

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Charles B. Simmons, Master-in-Equity

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Case No. 2010-CP-23-10468

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Bank of America, N.A.,

Respondent,

v.

Todd Draper, Mortgage Electronic Registration Systems, Inc., acting as nominee for American Home Mortgage, its successors and assigns, Shawn Kephart, Mathew H. Henrikson, The United States of America, by and through its Agency, the Internal Revenue Service, South Carolina Department of Revenue, Branch Banking and Trust Company, and Linkside III Homeowners Association, Inc.,

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SC Court of Appeals

of whom Todd Draper and Matthew H. Henrikson are

Appellants.

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FINAL BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

TITLE PAGE..... i

Table of Contents ..... ii

Table of Authorities ..... iii

Statement of the Issue on Appeal.....1

Statement of the Case.....1

Statement of the Facts.....2

Argument .....3

I. THE MASTER-IN-EQUITY PROPERLY GRANTED THE RESPONDENT’S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WAS NO TRIABLE ISSUE OF FACT REGARDING THE RESPONDENT’S STATUS AS THE SERVICER OF THE LOAN, AND BECAUSE, AS A MATTER OF LAW, THE SERVICER HAD THE RIGHT TO PURSUE THE FORECLOSURE ACTION IN ITS OWN NAME.....4

    A. The Respondent, as the Servicer of the Mortgage Loan, is the Real Party in Interest under Rule 17(a), SCRCP, and has Standing to Pursue the Foreclosure Action. ....4

    B. The Issue of the Original Note was not Genuine Because the Note has Remained with a Single Entity Since the Origination of the Loan and the Respondent had a Right, Under the Rules of Evidence, to Rely on its Photocopy, Thus the Grant of Summary Judgment was Proper.....8

Conclusion .....11

## TABLE OF AUTHORITIES

### Cases

<u>Bankers Trust v. 236 Beltway Inv.</u> , 865 F. Supp. 1186 (E.D. Va. 1994) .....	6
<u>CWCapital Asset Mgmt., LLC v. Chi. Props., LLC</u> , 610 F.3d 497 (7th Cir. 2010).....	7
<u>Dawkins v. Field</u> , 354 S.C. 58, 580 S.E.2d 433 (2003).....	11
<u>Greer v. O’Dell</u> , 305 F.3d 1297 (11th Cir. 2002) .....	6
<u>Hagy v. Pruitt</u> , 339 S.C. 425, 529 S.E.2d 714 (2000).....	7
<u>Hancock v. Mid-South Management Co.</u> , 381 S.C. 326, 673 S.E.2d 801 (2009) .....	4
<u>In re Mortg. Foreclosure Actions</u> , 396 S.C. 209, 720 S.E.2d 908 (2011).....	5
<u>In re Neals</u> , 459 B.R. 612 (Bankr. D.S.C. 2011). .....	6
<u>In re Tainan</u> , 48 B.R. 250 (Bankr. E.D. Pa. 1985).....	6
<u>In re Woodberry</u> , 383 B.R. 373 (Bankr. D.S.C. 2008) .....	5, 6
<u>Peterson v. W. Am. Ins. Co.</u> , 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999).....	3
<u>Saluda Motor Lines, Inc. v. Crouch</u> , 300 S.C. 43, 386 S.E.2d 290 (Ct. App. 1989).....	3, 10

### Statutes

12 U.S.C. § 2605(e)(1)(B) .....	4
S.C. Code Ann. § 36-3-301 (1976).....	8, 9

### Rules

Rule 1001(4), SCRE .....	9
Rule 1003, SCRE .....	9
Rule 17(a), SCRCPP .....	4, 7
Rule 56(c), SCRCPP .....	3

### Other Authorities

10B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2738 (3d ed. 1998).....	11
Adam J. Levitin & Tara Twomey, <u>Mortgage Servicing</u> , 28 Yale J. on Reg. 1 (2011).....	5
<u>Black’s Law Dictionary</u> (8th ed. 2004).....	5
Danny R. Collins, <u>South Carolina Evidence</u> (2d ed. 2000) .....	10

### STATEMENT OF THE ISSUE ON APPEAL

Did the lower court properly grant the Respondent's motion for summary judgment because the Respondent, as the mortgage servicer, is the real party in interest with standing to maintain a foreclosure action?

### STATEMENT OF THE CASE

On December 30, 2010, the Respondent initiated a foreclosure of its mortgage on the property located in Greenville County. (Am.R. p. 7). The Summons and Complaint listed BAC Home Loan Servicing, LP f/k/a Countrywide Home Loans Servicing, LP, as the plaintiff. (Am.R. pp. 5, 7). Following the service of process on all the parties involved and the filing of the responsive pleadings by the defendants - Todd Draper, Matthew H. Henrikson, Shawn Kephart, South Carolina Department of Revenue, the United States of America - and the Respondent, the Respondent moved for order referring the case to master-in-equity for final adjudication. (Am.R. p. 3). The circuit court referred the case to the Honorable Charles B. Simmons, Jr., Master-in-Equity for Greenville County. (Id.).

In late August 2011, the attorney for the Respondent moved for amendment of the caption to correctly reflect the name of the plaintiff as Bank of America, N.A.; the Respondent was the surviving entity of the merger with BAC Home Loan Servicing, LP. (Am.R. p. 2). The master-in-equity granted the motion and the caption was amended accordingly. (Id.).

On October 3, 2011, after completion of discovery, the Respondent moved for summary judgment on its cause of action on the grounds that no genuine issue existed as to the fact that it held note and mortgage and that the Appellant Todd Draper (Draper) was in arrears in payments on the note, owing the amount indicated in the Affidavit of Debt. (Am.R. pp. 4, 108-13). On October 19, 2011, the Appellant Mathew H. Henrikson (Henrikson) filed a motion for summary

judgment arguing that the Respondent did not own the debt and therefore lacked standing. (Am.R. p. 123).

Judge Simmons heard both motions on October 24, 2011. (Am.R. pp. 91-103). The Respondent's motion was granted while Henrikson's was denied. (Am.R. p. 99, line 6-p. 101, lines 23-5). The Order Granting Plaintiff's Motion for Summary Judgment is now being appealed to this Court.

#### STATEMENT OF THE FACTS

On August 25, 2005, Draper executed and delivered to America's Wholesale Lender, a division of Countrywide Home Loans, Inc., a promissory note for \$245,000.00 (Note). (Am.R. pp. 24-7). In order to secure the payment of the Note, Draper delivered to Mortgage Electronic Registration Systems, Inc., acting as nominee for America's Wholesale Lender, a mortgage encumbering a piece of real estate located at 106 Couples Court in Greenville, South Carolina (Mortgage). (Am.R. pp. 28-46). The Mortgage was recorded in Book 4424 at Page 1799 of the Greenville County Register of Deeds. (Am.R. p. 8).

The loan extended to Draper by America's Wholesale Lender in exchange for the Note and Mortgage, was funded by Freddie Mac, a secondary market investor. The Note bears an in-blank indorsement made by Countrywide Home Loans, Inc. (CHL), a New York corporation doing business as America's Wholesale Lender. (Am.R. p. 27).

Before acquisition of CHL by the Respondent, Draper's loan had been serviced by CHL's wholly owned subsidiary, Countrywide Home Loans Servicing, LP. Once the Respondent acquired CHL, Countrywide Home Loans Servicing, LP was renamed BAC Home Loans Servicing, LP, and, on July 1, 2011, merged into the Respondent. (Am.R. p. 2).

On December 29, 2010, Mortgage Electronic Registration Systems, Inc., acting as nominee for America's Wholesale Lender, transferred its rights under the Mortgage to BAC Home Loans Servicing, LP, by virtue of the assignment recorded on January 4, 2011 in Book 5106 at Page 4766. (Am.R. p. 8). Because of the merger with BAC Home Loans Servicing, LP, the Respondent became both the mortgagee and the servicer of the loan.

In August 2008, Draper stopped making monthly payments as scheduled under the Note and Mortgage. (Am.R. p. 54). Because Draper failed to cure the default, the Respondent chose to accelerate the debt and commenced the foreclosure action. (Am.R. p. 5).

#### ARGUMENT

On appeal from summary judgment under Rule 56 of the South Carolina Rules of Civil Procedure, the Court reviews the trial court's decision de novo. Rule 56, SCRCPP; see Peterson v. W. Am. Ins. Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999). "Summary judgment is properly upheld when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Id. (citing Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991)); Rule 56(c), SCRCPP. In determining whether any issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Id. at 95, 518 S.E.2d at 610, 611 (citing Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997)). "To justify departure from the course of the trial of an issue of fact and the award of summary judgment, the court must be convinced that the issue is not genuine but feigned and that there is in truth nothing to be tried. . . . The fact that there is a factual dispute is not enough to preclude a summary judgment." Saluda Motor Lines, Inc. v. Crouch, 300 S.C. 43, 46, 386 S.E.2d 290, 292 (Ct. App. 1989) (quoting 73 AM. JUR. 2D Summary Judgment § 27). "[I]n 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.” Hancock v. Mid-South Management Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

I. THE MASTER-IN-EQUITY PROPERLY GRANTED THE RESPONDENT’S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WAS NO TRIABLE ISSUE OF FACT REGARDING THE RESPONDENT’S STATUS AS THE SERVICER OF THE LOAN, AND BECAUSE, AS A MATTER OF LAW, THE SERVICER HAD THE RIGHT TO PURSUE THE FORECLOSURE ACTION IN ITS OWN NAME.

There is no genuine issue as to the fact that the Respondent is the servicer of the mortgage loan at issue in this case. Draper admitted in his response to the Respondent’s requests for admissions, that the payment history provided by the Respondent correctly reflected the status of his account. (Am.R. pp. 59-60). This admission constitutes a tacit acknowledgement on his part that the Respondent serviced the loan. Furthermore, the Appellants rely in their argument on the Respondent’s answer to Draper’s Qualified Written Request under 12 U.S.C. § 2605(e)(1)(B). (Am.R. p. 118-20). The Respondent’s letter to Draper states that it “services the loan on behalf of the owner.” (Am.R. p. 119). Accordingly, the fact that the Respondent is the servicer of Draper’s loan on behalf of Freddie Mac is beyond dispute in this case.

A. The Respondent, as the Servicer of the Mortgage Loan, is the Real Party in Interest under Rule 17(a), SCRC<sup>1</sup>, and has Standing to Pursue the Foreclosure Action.

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<sup>1</sup> Rule 17(a) of the South Carolina Rules of Civil Procedure provides that

[e]very action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the State. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Rule 17(a), SCRC<sup>1</sup>.

Neither this Court, nor the South Carolina Supreme Court, has precisely addressed the issue of a mortgage servicer's status as the real party in interest under Rule 17 of the South Carolina Rules of Civil Procedure, and whether it is entitled to prosecute foreclosure actions in its own name for the ultimate benefit of the secondary market investors, such as Freddie Mac or Fannie Mae. However, the South Carolina Supreme Court has implicitly acknowledged servicers' role in foreclosures of mortgages securing loans owned by other entities. See, e.g., In re Mortg. Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011) (discussing implications of the Home Affordable Modification Program for mortgage foreclosures and a need for addressing the breakdown in communications between the lender-servicers and the debtors; defining servicer – “any party acting on behalf of the owner and holder of the note and mortgage for the purpose of receiving payments, dealing with the mortgagor, or administering the loan evidenced by the note and mortgage, and any party seeking foreclosure of the subject mortgage, or otherwise acting as the agent of the owner and holder of the note in connection with the loan or the foreclosure of the note and mortgage,” as “mortgagee” for the purposes of the order).

According to Black's Law Dictionary, mortgage servicing involves “administration of a mortgage loan, including the collection of payments, release of liens, and payment of property insurance and taxes [and is] usually performed by the lender or the lender's agent, for a fee.” Black's Law Dictionary 1034 (8th ed. 2004). Oftentimes, servicers “are responsible for handling defaulted loans, including prosecuting foreclosures and attempting to mitigate investors' losses.” Adam J. Levitin & Tara Twomey, Mortgage Servicing, 28 Yale J. on Reg. 1, 23 (2011).

Status of a mortgage servicer as the real party in interest has been thoroughly discussed by courts in the bankruptcy context. In In re Woodberry, 383 B.R. 373 (Bankr. D.S.C. 2008), the

United States Bankruptcy Court for the District of South Carolina surveyed the law of other jurisdictions, concluding that they “tend to favor the view that a loan servicer is a ‘party in interest’ and a ‘real party in interest.’” Id. at 379. According to the court, the general rule seems to be “that a mortgage servicer has standing by virtue of its pecuniary interest in collecting payments under the terms of the note and mortgage.” Id. The court cited, inter alia, Bankers Trust v. 236 Beltway Inv., 865 F. Supp. 1186, 1191 (E.D. Va. 1994), which held that a servicer has standing to foreclose even if it does not hold the mortgage, and a 2002 decision of the United States Court of Appeals for the Eleventh Circuit, concluding that a “loan servicer is a ‘real party in interest’ with standing to conduct, through licensed counsel, the legal affairs of the investor relating to the debt that it services.” Greer v. O’Dell, 305 F.3d 1297, 1299 (11th Cir. 2002). More recently, the United States Bankruptcy Court for the District of South Carolina again expressed an opinion that “there is general view in this jurisdiction and others, that a loan servicer is a ‘party in interest’ and has standing . . . .” In re Neals, 459 B.R. 612, 617 (Bankr. D.S.C. 2011).

The Bankruptcy Court for the Eastern District of Pennsylvania in In re Tainan, 48 B.R. 250 (Bankr. E.D. Pa. 1985), addressed the servicer’s standing to seek relief from a bankruptcy stay where the mortgage sought to be foreclosed was owned by Fannie Mae. The court concluded that finding the servicer to be the real party in interest accords with the purpose of Rule 17(a) of the Federal Rules of Civil Procedure, that is, “to protect individuals from the harassment of suits by persons who do not have the power to make final and binding decisions concerning prosecution, compromise and settlement.” Id. at 252. Thus, according to the court, the purpose of the rule would imply that an action did not have to be brought in the name of the entity that would ultimately benefit from the recovery, such as the owner of the loan, but rather by the entity that is entitled to enforce the right. Id. (citing 6 Wright & Miller, Federal Practice

and Procedure § 1543 (1971 2d reprint 1984)). The discussion of purpose of the federal rule is relevant in the instant case because South Carolina adopted federal rules and the language of the Rule 17(a), SCRCP, mirrors the language of its federal counterpart. See, e.g., Hagy v. Pruitt, 339 S.C. 425, 430 n.6, 529 S.E.2d 714, 717 n.6 (2000).

The Seventh Circuit's opinion in CWCapital Asset Mgmt., LLC v. Chi. Props., LLC, 610 F.3d 497 (7th Cir. 2010), illustrates the proposition that servicers of loans owned by other entities can pursue actions in their own name. CWCapital involved a mortgage loan bought from its originator, pooled with a number of other loans and then securitized. Id. The loan was owned by a securitization trust, whose trustee, Bank of America, N.A., delegated servicing to CWCapital Asset Management, LLC. Id. Judge Posner, writing for the court, held that the "servicer is much like an assignee for collection, who must render to the assignor the money collected by the assignee's suit on his behalf (minus the assignee's fee) but can sue in his own name without violating Rule 17(a)." Id. at 500-01 (citing Sprint Communications Co. v. APCC Services, Inc., 554 U.S. 269, 128 S. Ct. 2531 (2008)). The court found that there could be no doubt about the servicer's standing, as it had a personal stake in the outcome of the case because it received a percentage of the proceeds of a defaulted loan that it serviced. Id. According to Judge Posner, it is

the servicer, under the [Pooling and Servicing Agreement], who has the whip hand; he is the lawyer and the client, and the trustee's duty, when the servicer is carrying out his delegated duties, is to provide support. The securitization trust holds merely the bare legal title; the Pooling and Servicing Agreement delegates what is effectively equitable ownership of the claim . . . to the servicer.

Id. at 501.

Though the instant case does not involve a securitized mortgage loan, the Seventh Circuit's analysis of the relationship of the servicer and the trustee appears to be highly relevant.

The relationship of Freddie Mac, as the owner of the loan, and the Respondent, as its servicer, is analogous to the one of CWCapital Asset Management, LLC and Bank of America, N.A. in the CWCapital case. Thus, even though Freddie Mac owns the subject loan, the Respondent has, in the Seventh Circuit's words, an "equitable ownership of the claim," and, therefore, standing to pursue it.

- B. The Issue of the Original Note was not Genuine Because the Note has Remained with a Single Entity Since the Origination of the Loan and the Respondent had a Right, Under the Rules of Evidence, to Rely on its Photocopy, Thus the Grant of Summary Judgment was Proper.

The South Carolina Commercial Code provides that in order to collect on the note one has to be either the holder of the note, a nonholder in possession of the note, or a person in possession who nonetheless is entitled to enforce it. S.C. Code Ann. § 36-3-301 (1976). Respondent is the holder of the note. (Am.R. p. 10). Therefore, it had the right to prosecute the foreclosure of the mortgage securing its payment.

Though the Respondent did not produce the original of the Note, the fact of its possessing it cannot be genuinely questioned. The Respondent presented a copy of the Note to Draper; it was attached to the plaintiff's requests for admissions. (Am.R. pp. 22-7). The Respondent asked Draper to admit or deny that the attached copy was an accurate copy of the Note. (Am.R. p. 23). Draper responded that he was unable to admit or deny without seeing the original. (Am.R. pp. 59). The Appellants maintain that it is "important to have the original to look at because that's the only way that you can make sure where this has been assigned, where the endorsements are, who actually owns the note." (Am.R. p. 97, lines 17-20). According to the Appellants, the importance of the original lies in the fact that a copy "freezes that note in time the copy is made." (Am.R. p. 97, line 16).

This argument is hardly genuine in light of the fact that Draper delivered the Note to America's Wholesale Lender, a division of Countrywide Home Loans, Inc., which was then acquired by the Respondent. (Am.R. pp. 2, 24-7). The Note remained with one entity, while only the entity's name and ownership changed. (Am.R. p. 2). More importantly, the Appellants' argument has no merit because producing the original of the Note would establish the Respondent's right to enforce the Note notwithstanding the type and number of indorsements. Production of the original would be the ultimate proof of possession, thus allowing the Respondent to enforce the Note pursuant to S.C. Code Ann. § 36-3-301 (1976), as the holder of the Note – if indorsed in blank, or, if indorsed to Freddie Mac or other entity, as the nonholder in possession.

Under the South Carolina Rules of Evidence, the Respondent had a right to rely on a photocopy of the note in pursuing this action. According to Rule 1001(4) of the South Carolina Rules of Evidence, a photocopy of a document constitutes its duplicate, which, pursuant to Rule 1003 “is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.” Rule 1003, SCRE. The Appellants, however, did not question the authenticity of the Note itself, the copy of which was presented to them with the requests for admission. (Am.R. pp. 22-7). The Appellants merely state in their response, that they would need to see the original in order to “accurately admit that the Exhibit ‘A’ [- a copy of the note], is a true and accurate copy.” (Am.R. pp. 59, 75).

The second condition of non-admissibility of duplicates under Rule 1003 is also not met in this case.

Unfairness requires some infirmity of the duplicate itself. [For instance u]se of an incomplete copy may be unfair because it may omit a vital part of the original or

may change the meaning of the original because the copied portion is taken out of context. However, minor omissions that do not really affect the contents of the original are usually not unfair. The determination whether use of the duplicate is unfair is for the trial court, and its decision will not be reversed except for abuse of discretion.

Danny R. Collins, South Carolina Evidence, 415 (2d ed. 2000) (citations omitted). In the case at bar, there were no circumstances which would render admission of the duplicate unfair to the Appellants, nor did the Appellants indicate any.

According to the South Carolina Supreme Court, the issue raised by a party opposing motion for summary judgment must be genuine. Saluda Motor Lines, 300 S.C at 45, 386 S.E.2d at 292 (citing Witt v. Poole, 182 S.C. 110, 188 S.E. 496 (1937)). “It is not sufficient that evidence create a farfetched inference. . . . Either motion should be granted or denied based on the whole of the evidence, and in making the determination the judge should not select any one morsel of testimony and attach significance to it unless it be genuine or reasonable.” Id. In light of the Appellants’ admissions that Draper was in default in payments and the presented payment history was correct, and the fact that the Respondent is the assignee of the mortgage securing the payment of the loan, the grant of summary judgment was proper.

Furthermore, Appellants did not submit any admissible evidence that Respondent did not have the right to maintain the action. In opposition to Respondent’s motion for summary judgment, Appellants submitted two affidavits - an affidavit by the borrower, Todd Draper, and an affidavit by the defendant, Matthew Henrikson. (Am.R. pp. 116-22). In paragraph 2 of Draper’s affidavit and in paragraph 5 of Henrikson’s affidavit is the statement “[t]hat upon information and belief, the Plaintiff is not the owner of the Note or the owner of the debt upon which the foreclosure has been based, and in fact the affiant has been informed by the Plaintiff that Freddie Mac is the owner of the debt.” (Am.R. pp. 116, 122). Paragraph 4 of Draper’s

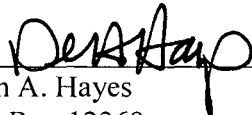
affidavit and in paragraph 7 of Henrikson's affidavit contains the statement "[t]hat the affiant is informed and believes that the Plaintiff does not have standing to bring this foreclosure action." (Id.).

These statements in the affidavits cannot be considered in opposition to Respondent's motion for summary judgment, as "[a]llegations made upon information and belief do not meet the 'personal knowledge' requirements of Rule 56(e)" of the South Carolina Rules of Civil Procedure. Dawkins v. Field, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003) (citing Scheinkopf v. Stone, 957 F.2d 1259 (1st Cir. 1991); Fowler v. Southern Bell Tel. & Tel. Co., 343 F.2d 150 (5th Cir. 1965); Seay v. Allstate Ins. Co., 59 N.C. App. 220, 296 S.E.2d 30 (1982)). "[U]ltimate or conclusory facts and conclusions of law, as well as statements made on . . . 'information and belief' cannot be utilized on a summary judgment motion." 10B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §2738 (3d ed. 1998). Thus, Appellants have submitted no evidence in opposition to Respondent's right to maintain this action as servicer of the loan and holder of the note.

#### CONCLUSION

For the reasons stated above, this Court should affirm the Order Granting Summary Judgment.

Respectfully submitted,

  
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October 5, 2012

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Charles B. Simmons, Master-in-Equity

Case No. 2010-CP-23-10468

Bank of America, N.A.,

Respondent,

v.

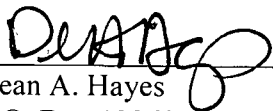
Todd Draper, Mortgage Electronic Registration Systems, Inc., acting as nominee for American Home Mortgage, its successors and assigns, Shawn Kephart, Mathew H. Henrikson, The United States of America, by and through its Agency, the Internal Revenue Service, South Carolina Department of Revenue, Branch Banking and Trust Company, and Linkside III Homeowners Association, Inc.,

of whom Todd Draper and Matthew H. Henrikson are

Appellants.

CERTIFICATE OF COUNSEL

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

  
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