THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-46-03040
Appellate Case No. 2013-001524

Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1, ... Respondent,

v.

Cora B. Wilks, David C. Wilks, Chase Bank USA, N.A., and Midland Funding, LLC, ... Defendants,

Of whom Cora B. Wilks and David C. Wilks are ..... Appellants.

FINAL BRIEF OF RESPONDENT

Michael J. Anzelmo
B. Rush Smith, III
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Attorneys for Respondent Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1

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STATEMENT OF ISSUES ON APPEAL

1. The trial court correctly granted the Respondent's motion to dismiss the Appellants' counterclaim with prejudice because the closing occurred prior to the effective date of the Matrix decision, which only applies prospectively.

2. The Appellants failed to preserve their appellate arguments for review by this Court because they raise the specific arguments in their appellate brief for the first time on appeal.

3. If the arguments are preserved, the governing precedent from the South Carolina Supreme Court bars the Appellants' request for this Court to adopt a sweeping application of the doctrine of unclean hands because such a position is in direct contravention to South Carolina case law that is directly on point.

STATEMENT OF THE CASE

Plaintiff Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1 ("Deutsche Bank"), initiated this action on May 20, 2011, by filing a complaint seeking to foreclose on a mortgage given by Defendants Cora B. Wilks and David C. Wilks ("the Wilkses"). (Compl., R. at 6.) In response, the Wilkses filed an answer and counterclaim, seeking to avoid the foreclosure on the ground that a licensed attorney did not supervise the closing. (Answer & Counterclaim, R. at 19.)

Deutsche Bank filed a motion to dismiss the Wilkses' counterclaim on November 29, 2012. (Motion to Dismiss, R. at 49.) Following a hearing, the trial court granted the motion to dismiss by written order entered on June 12, 2013. (Order, R. at 2-5.) The Wilkses filed this appeal on July 15, 2013. (Notice of Appeal, R. at 58.)

FACTS

The Wilkses executed the mortgage and loan documents that are the subject of this action on May 23, 2005, for property located in Rock Hill, York County, South Carolina. (Compl. ¶ 7, R. at 7.) The mortgage was recorded in the Register of Deeds Office for York County on June 1, 2005. (Compl. ¶ 9, R. at 7.) The mortgage was subsequently assigned to Deutsche Bank on April 28, 2011, and recorded on May 9, 2011. (Id.)

Because they defaulted on the loan, Deutsche Bank filed a foreclosure action against the Wilkses. (Compl., R. at 6.) All notices required by the note and mortgage and by state and federal law were provided to the Wilkses. (Compl. ¶ 11, R. at 7.)

The Wilkses owed Deutsche Bank $89,483.68, which represents the principal sum owed since January 1, 2010, together with interest from December 1, 2009, advances, late charges, and the costs of the foreclosure action. (Compl. ¶ 12, R. at 7.) In their answer, the Wilkses admitted that they executed the mortgage and loan documents. (Answer & Counterclaim ¶¶ 2–3, 5, R. at 19, 20.)

The Wilkses filed a counterclaim against Deutsche Bank, seeking to bar it from receiving the equitable relief of foreclosure. (Answer & Counterclaim ¶¶ 4–13, R. at 20-21.) The Wilkses claimed that "the actions of [Deutsche Bank], by its authorized agents and employees, in closing the subject mortgage in a manner that constitutes the unauthorized practice of law, precludes it from obtaining the equitable relief afforded by a mortgage foreclosure action." (Answer & Counterclaim ¶ 13, R. at 21.) In their answer and counterclaim, the Wilkses cited to and relied upon the following two cases as supporting their counterclaim: Matrix Financial Services. Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011) ("Matrix"), and BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 731 S.E.2d 547 (2012) ("BAC"). (Answer & Counterclaim at ¶ C, R. at 21.)

Deutsche Bank moved to dismiss the Wilkses' counterclaim. (Motion to Dismiss, R. at 49.) Deutsche Bank argued that the holdings of Matrix and BAC expressly apply only prospectively[1] to mortgages recorded after August 8, 2011, and

[1] As set forth fully below, the South Carolina Supreme Court held that closing a real estate loan without the presence of a licensed South Carolina attorney constitutes the unauthorized practice of law, and thus, bars the lender from subsequently seeking equitable relief related to the loan. See Matrix Fin. Servs. Corp., 394 S.C. at 138–40, 714 S.E.2d at 534–35; BAC Home Loan Servicing, L.P., 398 S.C. at 624, 731 S.E.2d at 549–50. However, the Court specifically held that its holding only applies to cases in which the mortgage was recorded after the filing of the Matrix decision, which was August 8, 2011. See

therefore, the Wilkses' counterclaims fail as a matter of law (even when the allegations of the counterclaims are taken as true). (Motion to Dismiss at 2, R. at 50; Tr. of Hearing at 2–3, 5–6, R. at 53-54, 56-57.) Because the Wilkses' mortgage was recorded on June 1, 2005, Deutsche Bank argued that the Wilkses could not assert the holdings of Matrix and BAC as a bar to Deutsche Bank's foreclosure claim.

At the hearing on Deutsche Bank's motion to dismiss and in the subsequent written order, the trial court held that it agreed with Deutsche Bank and dismissed the Wilkses' counterclaim as a matter of law, in accordance with the controlling South Carolina law announced in Matrix and BAC. (Tr. of Hearing at 5–6, R. at 56-57; Order at 2–3, R. at 3-5.) On appeal, the Wilkses concede that "[t]here is no argument as to the precedential background of this case," citing Matrix and BAC, and they "acknowledge that their mortgage was filed June 1, 2005, prior to the issuance and prospective application of Matrix, August 8, 2011." (Brief of App. at 5.).

STANDARD OF REVIEW

When reviewing a trial court's dismissal of a claim for failure to state facts sufficient to constitute a cause of action under Rule 12(b)(6), SCRCP, "the appellate court applies the same standard of review as the trial court." Logan v. Cherokee Landscaping & Grading Co., 389 S.C. 611, 617, 698 S.E.2d 879, 882 (Ct. App. 2010) (citing Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 112, 659 S.E.2d 158, 161 (2008)). "'The question for the court is whether in the light most favorable to the [claimant], and with every doubt resolved in his behalf, the allegations set forth on

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Matrix Fin. Servs. Corp., 394 S.C. at 140, 714 S.E.2d at 535; BAC Home Loan Servicing, L.P., 398 S.C. at 624, 731 S.E.2d at 550.

the face of the [pleading] state any valid claim for relief.'" Id. (quoting Sloan Constr. Co., 377 S.C. at 112–13, 659 S.E.2d at 161).

ARGUMENT

I. This Court should affirm the trial court's order and reject the Wilkses' appellate argument because they failed to preserve their argument for appellate review.

The Wilkses argue on appeal that "[d]eliberate violation of the law debars the Respondent from equitable relief, and specifically from the relief of foreclosure." (Brief of Appellants at 8.) The Wilkses failed to make this argument to the trial court. Therefore, the Wilkses failed to preserve it for appellate review. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal . . . ."). This Court should affirm.

At the hearing on Deutsche Bank's motion to dismiss, the Wilkses argued that this Court's 2010 decision in Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), supported denial of Deutsche Bank's motion to dismiss their counterclaim. (Tr. of Hearing at 3–4, R. at 54-55.) In Coffey, Wachovia closed a home equity loan without the supervision of an attorney and later instituted foreclosure proceedings. Coffey, 389 S.C. at 76, 698 S.E.2d at 248. The 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. Id.

The next year, in Matrix, the South Carolina Supreme Court reiterated this Court's holding in Coffey, and noted the following:

> Enforcing this requirement [of attorneys at real estate closings] 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.

Matrix Fin. Servs. Corp., 394 S.C. at 140, 714 S.E.2d at 535 (citing Coffey, 389 S.C. at 76, 698 S.E.2d at 248, and Buyers Serv. Co., 292 S.C. at 431–33, 357 S.E.2d at 18–19). However, the Supreme Court expressly held, "We apply this ruling to all filing dates after the issuance of this opinion." Id.

A year after Matrix, the South Carolina Supreme Court made another clarification to the law by explaining that the relevant filing date, for purposes of prospectively applying the Matrix holding, "is the date the document a party seeks to enforce was filed." BAC Home Loan Servicing, L.P., 398 S.C. at 624, 731 S.E.2d at 550. Thus, the South Carolina Supreme Court has left no doubt that in order for a borrower to assert the defense of failure to close the loan with the presence of a licensed attorney, the loan must involve a mortgage that was filed/recorded after August 8, 2011, the filing date for Matrix.

At the hearing before the trial court, the Wilkses argued that, although Coffey predated Matrix and BAC, those later cases did not expressly overrule Coffey, and thus, the court was not bound by the prospective only application announced in Matrix. (Tr. of Hearing at 3–4, R. at 54-55.) Yet, counsel for the Wilkses acknowledged at the hearing "that because Matrix is a later case in a line of cases and because it is the Supreme Court, it may be viewed as implicitly overruling or limiting [Coffey]." (Tr.

of Hearing at 4, R. at 55.) Importantly, the Wilkses failed to argue that the Matrix and BAC rule did not apply because the lender closed the loan with disbarred counsel.[2]

The trial court considered and denied the Wilkses' above arguments, noting as follows at the hearing:

> . . . I see little, if any, difference between Matrix and BAC and this, the Coffey case. . . . The only qualification is that Matrix would add an additional component or element to the test; namely, when did the closing occur. I believe that I must rule that it does add that additional requirement which . . . just limits . . . the Coffey case.

(Tr. of Hearing at 5, R. at 56.) In its written order, the trial court held that this case is governed by the holdings announced in Matrix and BAC, which required dismissal of the Wilkses' counterclaims. (Order at 2, R. at 3.) The trial court certainly did not rule on any argument that the Matrix and BAC rule did not apply because the lender closed the loan with disbarred counsel.

For the first time in this case, the Wilkses now argue on appeal that Matrix and BAC do not apply because Deutsche Bank committed a willful violation of the law because "the mortgage transaction in question was closed by—or with the connivance

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[2] The Wilkses also sought to distinguish Matrix by arguing at the hearing that the facts of their case "are rather more serious" and that the Coffey case "involves . . . actions within the state of South Carolina;" whereas, Matrix involved an out of state case. (Id.) Such an argument certainly does not raise the issue that the Wilkses now argued on appeal. Our preservation rules require the party to be sufficiently specific in raising the issue in order to bring into focus the precise nature of the alleged error. See, e.g., Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733. The Wilkses failed to do so. They made **no** argument related to disbarment as a distinguishing ground for Matrix and BAC before the trial court.

In any event, this argument lacks merit because Matrix did not involve an out of state closing, but instead, involved a mortgage loan closing for property located in Greenville, South Carolina. The only out of state component of the Matrix case was that the Frazers, the borrowers, moved to South Carolina from California, and a California resident had obtained a default judgment against them in a case filed prior to their move to South Carolina. Thus, the closings at issue in Coffey, Matrix, BAC, and the Wilkses' case all occurred in South Carolina. See BAC Home Loan Serv., L.P., 398 S.C. at 621, 731 S.E.2d at 548 (Aiken County); Matrix Fin. Servs. Corp., 394 S.C. at 136, 714 S.E.2d at 533 (Greenville County); Coffey, 389 S.C. at 71, 698 S.E.2d at 245-46 (Beaufort County).

of—disbarred counsel." (Id. at 7.) The Wilkses cite to treatise material and one 1928 case as supporting their new argument that "[i]t is axiomatic that if equity will aid a Defendant faced with forfeiture of a contract, so long and [sic] she may demonstrate a lack of wilfullness [sic] in her default, it must also condemn a Plaintiff guilty of, or chargeable with, willfulness in its wrongdoing." (Id.)

Thus, rather than arguing that this Court should follow Coffey, as the Wilkses argued below, they now argue that this Court should reverse because the alleged willful nature of Deutsche Bank's conduct renders Matrix and BAC inapplicable. The trial court never heard or ruled upon this new argument; therefore, the Wilkses failed to preserve it for appellate review. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.").

Accordingly, this Court should refuse to consider the Wilkses' appellate arguments because they are not preserved. This Court should affirm the trial court's order dismissing the Wilkses' counterclaim with prejudice.

II. This Court should affirm the trial court's order dismissing the counterclaim because the Wilkses failed to state any claim for which relief can be granted as a matter of law.

Even if this Court finds that the Wilkses' appellate argument is preserved, the trial court still properly granted Deutsche Bank's motion to dismiss the counterclaim.

Although the Wilkses claim that Deutsche Bank closed their loan without the presence of a licensed South Carolina attorney, the trial court correctly concluded that South Carolina law does not allow the Wilkses to avoid foreclosure on this basis because they closed their loan prior to the effective date of the law that allows such claims. Thus, assuming the Wilkses' allegations to be true for purposes of a motion to dismiss, the Wilkses still fail to state a claim upon which relief can be granted as matter of law. This Court should affirm.

In Matrix, the South Carolina Supreme Court held that "[a]ll real estate and mortgage loan closings must be supervised by an attorney" and that "closing a loan without the supervision of an attorney constitutes the unauthorized practice of law." Matrix Fin. Servs. Corp., 394 S.C. at 138–39, 714 S.E.2d at 534 (citing Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2003), and State v. Buyers Serv. Co., 292 S.C. 426, 430–34, 357 S.E.2d 15, 17–19 (1987)). The court in Matrix went on to note that a lender that closes a loan without the supervision of a licensed attorney is barred from subsequently seeking equitable relief as to that loan. Id. at 139, 714 S.E.2d at 534 (citing Coffey, 389 S.C. at 76, 698 S.E.2d at 248). However, the Supreme Court made clear in Matrix that it only "appl[ies] this ruling to all filing dates after the issuance of this opinion." Id. at 140, 714 S.E.2d at 535.

To alleviate confusion in the interpretation of which filing date the Matrix court intended, the South Carolina Supreme Court subsequently clarified its ruling in the BAC case. There, the court explained:

> In Matrix we reiterated that the closing of a loan without attorney supervision constitutes the unauthorized practice of law. Furthermore, we held that engaging in this unlawful behavior would preclude a lender from

> obtaining equitable relief. However, in a substitute opinion issued on rehearing, we explained that this holding would be prospective only, stating we would "apply this ruling 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***.

BAC Home Loan Servicing, L.P. , 398 S.C. at 624, 731 S.E.2d at 549–50 (internal citations omitted) (emphasis added). In BAC, the court noted that the mortgage at issue "was recorded . . . well before the issuance of Matrix. Thus, regardless of whether an attorney participated in the closing of Mortgage 2, BAC would not be barred from recovery by the illegality." Id. at 624, 731 S.E.2d at 550.

In the present appeal, the trial court properly noted that the Wilkses' mortgage (that they admit executing) "was recorded on June 1, 2005, more than six years before the decision in Matrix." (Order at 2–3, R. at 3-5.) Accordingly, the trial court aptly held that "the [Wilkses'] counterclaim cannot state a claim upon which relief can be granted, and fails as a matter of law." (Id. at 3, R. at 4.) Because the trial court correctly interpreted and applied the governing law as set forth in Matrix and BAC, this Court should affirm the trial court's order granting Deutsche Bank's motion to dismiss the Wilkses' counterclaim with prejudice.

III. Alternatively this Court should affirm because the Wilkses appellate argument, even if preserved, fails as a matter of law.

Even if this Court finds that the Wilkses' appellate argument is preserved, their argument still fails to advance any basis for reversing the trial court's correct ruling. As noted above, the Wilkses do not challenge the holdings of Matrix and BAC in this appeal. Instead, the Wilkses seek to avoid application of that controlling precedent,

which is directly on point with the facts of this case, by arguing for a broader application of "'[t]he maxim that a person who comes into equity must come with clean hands.'" (Brief of App. at 6 (quoting 7 AM. JUR. 2D Equity § 129 (2002)). The Wilkses rely on portions of the treatise material which state that "'the maxim [of unclean hands] refers to willful misconduct and not merely negligent misconduct.'" (Id.)

The Wilkses then seek to distinguish the facts of Matrix and BAC with the facts of their case by arguing that in those cases the lender closed the loan without an attorney present; whereas in this case, the lender closed the loan with "disbarred counsel." (Brief of App. at 7.) The Wilkses argue that in Matrix and BAC, the lenders were "ignorant of the laws of this State," unlike the present case, where the lender allegedly "committed a deliberate violation of those laws." (Id.) The Wilkses argument avails them nothing for several reasons.

First, this Court should reject the Wilkses' request for a sweeping application of the doctrine of unclean hands where the South Carolina Supreme Court has already addressed the application of that principle to the facts of this case. In Matrix and BAC, the Supreme Court specifically addressed the doctrine of unclean hands and its application in the context of a loan closed without the presence of a licensed South Carolina attorney. See Matrix Fin. Servs. Corp., 394 S.C. at 138–39, 714 S.E.2d at 534 (explaining that Matrix closed the refinance loan "without the supervision of a licensed attorney" and addressing appellant's argument that "Matrix is not entitled to an equitable remedy because it closed the refinance loan unlawfully, and thus has unclean hands"); BAC Home Loan Serv., L.P., 398 S.C. at 621, 731 S.E.2d at 548

(reaffirming the Matrix holding that closing a loan without attorney supervision is "unlawful behavior [that] would preclude a lender from obtaining equitable relief," as long as the mortgage was recorded after the filing of Matrix). Thus, the Wilkses improperly ask this Court to apply the doctrine of unclean hands in direct contravention to the holdings of Matrix and BAC, which are controlling authority in this case.

Second, the Wilkses allege that the Matthew Davis who was disbarred is the same Matthew Davis who signed as a witness to the loan closing, although he may not have attended the closing.[3] The Wilkes incorrectly argued at the hearing before the trial court and to this Court that Mr. Davis was disbarred at the time of the closing. (Tr. of Hearing at 4 (counsel for the Wilkes arguing that "we have a fellow closing loans who was suspended, and I believe I'm correct, in 2005, and then disbarred prior to the time this was done"), R. at 55; Brief of Appellant at 7 (arguing that "Appellants have alleged and presented *prima facie* proof, that the mortgage transaction in question was closed by . . . disbarred counsel").)

[3] The Wilkses do not allege in their answer which of the two witnesses, Mr. Davis or Mr./Mrs. Meetze, attended the closing. They only allege that one other person joined them at the closing, but do not specify who. (Answer & Counterclaim ¶ 8, R. at 20.) In the counterclaim, the Wilkses asserted that they attended the closing of their loan at the local Bojangles and were joined by "one other person," although the mortgage contains the signatures of two witnesses. (Answer & Counterclaim ¶¶ 7–8, R. at 20.) The Wilkses do not allege the identity of the person who attended the closing with them. (Id.) The two witness signatures appear to be those of a Mr. or Mrs. Meetze (the first name is not legible) and a Matthew E. Davis. (Mortgage at 14–15, R. at 36-37.) The Wilkses allege that neither witness was "an attorney licensed to practice law within the State of South Carolina." (Answer & Counterclaim ¶ 10, R. at 20.) The Wilkses allege that the Matthew E. Davis who signed the mortgage as a witness is the attorney Matthew Edward Davis, who previously practiced law at McGuire Woods LLP in Charlotte, North Carolina and was admitted to practice in South Carolina in 2006. (Answer & Counterclaim ¶ 11 & Ex. to Answer, R. at 20.) The Wilkses further allege that this same Mr. Davis was suspended from the practice of law in South Carolina on February 4, 2005, and disbarred on May 5, 2011. (Answer & Counterclaim ¶ 12 (citing In the Matter of Matthew E. Davis, Order (entered Feb. 4, 2005) (ruling that "respondent's license to practice law in this state is suspended until further order of the Court"); and In the Matter of Matthew Edward Davis, Op. No. 27071 (filed Dec. 5, 2011) (disbarring respondent from the practice of law), R. at 20-21.) The order disbarring Mr. Davis identifies him as from Gilbert, South Carolina. See In the Matter of Matthew Edward Davis, Op. No. 27071 at 1.

However, this is manifestly false. Matthew Davis was not disbarred until December 5, 2011, and the Wilks closed their loan on May 23, 2005. See In the Matter of Matthew Edward Davis, Op. No. 27071. (filed Dec. 5, 2011) (disbarring respondent from the practice of law), see also Mortgage, R. at 25. Assuming, *arguendo*, that the same Mr. Davis closed the Wilkses' loan, Mr. Davis had been suspended, not disbarred, from the practice of law, at the time of the closing. See In the Matter of Matthew E. Davis, Order (entered Feb. 4, 2005) (ruling that "respondent's license to practice law in this state is suspended until further order of the Court").

Accordingly, if this Court considers the Wilkses' appellate arguments, this Court should reject their arguments, finding them unsupported, and affirm the trial court's order dismissing the Wilkses' counterclaim with prejudice.

CONCLUSION

For the foregoing reasons, Deutsche Bank respectfully requests that this Court affirm the trial court's grant of its motion to dismiss the Wilkses' counterclaim in this case.

{Signature Page Follows}

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Michael J. Anzelmo
SC Bar No. 72933
E-Mail: michael.anzelmo@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Attorneys for Respondent Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1

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CERTIFICATE OF COUNSEL

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

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Michael J. Anzelmo
SC Bar No. 72933
E-Mail: michael.anzelmo@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Attorneys for Respondent Deutsche Bank National Trust Company, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Deutsche Bank National Trust Company, as Trustee for JPMorgan Acquisition Trust 2007-CH1, Asset Backed Pass Through Certificates, Series 2007-CH1, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: FINAL BRIEF OF RESPONDENT

Counsel Served:

John Martin Foster
Post Office Box 106
Rock Hill, SC 29731

Jennifer B. Lee
Administrative Assistant

June 23, 2014