect a "modification" as well as a "renewal" ... the court finds that the proceeds of the (Replacement) mortgage were used to take the place of the original (replaced) mortgage, which was a superior lien by recordation and by agreement to plaintiff's mortgages." See UPS Capital Business Credit v. Abbey, 408 N.J. Super. 524 (2009) at 528-529. The Restatement's Illustration 5 outlines a similar scenario regarding priority when a future advance clause is present.²

Because AFCU had notice at the time of its underwriting that future advances could be made by Quicken, the Replacement Mortgage should be given full priority because the expectations of AFCU did not change and it has not been materially prejudiced. For these reasons, DLJ should be granted priority and any potential foreclosure sale of the Subject Property should be subject to the Replacement Mortgage.

B. Alternative analysis of extent of material prejudice – the difference between the Payoff and the Replacement Mortgage principal balance

Assuming, arguendo, that the Court applies the legal doctrine of Replacement Mortgage to the language in the Future Advance Clause of the Replaced Mortgage and determines that material prejudice exists, the extent of the prejudice must be determined in order to rule on priority. While DLJ denies this is the appropriate analysis, it provides this discussion in the alternative. Because: (1) the language in the Future Advance Clause speaks for itself and (2) the Payoff is uncontroverted, there are no issues of material fact and a legal determination can be made by application of those facts as a matter of law.

² Illustration 5: Mortgagor borrows \$15,000 from Mortgagee-1 and gives Mortgagee-1 a promissory note for that amount secured by a mortgage on Blackacre. The mortgage states "this mortgage shall also secure all future loans or advances made by Mortgagee to Mortgagor." The obligation is due and payable in five years. The mortgage is immediately recorded. Two months later, Mortgagor borrows \$10,000 from Mortgagee-2 and gives Mortgagee-2 a promissory note for that amount secured by a mortgage on Blackacre. The latter mortgage is promptly recorded. A year later, Mortgagor and Mortgagee-1 agree to restructure their loan agreement. As a result of this agreement, Mortgagee-1 lends an additional \$20,000 to Mortgagor. Mortgagee-1 then releases its original mortgage of record and, a few days later, Mortgagor delivers to Mortgagee-1 a \$35,000 promissory note secured by a mortgage on Blackacre. The latter mortgage obligation carries the same interest rate and the full \$35,000 is due and payable five years thereafter. It does not secure future advances. The mortgage is promptly recorded. Mortgagee-1's \$35,000 mortgage is senior to Mortgagee-2's.

In Paragraph 20 of Exhibit A to AFCU's Memorandum in Support of its Motion for Summary Judgment, AFCU's Vice President admits that the extent of its prejudice is \$38,540.96. This amount reflects the difference between the amount of the Replacement Mortgage and the Payoff. ($\$296,000 - \$257,459.04 = \$38,540.96$). The first sentence of the Paragraph makes reference to cash loan proceeds given to the Baileys by Quicken (\$26,235.11), which is wholly irrelevant to priority since these were funds paid for by Quicken. Relevantly, Mr. Price quantifies the extent of his alleged damages from the Replacement Mortgage Transaction: "The refinance damaged the Credit Union's equity position by \$38,540.96." See Exhibit A to AFCU's Memorandum, Para. 20. Under no circumstance could AFCU argue that it was damaged to an extent greater than this amount under the Restatement analysis. The Restatement's Illustration 2 is analogous to the set of facts outlined (alternatively) here.³

DLJ argues alternatively that AFCU has not been materially prejudiced in an amount greater than \$38,540.96. For that reason, any foreclosure sale in this matter should be subject to the non-prejudicial amount of the Replacement Mortgage (\$257,459.04), which would remain as a senior mortgage on the Subject Property following the sale. Further and to the extent AFCU's sale proceeds exceeded AFCU's debt, Quicken would have a junior lien on the Subject Property in the amount of \$38,540.96 plus interest, costs, fees and other amounts due under its promissory note. DLJ would be entitled to surplus proceeds in that amount in the event of this alternate scenario and ruling by this Court.

C. Final analysis on Replacement Mortgage in this case

"The purpose of subrogation (replacement here) is to prevent a junior lien holder from converting the mistake of the lender into a magical gift for himself." Matrix, supra, dissenting opinion, J. Pleicones, (citing United States v. Baran, 996 F.2d 25 (2nd Cir. 1993)). Here, the mistake

³ **Illustration 1, with the caveat of Illustration 2, below:** Mortgagor borrows \$50,000 from Mortgagee-1 and gives Mortgagee-1 a promissory note for that amount secured by a mortgage on Blackacre. The mortgage obligation carries a fixed rate of interest and is to be amortized by fixed payments over 15 years. The mortgage is immediately recorded. Thereafter, Mortgagee borrows \$10,000 from Mortgagee-2 and gives Mortgagee-2 a promissory note for that amount secured by a mortgage on Blackacre. The latter mortgage is promptly recorded. Two years later, when the balance on Mortgagee-1's mortgage is \$49,000, Mortgagor and Mortgagee-1 agree to a replacement mortgage. Mortgagee-1 releases its original mortgage of record and Mortgagor delivers to Mortgagee-1 a new promissory note for \$49,000 secured by a mortgage on Blackacre. The mortgage obligation carries the same fixed rate of interest as its predecessor and is evenly amortized over 20 years. A few days later, Mortgagee-1 records the replacement mortgage. The latter mortgage is senior to Mortgagee-2's mortgage. **Illustration 2:** The facts are the same as Illustration 1, except that the replacement mortgage delivered to Mortgagee-1 secures a \$60,000 obligation. Mortgagee-1's replacement mortgage is senior to Mortgagee-2's mortgage except to the extent of \$11,000 and accruing interest thereon.

would seemingly be Quicken's failure to locate the publicly recorded Line of Credit Mortgage and ask AFCU for a legal subordination document. Equitable principles excuse this alleged negligence and allow the senior mortgagee to retain its priority. Even if Quicken had actual knowledge of the Line of Credit Mortgage, the Restatement 7.3 of Replacement Mortgages does not require AFCU's permission or allow AFCU "the ability to veto workouts or other flexible restructuring arrangements between mortgagors and senior lenders." See Restatement 7.3, supra, comment a; see also, Sovereign Bank supra at 7. Recognizing Quicken's priority here under these equitable principals: (a) reduces foreclosures and facilitates refinancing, (b) reduces title insurances premiums and (c) accomplishes the equitable maxim that no one (AFCU) should be enriched by another's loss. See Matrix, dissent, supra.; see also, Sovereign Bank, supra, at 6.

AFCU should not receive a magical gift. The equitable principles espoused in the Restatement Third of Property regarding Replacement Mortgages should be applied here in order to establish the priority of the Replacement Mortgage.

CONCLUSION

For the reasons stated herein, DLJ asks this Court for an Order denying Plaintiff's motion for summary judgment.

Respectfully submitted,



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