

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

U.S. Bank National Association, as
Trustee, successor in interest to Bank of
America National Association, as
Trustee, successor by merger to LaSalle
Bank National Association, as Trustee
for Residential Asset Mortgage Products,
Inc., Mortgage Asset-Backed Pass-
Through Certificates, Series 2007-RP1,

Plaintiff,

v.

Betty P. Hafez; ARF Financial Services,
LLC f/k/a Advance Restaurant Finance,
LLC; Comprehensive Legal Solutions,
Inc.; Midland Funding, LLC; Kiawah
Island Community Association, Inc.,

Defendants,

AND

Betty P. Hafez,

Third-Party Plaintiff,

v.

Ocwen Loan Servicing, LLC

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
CASE NO.: 2015-CP-10-03773

**MASTER IN EQUITY'S ORDER AND JUDGMENT OF
FORECLOSURE AND SALE**

DEFICIENCY WAIVED

FILED
2018 JUL -2 AM 10:33
JULIE HARRIS
CLERK OF COURT

RECEIVED

AUG 02 2018

SC Court of Appeals

INTRODUCTION:

The instant action is one for foreclosure of property located in Charleston County, South Carolina. The Lis Pendens, Summons and Complaint were filed July 7, 2015. In January 26, 2016, pursuant to Rule 53 of the South Carolina Rules of Civil Procedure (hereinafter "SCRCP"), the action was referred to the undersigned Master In Equity to make appropriate findings of fact and conclusions of law, with authority to enter a final Judgment in the cause. Defendant

Betty P. Hafez filed an Answer and Counterclaim and Third-Party Complaint on June 21, 2016. A bench trial was held on March 19, 2018. Present at the hearing was Chad W. Burgess of the firm of Brock and Scott, PLLC, on behalf of the Plaintiff and appearing on behalf of Defendant Betty P. Hafez was Susan M. Gaddy. Testimony was taken from the following witnesses: Cedric Bankston for the Plaintiff and Marcus Hodge and Saad Hafez, Jr. for the defense.

Based upon the arguments, testimony, and evidence presented at trial, I find and conclude as follows:

FINDINGS OF FACT:

The following events and dates are undisputed and relevant to the case:

1. Service was made upon the Defendants named in this Report as shown by the proofs of service filed herein.
2. According to an 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 fka Soldiers' and Sailors' Civil Relief Act of 1940, and any amendments thereto.
3. Defendants ARF Financial Services, LLC f/k/a Advance Restaurant Finance, LLC; Midland Funding, LLC; Kiawah Island Community Association, Inc. and Comprehensive Legal Solutions, Inc. are in default having failed to file an answer or other responsive pleading to Plaintiff's action.
4. All Defendants were notified of the time and date of the trial.
5. For value received, E.S.E. Hafez a/k/a Saad Hafez made, executed and delivered a note, dated August 23, 2003, promising thereby to pay to the order of Washington Mutual Bank, FA the sum of \$400,000.00 with interest at the rate of 3.949% per annum (hereinafter "Note"). Other



terms and conditions are stated in the note, which is of record herein (Plaintiff's Exhibit 2). Plaintiff is in possession of the original Note.

6. To better secure the payment of the Note described above, the said E.S.E. Hafez a/k/a Saad E. Hafez and Betty P. Hafez made, executed and delivered a mortgage to Washington Mutual Bank, FA, in writing, dated August 23, 2003, covering real property in Charleston County, which is the same as that described in the Complaint. The Mortgage was recorded on September 3, 2003, and is of record in the Charleston County Registry in Mortgage Book L465 at Page 670 (Plaintiff's Exhibit 3).

7. The mortgage constitutes a valid purchase money, first lien on the subject property.

8. There are four assignments of the subject Mortgage filed in the Charleston County Registry:

- A. An assignment from JPMorgan Chase Bank, N.A., as successor in interest to Washington Mutual Bank to Bank of America, National Association as successor by merger to LaSalle Bank National Association as Trustee recorded on January 21, 2010 in Book 103 at Page 231. Said Assignment appears to be invalid because no prior assignment of mortgage into the assignor, JPMorgan Chase Bank, N.A., was recorded prior to the recordation of this assignment.
- B. An assignment from Bank of America, National Association as successor by merger to LaSalle Bank National Association as Trustee Bank of America, National Association as successor by merger to LaSalle Bank National Association as Trustee for RAAC 2007RP1 recorded on October 18, 2011 in Book 212 at Page 393. Said Assignment appears to be invalid because the Mortgage based upon the 2010 assignment into Bank of America, National Association as successor by merger to LaSalle Bank National Association as Trustee being invalid.
- C. An assignment from The Federal Deposit Insurance Corporation, acting in its receivership capacity as receiver of Washington Mutual Bank f/k/a Washington



Mutual Bank, FA to JPMorgan Chase Bank, National Association by assignment recorded on May 28, 2015 in Book 0478 at Page 911 (Plaintiff's Exhibit 4).

D. An assignment from JPMorgan Chase Bank, National Association to the Plaintiff recorded on May 28, 2015 in Book 0478 at Page 914 (Plaintiff's Exhibit 5).

9. The titleholder of record of the Property as of filing of the Lis Pendens in the action was Betty P. Hafez.

10. Saad E. Hafez passed away on November 5, 2012. Betty P. Hafez passed away in December 2016, during the pendency of this action and after the filing of her Answer, Counterclaim, and Third-Party Complaint.

11. Payment due on the Note has not been made as provided for therein, and the Plaintiff, as the holder thereof, has elected to accelerate payment of the entire indebtedness and has placed the Note and Mortgage in the hands of its attorney of record herein for collection.

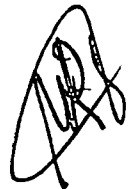
12. The Plaintiff is seeking foreclosure of its mortgage and has, in the Complaint or subsequently thereto in writing, expressly Waived the right to a personal or deficiency Judgment pursuant to Rule 71(b), SCRCF.

There are a number of relevant and disputed facts:

1. Plaintiff's witness, Cedric Bankston, testified as to the amounts due and owing to the Plaintiff outlined as follows:

Principal due as of today's date:	03/19/18		\$383,824.40
Deferred Principal Balance:			\$ 0.00
Accrued interest from:	11/01/10	to: 03/19/18	\$ 80,163.72
Accruing at:	2.842% per annum		
Advancements to Escrow			\$ 85,393.00
Corporate Advances			\$ 8,419.53
Late charges:			\$ 2,037.64

File reference: 14-13980



Other charges:	\$ 0.00
Credits:	\$ (700.54)
Costs of collection prior to hearing:	\$ 3,256.05
Attorney's fees:	\$ 11,480.00

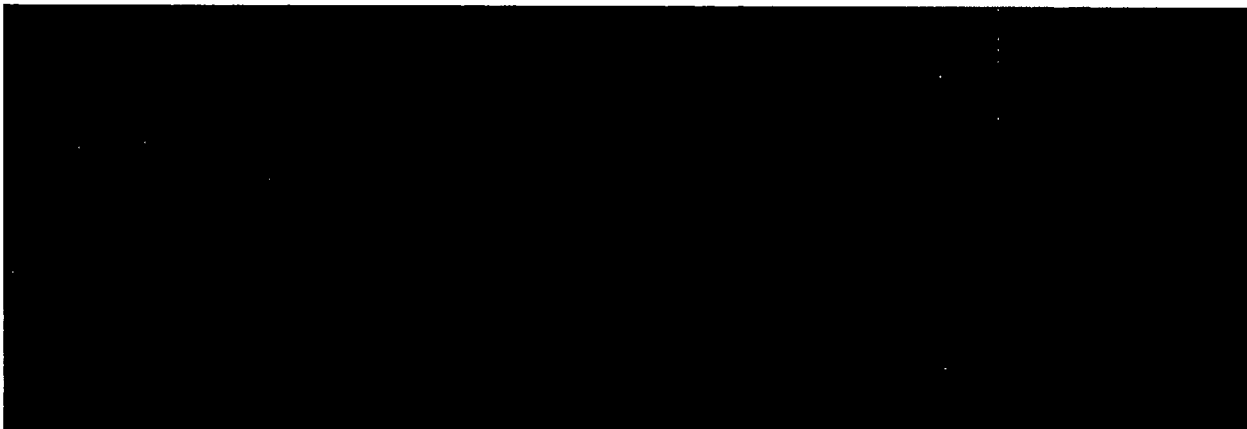
Total Debt secured by the Note and Mortgage including interest to date is \$573,873.80. Plaintiff seeks an award of interest for the period from the date shown above through the date of this judgment, at above stated rate to be added to the above stated "Total Debt" to comprise the amount of the Judgment entered herein, and interest after the date of Judgment at the rate 2.842% per annum, the Note's current rate, pursuant to the terms of the Note and Mortgage on the judgment debt should be added to such judgment debt to comprise the amount of Plaintiff's debt secured by the Mortgage through the date to which such interest is computed. The amount and measure of the Plaintiff's Attorney's fees and costs were outlined in Plaintiff's Exhibit 13 (Affidavit of Attorney's Fees and Costs) entered into evidence at trial. Defendant challenges the amount and computation of Plaintiff's debt.

2. Defendant asserts counterclaims against Plaintiff and third-party claims against Ocwen Loan Servicing, LLC. The counterclaims and third-party claims are for (1) breach of contract (2) RESPA violations: § 1024.35 – Error Resolution (3) RESPA violations: § 1024.36 – Requests for Information (4) RESPA violations: § 1024.38 – General Servicing Policies (5) RESPA violations: § 1024.40 – Continuity of Contact (6) RESPA violations: § 1024.41 – Loss Mitigation Procedures and (7) Vicarious Liability of Plaintiff Under Agency Theory. Defendant's claims stem from loan modification attempts that took place in 2012 and 2013. Plaintiff and Third-Party Defendant deny liability to Defendant.

ISSUES:

1. Is Plaintiff's calculation of the debt accurate?
2. Is Plaintiff entitled to add certain fees and charges to the loan?
3. Is the Defendant, through her estate, entitled to recovery for violations of RESPA?

File reference: 14-13980



4. Is the defendant entitled to actual and statutory damages and attorney's fees for violations of RESPA?
5. Were either of the servicing agents for Plaintiff properly put on notice of the death of Saad E. Hafez (a/k/a E.S.E. Hafez)?
6. Was the continued acceptance of payments tantamount to a new contract binding on the parties?

CONCLUSIONS OF LAW AND DISCUSSION:

I. A. Amount and measure of Plaintiff's damages

The first two issues outlined above relate to the amount and measure of Plaintiff's damages. "Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on the debt." *U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 205 (Ct. App. 2009). Mr. Bankston testified as to the amount and measure of Plaintiff's damages and copies of Plaintiff's business records were entered into evidence, including payment histories and a printout of Plaintiff's compilation of the debt (Plaintiff's Exhibits 8 through 10). It was established at trial that Plaintiff's business records do not contain a prior servicer's payment history for the years 2003 through 2006; however, it is undisputed that Saad E. Hafez made the require payments under the terms of the loan during that time frame.

The larger dispute regarding the amount and measure of Plaintiff's damages is the reliability of Plaintiff's business records. Defendant asserts that Plaintiff's business records related to the calculation of debt are unreliable. On cross examination, Mr. Bankston was not questioned in depth regarding the accuracy of Plaintiff's payment histories in terms of the readability of the histories. Mr. Bankston testified unequivocally as to the amounts outlined above.

Defendant's challenge to Plaintiff's debt hinged primarily on the testimony of its expert, Marcus Hodge. As a part of his testimony, Mr. Hodge presented what he asserted the payment history would look like for this loan for the years 2003 to 2006 (Defendant's Exhibit



2) which he testified was based upon the loan's Truth in Lending Statement dated August 28, 2003 (Defendant's Exhibit 3). Mr. Hodge's re-created payment history does not incorporate the terms of the note which indicate that the loan's interest rate is variable and tied to a specific index (Plaintiff's Exhibit 2). The Truth in Lending Statement has a capitalized disclosure that indicates "VARIABLE RATE: YOUR LOAN CONTAINS A VARIABLE-RATE FEATURE. DISCLOSURES ABOUT THE VARIABLE-RATE FEATURE HAVE BEEN PROVIDED TO YOU EARLIER" (Id). Based upon these facts, I find Marcus Hodge's payment history is not reliable.

Indeed, it appears Mr. Hodge's assertions regarding the reliability of Plaintiff's debt calculation were based upon his inability to read Plaintiff's business records, specifically the payment histories. Mr. Hodge's difficulty in reading the payment history does not render Plaintiff's calculation unreliable.

Plaintiff's business records regarding the debt appear to be consistent with each other as well as with the terms of the Note and Mortgage which, again, indicate that the interest rate for the subject loan was an adjustable one based upon an index. Defendant had the opportunity to cross-examine Plaintiff's witness in-depth regarding the figures shown in Plaintiff's business records and chose not to do so.

With respect to fees and costs to be included in Plaintiff's judgment, said items appear to be controlled by the terms of the subject Note and Mortgage. Paragraph 7(E) of the Note (Plaintiff's Exhibit 2) specifically allows for the recovery of costs associated with the enforcement of the Note. Likewise, Paragraphs 14 and 22 of the Mortgage (Plaintiff's Exhibit 3) provide for the recovery of the costs and expenses Plaintiff seeks in this foreclosure action.

Based upon the totality of the evidence presented, I find and conclude that Plaintiff's debt calculations are accurate. The total amount of the debt is established at \$573,873.80.

B. BREACH OF CONTRACT AND RESPA VIOLATION

Issues four through six outlined above relate to Defendant's counterclaims and 3rd party claims. Underlying all of Defendant's claims is the fundamental contractual question of whether there existed a valid loan modification. "Any modification of a written contract must satisfy all fundamental elements of a valid contract in order for it to be enforceable,



including a meeting of the minds between the parties with regard to all essential terms of the agreement.” *U.S. Bank Trust Nat. Ass’n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App 2009) citing *Player v. Chandler*, 299 S.C. 101, 104-05, 382 S.E. 2d 891, 893 (1989).

The evidence presented at trial does not support a valid loan modification agreement. The evidence presented indicates payment obligations under the terms of the Note and Mortgage became delinquent causing a breach of the terms of these documents. On September 26, 2012, GMAC, the prior servicer of the loan, offered Saad E. Hafez a Trial Payment Plan to involve three trial payments: November 1, 2012, December 1, 2012, and January 1, 2013 in the amount of \$2,878.64 (Plaintiff’s Exhibit 6). The Trial Period Plan was a part of a two-step process to permanently modify the terms of the loan.

Though Saad E. Hafez, the sole obligor under the terms of the Note, passed away in November 2012, all of the trial period payments were made (Plaintiff’s Exhibit 8). As a result, an offer of permanent modification (hereinafter “Offer”) was sent to the subject property addressed to Saad E. Hafez (Plaintiff’s Exhibit 7). The Offer called for total monthly payments in the amount of \$2,888.75 beginning February 1, 2013 with an interest rate initially of 2.000% per annum. The Offer was signed by Betty P. Hafez on January 25, 2013 and it is this document the defense purports to be a valid and enforceable agreement. Though Betty P. Hafez was a mortgagor under the terms of the Mortgage (Plaintiff’s Exhibit 3) and she signed a number of documents at closing including the Truth in Lending Disclosure Statement and HUD Settlement Statement (Defendant’s Exhibits 3), she was not an obligor under the terms of the Note (Plaintiff’s Exhibit 2). As such, she could not sign the Offer on her own behalf.

Further, no payments were made under the terms of the Offer, but rather in the amount of the Trial Period Plan, \$2,878.64 (Plaintiff’s Exhibits 6 and 8). Defendant continued to send in the Trial Period Plan payments for a number of months (through August 9, 2013) until the payments began to be returned based upon the arrearage. The acceptance of payments in an amount different from that on the Offer cannot constitute a binding contract between the parties.

Further still is the question as to whether or not either Ocwen or GMAC, as servicers of the subject loan during the time period in question, received the documents necessary to



have their records reflect the death of Saad E. Hafez. Mr. Bankston testified on cross examination that a copy of a deceased borrower's death certificate and documentation showing the appointment of a personal representative would be needed as a part of the process for updating the account for a deceased borrower. (Transcript, Page 31, line 18, et seq.).

The following exchange occurred regarding the necessary documents to have the loan's servicer update their records to reflect the death of Saad E. Hafez during cross examination of Saad Hafez, Jr.:

Q: And looking through the documents you provided from Ocwen, did you ever receive anything from them that said we have your – the death certificate and everything we need to speak with your mother or yourself regarding this loan?

A: No. All they would do is tell us they can't speak to us.

Q: They weren't showing that they received that document; would that be fair to say?

A: Even before they asked for it they wouldn't talk to me.

(Transcript, Page 157, Lines 6 – 16).

The above exchange supports a finding that the loan's servicers did not receive the documents required to update their records to reflect the death of Saad E. Hafez. Further, conspicuously absent from Defendant's exhibits were any copies of the death certificate for Saad E. Hafez or documentation as to Betty P. Hafez being appointed as the personal representative for Saad E. Hafez's estate which were purportedly sent to Ocwen. All of the correspondence from Ocwen presented in Defendant's Exhibits 6 and 7 were addressed to Saad E. Hafez, which indicates that their records had not been updated as a result of receipt of the necessary documentation regarding Saad E. Hafez's death.

In light of the foregoing, I do not find anything in the circumstances surrounding the passing of Saad E. Hafez and the subsequent loan modification Offer that would make the Offer a binding contract between the parties.



This Court acknowledges that the law regarding how loan servicers are required to treat successors in interest to a borrower has been evolving. See the 2018 Real Estate Settlement Procedures Act (Regulation X) and Truth in Lending Act (Regulation Z) Mortgage Servicing Rule Small Entity Compliance Guide dated October 18, 2017. Whether Defendant may have had a cause of action under RESPA or TILA if the facts of this case were to take place after April 19, 2018, the effective date of the provisions relating to successors in interest, is an exercise in speculation. Based upon the evidence presented, I cannot find that Plaintiff or Ocwen violated a provision of RESPA in effect during the time period at issue in this action.

With respect to the RESPA claims related to purported qualified written requests submitted on behalf of Defendant on August 17, 2016 and April 25, 2017 (Defendant's Exhibits 8 and 9), I cannot find grounds for a violation of RESPA based upon these documents as they are clearly dated after the date of Defendant's Answer, Counterclaim & 3rd Party complaint were filed on June 21, 2016.

In light of the foregoing, I find and conclude that Defendant cannot recover on her claims against Plaintiff or Ocwen for violations of RESPA.

FURTHER CONCLUSIONS OF LAW:

1. The Plaintiff should have judgment of foreclosure of its Mortgage; and the Property should be ordered sold at public auction after due advertisement.
2. That there is due to the Plaintiff on its Note and Mortgage the sum of \$573,873.80, representing the Total Debt due to the Plaintiff as outlined above, together with interest thereon at the rate provided in the Note to the date hereof.
3. That the amount due in the preceding paragraph (the "Total Debt") and later accrued interest and costs shall constitute the total judgment debt due to the Plaintiff and shall bear interest hereafter at the rate of 2.842% per annum, the current interest rate of the Note.



IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That the Defendant(s) liable for the aforesaid Mortgage debt shall, prior to the date and time of the sale of the Property, hereinafter described, pay to the Plaintiff, or the Plaintiff's attorney, the amount of the Plaintiff's debt as aforesaid, together with the costs and disbursements of this action.

2. That on default of payment prior to the date and time of the sale, the Property, hereinafter described, shall be sold by the undersigned Master in Equity at public auction, at the Charleston County Courthouse, City of Charleston, County and State aforesaid, on some convenient sales day hereafter, on the following terms, that is to say:

A. FOR CASH: The undersigned Master in Equity shall require a deposit of 5% on the amount of the bid (in cash or equivalent) the same to be applied on the purchase price only upon compliance with the bid, but in case of non-compliance within thirty (30) days the same to be forfeited and applied to the costs and then to the Plaintiff's debt.

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

C. Purchaser to pay for the deed and the cost of recording the deed.

3. If the Plaintiff is the successful bidder at the said sale, for a sum not exceeding the amount of costs, expenses and the indebtedness of the Plaintiff in full, the Plaintiff may pay to the undersigned Master in Equity only the amount of the costs and expenses, crediting the balance of the bid on the Plaintiff's indebtedness.

4. That a personal or deficiency Judgment being Waived, the bidding will not remain open for thirty (30) days and bidding will be final on the date of the sale, and compliance with the bid may be made immediately.



5. That the undersigned Master in Equity will, by advertisement according to law, give notice of the time and place of sale and the terms thereof; and that he/she will execute to the purchaser, or purchasers, a deed to the Property sold. The Plaintiff, or any other party to this action, or any other person may become a purchaser at such sale. If such sale is made to anyone other than the Plaintiff or its assignee, should the successful bidder, or his/her assignee, fail to comply with the terms thereof within thirty (30) after the date of sale, then the undersigned Master in Equity may re-advertise the Property for sale on the next, or some other subsequent, sales day, at the risk of the highest bidder, and so on from time to time thereafter until a full compliance shall be secured.

6. In the event an agent of the Plaintiff does not appear at the time of sale, the within property shall be withdrawn from sale and sold at the next available sales date upon the terms and conditions as set forth in the Judgment of Foreclosure and Sale or such terms as may be set forth in a supplemental order.

7. That the undersigned Master in Equity shall apply the proceeds of the sale as follows:
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; and
NEXT: To the payment of the amount to the Plaintiff, or the Plaintiff's Attorney, of the amount of the Plaintiff's debt and interest (including attorney fees) or so much thereof as the purchase money will pay on the same; and
NEXT: Any surplus will be held pending further Order of this Court pursuant to Rule 71(c), SCRPC.

8. That it is further ORDERED, ADJUDGED AND DECREED that each Defendant named herein, and all persons whomsoever claiming under him, them or it, 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.

9. That it is further ORDERED, ADJUDGED AND DECREED that the deed of conveyance made pursuant to this judgment and said sale shall contain the names of only the Plaintiff, the first-named Defendant, who was the title holder of the mortgaged property at the time of the filing of the Lis Pendens, and the Grantee; and that the Charleston County Register of



Deeds is hereby authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deed.

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

11. That it is further ORDERED, ADJUDGED AND DECREED that after the Order Confirming Sale and Disbursements has been issued and filed, the undersigned Master in Equity shall direct the Register of Deeds to release of record the lien(s) being foreclosed, which lien(s) are described in the Findings of Fact herein above.

12. That it is further ORDERED, ADJUDGED AND DECREED that the following is a description of the Property herein ordered to be sold:

ALL THAT CERTAIN PIECE PARCEL, LOT OR TRACT OF LAND WITH THE BUILDINGS AND IMPROVEMENTS THEREON, SITUATE, LYING AND BEING IN THE COUNTY OF CHARLESTON, STATE OF SOUTH CAROLINA, AND BEING KNOWN AND DESIGNATED AS LOT 78, OF TRACTS 30 & 34, BLOCK "9", PLANTATION WOODS SUBDIVISION, AS SHOWN ON A PLAT OF PLANTATION WOODS SUBDIVISION (421), MADE BY COASTAL SURVEYING CO., INC, DATED MARCH 9, 1979, HAVING LATEST REVISION DATED JULY 2, 1979, DULY RECORDED IN THE CHARLESTON COUNTY RMC OFFICE IN PLAT BOOK "AN" PAGE "139". SAID PARCEL HAVING SUCH SIZE, SHAPE, METES, BOUNDS, LOCATION AND DIMENSIONS AS SHOWN ON THE AFORESAID PLAT TO WHICH REFERENCE IS MADE.

SUBJECT TO ANY AND ALL RESTRICTIONS, COVENANTS AND EASEMENTS OF RECORD.



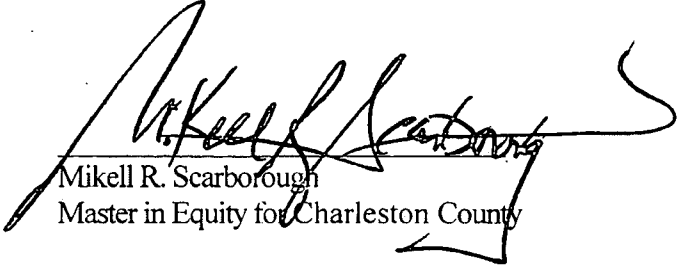
THIS BEING THE SAME PROPERTY CONVEYED TO E.S.E. HAFEZ AND BETTY P. HAFEZ AS JOINT TENANTS WITH RIGHTS OF SURVIVORSHIP AND NOT AS TENANTS IN COMMON BY DEED OF KIAWAH ISLAND COMPANY LIMITED DATED OCTOBER 1, 1979 AND RECORDED FEBRUARY 19, 1980 IN BOOK S-121, PAGE 319 IN THE RECORDS FOR CHARLESTON COUNTY, SOUTH CAROLINA. THEREAFTER, E.S.E. HAFEZ PASSED AWAY AND FULL TITLE PASSED TO BETTY P. HAFEZ BY OPERATION OF LAW.

CURRENT ADDRESS OF PROPERTY: 78 Surfsong Road, Kiawah Island, SC 29455

TMS: 246-13-00-056

AND IT IS SO ORDERED.

Date: 6/28/2018
Charleston, South Carolina


Mikell R. Scarborough
Master in Equity for Charleston County