

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master-in-Equity

Case No. 2009-CP-23-11051

Appellate Case No. 2012-212894

RECEIVED
JAN 31 2013
SC Court of Appeals

CitiMortgage, Inc.,

Respondent,

vs.

William H. Smith, Jr. a/k/a William H. Smith; Angella S. Smith.; The South
Carolina Department of Revenue

Of whom William H. Smith, Jr. a/k/a William H. Smith and Angella S. Smith are

Appellants.

RECORD ON APPEAL

[Counsels' name and addresses on the following page]

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Greenville, SC 29604
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Thad H. Westbrook
Sarah B. Nielson
Nelson Mullins Riley & Scarborough LLP
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(803) 799-2000
Attorney for Respondents

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE 2010 MAY 10 PM 1:23 DOCKET NO. 09-CP-23-11051

CitiMortgage, Inc.,

Plaintiff,

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL E. PICKENS

JUDGMENT OF FORECLOSURE AND SALE

Deficiency Judgment Waived

Subject to Home Affordable Modification
Program, but will not be modified

v.

William H. Smith, Jr. a/k/a William H. Smith;
Angella S. Smith; The South Carolina Department
of Revenue;

Defendant(s).

(011654-03607)

ENTERED COMPUTER

Samuel C. Waters, Esquire
Attorney for the Plaintiff

Ronald W. Urban, Esquire
Attorney for The South Carolina Department of Revenue

A hearing was held April 27, 2010 at 09:15 AM. Evidence was presented, which is reported herewith, and from the evidence, I find and conclude as follows:

FINDINGS OF FACT:

1. The Lis Pendens was filed on December 30, 2009.
2. The Summons and Complaint were filed on December 30, 2009.
3. Service was made upon all Defendant(s) as shown by the proof(s) of service filed herein.
4. The Defendant(s) William H. Smith, Jr. a/k/a William H. Smith and Angella S. Smith are in default as shown by affidavit or order filed herein.
5. The Defendant(s) William H. Smith, Jr. a/k/a William H. Smith and Angella S. Smith are in default and that the Defendant(s) William H. Smith, Jr. a/k/a William H. Smith and Angella S. Smith are not in the Military Service of the United States of America, as contemplated under The Servicemembers Civil Relief Act, 50 U.S.C. § 501 et. seq. as shown by affidavit or order filed herein.
6. No Defendant raised any issues related to Plaintiff's standing to prosecute this

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SCANNED

Verified

action.

7. Pursuant to the South Carolina Supreme Court Administrative Order dated May 22, 2009, the Plaintiff set forth its belief in its Complaint or by Affidavit, which is already of record in this case, that the mortgage loan which is the subject of this foreclosure action is not eligible for modification pursuant to the terms of the Home Affordable Modification Program (HMP). Pursuant to the South Carolina Supreme Court Administrative Order dated May 22, 2009, Plaintiff's attorney has not received a counter affidavit from any Defendant(s).

8. The South Carolina Department of Revenue filed an answer through their attorney, Ronald W. Urban, Esquire.

9. All Pro Se Defendant(s) and all attorneys of record were notified of the time, date, and place of the hearing by letter and certificate of mailing of record herein.

10. William H. Smith and Angella S. Smith for value received, made, executed and delivered a(n) Fixed Rate Note dated February 4, 2005 promising thereby to pay to Plaintiff or its predecessor the sum of \$200,000.00 with interest at 5.25% per annum. Other terms and conditions are stated in the Fixed Rate Note, of record herein.

11. To better secure the payment of the Fixed Rate Note described above, William H. Smith, Jr. and Angella S. Smith made, executed, and delivered to Mortgage Electronic Registration Systems, Inc., acting solely as nominee for RBC Mortgage Company (MIN #100058900101753622) a certain real estate Mortgage in writing, dated February 4, 2005 covering real property in Greenville County, which is the same as that described in the Complaint. This Mortgage was filed on February 24, 2005, and is of record in the Office of RMC/ROD in Book 4318 at Page 542. This Mortgage was subsequently assigned to the Plaintiff herein by assignment dated November 17, 2006 and recorded December 7, 2006 in Book 4689 at Page 1286. This Mortgage is subject to a Loan Modification Agreement dated April 1, 2009 and recorded July 29, 2009 in Book 5050 at Page 2794.

12. This Mortgage constitutes a first priority lien on the subject property, subject only to ad valorem taxes or other liens given priority by statute.

13. Plaintiff in this action is the owner and holder or nominee for the owner and holder of the Fixed Rate Note and first Mortgage it is seeking to foreclose, and the real party in interest pursuant to Rule 17(a) of the South Carolina Rules of Civil Procedure.

14. The titleholder(s) of record in and to the subject property as of the filing of the lis pendens in this action are William H. Smith, Jr. and Angella S. Smith, who are the original mortgagor(s).

15. Any notice required by the terms of the Mortgage or by state or federal statutes was given to the applicable Defendant(s) prior to the commencement of this action.

16. Payment due on the Fixed Rate Note was not made as provided for therein, and Plaintiff, as the holder or nominee for the holder thereof, elected to require immediate payment of the entire amount due thereon and placed the Fixed Rate Note and Mortgage in the hands of the attorney herein for remedy by foreclosure.

17. The sum of \$5,500 is a reasonable fee to allow Plaintiff's counsel for services performed and anticipated to be performed until final adjudication of this action, under the terms of the Fixed Rate Note and Mortgage. This fee is likewise reasonable based on the time necessarily devoted to representation of Plaintiff during the several month course of these proceedings. The services of counsel performed for Plaintiff, which include the number and types of pleadings and documents prepared, the incumbent liabilities, and the difficulties involved in this particular case also support the fee awarded. The fee is also reasonable given the professional standing of Plaintiff's counsel and their experience in handling foreclosure matters. The fee awarded herein is also reasonable in light of the fees customarily awarded by this court for similar services in this locality. Moreover, the efforts of Plaintiff's counsel have had the beneficial result of a prompt foreclosure of the Mortgage. Services anticipated to be performed until final adjudication contemplate completion of this matter within a reasonable time and does not include exceptional circumstances delaying conclusion beyond the normal time.

18. According to Plaintiff's accounting, after all payments received by Plaintiff have been credited to the subject loan, the amount due and owing on the Fixed Rate Note, with interest at the rate provided in the Fixed Rate Note, advances made by Plaintiff, and other costs and expenses of the action, including a reasonable attorney fee, all secured by the Fixed Rate Note and Mortgage, is as follows:

(a)	Principal due September 1, 2009	\$215,273.33
(b)	Interest from August 1, 2009 through April 27, 2010 at 5.25% per annum	\$8,492.97
(c)	Advances (Escrow advances, corporate charges, paid attorney fees, paid costs and expenses from the foreclosure action, and/or other charges)	\$3,217.49
(d)	Costs of collection prior to hearing (service, filing, etc.)	\$32.50
(e)	Late Charges	\$215.28
(f)	Attorney Fee (awarded herein, but unpaid)	\$4,765.00
TOTAL debt secured by Fixed Rate Note and Mortgage, including interest to date shown		\$231,996.57

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Interest shall accrue to the above stated "Total Debt" after the date of judgment at the rate of 5.25% per annum (pursuant to the terms of the Fixed Rate Note and first Mortgage). Accrued interest shall be added to the "Total Debt" and shall comprise the amount of the Plaintiff's debt secured by the first Mortgage through the date to which such interest is computed.

19. Plaintiff is seeking the usual foreclosure of the first mortgage and has in the Complaint (or subsequently thereto in writing) expressly waived the right to a personal or deficiency judgment.

20. The following Defendant(s) may claim a subordinate lien upon or subordinate legal interest in the subject property and in the event there is a surplus from the sale of the subject property, these Defendant(s) may present through any such lien or legal interest a claim to the surplus at a hearing subsequent to the sale, in accordance with Rule 71(c) South Carolina Rules of Civil Procedure. The said Defendant(s) and such liens or legal interests are as follows:

a. The South Carolina Department of Revenue by virtue of a Tax Lien against William Smith and Angella Smith; Tax Lien No.: 3-51083922-3; Dated: October 19, 2009; Recorded: October 26, 2009; in the amount of \$628.61; in Book 44 at Page 1367.

IT IS THEREFORE ORDERED:

21. Plaintiff has fully complied with The South Carolina Supreme Court Administrative Order dated May 22, 2009, and the foreclosure action may proceed.

22. There is due on the Fixed Rate Note and first Mortgage set forth in the Complaint the sum of \$231,996.57, as set out in the Findings of Fact *supra*, together with interest at the rate provided therein on the balance of principal from the date aforesaid to the date hereof.

23. The amount due in the preceding paragraph (the "Final Total Debt" as set out in the Findings of Fact *supra*) shall accrue interest at the rate of the respective note rate(s) per annum and together with such interest shall constitute the total judgment debt due Plaintiff.

24. The amount of the judgment shall be subject to increase to permit Plaintiff to recover additional costs, commissions, and expenses not included in the minimum deposit previously made in compliance with S.C. Code Ann. §14-11-310 (1976). It may also increase to include supplemental compensation for attorneys' services not contemplated by the initial fee award. Jurisdiction over the fee award and total debt is reserved to facilitate the assessment and payment of any such costs or supplemental compensation. Such additional costs, commissions and expenses may be established by affidavit and shall be adjudicated by the court without further hearing.

25. The Defendant(s) liable for the aforesaid judgment debt of the Fixed Rate Note and Mortgage including interest at the rate of 5.25% per annum shall pay on or before the date of

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sale of the property hereinafter described, to Plaintiff or Plaintiff's attorney the amount of Plaintiff's debt as aforesaid, including with the costs and disbursements of this action.

26. On default of payment at or before the time of the sale of the property, the mortgaged property described hereinafter shall be sold at public auction at the Greenville County Courthouse, in the City of Greenville, and State of South Carolina on a sales day determined by the below signed Master in Equity or Special Referee, on the following terms:

a. For cash or its equivalent: An immediate deposit of 5% is required on the amount of the bid. The deposit will be applied to the purchase price when total compliance is made. In the event compliance is not made, the deposit shall be forfeited without further hearing and applied first to costs and expense of the action and then to plaintiff's debt. Should the successful bidder at the regularly conducted sale fail or refuse either to make the required deposit at time of bid or to comply with the other terms of the bid within 0 days, then the property may be re-sold on the same terms and conditions on the same or some subsequent sales day and at the risk of the defaulting bidder.

b. Interest on the balance of the bid after the deposit is applied shall be paid through the day of compliance at the note rate of 5.25%.

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

d. Purchaser shall pay for any statutory commission on sale from the proceeds of the final bid amount.

e. Purchaser to pay for deed preparation, costs of recording the deed and the satisfaction of mortgage, and transfer taxes on the deed.

f. Purchaser shall be entitled to possession of the premises only after Purchaser fully complies with the bid amount and a deed is issued by the Master in Equity or Special Referee.

27. A personal or deficiency judgment having been waived, the bidding will not remain open after the date of sale and compliance with the bid may be made immediately.

28. Plaintiff may waive any of its rights, including its right to a deficiency judgment in accordance with Rule 71, of the South Carolina Rules of Civil Procedure, prior to sale.

29. The Master in Equity will give notice of the time and place of the sale by advertisement according to law and the terms thereof by advertisement according to law and will execute to the Purchaser a deed to the property sold. Plaintiff or any other party to this action may become a purchaser at such sale. If, upon such sale being made, the Purchaser should fail to comply with the terms

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thereof within 0 days after date of sale, then the Master in Equity may advertise the said premises for sale 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.

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

31. The Master in Equity will apply the proceeds of the sale as follows:

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

NEXT: To the payment to Plaintiff or Plaintiff's attorney of the amount of Plaintiff's debt and interest (including a reasonable attorney fee) or so much thereof as the purchase money will pay on the same;

NEXT: Any surplus should be held pending further Order of this court.

32. In the event the successful bidder is someone other than the Defendant(s) in possession of the subject property, the Sheriff of Greenville County is ordered and directed to eject and remove from the property 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 property without delay, and to keep said successful bidder or his assigns in such peaceable possession.

33. In the event the successful bidder is other than the Defendant(s) in possession of the subject property and the occupants have voluntarily vacated the property or have been ejected from the property leaving furnishings, fixtures and items not subject to Plaintiff's Mortgage in said property, the Purchaser is authorized to remove from the property all furnishings, fixtures and items not subject to the lien of Plaintiff's Mortgage. The personal property, being deemed abandoned, shall be removed by the Purchaser or its agents from the subject property by placing said personal property on the public street or highway or by any other means.

34. The Defendant(s) named herein, and all persons whosoever claiming under Defendant(s), are forever barred and foreclosed of all right, title, interest, equity of redemption or lien in the said mortgaged property so sold, or any part thereof.

35. In accordance with Rule 77(d), of the South Carolina Rules of Civil Procedure, the Clerk of Court shall serve a notice of entry of this Judgment of Foreclosure upon all parties not in default for failure to appear in this action.

36. The deed of conveyance made pursuant to the foreclosure sale shall contain the names of only the first-named Plaintiff and the first-named Defendant(s), and the Defendant(s) who

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was/were the titleholder(s) of the mortgaged property at the time of the filing of the notice of pendency of the within action, and the name of the grantee. The Register of Deeds/Clerk of Court is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deed.

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

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

All that certain piece, parcel or lot of land, situate, being in the State of South Carolina, County of Greenville and being shown on Survey of Angella J. Stephens dated June 28, 1983 by Carolina Surveying Company, containing 0.72 acres, more or less, said plat being recorded in the RMC Office for Greenville County in Plat Book 9-U at Page 96, reference to which plat is hereby made for a more particular description.

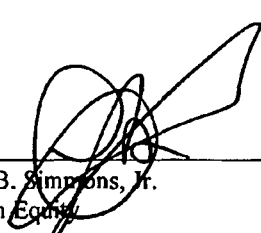
Less and Excepting: 892 feet of land and all improvements thereon, if any, along a relocated centerline as shown on plans between approximate survey stations 172 +47.76 and 192+ 61.86, which was conveyed to the South Carolina Department of Transportation by deed dated October 27, 2003 and recorded December 12, 2003 in Book 2067 at Page 117.

This being the same property conveyed to Angella Jean Stephens by deed of Ronald Stephens and Betty Wade Stephens, dated July 1, 1983 and recorded July 1, 1983 in Deed Book 1191 at Page 596; subsequently, Angella S. Smith f/k/a Angella Jean Stephens conveyed her interest to Angella S. Smith and William H. Smith, Jr. by deed dated March 13, 1997 and recorded May 19, 1997 in Deed Book 1690 at Page 409.

Property Address: 2812 Brushy Creek Road
Greer, SC 29650

TMS# 0538.07-01-007.03

4/27, 2010
Greenville, South Carolina


Charles B. Simmons, Jr.
Master in Equity

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

2010 MAY 10 PM 1:23

CASE NO: 2009CP2311051

FILED-CLERK OF COURT

GREENVILLE CO. S.C.

PAUL B. WICKENSIMER

Citimortgage Inc vs. William H Smith Jr

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a),
SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy:
- ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- ☐ Other: _____

IT IS ORDERED AND ADJUDGED:

☐ See attached order;

☐ Statement of Judgment by the Court:

See attached Order

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 10th day of May, 2010, and a copy mailed first class this 10th day of May, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Eve Moredock S Stacey Rogers Townsend &
Thomas, Pc P.O. Box 100200 Columbia, SC
292023200

Ronald W. Urban SC Department Of Revenue
Po Box 12265 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC APP-24/FORM 4

Paul B. Wickensimer Greenville County Clerk Of Court

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

CitiMortgage, Inc.,

Plaintiff,

v.

William H. Smith, Jr. a/k/a William H. Smith;
Angella S. Smith; The South Carolina Department
of Revenue;

Defendant(s),

(011654-03607)

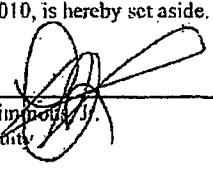
IN THE COURT OF COMMON PLEAS

DOCKET NO. 09-CP-23-11051

ORDER SETTING ASIDE SALE
Deficiency Judgment Waived

I have been advised by the attorney for the Plaintiff that the Defendant(s), William H. Smith, Jr. a/k/a William H. Smith, and CitiMortgage, Inc. entered into settlement negotiations, prior to the scheduled sale of the property that is the subject of this foreclosure action. Plaintiff has moved for the sale to be set aside so settlement negotiations may continue.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the foreclosure sale, which occurred on June 7, 2010, is hereby set aside.



Charles B. Simpson, Jr.
Master in Equity

_____, South Carolina
7/1, 2010

RECEIVED
JUL - 5 2010
Clerk of Court
Greenville County

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2009-CP-23-11051

Citimortgage Inc vs. William H Smith Jr

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON: ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ ACTION STRICKEN (CHECK REASON: ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

IT IS ORDERED AND ADJUDGED:

☐ See attached order;

☐ Statement of Judgment by the Court:

See attached order

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 8th day of July, 2010, and a copy mailed first class this 8th day of July, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Eve Moredock S Stacey Rogers Townsend &
Thomas, P.C. Box 100200 Columbia, SC
292023200

Ronald W. Urban SC Department Of Revenue
Po Box 12265 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC APP-24/FORM 4

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

CPFORM461

In re Mortgage Foreclosure Actions
 Supreme Court of South Carolina : May 2, 2011 : 395 S.C. 209 : 720 S.E.2d 908 (Approx. 3 pages)

RELATED TOPICS

Rights and Liabilities of Parties

Mortgagee Negligent Management of
Mortgaged Premises

Re: MORTGAGE FORECLOSURE ACTIONS.

No. 2011-05-02-01. : May 2, 2011.

Opinion

Return to list 1 of 4 results Search term

JEAN H. TOAL, Chief Justice.

*209 On May 22, 2009, I issued an Administrative Order (Order No. 2009-05-22-01) applicable to mortgage foreclosure actions subject to the Home Affordable Modification Program ("HMP") instituted by the United States Treasury Department ("Treasury"). The program applied to residential loans owned, securitized or guaranteed by the Federal National *210 Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac).

Subsequently, Treasury issued, by directive, additional guidance to servicers for adoption and implementation of the HMP for residential mortgage loans that are not owned, securitized or guaranteed by Fannie Mae or Freddie Mac. However, the HMP is only applicable to such loans if the lender or servicer has agreed to participate in the HMP. Not all lenders or servicers have so agreed.

Since imposition of my prior order, the number of foreclosure actions filed in this State have continued to increase. The trial courts having jurisdiction over such actions have reported to this Court difficulty in making final disposition of these actions as a result of failed or delayed loss mitigation efforts between lender-servicers and mortgagor-debtors. As a result, the number of unresolved foreclosure actions has increased, with a resulting burden on the resources of the Court before which the action is pending.

The courts have reported that these failures are the result of a breakdown of loss mitigation efforts that all parties find to be in their best interests, if possible. The trial courts report that such breakdowns are largely the result of difficulty in communication between lender-servicers and debtors, and the fact that foreclosure actions are proceeding to conclusion without regard to ongoing loss mitigation efforts by the parties.

I further take judicial notice of the actions of courts in other jurisdictions describing a similar breakdown in the efforts of parties to foreclosure actions to reach a resolution of defaults in payment of mortgage loans.

Therefore, based on the foregoing, and in order to insure that eligible homeowners and lender-servicers have been afforded the benefits of loan modification or other loss mitigation where possible, and to insure that the procedures for handling issues relating to such efforts are handled uniformly throughout the State, so that mortgage foreclosure actions are not unnecessarily dismissed; delayed or inappropriately concluded while loan modification or other loss mitigation efforts are being pursued, it is ordered as follows:

*211 A. Definitions:

For the purposes of this administrative order, the following definitions shall apply:

- (1) "Mortgagor" shall include every owner, mortgagor, and debtor under the note and mortgage at issue.
- (2) "Mortgagee" shall include the owner and holder of the note and mortgage, 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, except for the mortgagee's attorney.

(3) "Owner-Occupied dwelling" is defined as mortgaged real property that is the principal residence of any mortgagor.

(4) "Court" shall include any judicial officer having jurisdiction over the foreclosure action, including any Circuit Court Judge, Master-in-Equity or Special Referee.

(5) "Foreclosure intervention" shall include any policy, process or procedure employed by a Mortgagee for the purpose of seeking a resolution of a foreclosure action "909 by loan modification or other means of loss mitigation.

B. Procedure in Foreclosure Actions:

The terms and conditions of this order shall apply to all mortgage foreclosure proceedings concerning Owner-Occupied dwellings in this State.

(1) Actions pending on May 9, 2011.

In all mortgage foreclosure actions pending on May 9, 2011, before any merits hearing in the case, or if an order of foreclosure has been entered, before any foreclosure sale, the Mortgagee shall, through its attorney of record, file with the court and serve upon every Mortgagor a notice of the Mortgagor's right to foreclosure intervention. All proceedings in the foreclosure action shall be stayed until completion of such foreclosure intervention.

*212 No foreclosure hearing or foreclosure sale may be held in the foreclosure action until the Mortgagee's attorney certifies the following:

(a) that the Mortgagor has been served with a notice of the Mortgagor's right to foreclosure intervention for the purpose of seeking a resolution of the foreclosure action by loan modification or other means of loss mitigation;

(b) that the Mortgagee, or its designated agent, has received and examined all documents and records required to be submitted by the Mortgagor to evaluate eligibility for foreclosure intervention;

(c) that the Mortgagor has been afforded a full and fair opportunity to submit any other information or data pertaining to the Mortgagor's loan or personal circumstances for consideration by the Mortgagee;

(d) that after completion of the foreclosure intervention process, the Mortgagor does not qualify for loan modification or other means of loss mitigation, in accordance with any standards, rules or guidelines applicable to the mortgage loan, and the parties have been unable to reach any other agreement concerning the foreclosure process; and,

(e) that notice of the denial of loan modification or other means of loss mitigation has been served on the Mortgagor by mailing such notice to all known addresses of the Mortgagor; provided, that such notice shall also state that the Mortgagor has 30 days from the date of mailing of notice of denial of relief to file and serve an answer or other response to the Mortgagee's summons and complaint.

If within thirty days after having been served with notice of the Mortgagor's rights, the Mortgagor has failed, refused, or voluntarily elected not to participate in any foreclosure intervention process, the Mortgagee, through its attorney, shall certify that fact to the Court, and the foreclosure action may proceed.

(2) Actions filed after May 9, 2011.

In all mortgage foreclosure actions filed after May 9, 2011, the Mortgagee's attorney shall serve on the Mortgagor, along with the summons and complaint, a notice of the Mortgagor's right to foreclosure intervention.

*213 No foreclosure hearing may be held in the foreclosure action until the Mortgagee's attorney certifies that the Mortgagee has complied with the requirements of paragraphs B(1)(a) through (e) above.

If within thirty days after having been served with notice of the Mortgagor's rights, the Mortgagor has failed, refused, or voluntarily elected not to participate in any foreclosure intervention process, the Mortgagee, through its attorney, shall certify that fact to the Court, and the foreclosure action may proceed.

C. General Conditions.

Throughout the foreclosure intervention process and the foreclosure action, the Mortgagee shall communicate with and otherwise deal with the Mortgagor through the Mortgagee's attorney, and the Mortgagor shall have the right to deal with the Mortgagee through the Mortgagee's attorney. This includes, without limitation, submission of all required

information, negotiations, and consummation of any loan modification or other loss mitigation agreement. If the Mortgagor "910 is represented by an attorney, then the Mortgagee shall communicate with and otherwise deal with the Mortgagor through the Mortgagor's attorney.

No document, statement or evidence of any kind shared, released or exchanged exclusively for purposes of foreclosure intervention pursuant to this order shall be admissible as evidence in any subsequent proceeding. The provisions of Rule 8 of the Court Annexed Alternative Dispute Resolution Rules ("ADR Rules") shall apply to all such documents, statements or evidence, as well as to all discussions, disclosures and negotiations occurring in any foreclosure intervention process.

A Mortgagee's attorney, by proceeding with a foreclosure, represents to the Court that the Mortgagee has fully complied with all provisions of this Order.

In the event that the Mortgagor and Mortgagee agree on any loan modification or other loss mitigation plan ("Agreement"), such Agreement shall be reduced to writing, executed by the Mortgagor and Mortgagee, and served on all parties in the case. Any pending case shall be stayed, and no hearing or foreclosure sale held for 90 days following the entry of any "214 Agreement, unless the Mortgagor shall not comply with the terms of the Agreement.

Upon any failure by Mortgagor to comply with the terms of the Agreement before the expiration of 90 days from the date of the Agreement, the Mortgagee, through its attorney, shall file and serve on all parties a "Notice of Breach of Agreement". Upon filing and service of such notice, the foreclosure action may proceed in the ordinary course.

If the Mortgagor shall be in compliance with the terms of the Agreement after 90 days, the Mortgagee's attorney shall promptly file a notice of dismissal of the action without prejudice, and the case will be dismissed. Such notice of dismissal shall be served on all parties to the action.

The Court having jurisdiction over the foreclosure action shall hear and determine any dispute concerning any party's compliance with this order, including without limitation, the failure of any party to act in good faith in complying with the terms of this order. In the event the Court determines that any party to the foreclosure action, or their acting agent, has failed to comply with the terms of this order, or has not attempted to reach an agreement for foreclosure intervention in good faith, the Court may, in its discretion, impose such sanctions as it determines to be reasonable and just under the circumstances, including without limitation, the assessment of reasonable attorneys' fees and costs against the culpable party.

The Court having jurisdiction over the action shall have the authority, and may in its discretion, order the parties to submit to mediation. In such event, the mediation shall proceed in accordance with the ADR Rules.

This order remains in effect unless amended or rescinded by the Chief Justice.

IT IS SO ORDERED.

/s/ Jean H. Toal

/s/ Chief Justice of South Carolina

Parallel Citations

720 S.E.2d 908 (Mem)

End of Document

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

CitiMortgage, Inc.,

Plaintiff,

v.

William H. Smith, Jr. a/k/a William H. Smith;
Angella S. Smith; The South Carolina Department
of Revenue;

Defendant(s).

(011654-03607)

IN THE COURT OF COMMON PLEAS

DOCKET NO. 09-CP-23-11051

ORDER REMOVING CASE FROM ACTIVE
DOCKET
Deficiency Judgment Waived

ENTERED COMPUTER

The within action is for the foreclosure of a mortgage. It appears the Defendant mortgagor(s) have entered into foreclosure intervention negotiations with the Plaintiff.

Pursuant to Supreme Court Administrative Order (Order No. 2011-05-02-01), the Court finds that all proceedings in a foreclosure action shall be stayed until completion of any foreclosure intervention process. The action may be restored to the active docket with the same civil action number and no additional filing fee upon Motion properly made.

THEREFORE, IT IS HEREBY ORDERED that the above case be stricken from the active docket with leave to restore to the same civil action number.

JUDGE

Greenville, South Carolina

12/13, 2011

Copy mailed to

Attorney Stacy

on 12/14/11

RECEIVED
DEC 14 2011

SCANNED

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
MOTION INFORMATION FORM
AND COVER SHEET
CASE NO. 09-CP-23-11051

2011 DEC 14 PM 4:13

CitiMortgage, Inc. ☒ Plaintiff

v.

William H. Smith, Jr. a/k/a William H. Smith; Angella S. Smith; The South Carolina Department of Revenue; ☐ Defendant

Check box above indicating submitting party

name, S.C. Bar no. and address of plaintiff's attorney

Samuel C. Waters (SC Bar #5958); Cheryl H. Fisher (SC Bar #15213); Reginald P. Corley (SC Bar #69453); Jennifer W. Rubin (SC Bar #16727); Ellie C. Floyd (SC Bar #68635); Michael P. Morris (SC Bar #73560); Eve Moredock Stacey (SC Bar #5300); Mary R. Powers (SC Bar #16534); Robert P. Davis (SC Bar #74030); William S. Koehler (SC Bar #74935); Vance L. Brabham, III (SC Bar #71250); Jaclynn B. Goings (SC Bar #77501); John P. Fetner (SC Bar #77460); Kelsey K. Lipscomb (SC Bar #77519); Andrew W. Montgomery (SC Bar #79893); Taryn M. Zange (SC Bar #70357); Andrew A. Powell (SC Bar #100210)
220 Executive Center Drive, Suite 109, Columbia, SC 29210
telephone: 803-744-4444 fax: 803-343-7013

name, S.C. Bar no. and address of Defendant's attorney

telephone: fax:
email: other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (Complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

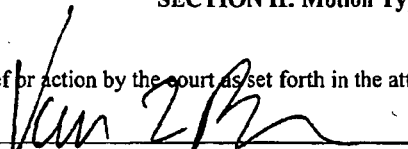
Estimated Time Needed:

Court Reporter Needed: YES/NO

SECTION II: Motion Type

- ☐ Written motion attached
☒ Form Motion —

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for Plaintiff/Defendant

December 12 2011
Date submitted

SECTION III: Motion Fee

- ☒ PAID — AMOUNT: \$25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other

CODE: _____ Date: _____

JUDGE

CLERK'S VERIFICATION

Collected by: CJN

(print name)

- ☐ MOTION FEE COLLECTED: \$25.00
☐ CONTESTED — AMOUNT DUE: _____

SCCA/233 (12/2009) 011654-03607

Date Filed:

CU# 242011
RTT

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
DOCKET NO. 09-CP-23-11051

CitiMortgage, Inc.,

Plaintiff,

v.

William H. Smith, Jr. a/k/a William H. Smith;
Angella S. Smith; The South Carolina Department
of Revenue;

Defendant(s).

2012 MAR 27 P 4: 15
CLERK OF COURT
GREENVILLE CO. S.C.
JULIE E. WICKENBARGER

ORDER TO RESTORE
Deficiency Judgment Waived

ENTERED COMPUTER

(011654-03607)

The above-captioned Civil Action was removed from the active docket while the mortgagor was evaluated for Foreclosure Intervention pursuant to the South Carolina Supreme Court Administrative Order (Order No. 2011-05-02-01). The foreclosure intervention process has been completed without a modification and the Plaintiff has moved for the case to be restored to the active docket so it may proceed with the foreclosure.

It appears to the Court that the Civil Action should be restored to the Active Roster of pending cases, therefore it is

ORDERED, upon motion of the undersigned attorney for the Plaintiff, that the above-captioned Civil Action is hereby restored to the Active Roster, with a Docket Number 09-CP-23-11051, and it is
SO ORDERED.

Judge

Greenville, South Carolina

I SO MOVE:

326, 2012.

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958)
Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
Eve Moredock Stacey (SC Bar #5300)
Robert P. Davis (SC Bar #74030)
Vance L. Brabham, III (SC Bar #71250)
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Cheryl H. Fisher (SC Bar #15213)
Jennifer W. Rubin (SC Bar #16727)
Michael P. Morris (SC Bar #73560)
Mary R. Powers (SC Bar #16534)
William S. Koehler (SC Bar #74935)
Jaclynn B. Goings (SC Bar #77501)
Andrew W. Montgomery (SC Bar #79893)

Post Office Box 100200 (29202)

(803) 744-4444

Columbia, South Carolina
March 23, 2012

Copy mailed to

Attorney Stacey

on 03.27.12

SCANNER

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
MOTION INFORMATION FORM
AND COVER SHEET
CASE NO. 09-CP-23-11051

CitiMortgage, Inc. ☒ Plaintiff

v.

William H. Smith, Jr. a/k/a William H. Smith; Angella S. Smith; The South Carolina Department of Revenue; ☐ Defendant

Check box above indicating submitting party

name, S.C. Bar no. and address of plaintiff's attorney

Samuel C. Waters (SC Bar #5958); Cheryl H. Fisher (SC Bar #15213); Reginald P. Corley (SC Bar #69453); Jennifer W. Rubin (SC Bar #16727); Ellie C. Floyd (SC Bar #68635); Michael P. Morris (SC Bar #73560); Eve Moredock Stacey (SC Bar #5300); Mary R. Powers (SC Bar #16534); Robert P. Davis (SC Bar #74030); William S. Koehler (SC Bar #74935); Vance L. Brabham, III (SC Bar #71280); J. Michael Goings (SC Bar #77501); John P. Fetner (SC Bar #77460); Kelsey M. Lipscomb (SC Bar #77519); Andrew W. Montgomery (SC Bar #79893); Taryn M. Zange (SC Bar #70357); Andrew A. Powell (SC Bar #100210)
220 Executive Center Drive, Suite 109, Columbia, SC 29210
telephone: 803-744-4444 fax: 803-343-7013

name, S.C. Bar no. and address of Defendant's attorney

telephone: fax:
email: other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (Complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____

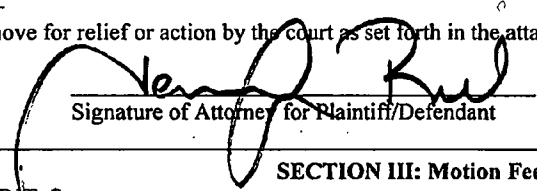
Estimated Time Needed: _____

Court Reporter Needed: YES/NO

SECTION II: Motion Type

- ☐ Written motion attached
☒ Form Motion —

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for Plaintiff/Defendant

23
March 21, 2012
Date submitted

SECTION III: Motion Fee

- ☐ PAID—AMOUNT: \$ _____
☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☒ Other: _____

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other

CODE: _____ Date: _____

JUDGE

CLERK'S VERIFICATION

Collected by: LP

(print name)

Date Filed: _____

☒ MOTION FEE COLLECTED: NA

☐ CONTESTED—AMOUNT DUE: _____

SCCA/233 (12/2009) 011654-03607

RECEIVED

MAR 27 2012

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2009CP2311051

Citimortgage Inc vs. William H Smith Jr

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy: _____
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

NOTICE

This is a notice to you that an **Order on CitiMortgage Mtn/Strike, Dism Jdgmt on Pldgs** in this case has been filed in the Clerk of Court's Office. To obtain a certified copy, you may contact our office by phone (864) 467-8551 or email a request to lbobo@greenvillecounty.org. If you would like a copy via email, please provide a valid email address.

Dated at Greenville, South Carolina, this 8th day of August, 2012.

Court Reporter:

PRESIDING JUDGE -

Mailed hard copy:
Sarah Beth Nielsen PO Box 11070 Columbia, SC
29211

Ronald W. Urban PO Box 7721 Columbia, SC
29202
Bridget Davis Swing PO Box 8246 Greenville, SC
29604

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
CitiMortgage, Inc.,	)	Civil Action No. 2009-CP-23-11051
	)	
Plaintiff,	)	
	)	
vs.	)	<u>ORDER ON PLAINTIFF</u>
	)	<u>CITIMORTGAGE, INC.'S MOTION</u>
William H. Smith, Jr. a/k/a William H.	)	<u>TO STRIKE, DISMISS AND FOR</u>
Smith, Angella S. Smith, The South	)	<u>JUDGMENT ON THE PLEADINGS</u>
Carolina Department of Revenue,	)	
	)	
Defendants.	)	

BEFORE THE COURT is Plaintiff CitiMortgage, Inc.'s ("Plaintiff") Motion to Strike, Dismiss and for Judgment on the Pleadings pursuant to Rules 12, 13, and 55 of the South Carolina Rules of Civil Procedure as to Defendants William H. Smith, Jr. a/k/a William H. Smith and Angella S. Smith's ("Defendants") Answer and Counterclaim. After the hearing held on Thursday, July 12, 2012, at 11:00 AM and after consideration of Plaintiff's written motion and memorandum, Defendants' written opposition, and the oral arguments of both parties, the Court finds that under the circumstances of this case it is appropriate to grant Plaintiff's Motion in its entirety.

BACKGROUND

1. On February 4, 2005, Defendants made, executed and delivered a Fixed Rate Note ("Note") in the amount of \$200,000.00, secured by a Mortgage ("Mortgage") on certain real property known as 2812 Bushy Creek Road, Greer, South Carolina 29650. Subsequently, Defendants defaulted on their payment obligations under the Note and Mortgage and Plaintiff filed a Complaint for foreclosure on December 30, 2009. On that same date, Defendants were properly served with the Summons and



Complaint, notifying them that they had thirty (30) days, until January 29, 2010, to serve a responsive pleading.

2. Thereafter, Defendants failed to appear or otherwise respond to the Complaint for foreclosure and, on that basis, are in default. A Judgment of Foreclosure and Sale ("Judgment"), holding Defendants in default, was signed on April 27, 2010, and filed on May 10, 2010. The Judgment specifically provides that the property would be sold at public auction after notice via advertisement. The property was sold at public auction on June 7, 2010.

3. On July 1, 2010, this Court signed an Order Setting Aside Sale ("Order"), upon motion filed by Plaintiff, due to ongoing settlement negotiations between the parties that began prior to the June 7, 2010 sale. The Order states only that the "foreclosure sale" is set aside, but the Judgment remains intact.

4. During this time, on May 2, 2011, the South Carolina Supreme Court issued its Administrative Order on foreclosure intervention, No. 2011-05-02-01 ("Administrative Order"), which outlines a uniform system for handling loss mitigation efforts in South Carolina. Pursuant to the terms of the Administrative Order, those actions pending on May 9, 2011, cannot proceed to foreclosure hearing or foreclosure sale until the attorney certifies that notice of a right to foreclosure intervention has been served, the relevant documents were returned and examined, the mortgagors did not qualify for loss mitigation, and the denial was served on the mortgagors.

5. In accordance with the terms of the Administrative Order, Defendants were served with the Notice of Right to Foreclosure Intervention on November 7, 2011. Upon completion of the foreclosure intervention process, and when

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the foreclosure intervention process did not result in modification, the foreclosure counsel filed a certification of compliance on April 4, 2012, which lifted the litigation stay.

6. Once Defendants were served with the Notice of Denial of Foreclosure Intervention by Plaintiff's foreclosure counsel, Defendants served an Answer and Counterclaim on May 3, 2012. In response, Plaintiff filed a Motion to Strike, Dismiss and for Judgment on the Pleadings on June 5, 2012.

7. A hearing on Plaintiff's Motion was held on July 12, 2012. Prior to that time, both parties submitted memorandums of law for the Court's review. At the hearing, Plaintiff was represented by Thad H. Westbrook, Esquire and Sarah B. Nielsen, Esquire and Defendants were represented by Bridget D. Swing, Esquire. Based on the briefing provided to the Court and the oral arguments during the hearing, this Court finds, as outlined below, that Defendants' Answer and Counterclaim is untimely, the counterclaims fail to state facts sufficient to constitute a cause of action, and the counterclaim for alleged violation of the South Carolina Unfair Trade Practices Act ("SCUTPA") is barred by the statute of limitations. On those bases, Plaintiff's Motion is granted.

APPLICABLE LAW

8. South Carolina Rule of Civil Procedure 12(f) provides that a "court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." S.C. R. Civ. P. 12(f). "In ruling on such a motion, a Court decides whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded." *Alladin Plastics, Inc. v. Wintenna, Inc.*, 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990).

9. Additionally, a motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a claim and is granted if the claim does not set forth sufficient allegations entitling the party to relief. *Williams v. Condon*, 347 S.C. 227, 232–33, 553 S.E.2d 496, 499 (Ct. App. 2001). The “motion must be granted if the facts and inferences reasonably deducible from them show that the [defendant] could not prevail on any theory of the case.” *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 650–51, 492 S.E.2d 272, 274–75 (Ct. App. 1997). Similarly, Rule 12(c) “provides for motions to dismiss based upon the pleadings.” *Gregory v. Gregory*, 292 S.C. 587, 590, 358 S.E.2d 144, 147 (Ct. App. 1987). “A judgment on the pleadings is proper where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment if resolved in plaintiff’s favor.” *Sapp v. Ford Motor Co.*, 386 S.C. 143, 146, 687 S.E.2d 47, 49 (2009).

ANALYSIS AND CONCLUSIONS

10. Due to Defendants’ failure to serve a responsive pleading within the time-period provided by the South Carolina Rules of Civil Procedure, this Court holds that Defendant’s Answer is untimely and, therefore, the Answer, including all affirmative defenses, must be stricken pursuant to Rule 12(f), SCRPC. In this case, the Summons and Complaint was served on Defendants on December 30, 2009. Accordingly, Defendants had until January 29, 2010 to serve an Answer or other responsive pleading pursuant to the South Carolina Rules of Civil Procedure. See S.C. R. Civ. P. 12(a). Here, Defendants did not serve their Answer and Counterclaim until May 3, 2012, which was well outside the thirty days provided by the South Carolina Rules of Civil Procedure. Once Defendants failed to serve a responsive pleading, a Judgment was entered against them which, to date, has not been set aside.

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11. Defendants' failure to serve an Answer and Counterclaim until after they defaulted in the action, a Judgment was entered against them, and prior to Defendants obtaining any relief from default pursuant to Rules 55(c) and 60(b) of the South Carolina Rules of Civil Procedure, renders the Answer and Counterclaim an improper and insufficient pleading. This Court holds that because the Answer and Counterclaim does not constitute a valid pleading under the South Carolina Rules of Civil Procedure, it must be stricken in its entirety pursuant to Rule 12(f), SCRPC.

12. In addition to failing to timely serve an Answer pursuant to Rule 12(a), SCRPC, this Court finds that Defendants failed to properly plead compulsory counterclaims pursuant to Rule 13(a), SCRPC and, therefore, the counterclaims must be dismissed pursuant to Rule 12(b)(6), SCRPC.

13. The two counterclaims asserted by Defendants are (1) the unauthorized practice of law and (2) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). Defendants claim that Plaintiff engaged in the unauthorized practice of law and engaged in unfair trade practices when the parties entered into a loan modification on April 1, 2009, without an attorney present. (See Ans. & Countercl. at ¶¶ 26-34.) Based on those allegations, Defendants seek a declaration that the Mortgage is unenforceable, attorneys' fees and costs, and actual and punitive damages. Because each of these counterclaims arise out of the same transaction or occurrence as the foreclosure action filed by Plaintiff, this Court finds that they are compulsory counterclaims pursuant to Rule 13(a), SCRPC, that were not timely asserted. *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 62, 566 S.E.2d 863, 865 (Ct. App. 2002) ("The South Carolina Reporter's Note following Rule 13 states: '[c]ounterclaims arising out of the same transaction or

5 

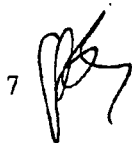
occurrence that is the subject of the action are 'compulsory' under Rule 13(a) and are barred by *res judicata* or estoppel by judgment if not asserted.'").

14. In South Carolina, the logical relationship test is applied to determine whether a counterclaim is compulsory under Rule 13(a), SCRC. See *N.C. Fed. Savings & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989) ("We hereby adopt the logical relationship test."). In a foreclosure action, the logical relationship determination is "made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage." *Wells Fargo Bank, N.A. v. Smith*, No. 4988, 2012 S.C. App. LEXIS 176, at *9-10 (Ct. App. June 13, 2012). Here, it is clear that the two counterclaims asserted by Defendants relate to the alleged unauthorized practice of law and, therefore, bear a logical relationship to the foreclosure action. Defendants failure to assert the counterclaims within the thirty days provided by the South Carolina Rules of Civil Procedure; bars them from asserting these claims after their default and after a Judgment was entered against them. See, e.g., *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997); *Stark Truss Co. v. Superior Constr. Corp.*, 360 S.C. 503, 512, 602 S.E.2d 99, 102 (Ct. App. 2004) (dismissing counterclaims pursuant to Rule 13(a) where there was a default for failure to timely serve an answer). Accordingly, Defendants' two counterclaims are hereby dismissed, with prejudice.

15. While Defendants argue that the terms of the Administrative Order allow them to file the late Answer and Counterclaim, this Court finds that the argument is unavailing since Defendants are in default, a Judgment was entered against them, and a sale was held and subsequently vacated.

16. The Administrative Order requires in "all mortgage foreclosure actions pending on May 9, 2011, before any merits hearing in the case, or if an order of foreclosure has been entered, before any foreclosure sale," that a plaintiff serve a notice of right to foreclosure intervention on the mortgagors. S.C. Admin. Order No. 2011-05-02-01, Sec. B(1). The litigation is then stayed until the attorney for the plaintiff certifies compliance with the Administrative Order. In the certification of compliance, the plaintiff must state that the denial of foreclosure intervention has been mailed to "all known addresses for the Mortgagor" and "shall also state that the Mortgagor has 30 days from the date of mailing of notice of denial of relief to file and serve an answer or other response to the Mortgagee's summons and complaint." *Id.* at Sec. B(1)(e). Defendants argued that this provision set aside their previous default and gave them an opportunity to file and serve an Answer and Counterclaim. This Court disagrees.

17. A reading of the Administrative Order, in its entirety, evidences that it does not resurrect any procedural or substantive rights of the parties. In those actions pending on May 9, 2011 that have already gone to judgment and only the sale is pending, the mortgagors may not file a late answer following the plaintiff's counsel's certification of compliance. The Administrative Order provides that "[i]n all mortgage foreclosure actions pending on May 9, 2011, before any merits hearing in the case, or if an order of foreclosure has been entered, before any foreclosure sale, the Mortgagee shall, through its attorney of record, file with the court and serve upon every Mortgagor a notice of the Mortgagor's right to foreclosure intervention." *Id.* at Sec. B(1). The use of the word "or" in subsection B(1) confirms that the Administrative Order did not vacate all prior foreclosure judgments that were issued before May 9, 2011. Therefore,

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Defendants rights in this case were not resurrected, they remain in default, and the May 3, 2012 Answer and Counterclaim remains untimely. Because the Administrative Order does not contemplate vacatur of judgments or relief from default for mortgagors, nor does it override the mechanisms provided by the South Carolina Rules of Civil Procedure for relief from default or a judgment, this Court holds that Defendants' argument related to the Administrative Order fails.

18. In reaching this conclusion, this Court notes that its holding is consistent with the letter from Court Administration dated June 7, 2011. In that correspondence, Rosalyn W. Frierson, the Director of Court Administration, was asked by the Chief Justice to respond to questions posed in relation to the Administrative Order, including the tolling provision in subsection B(1)(e). Court Administration noted that the tolling provision is only applicable in those instances where a mortgagor is not in default when served with a notice of right to foreclosure intervention. In those instances where the mortgagor is already in default, such as in this case, relief from the default is only by the usual course, meaning Rules 55 and 60 of the South Carolina Rules of Civil Procedure. Accordingly, this Court holds that the Administrative Order, specifically subsection B(1)(e), does not override Rules 55 and 60 of the South Carolina Rules of Civil Procedure and, therefore, Defendants' time to answer was not tolled in this case.

19. Moreover, this Court finds that with the exhaustive efforts that have taken place between the time the first sale was vacated on June 7, 2010, and the date Plaintiff's foreclosure counsel certified compliance with the Administrative Order on April 3, 2012, the intent of the Administrative Order has been fully complied with in this case.

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20. Therefore, because the Administrative Order does not relieve Defendants' of their previous default and does not vacate the Judgment entered in this case, this Court holds that Defendants' Answer and Counterclaim is untimely.

21. Finally, Defendants argued that the Notice of Denial of Foreclosure Intervention served by counsel for Plaintiff on April 3, 2012, resulted in a waiver of their previous default and the Judgment in this case. Again, this Court disagrees. The April 3, 2012 Notice of Denial of Foreclosure Intervention quotes directly from the language in subsection B(1)(e) of the Administrative Order and, on that basis, does not meet the standard necessary for a waiver pursuant to South Carolina law. *See, e.g., Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (1994) (citing *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)) (noting a waiver is a "voluntary and intentional abandonment or relinquishment of a known right"); *Zeller v. Cumberland Truck Sales*, 272 S.C. 558, 562, 253 S.E.2d 111, 112 (1979) ("[W]here an implied waiver is claimed, caution must be exercised, for waiver will not be implied from doubtful acts." *Id.* (citing 28 Am. Jur. 2d, *Estoppel and Waiver*, § 160.)). While the Notice of Denial of Foreclosure Intervention quotes the Administrative Order directly, it does not agree to set aside Defendants' default, nor can it unilaterally vacate the previously entered Judgment without Court involvement. Therefore, the Notice of Denial of Foreclosure Intervention did not waive the default or set aside the Judgment.

22. Additionally, this Court finds that Defendants' two counterclaims fail as a matter of law and, therefore, are hereby dismissed pursuant to Rules 12(b) and 12(c) of the South Carolina Rules of Civil Procedure.

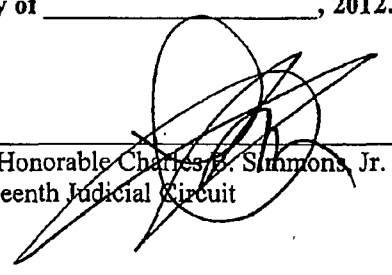
23. First, both counterclaims relate to the unauthorized practice of law, for which South Carolina law does not provide for a private right of action. *See, e.g., Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 496, 560 S.E.2d 612, 622 (2002) (stating there is “no private right of action in South Carolina for the unauthorized practice of law”); *Franklin v. Chavis*, 371 S.C. 527, 535, 640 S.E.2d 873, 877 (2007) (“There is no private right of action in South Carolina for the unauthorized practice of law.”); *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 124–25, 634 S.E.2d 5, 8 (Ct. App. 2006) (dismissing the action after noting that there is no private right of action for the unauthorized practice of law and that “[e]very allegation in the complaint ultimately stems from the Hambrick’s assertion that Ditech engaged in the unauthorized practice of law during the loan transaction”). Moreover, the factual allegations in the Answer and Counterclaim surround a loan modification in April 2009, which does not give rise to the unauthorized practice of law. In 1987, the South Carolina Supreme Court stated that “real estate and mortgage loan closings should be conducted only under the supervision of attorneys.” *State v. Buyers Servs. Corp.*, 292 S.C. 426, 434, 357 S.E.2d 15, 19 (1987). Here, the only closing that took place was when the Defendants executed the Note and Mortgage in 2005. Because Defendants arguments regarding the unauthorized practice of law relate to the loan modification in 2009, and a “closing” did not occur at that time, this Court finds that there is no unauthorized practice of law to support Defendants’ claims.

24. Second, this Court finds that the counterclaim for violation of the SCUTPA is barred by the applicable statute of limitations. As outlined above, the loan modification at issue in the Answer and Counterclaim and which forms the basis for Defendants’ SCUTPA claim took place on April 1, 2009. (*See Ans. & Countercl. at ¶¶*

27, 30.) While this Court finds that an attorney does not need to be present for purposes of a loan modification, even if a cause of action were to arise at that time, Defendants would have had three years from that date to assert any claim. *See* S.C. Code Ann. § 39-5-150 (outlining the statute of limitations on a SCUTPA claim as three years). Thus, under the applicable statute of limitations, Defendants had until April 1, 2012 to assert any counterclaims related to the loan modification. Because the statute of limitations has run on Defendants' counterclaim for alleged violation of the SCUTPA, the claim is time-barred, and this Court grants CitiMortgage's Motion as to the SCUTPA claim.

NOW, THEREFORE, the Court hereby **GRANTS** Plaintiff's Motion to Strike, Dismiss, and for Judgment on the Pleadings as to Defendants' Answer and Counterclaim. Defendants' Answer, including all affirmative defenses, is hereby stricken and Defendants' counterclaims are dismissed, with prejudice.

IT IS SO ORDERED, this _____ day of _____, 2012.



The Honorable Charles E. Simmons, Jr.
Thirteenth Judicial Circuit

Greenville, South Carolina

8/6, 2012

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

CitiMortgage, Inc.,

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

Plaintiff(s) 21 10 56

vs.

2009-CP-23-11051

William H. Smith, Jr. a/k/a William H. Smith; Angella S. Smith; The State of South Carolina Department of Revenue;

Defendant(s)

Submitted By: Samuel C. Waters (SC Bar #5958), Cheryl H. Fisher (SC Bar #15213), Reginald P. Corley (SC Bar #69453), Jennifer W. Rubin (SC Bar #16727), Ellic C. Floyd (SC Bar # 68635), Michael P. Morris (SC Bar #73560), Eve Moredock Stacey (SC Bar # 5300), Mary R. Powers (SC Bar# 16534), Robert P. Davis (SC Bar# 74030), William S. Koehler (SC Bar# 74935), Kevin T. Hardy (SC Bar #76015), Benjamin J. Powell (SC Bar #77205), John P. Feiner (SC Bar # 77460), Kelsey K. Brockbank (SC Bar # 77519)
Attorneys for the Plaintiff
01654-03607

Rogers Townsend & Thomas, PC
220 Executive Center Drive, Suite 109
Post Office Box 100200
Columbia, SC 29202
(803) 744-4444
(803) 343-7013 - Fax
info@rtt-law.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|--|---|--|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | Torts - Professional
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 - CP-
☐ Notice/File Med Mal (230)
☐ Other (299) | Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☒ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Other (799) | Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Commission (990)
☐ Employment Security Commn (991) |
| Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other(699) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of-State Deposition (650)
☐ Motion to Quash Subpoena in An Out-of-County Action (660)
☐ Sexual Predator (510) | | ☐ Other (999) |

Submitting Party Signature:

Eve Moredock Stacey

Date:

12/29/09

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form or by the 210th day of filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code § 15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Case are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals;
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

011654-03607

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

CitiMortgage, Inc.,

Plaintiff,

v.

William H. Smith, Jr. a/k/a William H. Smith;
Angella S. Smith; The South Carolina Department
of Revenue;

Defendant(s).

IN THE COURT OF COMMON PLEAS

2009-CP-23-11051
DOCKET NO.

2009-CP-23-11051

SUMMONS AND NOTICES
(NON-JURY)
FORECLOSURE OF REAL ESTATE
MORTGAGE
Deficiency Judgment Demanded

(011654-03607)

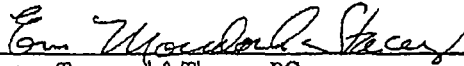
TO THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to appear and defend by answering the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer on the subscribers at their offices, 220 Executive Center Drive, Suite 109, Post Office Box 100200, Columbia, South Carolina 29202, 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 Complaint.

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, of the South Carolina Rules of Civil Procedure.

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 CitiMortgage, Inc..



Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958)	Cheryl H. Fisher (SC Bar #15213)
Reginald P. Corley (SC Bar #69453)	Jennifer W. Rubin (SC Bar #16727)
Ellie C. Floyd (SC Bar # 68635)	Michael P. Morris (SC Bar #73560)
Eve Moredock Stacey (SC Bar # 5300)	Mary R. Powers (SC Bar #16534)
Robert P. Davis (SC Bar # 74030)	William S. Koehler (SC Bar# 74935)
Kevin T. Hardy (SC Bar #76015)	Benjamin J. Powell (SC Bar #77205)
John P. Fetner (SC Bar # 77460)	Kelsey K. Brockbank (SC Bar # 77519)
220 Executive Center Drive, Suite 109 Post Office Box 100200 (29202)	
Columbia, SC 29210 (803) 744-4444	

Columbia, South Carolina
December 29, 2009

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE SEP 23 2009 58 DOCKET NO.

CitiMortgage, Inc.,

Plaintiff,

2009-CP-23-11051

COMPLAINT

(NON-JURY)

FORECLOSURE OF REAL ESTATE
MORTGAGE
Deficiency Judgment Demanded

v.

William H. Smith, Jr. a/k/a William H. Smith;
Angella S. Smith; The South Carolina Department
of Revenue;

Defendant(s).

(011654-03607)

Plaintiff alleges:

1. This is an action for the foreclosure of a mortgage upon certain real estate in Greenville County, South Carolina.

2. Pursuant to S.C. Code Section 33-15-101, Plaintiff is a corporation or other legal entity doing business in the State of South Carolina.

3. Plaintiff is the owner and holder of the Note and Mortgage described hereafter and the subject of this action.

4. The Plaintiff's servicing agent for the mortgage loan described in this foreclosure action is participating in the Home Affordable Modification Program ("HMP"), but the subject loan is not eligible for modification because the Mortgagor has refused to participate in the HMP.

5. Some lien on or interest in the real estate, the subject of this action, may be claimed by the Defendant(s) herein.

6. The Defendant(s) 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 South Carolina Code Section 15-35-840.

7. Heretofore, on or about February 4, 2005, William H. Smith and Angella S. Smith made, executed and delivered a certain Fixed Rate Note ("Note") in the principal sum of \$200,000.00,

payable in monthly installments.

8. In order to secure the payment of the Note according to the terms and conditions thereof, William H. Smith, Jr. and Angella S. Smith made, executed and delivered unto Mortgage Electronic Registration Systems, Inc., acting solely as nominee for RBC Mortgage Company (MIN #100058900101753622) a certain real estate mortgage ("Mortgage") covering the following described property and any and all improvements to the property, including but not limited to a mobile/manufactured home:

All that certain piece, parcel or lot of land, situate, being in the State of South Carolina, County of Greenville and being shown on Survey of Angella J. Stephens dated June 28, 1983 by Carolina Surveying Company, containing 0.72 acres, more or less, said plat being recorded in the RMC Office for Greenville County in Plat Book 9-U at Page 96, reference to which plat is hereby made for a more particular description.

Less and Excepting: 892 feet of land and all improvements thereon, if any, along a relocated centerline as shown on plans between approximate survey stations 172 +47.76 and 192+ 61.86, which was conveyed to the South Carolina Department of Transportation by deed dated October 27, 2003 and recorded December 12, 2003 in Book 2067 at Page 117.

This being the same property conveyed to Angella Jean Stephens by deed of Ronald Stephens and Betty Wade Stephens, dated July 1, 1983 and recorded July 1, 1983 in Deed Book 1191 at Page 596; subsequently, Angella S. Smith f/k/a Angella Jean Stephens conveyed her interest to Angella S. Smith and William H. Smith, Jr. by deed dated March 13, 1997 and recorded May 19, 1997 in Deed Book 1690 at Page 409.

Property Address: 2812 Brushy Creek Road
Greer, SC 29650

TMS# 0538.07-01-007.03

9. The Mortgage was signed, witnessed and probated February 4, 2005; thereafter the Mortgage was recorded in the Office of the RMC/ROD for Greenville County on February 24, 2005, in Mortgage Book 4318 at Page 542. This Mortgage was subsequently assigned to the Plaintiff herein by assignment dated November 17, 2006 and recorded December 7, 2006 in Book 4689 at Page 1286. This Mortgage is subject to a Loan Modification Agreement dated April 1, 2009 and recorded July 29, 2009 in Book 5050 at Page 2794.

10. The Mortgage evidences and secures the repayment of money advanced by Plaintiff or its predecessor in interest to, or on behalf of, the mortgagor(s) and constitutes a first lien on the mortgaged premises.

11. Any notice required by the terms of the Mortgage or by state or federal law has been given to the applicable Defendant(s) prior to the commencement of this action.

12. After all payments received by the Plaintiff have been credited to the subject loan, the

loan is in default and due for September 1, 2009, and the conditions of the Note and Mortgage have been broken. Plaintiff elects to and does declare the entire balance of said indebtedness due and payable, and that there is due on the Note and Mortgage as of September 1, 2009, the principal sum of \$215,273.33, with interest from August 1, 2009, advances, late charges, and also for the costs and disbursements of this action, including attorney's fees.

13. Plaintiff's right to a personal or deficiency judgment pursuant to South Carolina Code Sections 29-3-650 and 29-3-660 is expressly demanded against William H. Smith and Angella S. Smith.

14. Pursuant to the terms of the Mortgage, Plaintiff has employed counsel to prosecute this action and a reasonable value of services of counsel in this action is the sum as the Court may find appropriate.

15. 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 Mortgage, should be added to the amount of the debt.

16. Pursuant to the terms of the Mortgage and applicable state law, Plaintiff requests the 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.

17. The hereinafter named Defendant(s) may have some interest in or lien upon the premises covered by the Mortgage set forth above, or some part thereof, but that such interests or liens are junior and subsequent to the lien of Plaintiff's Mortgage or, if specified below, have been paid in full and either should be satisfied of record or the lien released from the subject real estate. Said liens or interests are of record in the Office of the RMC or Clerk of Court of the aforesaid county and are described as follows:

A. The South Carolina Department of Revenue by virtue of a Tax Lien, including but not limited to, a lien against William Smith and Angella Smith; Tax Lien No.: 3-51083922-3; Dated: October 19, 2009; Recorded: October 26, 2009; in the amount of \$628.61; in Book 44 at Page 1367.

WHEREFORE, having fully set forth its Complaint, Plaintiff prays that this Honorable Court inquire into the matters as set forth herein and:

(1) Under the direction of this Court, ascertain and determine the amount due upon the Note and Mortgage held by Plaintiff together with attorney's fees and costs of this action.

(2) Declare Plaintiff's Mortgage a first lien and render judgment of foreclosure for the amount so found to be due and owing thereon, together with any ad valorem taxes, or insurance premiums, and any other expenses which may be due and have been advanced by Plaintiff, with

reasonable attorney's fees, and for the costs of this action.

(3) Order the reimbursement of all costs for inspecting and securing the property incurred by the Plaintiff as a result of the delinquency.

(4) 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.

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

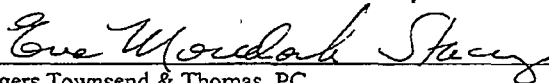
First, to the costs and expenses of the within action and sale;

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

Third, to the distribution of any surplus pursuant to Rule 71, of the South Carolina Rules of Civil Procedure;

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

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



Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958)	Cheryl H. Fisher (SC Bar #15213)
Reginald P. Corley (SC Bar #69453)	Jennifer W. Rubin (SC Bar #16727)
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220 Executive Center Drive, Suite 109 Post Office Box 100200 (29202)	
Columbia, SC 29210 (803) 744-4444	

Columbia, South Carolina
December 29, 2009

IN THE
IN THE COURT OF COMMON PLEAS OF THE STATE OF SOUTH CAROLINA FOR GREENVILLE COUNTY

Crimortgage, Inc

Plaintiff/Petitioner

vs.
William H. Smith, Jr. e/k/a William H.
Smith, ET AL

Defendant/Respondent

Docket Number:
09-CP-23-11061

AFFIDAVIT OF SERVICE OF:
Lis Pendens (Deficiency Judgement Waived); Civil Action
Coversheet; Certificate of Exemption from ADR;
Summons and Notices; Complaint; Notice required by the
Fair Debt Collection Practices Act

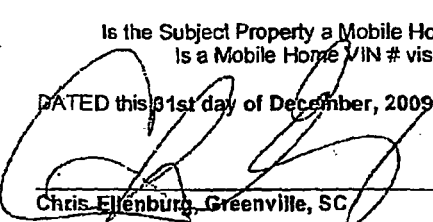
The undersigned, being first duly sworn, on oath deposes and says: That s(he) is now and at all times herein mentioned was a citizen of the United States, over the age of eighteen, not an officer of a plaintiff corporation, not a party to nor interested in the above entitled action, has the authority to serve pleadings in the State named below, and is competent to be a witness therein.

On the 30th day of December, 2009, at 5:30 PM, at the address of 2812 BRUSHY CREEK Road, GREER, Greenville County, SC 29650; this affiant served the above described documents upon Angella S. Smith, by then and there personally delivering 1 true and correct copy(ies) thereof, by then presenting to and leaving the same with William H. Smith Jr., Spouse, A white male approx. 45-55 years of age 5'10"-6'0" in height weighing 200-220 lbs with brown hair.

No Information was provided or discovered that indicates that the subjects served are members of the U.S. military.

Is the Subject Property a Mobile Home? (X) NO () YES
Is a Mobile Home VIN # visible? () NO () YES VIN #:

DATED this 31st day of December, 2009.


Chris Eilenburg, Greenville, SC

SUBSCRIBED AND SWORN to before me this 31st day of December, 2009


NOTARY PUBLIC in and for the State of South Carolina
My Commission Expires: 03/03/2013

FOR: Rogers Townsend & Thomas, PC ORIGINAL PROOF OF
REF: 011654-03607-4 SERVICE

Tracking #: 8472837 CAE FIL



FILED JAN -4 AM 11:13
CLERK OF COURT
GREENVILLE CO., S.C.
PAUL D. BICKERSTACE

IN THE
IN THE COURT OF COMMON PLEAS OF THE STATE OF SOUTH CAROLINA FOR GREENVILLE COUNTY

CitiMortgage, Inc

Plaintiff/Petitioner

vs.
William H. Smith, Jr. a/k/a William H.
Smith, ET AL

Defendant/Respondent

Docket Number:
09-CP-23-11051

AFFIDAVIT OF SERVICE OF:
Lis Pendens (Deficiency Judgement Waived); Civil Action
Cover Sheet; Certificate of Exemption from ADR;
Summons and Notices; Complaint; Notice required by the
Fair Debt Collection Practices Act

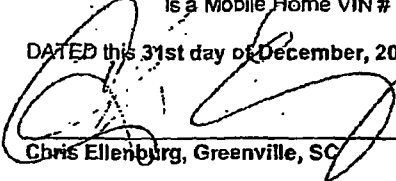
The undersigned, being first duly sworn, on oath deposes and says: That s(he) is now and at all times herein mentioned was a citizen of the United States, over the age of eighteen, not an officer of a plaintiff corporation, not a party to nor interested in the above entitled action, has the authority to serve pleadings in the State named below, and is competent to be a witness therein.

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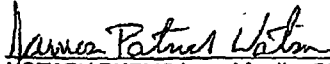
No information was provided or discovered that indicates that the subjects served are members of the U.S. military.

Is the Subject Property a Mobile Home? ☒ NO ☐ YES
Is a Mobile Home VIN # visible? ☐ NO ☐ YES VIN #:

DATED this 31st day of December, 2009.


Chris Ellenburg, Greenville, SC

SUBSCRIBED AND SWORN to before me this 31st day of December, 2009


NOTARY PUBLIC in and for the State of South Carolina
My Commission Expires: 03/03/2013

FOR: Rogers Townsend & Thomas, PC ORIGINAL PROOF OF
REF: 011654-03607-3 SERVICE

Tracking #: 8472836 CAE FIL



2010 JAN -4 AM 11:13
FILED-CLERK OF COURT
GREENVILLE, S.C.
PAUL B. WICKENBACHER

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

CitiMortgage, Inc.,

Plaintiff,

vs.

William H. Smith, Jr. a/k/a William H.
Smith; Angella S. Smith; The South
Carolina Department of Revenue;

Defendant(s).

IN THE COURT OF COMMON PLEAS

DOCKET NO. 2009-CP-23-11051

ANSWER OF DEFENDANTS
WILLIAM H. SMITH, JR. A/K/A
WILLIAM H. SMITH AND
ANGELLA S. SMITH

2009 MAY -3 AM 11:37

Defendants William H. Smith, Jr. a/k/a William H. Smith and Angella S. Smith ("Smith Defendants"), by and through their undersigned counsel, answer the Complaint of Plaintiff CitiMortgage, Inc. ("Plaintiff"), and would respectfully show unto this honorable Court the following:

For a First Defense
(By Way of a General Denial)

1. All allegations of Plaintiff's Complaint not admitted, qualified or explained are expressly denied.
2. Smith Defendants admit the allegations contained in Paragraph 1 of the Complaint.
3. Smith Defendants, upon information and belief, admit the allegations contained in Paragraph 2 of the Complaint.
4. In response to Paragraph 3 of the Complaint, Smith Defendants deny that Plaintiff is a real party in interest to this matter as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure and demand strict proof thereof. Furthermore, Smith Defendants would assert to this honorable Court that the Note and Mortgage referenced in Plaintiff's allegation are

unenforceable due to Plaintiff's unauthorized practice of law in violation of the South Carolina Supreme Court's decisions in *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987) and *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003). As a result, Smith Defendants deny that the Mortgage constitutes a valid first lien on the premises and demand strict proof thereof.

5. Smith Defendants deny the allegations contained in Paragraph 4 of the Complaint and demand strict proof thereof.

6. Smith Defendants admit the allegations contained in Paragraph 5 of the Complaint.

7. The allegations contained in Paragraph 6 of the Complaint require no response from Smith Defendants.

8. In response to Paragraph 7 of the Complaint, Smith Defendants aver that the terms of the Note speak for themselves, and deny any characterizations of the provisions of the instrument that are at variance with the plain meaning of the original document. Furthermore, Smith Defendants deny that Plaintiff has established its legal right to enforce the Note and, therefore, has not established that it is a real party in interest to this matter as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure. In addition, Smith Defendants would assert to this honorable Court that the Note referenced in Plaintiff's allegation is unenforceable due to Plaintiff's unauthorized practice of law in violation of the South Carolina Supreme Court's decisions in *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987) and *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003). As a result, Smith Defendants deny that the Note constitutes a valid enforceable debt and demand strict proof thereof.

9. In response to Paragraph 8 of the Complaint, Smith Defendants aver that the terms of the Mortgage speak for themselves, and deny any characterizations of the provisions of the instrument that are at variance with the plain meaning of the original document. Furthermore,

Smith Defendants deny that Plaintiff has established its legal right to enforce the Mortgage and, therefore, has not established that it is a real party in interest to this matter as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure. In addition, Smith Defendants would assert to this honorable Court that the Mortgage referenced in Plaintiff's allegation is unenforceable due to Plaintiff's unauthorized practice of law in violation of the South Carolina Supreme Court's decisions in *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987) and *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003). As a result, Smith Defendants deny that the Mortgage constitutes a valid first lien on the premises and demand strict proof thereof.

10. In response to Paragraph 9 of the Complaint, Smith Defendants aver that the terms of the Mortgage speak for themselves, and deny any characterizations of the provisions of the instrument that are at variance with the plain meaning of the original document. Furthermore, Smith Defendants deny that Plaintiff has established its legal right to enforce the Mortgage and, therefore, has not established that it is a real party in interest to this matter as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure. In addition, Smith Defendants would assert to this honorable Court that the Mortgage referenced in Plaintiff's allegation is unenforceable due to Plaintiff's unauthorized practice of law in violation of the South Carolina Supreme Court's decisions in *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987) and *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003). As a result, Smith Defendants deny that the Mortgage constitutes a valid first lien on the premises and demand strict proof thereof.

11. In response to Paragraph 10 of the Complaint, Smith Defendants aver that the terms of the Mortgage speak for themselves, and deny any characterizations of the provisions of the instrument that are at variance with the plain meaning of the original document. Furthermore, Smith Defendants deny that Plaintiff has established its legal right to enforce the Mortgage and,

therefore, has not established that it is a real party in interest to this matter as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure. In addition, Smith Defendants would assert to this honorable Court that the Mortgage referenced in Plaintiff's allegation is unenforceable due to Plaintiff's unauthorized practice of law in violation of the South Carolina Supreme Court's decisions in *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987) and *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003). As a result, Smith Defendants deny that the Mortgage constitutes a valid first lien on the premises and demand strict proof thereof.

12. In response to Paragraph 11 of the Complaint, Smith Defendants deny that any notice required by the terms of the Mortgage or by state or federal law has been given to Smith Defendants prior to the commencement of this action and demand strict proof thereof.

Furthermore, Smith Defendants deny that Plaintiff has established its legal right to enforce the Mortgage and, therefore, has not established that it is a real party in interest to this matter as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure. In addition, Smith Defendants would assert to this honorable Court that the Mortgage referenced in Plaintiff's allegation is unenforceable due to Plaintiff's unauthorized practice of law in violation of the South Carolina Supreme Court's decisions in *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987) and *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003). As a result, Smith Defendants deny that the Mortgage constitutes a valid first lien on the premises and demand strict proof thereof.

13. In response to Paragraph 12 of the Complaint, Smith Defendants aver that the terms of the Mortgage speak for themselves, and deny any characterizations of the provisions of the instrument that are at variance with the plain meaning of the original document. Furthermore, Smith Defendants deny that Plaintiff has established its legal right to enforce the Mortgage and,

therefore, has not established that it is a real party in interest to this matter as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure. In addition, Smith Defendants would assert to this honorable Court that the Mortgage referenced in Plaintiff's allegation is unenforceable due to Plaintiff's unauthorized practice of law in violation of the South Carolina Supreme Court's decisions in *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987) and *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003). As a result, Smith Defendants deny that the Mortgage constitutes a valid first lien on the premises and demand strict proof thereof.

14. In response to Paragraph 13 of the Complaint, Smith Defendants deny that Plaintiff has established its legal right to enforce the Note and the Mortgage and, therefore, has not established that it is a real party in interest to this matter as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure. In addition, Smith Defendants would assert to this honorable Court that the Mortgage referenced in Plaintiff's allegation is unenforceable due to Plaintiff's unauthorized practice of law in violation of the South Carolina Supreme Court's decisions in *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987) and *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003). As a result, Smith Defendants deny that Plaintiff is entitled to a deficiency judgment in this action and demand strict proof thereof.

15. In response to Paragraph 14 of the Complaint, Smith Defendants aver that the terms of the Mortgage speak for themselves, and deny any characterizations of the provisions of the instrument that are at variance with the plain meaning of the original document. Furthermore, Smith Defendants deny that Plaintiff has established its legal right to enforce the Mortgage and, therefore, has not established that it is a real party in interest to this matter as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure. In addition, Smith Defendants would assert to this honorable Court that the Mortgage referenced in Plaintiff's allegation is

unenforceable due to Plaintiff's unauthorized practice of law in violation of the South Carolina Supreme Court's decisions in *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987) and *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003). As a result, Smith Defendants deny that Plaintiff is entitled to the value of services of counsel in this action and demand strict proof thereof.

16. In response to Paragraph 15 of the Complaint, Smith Defendants aver that the terms of the Mortgage speak for themselves, and deny any characterizations of the provisions of the instrument that are at variance with the plain meaning of the original document. Furthermore, Smith Defendants deny that Plaintiff has established its legal right to enforce the Mortgage and, therefore, has not established that it is a real party in interest to this matter as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure. In addition, Smith Defendants would assert to this honorable Court that the Mortgage referenced in Plaintiff's allegation is unenforceable due to Plaintiff's unauthorized practice of law in violation of the South Carolina Supreme Court's decisions in *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987) and *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003). As a result, Smith Defendants deny that Plaintiff is entitled to sums for taxes and insurance and costs for securing the property in this action and demand strict proof thereof.

17. In response to Paragraph 16 of the Complaint, Smith Defendants aver that the terms of the Mortgage speak for themselves, and deny any characterizations of the provisions of the instrument that are at variance with the plain meaning of the original document. Furthermore, Smith Defendants deny that Plaintiff has established its legal right to enforce the Mortgage and, therefore, has not established that it is a real party in interest to this matter as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure. In addition, Smith Defendants would assert

to this honorable Court that the Mortgage referenced in Plaintiff's allegation is unenforceable due to Plaintiff's unauthorized practice of law in violation of the South Carolina Supreme Court's decisions in *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987) and *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003). As a result, Smith Defendants deny that Plaintiff is entitled to foreclosure of the Mortgage in this action and demand strict proof thereof.

18. The allegations contained in Paragraph 17 of the Complaint require no response from Smith Defendants.

For a Second Defense
(Failure to State a Claim)

19. Each and every allegation of the Answer set forth above and hereafter is incorporated by reference as fully as if restated verbatim where not inconsistent herewith.
20. Plaintiff fails to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

For a Third Defense
(Standing)

21. Each and every allegation of the Answer set forth above and hereafter is incorporated by reference as fully as if restated verbatim where not inconsistent herewith.
22. Plaintiff lacks standing to bring the instant action.

For a Fourth Defense
(Unclean Hands)

23. Each and every allegation of the Answer set forth above and hereafter is incorporated by reference as fully as if restated verbatim where not inconsistent herewith.
24. Any alleged obligations of Smith Defendants claimed by Plaintiff are precluded by the equitable principal of unclean hands.

For a Fifth Defense
(Reservation of Affirmative Defenses)

25. Smith Defendants reserve the right to add such further defenses as the facts learned through discovery may warrant.

For a Sixth Defense and First Counterclaim
(Unauthorized Practice of Law)

26. Each and every allegation of the Answer set forth above and hereafter is incorporated by reference as fully as if restated verbatim where not inconsistent herewith.

27. Upon information and belief, Plaintiff engaged in the unauthorized practice of law by depriving Smith Defendants of legal representation when the Mortgage was modified pursuant to the Loan Modification Agreement executed on April 1, 2009 in violation of the South Carolina Supreme Court's decisions in *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987) and *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003).

28. Upon information and belief, Plaintiff's violation of the South Carolina Supreme Court's decisions in *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987) and *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003) entitles Smith Defendants to rescission and nullification of the Note and Mortgage by this honorable Court.

For a Seventh Defense and Second Counterclaim
(Unfair Trade Practices Act)

29. Each and every allegation of the Answer set forth above and hereafter is incorporated by reference as fully as if restated verbatim where not inconsistent herewith.

30. Upon information and belief, Plaintiff routinely engaged in the unauthorized practice of law by depriving its debtors of legal representation for mortgage modifications in South Carolina in violation of the Supreme Court's decisions in *State v. Buyers Service Co.*, 292 S.C. 426, 357

S.E.2d 15 (1987) and *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003).

31. Upon information and belief, the activities of Plaintiff set forth above constitute “trade or commerce” as defined by South Carolina Code Section § 39-5-10 *et seq.*, (as amended).

32. Upon information and belief, the actions of Plaintiff set forth above constitute unfair and/or deceptive trade practices which are unlawful in the State of South Carolina, as set forth in S.C. Code Ann. §39-5-20, *et seq.*, (as amended), and are willful violations thereof.

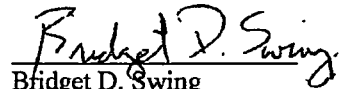
33. Upon information and belief, the actions of Plaintiff set forth above affect the public interest because they are capable of repetition and affect the public interest.

34. Upon information and belief, the actions of Plaintiff caused Smith Defendants to suffer an ascertainable loss due to the unlawful actions of Plaintiff, entitling Smith Defendants to recover actual damages in an amount to be proven at trial, treble said actual damages, and an award of attorney's fees and costs.

WHEREFORE, having fully answered Plaintiff's Complaint, Smith Defendants pray for the following relief:

1. That Plaintiff's Complaint be dismissed with prejudice and that Smith Defendants be awarded the costs and attorney's fees associated with the defense of this action;
2. That Plaintiff's Mortgage be declared unenforceable and, therefore, null and void;
3. For actual and punitive damages in an amount to be determined by this honorable Court;
and
4. For any other relief this honorable Court deems just and proper under the circumstances.

This the 3rd day of May, 2012


Bridget D. Swing KBW
South Carolina Bar No. 13616

Foreclosure Defense Law Firm, LLC
301 Augusta Street
PO Box 8246
Greenville, SC 29604
Tel & Fax: (864) 551-4353

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

DOCKET NO. 2009-CP-23-11051

CitiMortgage, Inc.,

Plaintiff,

vs.

William H. Smith, Jr. a/k/a William H.
Smith; Angella S. Smith; The South
Carolina Department of Revenue;

Defendant(s).

2012 MAY -3 AM 11:37
CLERK OF COURT
GREENVILLE CO S.C.
KIM L. WINTERSON

CERTIFICATE OF SERVICE

The undersigned attorney of record for Defendants William H. Smith, Jr. a/k/a William H. Smith and Angella S. Smith hereby certifies that the foregoing Answer was served upon the following addressee by depositing a copy in the United States Postal Depository with adequate postage affixed thereon and properly addressed to the last known address as follows:

Jennifer Rubin
Rogers Townsend & Thomas, PC
220 Executive Center Drive
Columbia, SC 29210

This the 3rd day of May, 2012.

Bridget D. Swing KBC
Bridget D. Swing, SC Bar No. 13616

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF GREENVILLE) COURT OF COMMON PLEAS
3
4 Citimortgage, Inc.,) Case No.: 09-CP-23-11051
5 Plaintiff,)
6 vs.) TRANSCRIPT OF TESTIMONY
7 William H. Smith, Jr., et al.,) July 12th, 2012
8 Defendants,) Greenville, South Carolina
9)

10
11 B E F O R E:

12 The Honorable Charles B. Simmons, Jr.
13 Master in Equity for Greenville County

14 A P P E A R A N C E S:

15 Sarah Beth Nielsen, Esquire
16 Thad H. Westbrook, Esquire
Attorneys for Plaintiff
17
18 Bridget Davis Swing, Esquire
Luke A. Burke, Esquire
Attorneys for Defendant Smith
19
20
21
22
23

24 Ann Dickey Campbell, CVR
25 Court Reporter

GREENVILLE COUNTY COURTHOUSE

1 BY THE COURT: All right, for the record, this is 2009-
2 11051, Citimortgage versus Smith and others, here today on
3 Plaintiff's Motion to Strike, Dismiss and for Judgment on the
4 Pleadings.

5 Let me go through what I understand to be the factual
6 history and background of where we are, and of course, I will
7 invite correction where appropriate.

8 The case was referred back in January of 2010. The Summons
9 and Complaint were properly served upon the Smiths, and they
10 went into default, and an Affidavit of Default was filed with
11 the Clerk's office. The matter then proceeded to a foreclosure
12 hearing that resulted in a Foreclosure Order being filed on
13 April 27th, 2010.

14 Am I correct thus far?

15 MS. NIELSEN: The Judgment was signed on the 27th. I
16 think it was actually filed on May 10th, but in that same time
17 period.

18 BY THE COURT: All right, and the matter then was set
19 for sale, and in fact sold at the June, 2010 foreclosure sale.
20 After that, the Administrative Order from the Chief Justice came
21 down and everything was put on hold.

22 MS. SWING: I believe it was put on hold, that the sale
23 was vacated prior to the Administrative Order being issued, I
24 believe.

25 BY THE COURT: Okay, is that correct?

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1 MS. NIELSEN: That's correct, the sale was vacated on
2 July 1 of 2010 pursuant to some settlement discussions amongst
3 the parties at that time.

4 BY THE COURT: All right, and since that time, there
5 were some active negotiations as far as modifications, workout
6 that went on for quite a long time. Ultimately, on April 4th of
7 2012, the Certification was filed with the Clerk's Office
8 saying, "Hey, we've tried and have given it a good shot, can't
9 get it worked out." And at that point, Ms. Swing has filed an
10 Answer and several counterclaims on behalf of the Smiths, and
11 that kind of leads us up to where we are today. So generally, is
12 that accurate?

13 MS. NIELSEN: Yes, it is.

14 MS. SWING: Yes. Yes, sir, it is.

15 BY THE COURT: And, I guess the initial threshold issue
16 is, under the Chief Justice's Administrative Order that was
17 filed in May of 2011, there is some language in that Order, and
18 it is at paragraph B(1)(e) that says, "That such notice," and
19 the notice is the notice we just referred to, that there is a
20 denial of loan modification, "that such notice shall also state
21 that the mortgagor," in this case the Smiths, "has thirty days
22 from the date of mailing of notice of denial or relief to file
23 and serve an Answer or otherwise respond to the mortgagee's
24 Summons and Complaint."

25 The Smiths take the position that under this language, they

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4
1 are allowed from the date the notice is filed with the Clerk's
2 Office to file an Answer, counterclaims, crossclaims, whatever
3 they need to.

4 MS. SWING: That's correct, our position is that under
5 the terms of the Order, that the Order states that upon the ---
6 thirty days from the mailing of the Notice of Foreclosure
7 Intervention Denial, that you have a right, and it says, "To
8 file and serve an Answer or other response to the Summons and
9 Complaint."

10 BY THE COURT: All right, and let me ask, and I'm going
11 to jump around a little bit. The Order that was filed in May of
12 2010 --- was it May, '10?

13 MS. SWING: 11th.

14 MS. NIELSEN: The Administrative Order?

15 BY THE COURT: No, the Foreclosure Order?

16 MS. NIELSEN: May 10th of 2010, I believe, is when it
17 was actually filed with the Clerk's Office.

18 BY THE COURT: All right, has that Order ever been
19 vacated or set aside?

20 MS. NIELSEN: It has not, Your Honor. As of July 1 of
21 that same year, the parties agreed to set aside the sale so that
22 the settlement discussions which they had entered into just
23 prior to the sale could be ongoing, so the foreclosure ---

24 BY THE COURT: All right, so the sale was set aside,
25 but the Order has never been set aside or vacated?

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1 MS. NIELSEN: That's correct. The Order has never been
2 vacated.

3 BY THE COURT: And in that Order, there is a finding
4 that the Smiths are in default as to the Summons and Complaint,
5 correct?

6 MS. NIELSEN: That's correct, due to their failure to
7 make an appearance or answer or otherwise plead in response to
8 the Complaint, there was an Affidavit of Default issued, and
9 they were found in default.

10 BY THE COURT: All right, Ms. Swing, do you agree that
11 the May 10th, 2010 Order has never been vacated or voided or set
12 aside?

13 MS. SWING: Yes, sir, Your Honor, I do agree with that.

14 BY THE COURT: All right, now, jumping a little bit
15 ahead, Ms. Swing, on your argument, what impact, if any, does
16 the letter from Rosalyn Frierson, our very fine Director of
17 Court Administration of June 7, 2010, have on this where Court
18 Administration takes a contrary interpretation from what you're
19 proposing here this morning?

20 MS. SWING: I think that it has no impact, and should
21 have no impact, on the Court's decision making. In reading the
22 letter, it's difficult to discern whether or not Ms. Frierson is
23 relaying the intent of the --- the opinion of the Chief Justice
24 or her own opinion. It appears that she is setting forth her own
25 opinion and interpretation and again, a fine attorney that works

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6
1 for the Court Administration, but I think her opinion and
2 interpretation has no bearing at all on the intent of the
3 language.

4 BY THE COURT: Do you suspect that perhaps she would
5 have taken it to the Chief and said, "Chief, is this what your
6 intent is," as opposed to sending it out without any input from
7 the Chief?

8 MS. SWING: She very may well could have. I have no
9 idea or not. They work in the same office. She works under the
10 direction of the Chief Justice. But that would be hearsay and
11 shouldn't be brought into the Court on that basis. I don't think
12 it's relevant to this particular case. This was a specific
13 letter addressed to two attorneys that are not involved in this
14 action. It appears --- you know, all I've got is this letter,
15 but it appears that these were two attorneys that had some
16 questions about the Administrative Order as relatively new, and
17 Ms. Frierson answered their questions. That should have no
18 bearing on this case. It's not relevant.

19 If the Plaintiff's position is that it's going to be
20 providing the Chief Justice's opinion, then I think that's
21 hearsay. Chief Justice Toal has the ability to amend or alter
22 the Administrative Order. She's issued two Administrative Orders
23 dealing with the mortgage foreclosure crisis in an attempt to
24 amend and supplement the '09 Administrative Order. She has the
25 ability to do it. She's obviously done it before. And if she

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7
1 feels the need to do that again, I trust that she would, if she
2 needed to clarify.

3 BY THE COURT: Well, can the Administrative Order that
4 we're here on today resurrect rights of the Smiths that they had
5 already given up? And specifically, there's an Order, there's an
6 Affidavit of Default saying, "Hey, we served them. They didn't
7 show up. They're in default," which is the way you do business
8 under the Rules of Civil Procedure.

9 You then have a Court Order that says the same thing, "Hey,
10 they were served. They didn't file any kind of pleadings. They
11 were given notice of the hearing, and they didn't participate."
12 And now, some months after there's a Court Order declaring them
13 in default, can the Administrative Order resurrect those rights
14 and say, "Hey, we know the Order and the Affidavit of Default
15 say this, but we're really not going to pay attention and we're
16 going to kind of re-write the Rules of Civil Procedure"?

17 MS. SWING: Well, I would point out, initially, that
18 the Constitution, South Carolina Constitution, provides the
19 Supreme Court, specifically the Chief Justice, with the right to
20 issue these Administrative Orders and to control that. I would
21 also say that the Order, on its face in clear language, allows
22 that to happen, that when it's stating in all mortgage
23 foreclosure actions before any merit hearings or if an Order of
24 Foreclosure has been entered.

25 So it was contemplated by the Court that there were going

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1 to be cases pending when this Order was issued on May 9th, 2011,
2 where there were going to be Orders of Foreclosure already on
3 the record, so that was contemplated in the Order, and that
4 section of the Order goes on to say that no foreclosure hearing
5 or sale may be held until the following is done, and one of
6 those followings is Subsection E, dealing with the thirty days
7 to respond, so I think that ---

8 BY THE COURT: And that is, admittedly, that is some
9 troubling language.

10 MS. SWING: And I think that, you know, if Justice Toal
11 feels the need to clarify or amend, I think she has the ability
12 and would do that. But I think, in reading the clear language of
13 the Order, that that's what was allowed. When you look at the
14 purpose of the Administrative Order, the purpose of the '09
15 Order, the purpose of the '11 Order, was to address concerns
16 that were reported to the Court with breakdown in communications
17 between borrowers and lenders.

18 In this specific case, when the sale took place, the Smiths
19 were having direct conversations with Citimortgage, and
20 Citimortgage representatives were telling them, "We're not
21 moving forward with the sale. We're still talking to you."
22 Obviously, there was a breakdown in communication which resulted
23 in the sale, a vacating of the Order. So the particular reasons
24 for these Orders, that Order being issued, is something that the
25 Smiths experienced. Justice Toal was trying to provide a uniform

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1 measure, a uniform way, in which to deal with this foreclosure
2 crisis and with these HAMP guidelines and all these new
3 procedures kind of coming down the pike. And this is the way the
4 Court deemed best to deal with it.

5 BY THE COURT: Well, how do you respond to the argument
6 that the Smiths were given every benefit of the intent behind
7 the Chief Justice's Order by this lengthy period of seeking
8 modification?

9 MS. SWING: I would say that they were given every
10 benefit of the Order thus far except for Sub-part E, which is to
11 give them the ability to answer or respond to the Summons and
12 Complaint. So I would agree that they've been given all the
13 other opportunities under the Order.

14 BY THE COURT: All right, now let me shift gears and
15 put you on the hot seat for a minute.

16 MS. NIELSEN: Yes, Your Honor.

17 BY THE COURT: I have in front of me a copy of a letter
18 dated April 3rd, 2012, from Rogers Townsend, very fine law firm,
19 and it is basically the denial of any intervention. And the last
20 paragraph of that letter --- and at the point this letter is
21 written, the Smiths are in default on the Summons and Complaint,
22 there is a Court Order that has found them in default and has
23 ordered the property go to sale, so the die is cast in that
24 regard. But then this last paragraph in this letter says,
25 "Pursuant to South Carolina Supreme Court Administrative Order

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1 2011-05-02-01," and then it's set out in quotes, "The
2 mortgagor," which are the Smiths, "has thirty days from the date
3 of mailing of notice of denial of relief," which is this letter,
4 "to file and serve an Answer or other response to the
5 mortgagee's Summons and Complaint," close quotes.

6 Isn't that now inconsistent with the argument that your
7 client is making?

8 MS. NIELSEN: Well, at the outset, Your Honor, we would
9 look back to the Administrative Order, which is kind of the
10 subject of where this Motion is heading, and in Subsection C, it
11 specifically provides that any correspondence exchanged in
12 relation to the foreclosure intervention process is not
13 admissible against a party in a subsequent proceeding, and
14 that's in Subsection C. So to the extent that that letter is
15 being admitted against Citimortgage, it is inadmissible pursuant
16 to the plain language of the Administrative Order on foreclosure
17 intervention.

18 Additionally, beyond that step, the language, as you can
19 see in the letter, is a direct quote from the Administrative
20 Order itself, and it appears that this is a type of form letter
21 that's merely mirroring the language that's provided in the
22 Administrative Order itself for purposes of denial, and that's
23 the extent of it.

24 BY THE COURT: All right, but if I am the Smiths, and I
25 get this letter, and it says there's a thing called the Supreme

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1 Court Administrative Order and it gives me thirty days from the
2 date of the mailing of this notice of denial to serve an Answer
3 or other response, can't I reasonably interpret that as saying
4 I've got a thirty-day period. I've either got to file something
5 or I've got to talk to a lawyer or I've got to get some help?

6 MS. NIELSEN: Your Honor, I don't think so. I think,
7 having the history of this case and knowing that they have had
8 this foreclosure action pending against them since late 2009,
9 and that they had not taken any action to appear in the matter,
10 that a judgment had been entered against them, all of this, that
11 they are made aware of, and now they realize that these loan
12 modification discussions and loss mitigation efforts are coming
13 to a close, I don't think that's a reading that is in accordance
14 with the terms of the Administrative Order or based on the
15 history of the litigation.

16 BY THE COURT: And I hear what you're saying, but part
17 of Ms. Swing's argument is, even if the Administrative Order
18 should not be interpreted the way she's arguing, then her
19 clients reasonably relied upon this letter, and that there's
20 been a waiver of sorts. So how do you respond to that?

21 MS. NIELSEN: Pursuant to the law of South Carolina, it
22 just doesn't comport with what a waiver is pursuant to our case
23 law, and our courts have held that a waiver can only work as a
24 shield. It cannot work as some type of offensive weapon, which
25 is what it would be doing in this case. It would be using the

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1 Order offensively to override a judgment that was entered over
2 two years ago in this case without taking any action pursuant to
3 the South Carolina Rules of Civil Procedure to set that judgment
4 aside. The Administrative Order in no way allows or contemplates
5 vacating of any judgments. Rule 60(b) does that and says it must
6 be done on Motion, which it was never done in this case. So with
7 the waiver argument, it could not be done unilaterally. They
8 could not waive the judgment unilaterally without some type of
9 court intervention, and in no way does it create a waiver in
10 this case.

11 BY THE COURT: All right, Ms. Swing, legally, can you
12 have a waiver after a judgment is entered? Once the judgment is
13 entered, doesn't that kind of --- it becomes the Order unless
14 there's a Rule 59 or a Rule 60 Motion.

15 MS. SWING: Well, not according to the Administrative
16 Order and what the Administrative Order provides these
17 mortgagors the right to do and not according to Citimortgage's
18 own counsel, Rogers Townsend. When they sent out this letter on
19 April 3rd, I can only presume that their interpretation of the
20 Order was the same as mine, that they were to allow the
21 mortgagors thirty days to respond. They extended that offer to
22 our clients, and they came to see us shortly after receiving
23 this letter, which is when we were hired, so I think that was
24 Citimortgage's position at the time. I think now they are trying
25 to argue the opposite, and I think they have waived that right.

GREENVILLE COUNTY COURTHOUSE

1 If anything, if this is an issue to be decided what the
2 Administrative Order says, I would argue that this is not the
3 case for it to be decided, that it would have to be another
4 unique case in which someone has gone through the process, a
5 case was pending prior to May, 2011, an Order of Foreclosure was
6 entered, a notice of denial is sent out, yet they are explained
7 in that letter, or Plaintiff can take the position that you are
8 not allowed to answer or otherwise respond, that the posture of
9 the case is sent to the active docket in the Order stance.
10 That's not what this letter says. And that's not what their
11 interpretation of the Order was, and that's not what they
12 offered the client, or my client.

13 BY THE COURT: Let me hear from you.

14 MS. NIELSEN: Your Honor, as counsel for Citimortgage,
15 we can say that there is no authority to waive, from our client
16 to waive any judgment that has already been entered, and to the
17 extent that an affidavit from RTT would be helpful in this
18 situation, just to show that it's merely a regurgitation of the
19 language of the Administrative Order, that's something that we
20 could provide to Your Honor.

21 MS. SWING: An affidavit from RBC?

22 MS. NIELSEN: From RTT, Rogers Townsend & Thomas.

23 MS. SWING: Oh, excuse me. Excuse me. Is there another
24 bank?

25 MS. NIELSEN: No, just one.

GREENVILLE COUNTY COURTHOUSE

1 MS. SWING: Sorry.

2 BY THE COURT: Now, let me ask, as far as, the analysis
3 is, if the Administrative Order does not allow an Answer, then
4 that's the end of the analysis, correct, Ms. Swing?

5 MS. SWING: I think that's correct.

6 BY THE COURT: I mean, ever how incorrect that analysis
7 would be ---

8 MS. SWING: Sure. I would disagree with it, but that
9 would end any of the other arguments that were presented in
10 Plaintiff's Motion, you're right.

11 BY THE COURT: All right, and assuming just for pure
12 hypothetical, and having truly wonderful lawyers here today,
13 that the Court did allow the Answer and counterclaims, and what
14 I'm trying to do is address all of the issues at one time
15 instead of having to keep bringing you all back to court. Part
16 of the Motion is addressed to the two counterclaims. I think I
17 understand the argument, but let me hear briefly the argument on
18 striking the counterclaims.

19 MS. NIELSEN: Sure, Your Honor. As to the two
20 counterclaims, there's two counterclaims captioned in this
21 action: one as the unauthorized practice of law, and the second
22 being the South Carolina Unfair Trade Practices Act. Our
23 position is that they should be stricken pursuant to Rule 12(f)
24 and 12(b) and 13(a) because they are untimely. Even viewing them
25 in light of ---

GREENVILLE COUNTY COURTHOUSE

1 BY THE COURT: All right, that kind of relates back to
2 the first argument?

3 MS. NIELSEN: Correct.

4 BY THE COURT: Okay.

5 MS. NIELSEN: And even if you just view the Answer and
6 Counterclaim on its face, they fail, pursuant to Rule 12(b) and
7 12(c). The first ground being that our courts have held that the
8 unauthorized practice of law does not create a prior right of
9 action and that's been in Linder and Hambrick and a variety of
10 other cases.

11 BY THE COURT: All right, well, how about like the
12 Matrix and the other cases where, you know, the court has
13 recognized that and Wachovia v Coffey?

14 MS. NIELSEN: To the extent that they want to assert a
15 defense based on those grounds, we believe that they are
16 untimely. To the extent the U.T.P.A. claim, which seeks damages
17 and affirmative relief, the Matrix and Coffey line of cases in
18 no way change the prior line of reasoning, which is there's no
19 affirmative damages type relief for that type of claim, so the
20 U.T.P.A. claim, it's our position, would fail under the
21 precedent of the Hambrick and Linder cases, being that there's
22 no prior right of action, which, in this case, the Memorandum
23 that we received, they concede that point as to the U.T.P.A.
24 claim.

25 In addition, for purposes of the U.T.P.A. claim, there's

GREENVILLE COUNTY COURTHOUSE

1 the three-year statute of limitations, which we believe is also
2 applicable here as a legal counterclaim, due to the fact that
3 the origination of the loan was in 2005, and then the alleged
4 loan modification was in April 1 of 2009, which would have been
5 expired by the time that they served their Answer and
6 Counterclaim on May 3rd, 2012. So the U.T.P.A. claim fails
7 outright, just viewing the Complaint and the Answer in this
8 case.

9 Additionally, to the extent that they claim the loan
10 modification process requires an attorney, we also believe that
11 that position fails under the Buyer's Services cases, that a
12 loan modification is not a closing and therefore does not
13 require an attorney and would not be the unauthorized practice
14 of law.

15 BY THE COURT: All right, Ms. Swing, let me ask, I
16 guess, first substantively, where is the unauthorized practice
17 of law in this case? Is it from the original loan or from the
18 modification?

19 MS. SWING: It is from the modification. It is from the
20 modification, which I'm sure, as everybody is aware, is an issue
21 that's currently for consideration before the Supreme Court,
22 which is why we asserted it in the Answer. We believe that it
23 does require the presence of an attorney under the Buyer's
24 Service, that it doesn't meet all the --- I believe there are
25 five elements that are listed in there, but it meets the

GREENVILLE COUNTY COURTHOUSE

1 majority of those such that it should fall under that. We will
2 find out what the Supreme Court has to say about that.

3 BY THE COURT: I think it was argued about two weeks
4 ago.

5 MS. SWING: About two or three weeks ago, it was, Your
6 Honor, so we should hear soon on that.

7 BY THE COURT: All right, now, let me ask you, even
8 assuming that the Supreme Court rules a modification requires an
9 attorney, and I've had multiple, several cases, where I've ruled
10 that a modification does not require, and I think some of those
11 are down in Columbia as well, because I know that's been a hotly
12 contested issue ever since Matrix. How about, on the Unfair
13 Trade Practices Act being barred by the statute of limitations?

14 MS. SWING: I disagree that it would be barred by the
15 statute of limitations and that you would look to the rule of
16 discovery when the violation was discovered, and that violation
17 isn't going to really be discovered until we know that it's
18 actually a viable claim. We certainly think it's going to be a
19 claim. That's why we placed it in the counterclaim. But until
20 the Supreme Court makes its ruling, that's going to be the time
21 where we'll actually discover that it is, in fact, a claim, and
22 it was, you know, put there in order to preserve those rights.

23 BY THE COURT: Interesting argument. I'm trying to
24 plumb the depths of that.

25 All right, let me hear from you, then. Where does the right

GREENVILLE COUNTY COURTHOUSE

1 arise? Is it when the Supreme Court says it is or under Coffey
2 and all those, or is it from the day of the modification?

3 MS. NIELSEN: Your Honor, our position would be it's
4 from the day of modification. At that time, the Defendants
5 necessarily would have known if there was an attorney sitting at
6 that table signing the documents with them, and I believe we
7 cite a case in our Memorandum stating that it's not when there's
8 a full-blown theory of recovery that's been fleshed out that the
9 actual Cause of Action accrues. It's when there's facts showing
10 that they have this Cause of Action, and these arguments about
11 the unauthorized practice of law have been going about for some
12 time, and if they believe they had a Cause of Action and that
13 there was not an attorney sitting at that table when they signed
14 the documents, that it started running on that date.

15 BY THE COURT: All right, now, Ms. Swing, does the
16 Unfair Trade Practices claim swing or grow out of the
17 unauthorized practice of law?

18 MS. SWING: Yes, Your Honor, it does.

19 BY THE COURT: All right, anything else you all want to
20 have on the record or impress me with before I . . .

21 MS. NIELSEN: One final thing, Your Honor. To the
22 extent that the Matrix opinion is relied on for purposes of
23 supporting the unauthorized practice of law defense, I guess it
24 would be in this case, we would also argue that it's
25 inapplicable due to the date that it's after the filing of this

GREENVILLE COUNTY COURTHOUSE

1 Order, I think is what the Matrix opinion says, and this
2 Complaint was filed back in 2009. So we believe the Matrix
3 opinion is inapplicable here.

4 BY THE COURT: And there's been any number of law suits
5 now arguing what exactly does that language mean.

6 All right, Ms. Swing, anything else?

7 MS. SWING: I would just want to re-emphasize the
8 letter that Rogers Townsend sent where they specifically
9 extended an offer to our clients to answer or to otherwise
10 respond, and even if the Court finds that the Administrative
11 Order does not provide that, Rogers Townsend obviously
12 interpreted the Order that way. My client interprets the Order
13 that way. The offer was extended and they accepted.

14 BY THE COURT: All right, here's what, on the bigger
15 issue, I want to, there are a couple of other things I want to,
16 the bigger issue being the Administrative Order in fact. I think
17 I know what my ruling needs to be there but there are a couple
18 of other points, thanks to very fine arguments that you all have
19 raised, I'm going to look at. To the extent that we even get
20 there, I am going to grant the Motion to Strike relative to the
21 unauthorized practice of law. I just don't think a modification
22 requires a lawyer, and that would necessarily also take out the
23 Unfair Trade Practices, and alternatively, I think it would be
24 barred by the statute of limitations.

25 Go off the record for a minute, Ann.

GREENVILLE COUNTY COURTHOUSE

1 (WHEREUPON, a discussion was held off the record and
2 the hearing was concluded.)

3 ----- END OF TRANSCRIPT -----
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GREENVILLE COUNTY COURTHOUSE

1 I, the undersigned Ann D. Campbell, Court Reporter, Office
2 of Master in Equity for Greenville County, South Carolina, do
3 hereby certify that the foregoing is a true, accurate and
4 complete transcript of record of all the proceedings had and
5 evidence introduced in the hearing of the captioned case,
6 relative to appeal, before The Honorable Charles B. Simmons,
7 Jr., as Master in Equity for Greenville County, South Carolina,
8 on the 12th day of July, 2012.

9 I do further certify that I am neither of kin, counsel, nor
10 any interest to any parties hereto.

11 September 18th, 2012

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14 Ann Dickey Campbell, CVR
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GREENVILLE COUNTY COURTHOUSE

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

CASE NO.: 2009-CP-23-11051

CitiMortgage, Inc.

Plaintiff,

vs.

William Smith, Jr. a/k/a William H. Smith, et
al.

Defendant.

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: Sarah B. Nielsen, Bar No. _____ Address: Nelson Mullins, P.O. Box 11070, Columbia, SC 29211 Phone: 803.255.9284 Fax 803.255.5943 E-mail: sarah.nielsen@nelsonmullins.com Other: _____	Defendant's Attorney: Bridget D. Swing, Bar No. _____ Address: Foreclosure Defense Law Firm, LLC P.O. Box 8246 Greenville, SC 29604 Phone: 864.551.4353 Fax _____ E-mail: _____ Other: _____
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion to Strike, Dismiss and for Judgment on the Pleadings Estimated Time Needed: 15 mins Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. 6/1/12 Signature of Attorney for ☒ Plaintiff / ☐ Defendant Date submitted	
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$ _____ ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED - AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA	)	IN THE
COUNTY OF GREENVILLE	)	COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
CitiMortgage, Inc.,	)	Civil Action No. 2009-CP-23-11051
Plaintiff,	)	
vs.	)	<u>MOTION TO STRIKE, DISMISS</u>
William H. Smith, Jr. a/k/a William H.	)	<u>AND FOR JUDGMENT ON THE</u>
Smith, Angella S. Smith, The South	)	<u>PLEADINGS</u>
Carolina Department of Revenue,	)	
Defendants.	)	

Plaintiff CitiMortgage, Inc. ("CitiMortgage"), by and through its undersigned counsel, hereby moves this Court pursuant to Rules 12, 13 and 55 of the South Carolina Rules of Civil Procedure, to strike Defendants William H. Smith, Jr. a/k/a William H. Smith and Angella S. Smith's ("Defendants") answer and to dismiss and/or grant judgment on the pleadings as to Defendants' counterclaims. The grounds for this motion are as follows:

1. CitiMortgage's Summons and Complaint were filed and served on December 30, 2009. See Affidavits of Service, attached hereto as Exhibit "A."
2. Pursuant to Rule 12(a) of the South Carolina Rules of Civil Procedure, Defendants' responsive pleading was due on or before January 29, 2010. Defendants failed to file a responsive pleading within this time period and, therefore, were in default pursuant to Rule 55, SCRCP.
3. Thereafter, on April 27, 2010, the Master-in-Equity entered a Judgment of Foreclosure and Sale finding that Defendants were in default as evidenced

by an affidavit presented at the hearing held on that same day. *See* Judgment of Foreclosure and Sale, attached hereto as Exhibit "B." The Judgment of Foreclosure and Sale was filed on May 10, 2010.

4. On June 7, 2010, the real property was sold at a foreclosure sale. Subsequently, due to settlement negotiations between CitiMortgage and Defendants, the foreclosure sale was set aside by order dated July 1, 2010, but the Judgment of Foreclosure and Sale remained intact. *See* Order Vacating Sale, attached hereto as Exhibit "C."

5. Almost two years later, on May 3, 2012, after the parties engaged in foreclosure intervention pursuant to the South Carolina Supreme Court's Administrative Order on foreclosure intervention, Defendants improperly filed and served a pleading titled "Answer of Defendants William H. Smith, Jr. a/k/a William H. Smith and Angella S. Smith." By operation of Rules 12(a) and 55, SCRCP, Defendants were found to be in default, and a judgment entered against them, at the time this pleading was filed. Defendants failed to obtain relief from the judgment or otherwise seek leave of the court to file this purported pleading.

6. Due to the judgment against Defendants, the purported Answer and Counterclaim does not constitute a valid pleading or defense under the South Carolina Rules of Civil Procedure. *See, e.g., Stark Truss Co., Inc. v. Superior Constr. Corp.*, 360 S.C. 503, 602 S.E.2d 99 (Ct. App. 2004). Therefore, pursuant to Rule 12(f), SCRCP Defendants' "Answer of Defendants William H. Smith, Jr. a/k/a William H. Smith and Angella S. Smith" should be stricken in its entirety. *See* S.C. R. Civ. P. 12(f).

7. In addition to filing the late Answer to the Complaint for foreclosure, Defendants also assert two counterclaims: (1) alleged unauthorized practice of law and (2) alleged violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). CitiMortgage seeks dismissal of these claims pursuant to Rule 12(b), SCRPC and/or judgment on the pleadings as to both claims under Rule 12(c), SCRPC.

8. Pursuant to Rules 12(b) and 13(a), SCRPC, Defendants' two counterclaims against CitiMortgage should be dismissed, with prejudice, for failure to properly plead compulsory counterclaims within the time required under the South Carolina Rules of Civil Procedure. The South Carolina Supreme Court has adopted the "logical relationship" test for determining whether a claim is a compulsory counterclaim under Rule 13(a). *N.C. Fed. Savings & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989) ("We hereby adopt the logical relationship test."). Under the logical relationship test, a counterclaim is compulsory if there is any logical relationship between the claim and the counterclaim. *See id.* (finding a logical relationship between the enforceability of a note, which was the subject of a foreclosure action, and the validity of a purported oral agreement which, if performed, would have avoided default on the note). Defendants' counterclaims relate to the enforceability of the Note and the origination of the loan and, therefore, have a logical relationship to the foreclosure action. Having failed to file these counterclaims on or before January 29, 2010, Defendants are barred from doing so at this juncture. Therefore, CitiMortgage seeks dismissal of the counterclaims, with prejudice.

9. Defendants' counterclaims must also be dismissed under Rule 12(b), SCRPC for failure to state facts sufficient to constitute a cause of action because

both claims rely exclusively on allegations that the loan was not closed by an attorney. It has long been established in South Carolina that there is no private right of action for the unauthorized practice of law. See *Linder v. Insurance Claims Consultants, Inc.*, 348 S.C. 477, 560 S.E.2d 612 (2002) (finding plaintiffs could not maintain negligence claim based on unauthorized practice of law because no private right of action existed); *Franklin v. Chavis*, 371 S.C. 527, 535, 640 S.E.2d 873, 877 (2007) ("There is no private right of action in South Carolina for the unauthorized practice of law."); *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 124-25, 634 S.E.2d 5, 8 (Ct. App. 2006) (dismissing the action after noting that there is no private right of action for the unauthorized practice of law and that "[e]very allegation in the complaint ultimately stems from the Hambrick's assertion that Ditech engaged in the unauthorized practice of law during the loan transaction"). Because Defendants are attempting to rely solely on their allegations that an attorney did not close this loan, they cannot succeed on these counterclaims.

10. Finally, Defendants' counterclaim for alleged violation of the SCUTPA is barred by the three-year statute of limitations and, therefore, CitiMortgage is entitled to judgment on the pleadings as to this claim.¹ As noted above, Defendants claim CitiMortgage "routinely engaged in the unauthorized practice of law by depriving its debtors of legal representation for mortgage modifications in South Carolina," to support her SCUTPA claim. (Ans. & Countercl. ¶ 30.) However, in this case, Defendants' loan was closed on or about February 4, 2005. (See Compl. ¶ 7.) Because the SCUTPA relates to the closing of Defendants' loan in 2005, and

¹ Even if the unauthorized practice of law is deemed a valid claim, it is barred by a three-year statute of limitations, as noted in Paragraph 10.

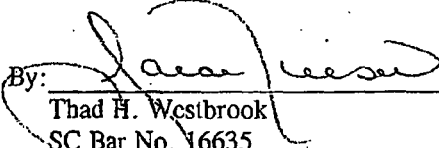
Defendants did not assert this counterclaim until 2010, the claim is barred by the applicable statute of limitations. *See* S.C. Code Ann. § 39-5-150 (outlining the statute of limitations on a SCUTPA claim as three years).

11. Based on the foregoing, CitiMortgage respectfully requests that this Court grant its motion and strike Defendants' alleged pleading in its entirety, dismiss Defendants' purported counterclaims, with prejudice, and/or grant CitiMortgage judgment on the pleadings as to the SCUTPA and unauthorized practice of law claims.

This Motion is further based on the pleadings, affidavits, and other documents filed in this case, the South Carolina Rules of Civil Procedure, the applicable statutory and case law of South Carolina, and any memorandum of law or other supporting materials to be submitted prior to, at, or subsequent to a hearing on this Motion.

SIGNATURE PAGE ATTACHED

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Thad H. Westbrook

SC Bar No. 16635

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Columbia, SC 29201

(803) 799-2000

Attorneys for CitiMortgage, Inc.

Columbia, South Carolina

6/1, 2012

Exhibit A

(Affidavits of Service)

IN THE
IN THE COURT OF COMMON PLEAS OF THE STATE OF SOUTH CAROLINA FOR GREENVILLE COUNTY

Citimortgage, Inc

Plaintiff/Petitioner

vs.
William H. Smith, Jr. a/k/a William H.
Smith, ET AL

Defendant/Respondent

Docket Number:
09-CP-23-11051

AFFIDAVIT OF SERVICE OF:
Lis Pendens (Deficiency Judgement Waived); Civil Action
Coversheet; Certificate of Exemption from ADR;
Summons and Notices; Complaint; Notice required by the
Fair Debt Collection Practices Act

The undersigned, being first duly sworn, on oath deposes and says: That s(he) is now and at all times herein mentioned was a citizen of the United States, over the age of eighteen, not an officer of a plaintiff corporation, not a party to nor interested in the above entitled action, has the authority to serve pleadings in the State named below, and is competent to be a witness therein.

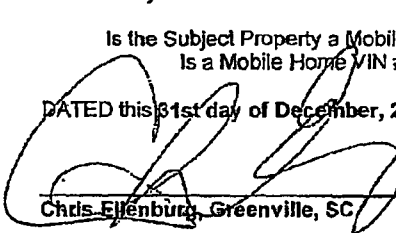
On the 30th day of December, 2009, at 5:30 PM, at the address of 2812 BRUSHY CREEK Road, GREER, Greenville County, SC 29650; this affiant served the above described documents upon Angella S. Smith, by then and there personally delivering 1 true and correct copy(ies) thereof, by then presenting to and leaving the same with William H. Smith Jr., Spouse, A white male approx. 45-55 years of age 5'10"-6'0" in height weighing 200-220 lbs with brown hair.

No Information was provided or discovered that indicates that the subjects served are members of the U.S. military.

Is the Subject Property a Mobile Home? (X) NO () YES
Is a Mobile Home VIN # visible? () NO () YES

VIN #:

DATED this 31st day of December, 2009.


Chris Ellenburg, Greenville, SC

SUBSCRIBED AND SWORN to before me this 31st day of December, 2009


NOTARY PUBLIC in and for the State of South Carolina
My Commission Expires: 03/03/2013

FOR: Rogers Townsend & Thomas, PC ORIGINAL PROOF OF
REF: 011654-03607-4 SERVICE

Tracking #: 8472837 CAE FIL



FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL R. HICKENSTINE
JAN -4 AM 11:13

IN THE
IN THE COURT OF COMMON PLEAS OF THE STATE OF SOUTH CAROLINA FOR GREENVILLE COUNTY

CitImortgage, Inc

Plaintiff/Petitioner

vs.
William H. Smith, Jr. a/k/a William H.
Smith, ET AL

Defendant/Respondent

Docket Number:
09-CP-23-11051

AFFIDAVIT OF SERVICE OF:
Lis Pendens (Deficiency Judgement Waived); Civil Action
Cover Sheet; Certificate of Exemption from ADR;
Summons and Notices; Complaint; Notice required by the
Fair Debt Collection Practices Act

The undersigned, being first duly sworn, on oath deposes and says: That s(he) is now and at all times herein mentioned was a citizen of the United States, over the age of eighteen, not an officer of a plaintiff corporation, not a party to nor interested in the above entitled action, has the authority to serve pleadings in the State named below, and is competent to be a witness therein.

On the 30th day of December, 2009, at 5:30 PM, at the address of 2812 BRUSHY CREEK Road, GREER, Greenville County, SC 29650; this affiant served the above described documents upon William H. Smith, Jr. a/k/a William H. Smith, by then and there personally delivering 1 true and correct copy(ies) thereof, by then presenting to and leaving the same with William H. Smith, NAMED DEFENDANT, A white male approx. 45-55 years of age 5'10"-6'0" in height weighing 200-220 lbs with brown hair.

No Information was provided or discovered that indicates that the subjects served are members of the U.S. military.

Is the Subject Property a Mobile Home? ☒ NO ☐ YES
Is a Mobile Home VIN # visible? ☐ NO ☐ YES VIN #

DATED this 31st day of December, 2009.

Chris Ellenburg, Greenville, SC

SUBSCRIBED AND SWORN to before me this 31st day of December, 2009

James Patrick Watson
NOTARY PUBLIC in and for the State of South Carolina
My Commission Expires: 03/03/2013

FOR: Rogers Townsend & Thomas, PC ORIGINAL PROOF OF
REF: 011654-03607-3 SERVICE

Tracking #: 8472836 CAE FIL



2009 JAN -4 AM 11:13
FILED-CLERK OF COURT
GREENVILLE, S.C.
PAUL B. WICKERSTEN

Exhibit B

(Judgment of Foreclosure & Sale)

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

CitiMortgage, Inc.,

Plaintiff,

v.

William H. Smith, Jr. a/k/a William H. Smith;
Angella S. Smith; The South Carolina Department
of Revenue;

Defendant(s).

(011654-03607)

IN THE COURT OF COMMON PLEAS

DOCKET NO. 09-CP-23-11051

JUDGMENT OF FORECLOSURE AND SALE

Deficiency Judgment Waived
Subject to Home Affordable Modification
Program, but will not be modified

Samuel C. Waters, Esquire
Attorney for the Plaintiff

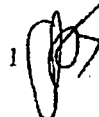
Ronald W. Urban, Esquire
Attorney for The South Carolina Department of Revenue

A hearing was held April 27, 2010 at 09:15 AM. Evidence was presented, which is reported herewith, and from the evidence, I find and conclude as follows:

FINDINGS OF FACT:

1. The Lis Pendens was filed on December 30, 2009.
2. The Summons and Complaint were filed on December 30, 2009.
3. Service was made upon all Defendant(s) as shown by the proof(s) of service filed herein.
4. The Defendant(s) William H. Smith, Jr. a/k/a William H. Smith and Angella S. Smith are in default as shown by affidavit or order filed herein.
5. The Defendant(s) William H. Smith, Jr. a/k/a William H. Smith and Angella S. Smith are in default and that the Defendant(s) William H. Smith, Jr. a/k/a William H. Smith and Angella S. Smith are not in the Military Service of the United States of America, as contemplated under The Servicemembers Civil Relief Act, 50 U.S.C. § 501 et. seq. as shown by affidavit or order filed herein.
6. No Defendant raised any issues related to Plaintiff's standing to prosecute this

1



action.

7. Pursuant to the South Carolina Supreme Court Administrative Order dated May 22, 2009, the Plaintiff set forth its belief in its Complaint or by Affidavit, which is already of record in this case, that the mortgage loan which is the subject of this foreclosure action is not eligible for modification pursuant to the terms of the Home Affordable Modification Program (HMP). Pursuant to the South Carolina Supreme Court Administrative Order dated May 22, 2009, Plaintiff's attorney has not received a counter affidavit from any Defendant(s).

8. The South Carolina Department of Revenue filed an answer through their attorney, Ronald W. Urban, Esquire.

9. All Pro Se Defendant(s) and all attorneys of record were notified of the time, date, and place of the hearing by letter and certificate of mailing of record herein.

10. William H. Smith and Angella S. Smith for value received, made, executed and delivered a(n) Fixed Rate Note dated February 4, 2005 promising thereby to pay to Plaintiff or its predecessor the sum of \$200,000.00 with interest at 5.25% per annum. Other terms and conditions are stated in the Fixed Rate Note, of record herein.

11. To better secure the payment of the Fixed Rate Note described above, William H. Smith, Jr. and Angella S. Smith made, executed, and delivered to Mortgage Electronic Registration Systems, Inc., acting solely as nominee for RBC Mortgage Company (MIN #100058900101753622) a certain real estate Mortgage in writing, dated February 4, 2005 covering real property in Greenville County, which is the same as that described in the Complaint. This Mortgage was filed on February 24, 2005, and is of record in the Office of RMC/ROD in Book 4318 at Page 542. This Mortgage was subsequently assigned to the Plaintiff herein by assignment dated November 17, 2006 and recorded December 7, 2006 in Book 4689 at Page 1286. This Mortgage is subject to a Loan Modification Agreement dated April 1, 2009 and recorded July 29, 2009 in Book 5050 at Page 2794.

12. This Mortgage constitutes a first priority lien on the subject property, subject only to ad valorem taxes or other liens given priority by statute.

13. Plaintiff in this action is the owner and holder or nominee for the owner and holder of the Fixed Rate Note and first Mortgage it is seeking to foreclose, and the real party in interest pursuant to Rule 17(a) of the South Carolina Rules of Civil Procedure.

14. The titleholder(s) of record in and to the subject property as of the filing of the lis pendens in this action are William H. Smith, Jr. and Angella S. Smith, who are the original mortgagor(s).

15. Any notice required by the terms of the Mortgage or by state or federal statutes was given to the applicable Defendant(s) prior to the commencement of this action.

16. Payment due on the Fixed Rate Note was not made as provided for therein, and Plaintiff, as the holder or nominee for the holder thereof, elected to require immediate payment of the entire amount due thereon and placed the Fixed Rate Note and Mortgage in the hands of the attorney herein for remedy by foreclosure.

17. The sum of \$5,500 is a reasonable fee to allow Plaintiff's counsel for services performed and anticipated to be performed until final adjudication of this action, under the terms of the Fixed Rate Note and Mortgage. This fee is likewise reasonable based on the time necessarily devoted to representation of Plaintiff during the several month course of these proceedings. The services of counsel performed for Plaintiff, which include the number and types of pleadings and documents prepared, the incumbent liabilities, and the difficulties involved in this particular case also support the fee awarded. The fee is also reasonable given the professional standing of Plaintiff's counsel and their experience in handling foreclosure matters. The fee awarded herein is also reasonable in light of the fees customarily awarded by this court for similar services in this locality. Moreover, the efforts of Plaintiff's counsel have had the beneficial result of a prompt foreclosure of the Mortgage. Services anticipated to be performed until final adjudication contemplate completion of this matter within a reasonable time and does not include exceptional circumstances delaying conclusion beyond the normal time.

18. According to Plaintiff's accounting, after all payments received by Plaintiff have been credited to the subject loan, the amount due and owing on the Fixed Rate Note, with interest at the rate provided in the Fixed Rate Note, advances made by Plaintiff, and other costs and expenses of the action, including a reasonable attorney fee, all secured by the Fixed Rate Note and Mortgage, is as follows:

(a)	Principal due September 1, 2009	\$215,273.33
(b)	Interest from August 1, 2009 through April 27, 2010 at 5.25% per annum	\$8,492.97
(c)	Advances (Escrow advances, corporate charges, paid attorney fees, paid costs and expenses from the foreclosure action, and/or other charges)	\$3,217.49
(d)	Costs of collection prior to hearing (service, filing, etc.)	\$32.50
(e)	Late Charges	\$215.28
(f)	Attorney Fee (awarded herein, but unpaid)	\$4,765.00
TOTAL debt secured by Fixed Rate Note and Mortgage, including interest to date shown		\$231,996.57

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Interest shall accrue to the above stated "Total Debt" after the date of judgment at the rate of 5.25% per annum (pursuant to the terms of the Fixed Rate Note and first Mortgage). Accrued interest shall be added to the "Total Debt" and shall comprise the amount of the Plaintiff's debt secured by the first Mortgage through the date to which such interest is computed.

19. Plaintiff is seeking the usual foreclosure of the first mortgage and has in the Complaint (or subsequently thereto in writing) expressly waived the right to a personal or deficiency judgment.

20. The following Defendant(s) may claim a subordinate lien upon or subordinate legal interest in the subject property and in the event there is a surplus from the sale of the subject property, these Defendant(s) may present through any such lien or legal interest a claim to the surplus at a hearing subsequent to the sale, in accordance with Rule 71(c) South Carolina Rules of Civil Procedure. The said Defendant(s) and such liens or legal interests are as follows:

a. The South Carolina Department of Revenue by virtue of a Tax Lien against William Smith and Angella Smith; Tax Lien No.: 3-51083922-3; Dated: October 19, 2009; Recorded: October 26, 2009; in the amount of \$628.61; in Book 44 at Page 1367.

IT IS THEREFORE ORDERED:

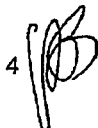
21. Plaintiff has fully complied with The South Carolina Supreme Court Administrative Order dated May 22, 2009, and the foreclosure action may proceed.

22. There is due on the Fixed Rate Note and first Mortgage set forth in the Complaint the sum of \$231,996.57, as set out in the Findings of Fact *supra*, together with interest at the rate provided therein on the balance of principal from the date aforesaid to the date hereof.

23. The amount due in the preceding paragraph (the "Final Total Debt" as set out in the Findings of Fact *supra*) shall accrue interest at the rate of the respective note rate(s) per annum and together with such interest shall constitute the total judgment debt due Plaintiff.

24. The amount of the judgment shall be subject to increase to permit Plaintiff to recover additional costs, commissions, and expenses not included in the minimum deposit previously made in compliance with S.C. Code Ann. §14-11-310 (1976). It may also increase to include supplemental compensation for attorneys' services not contemplated by the initial fee award. Jurisdiction over the fee award and total debt is reserved to facilitate the assessment and payment of any such costs or supplemental compensation. Such additional costs, commissions and expenses may be established by affidavit and shall be adjudicated by the court without further hearing.

25. The Defendant(s) liable for the aforesaid judgment debt of the Fixed Rate Note and Mortgage including interest at the rate of 5.25% per annum shall pay on or before the date of

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sale of the property hereinafter described, to Plaintiff or Plaintiff's attorney the amount of Plaintiff's debt as aforesaid, including with the costs and disbursements of this action.

26. On default of payment at or before the time of the sale of the property, the mortgaged property described hereinafter shall be sold at public auction at the Greenville County Courthouse, in the City of Greenville, and State of South Carolina on a sales day determined by the below signed Master in Equity or Special Referee, on the following terms:

a. For cash or its equivalent: An immediate deposit of 5% is required on the amount of the bid. The deposit will be applied to the purchase price when total compliance is made. In the event compliance is not made, the deposit shall be forfeited without further hearing and applied first to costs and expense of the action and then to plaintiff's debt. Should the successful bidder at the regularly conducted sale fail or refuse either to make the required deposit at time of bid or to comply with the other terms of the bid within 0 days, then the property may be re-sold on the same terms and conditions on the same or some subsequent sales day and at the risk of the defaulting bidder.

b. Interest on the balance of the bid after the deposit is applied shall be paid through the day of compliance at the note rate of 5.25%.

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

d. Purchaser shall pay for any statutory commission on sale from the proceeds of the final bid amount.

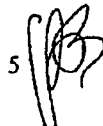
e. Purchaser to pay for deed preparation, costs of recording the deed and the satisfaction of mortgage, and transfer taxes on the deed.

f. Purchaser shall be entitled to possession of the premises only after Purchaser fully complies with the bid amount and a deed is issued by the Master in Equity or Special Referee.

27. A personal or deficiency judgment having been waived, the bidding will not remain open after the date of sale and compliance with the bid may be made immediately.

28. Plaintiff may waive any of its rights, including its right to a deficiency judgment in accordance with Rule 71, of the South Carolina Rules of Civil Procedure, prior to sale.

29. The Master in Equity will give notice of the time and place of the sale by advertisement according to law and the terms thereof by advertisement according to law and will execute to the Purchaser a deed to the property sold. Plaintiff or any other party to this action may become a purchaser at such sale. If, upon such sale being made, the Purchaser should fail to comply with the terms

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thereof within 0 days after date of sale, then the Master in Equity may advertise the said premises for sale 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.

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

31. The Master in Equity will apply the proceeds of the sale as follows:

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

NEXT: To the payment to Plaintiff or Plaintiff's attorney of the amount of Plaintiff's debt and interest (including a reasonable attorney fee) or so much thereof as the purchase money will pay on the same;

NEXT: Any surplus should be held pending further Order of this court.

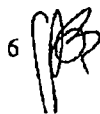
32. In the event the successful bidder is someone other than the Defendant(s) in possession of the subject property, the Sheriff of Greenville County is ordered and directed to eject and remove from the property the occupant(s) of the property sold, together with all personal property located thereon, and put the successful bidder or his assigns in full, quiet, and peaceable possession of said property without delay, and to keep said successful bidder or his assigns in such peaceable possession.

33. In the event the successful bidder is other than the Defendant(s) in possession of the subject property and the occupants have voluntarily vacated the property or have been ejected from the property leaving furnishings, fixtures and items not subject to Plaintiff's Mortgage in said property, the Purchaser is authorized to remove from the property all furnishings, fixtures and items not subject to the lien of Plaintiff's Mortgage. The personal property, being deemed abandoned, shall be removed by the Purchaser or its agents from the subject property by placing said personal property on the public street or highway or by any other means.

34. The Defendant(s) named herein, and all persons whosoever claiming under Defendant(s), are forever barred and foreclosed of all right, title, interest, equity of redemption or lien in the said mortgaged property so sold, or any part thereof.

35. In accordance with Rule 77(d), of the South Carolina Rules of Civil Procedure, the Clerk of Court shall serve a notice of entry of this Judgment of Foreclosure upon all parties not in default for failure to appear in this action.

36. The deed of conveyance made pursuant to the foreclosure sale shall contain the names of only the first-named Plaintiff and the first-named Defendant(s), and the Defendant(s) who

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was/were the titleholder(s) of the mortgaged property at the time of the filing of the notice of pendency of the within action, and the name of the grantee. The Register of Deeds/Clerk of Court is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deed.

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

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

All that certain piece, parcel or lot of land, situate, being in the State of South Carolina, County of Greenville and being shown on Survey of Angella J. Stephens dated June 28, 1983 by Carolina Surveying Company, containing 0.72 acres, more or less, said plat being recorded in the RMC Office for Greenville County in Plat Book 9-U at Page 96, reference to which plat is hereby made for a more particular description.

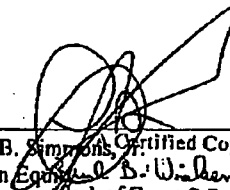
Less and Excepting: 892 feet of land and all improvements thereon, if any, along a relocated centerline as shown on plans between approximate survey stations 172+47.76 and 192+61.86, which was conveyed to the South Carolina Department of Transportation by deed dated October 27, 2003 and recorded December 12, 2003 in Book 2067 at Page 117.

This being the same property conveyed to Angella Jean Stephens by deed of Ronald Stephens and Betty Wade Stephens, dated July 1, 1983 and recorded July 1, 1983 in Deed Book 1191 at Page 596; subsequently, Angella S. Smith f/k/a Angella Jean Stephens conveyed her interest to Angella S. Smith and William H. Smith, Jr. by deed dated March 13, 1997 and recorded May 19, 1997 in Deed Book 1690 at Page 409.

Property Address: 2812 Brushy Creek Road
Greer, SC 29650

TMS# 0538.07-01-007.03

4/27, 2010
Greenville, South Carolina


Charles B. Simmons, Certified Copy
Master in Equity
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated 5/10/10

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
CASE NO. 09-CP-23-11051

MOTION INFORMATION
FORM
AND COVER SHEET

CitiMortgage, Inc. ☒ Plaintiff

v.

William H. Smith, Jr. aka William H. Smith; Angella S. Smith; The South Carolina Department of Revenue; ☐ Defendant

Name, S.C. Bar no. and address of plaintiff's attorney

Samuel C. Waters (SC Bar #5958), Cheryl H. Fisher (SC Bar #15213), Reginald P. Cogley (SC Bar #69453), Jennifer W. Rubin (SC Bar #16727), Ellie C. Floyd (SC Bar #68635), Michael P. Morris (SC Bar #73560), Bre Moredock Stacey (SC Bar #5300), Mary R. Powers (SC Bar #16534), Robert P. Davis (SC Bar #74030), William S. Koehler (SC Bar #74935), Shawn R. Willis (SC Bar #71155), Kevin T. Hardy (SC Bar #76015), Benjamin J. Powell (SC Bar #77205), John P. Palmer (SC Bar #77460), Kelsey K. Brockbank (SC Bar #77519)
220 Executive Center Drive, Suite 109, Columbia, SC 29210
telephone: 803-744-4444 fax: 803-343-7013

Name, S.C. Bar no. and address of
Defendant's attorney

telephone: fax:
email: other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and II)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (Complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed:

Court Reporter Needed: YES/NO

SECTION II: Motion Fee

☒ PAID — AMOUNT: \$25.00

☐ EXEMPT:

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

SECTION III: Motion Type

☐ Written motion attached

☒ Form Motion

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for Plaintiff/Defendant

June 24, 2010
Date submitted

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other

JUDGE
CODE: _____

Date: _____

CLERK'S VERIFICATION

Collected by: Aranda

(print name)

☒ MOTION FEE COLLECTED: 0.25

☐ CONTESTED — AMOUNT DUE: _____

SCCA/233 (11/2003) 011654-03607

Date Filed: 7/8/10

Check # 136472
ATT

Exhibit C

(Order Vacating Sale)

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2009-CP-23-11051

Citimortgage Inc vs. William H Smith Jr

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other:

IT IS ORDERED AND ADJUDGED:

☐ See attached order.

☒ Statement of Judgment by the Court:

See attached order

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 8th day of July, 2010, and a copy mailed first class this 8th day of July, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Eve Moredock S Stacey Rogers Townsend &
Thomas, P.C. Box 100200 Columbia, SC
292023200

Ronald W. Urban SC Department Of Revenue
Po Box 12265 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC APP-24/FORM 4

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

CPFORM44M

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

CitiMortgage, Inc.,

Plaintiff,

v.

William H. Smith, Jr. a/k/a William H. Smith;
Angella S. Smith; The South Carolina Department
of Revenue;

Defendant(s).

IN THE COURT OF COMMON PLEAS

DOCKET NO. 09-CP-23-11051

ORDER SETTING ASIDE SALE
Deficiency Judgment Waived

(011654-03607)

I have been advised by the attorney for the Plaintiff that the Defendant(s), William H. Smith, Jr. a/k/a William H. Smith, and CitiMortgage, Inc. entered into settlement negotiations, prior to the scheduled sale of the property that is the subject of this foreclosure action. Plaintiff has moved for the sale to be set aside so settlement negotiations may continue.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the foreclosure sale, which occurred on June 7, 2010, is hereby set aside.

Charles B. Simpson, Jr.
Master in Equity

_____, South Carolina

7/1, 2010

RECEIVED
JUL - 6 2010
Clerk of Court
Greenville County

CERTIFICATE OF SERVICE

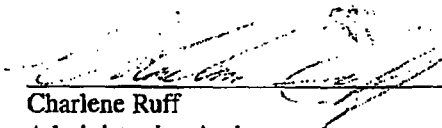
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for CitiMortgage, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

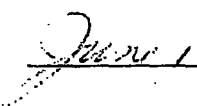
MOTION TO STRIKE, DISMISS AND FOR JUDGMENT ON
THE PLEADINGS

Counsel Served:

Bridget D. Swing
Foreclosure Defense Law Firm, LLC
P.O. Box 8246
Greenville, SC 29604



Charlene Ruff
Administrative Assistant

_____, 2012

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL A. WILKINS

) IN THE COURT OF COMMON PLEAS
) THIRTEENTH JUDICIAL CIRCUIT

CitiMortgage, Inc.,

Plaintiff,

vs.

William H. Smith, Jr. a/k/a William H.
Smith, Angella S. Smith, The South
Carolina Department of Revenue,

Defendants.

Civil Action No. 2009-CP-23-11051

MEMORANDUM IN SUPPORT OF
MOTION TO STRIKE, DISMISS
AND FOR JUDGMENT ON THE
PLEADINGS

Plaintiff, CitiMortgage, Inc. ("CitiMortgage"), by and through its undersigned counsel and pursuant to Rules 12, 13 and 55 of the South Carolina Rules of Civil Procedure, respectfully submits this Memorandum in Support of its Motion to Strike, Dismiss, and/or for Judgment on the Pleadings as to Defendants William H. Smith, Jr. a/k/a William H. Smith and Angella S. Smith's ("Defendants") Answer and Counterclaim. Defendants' Answer and Counterclaim is untimely pursuant to the South Carolina Rules of Civil Procedure and, on that basis, the defenses must be stricken pursuant Rule 12(f), and counterclaims dismissed pursuant to Rules 12(b) and 13(a) of the South Carolina Rules of Civil Procedure. Moreover, Defendants' counterclaims fail to state facts sufficient to constitute a cause of action and are barred by the applicable statute of limitations. Thus, CitiMortgage seeks dismissal of the counterclaims pursuant to Rule 12(b) and judgment on the pleadings pursuant to Rule 12(c).

To the extent Defendants argue that the South Carolina Supreme Court's Administrative Order No. 2011-05-02-01 (the "Administrative Order") gives them the right to file a pleading two years after their default, that argument is in direct contravention of the language of the Administrative Order, the South Carolina Rules of Civil Procedure, and Court Administration's letter dated June 7, 2011. Accordingly, as outlined more fully below, Defendants seek an order striking Defendants' affirmative defenses, dismissing the counterclaims and/or granting judgment on the pleadings in favor of CitiMortgage.

BACKGROUND

This matter began almost three years ago, on December 30, 2009, when CitiMortgage filed and served a Summons and Complaint for foreclosure against Defendants, following their default on the obligations under a Note and Mortgage in the amount of \$200,000.00. After Defendants were served with the Summons and Complaint for foreclosure, they failed to appear in the action and, on that basis, were in default. Because Defendants defaulted in this action, they admitted the allegations in the Complaint and a Judgment of Foreclosure and Sale (the "Judgment") was entered on April 27, 2010. The Judgment provided that "Defendant(s) [are] liable for the aforesaid judgment debt of the Fixed Rate Note and Mortgage including interest at the rate of 5.25% per annum [and] shall pay on or before the date of sale of the property hereinafter described, to Plaintiff or Plaintiff's attorney." (See Ex B. at ¶ 25, Mot. to Strike, Dismiss and/or Judgment on Pleadings.) If Defendants failed to pay the judgment debt, the property was to be "sold at public auction at the Greenville County

Courthouse.” (*Id.* at ¶ 26.) The notice of the “time and place of the sale” was to be made by “advertisement.” (*Id.* at ¶ 29.)

In this case, the subject property was sold at public auction on June 7, 2010. On July 1, 2010, the Master in Equity signed an Order Setting Aside Sale due to ongoing settlement negotiations between the parties that began prior to the sale. (*See* Ex. C, Mot. to Strike, Dismiss and/or Judgment on Pleadings.) The Order was filed on July 6, 2010, and states as follows:

I have been advised by the attorney for the Plaintiff that the Defendant(s), William H. Smith, Jr. a/k/a William H. Smith, and CitiMortgage, Inc. entered into settlement negotiations, prior to the scheduled sale of the property that is the subject of this foreclosure action. Plaintiff has moved for the sale to be set aside so settlement negotiations may continue.

NOW THEREFORE, IT IS ORDERED ADJUDGED AND DECREED that *the foreclosure sale*, which occurred on June 7, 2010, *is hereby set aside*.

(*See id.* (emphasis added).) Thus, while the sale was set aside so that the parties could continue settlement negotiations, there is no mention of the Judgment, which remained intact.¹

Following several months of settlement negotiations, on May 2, 2011, the South Carolina Supreme Court issued Administrative Order No. 2011-05-02-01 (the “Administrative Order”) on foreclosure intervention. The Administrative Order sought to outline a uniform system for handling loss mitigation efforts in South Carolina related to both pending and future foreclosure actions. For those foreclosure actions

¹ If Defendants intended to set aside the foreclosure judgment and/ or their default, a motion and court order pursuant to Rules 55(c) and 60(b), SCRPC would be required. *See, e.g.*, S.C. R. Civ. P. 55(c) (noting that a “*the court*” may set aside a judgment by default in accordance with Rule 60(b) (emphasis added)). No such motion was made or order entered in this case.

pending on May 9, 2011, the proceedings were “stayed until completion of [] foreclosure intervention.” See S.C. Admin. Order No. 2011-05-02-01, Sec. B. The Administrative Order further stated that no “foreclosure hearing *or* foreclosure sale” could be held until the attorney certified that a notice was served, documents were examined, the mortgagors were given a full opportunity to submit relevant information, the mortgagors did not qualify for loss mitigation, and the denial was served on the mortgagor. See *id.* at Sec. B(1)(a)–(e). However, if the mortgagors failed to respond to the notice of rights after thirty days, the lender could certify compliance and the “foreclosure action [could] proceed.” *Id.*

Because this matter remained pending on May 9, 2011, due to the vacated foreclosure sale, CitiMortgage served Defendants with their Notice of Rights on November 7, 2011. When the Defendants elected to participate in foreclosure intervention, CitiMortgage filed an Order Removing the Case from the Active Docket on December 14, 2011. Thereafter, as outlined in the Attorney Certification filed on April 4, 2012, the Defendants were given an opportunity to submit documents for review, CitiMortgage reviewed the documents submitted, and after a complete review, it was determined that Defendants did not qualify for any loss mitigation efforts. Thus, the stay was lifted and the litigation proceeded. It was at that time, on May 3, 2012, that Defendants filed an Answer and Counterclaim that is the subject of this Motion.

Because Defendants were in default in the action for failure to file a responsive pleading and a Judgment was entered against them, and because Defendants fail to state facts sufficient to constitute a cause of action, CitiMortgage filed a Motion to Strike, Dismiss and/or for Judgment on the Pleadings on June 5, 2012. Each of the

bases for dismissal of Defendants' Answer and Counterclaim, grounds to strike the Answer and Counterclaim, and the implications of the Administrative Order are outlined in detail below.

STANDARDS OF REVIEW

Under South Carolina Rule of Civil Procedure 12(f), a "court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." S.C. R. Civ. P. 12(f). "In ruling on such a motion, a Court decides whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded." *Alladin Plastics, Inc. v. Wintenna, Inc.*, 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990). In the present case, the answer and counterclaims that CitiMortgage seeks to have stricken were pled over two years after Defendants defaulted in the litigation. This is clearly improper and, therefore, acts as a basis for striking the pleading.

In contrast, a motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a claim and should be granted if the claim does not set forth sufficient allegations entitling the party to relief. *Williams v. Condon*, 347 S.C. 227, 232-33, 553 S.E.2d 496, 499 (Ct. App. 2001). Although the court must accept the allegations of the complaint, it is not permitted to read into the complaint unalleged facts. *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). Rather, the "motion must be granted if the facts and inferences reasonably deducible from them show that the [defendant] could not prevail on any theory of the case." *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 650-51, 492 S.E.2d 272, 274-75 (Ct. App. 1997).

Rule 12(c) “provides for motions to dismiss based upon the pleadings.” *Gregory v. Gregory*, 292 S.C. 587, 590, 358 S.E.2d 144, 147 (Ct. App. 1987). “A judgment on the pleadings is proper where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment if resolved in plaintiff’s favor.” *Sapp v. Ford Motor Co.*, 386 S.C. 143, 146, 687 S.E.2d 47, 49 (2009). The standard for reviewing a motion for judgment on the pleadings under Rule 12(c) is the same as that for a motion under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. *Rose v. Thrash*, 291 S.C. 459, 354 S.E.2d 378 (1987) (comparing a 12(b)(6) motion to a 12(c) motion or demurrer); *Independence News, Inc. v. City of Charlotte*, 568 F.3d 148, 154 (4th Cir. 2009) (stating that the same standard applies to motions made under Fed. R. Civ. P. 12(b)(6) and 12(c)); *see also* S.C. R. Civ. P. 12(h)(2) (stating that a “defense of failure to state a cause of action upon which relief can be granted . . . may be made . . . by motion for judgment on the pleadings”). Both motions test the legal sufficiency of a claim.

ARGUMENTS

I. Defendants’ Answer is Untimely and, Therefore, Must be Stricken Pursuant to Rule 12(f), SCRCP.

As outlined above, while Defendants were served with a Summons and Complaint on December 30, 2009, they failed to serve an Answer within the thirty (30) days outlined in Rule 12(a), SCRCP. In fact, Defendants did not serve an Answer and Counterclaim until May 3, 2012—*over two years after* their deadline to timely serve a responsive pleading expired. Due to Defendants failure to timely file and serve a responsive pleading, they were found to be in default and a Judgment was entered

against them on April 27, 2010. Since that time, Defendants have not sought relief from judgment or otherwise sought leave from the Court to file a responsive pleading. Instead, they served an Answer and Counterclaim without first obtaining any relief provided by a Rule 55 and/or Rule 60 motion. Because the Answer and Counterclaim was not timely served pursuant to the South Carolina Rules of Civil Procedure, it should be stricken pursuant to Rule 12(f).

At this point, in order to properly serve a responsive pleading, Defendants would need to obtain relief under Rule 60(b), SCRPC due to a final judgment having already been entered against them two years ago. Rule 55(c), SCRPC, governing the setting aside of default states that “[f]or good cause shown the court may set aside an entry of default and, if a *judgment by default* has been entered, may likewise *set it aside in accordance with Rule 60(b)*.” S.C. R. Civ. P. 55(c) (emphasis added). Rule 60(b) outlines the six grounds on which a Court may relieve a party of a judgment or order, three of which are inapplicable here since well over a year has passed since the Judgment was entered against Defendants. *See* S.C. R. Civ. P. 60(b) (“The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken.”). In this case, Defendants have failed to seek relief under either Rule 55 or Rule 60 and, therefore, any pleading is necessarily untimely and improper.

Without seeking relief pursuant to Rule 55 or 60 and succeeding on the same, Defendants’ purported Answer and Counterclaim does not constitute a valid pleading under the South Carolina Rules of Civil Procedure. As previously outlined, Rule 12(a) mandates a party to “serve [their] answer within 30 days after service of the

complaint upon [them].” S.C. R. Civ. P. 12(a). At that same time, the party must also “state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim.” S.C. R. Civ. P. 13(a). Where the party has failed to “plead or otherwise defend as provided by the [South Carolina Rules of Civil Procedure] and that fact is made to appear by affidavit or otherwise,” the clerk will enter default. S.C. R. Civ. P. 55(a).

Here, Defendants failed to timely plead or otherwise defend; they were found to be in default, and a judgment was entered against them. Two years later, they filed the Answer and Counterclaim that forms the subject of this Motion. Because the purported Answer and Counterclaim does not constitute a valid pleading under the South Carolina Rules of Civil Procedure, CitiMortgage respectfully requests that it be stricken in its entirety pursuant to Rule 12(f), SCRCF. Rule 12(f) allows the court to order “stricken from any pleading *any insufficient defense* or any redundant, immaterial, impertinent or scandalous matter.” S.C. R. Civ. P. 12(f) (emphasis added). Any defenses asserted by Defendants are necessarily “insufficient” due to the fact that the pleading is untimely by two years and, therefore, must be stricken.

II. Defendants Failed to Properly Plead Compulsory Counterclaims and, On That Basis, the Counterclaims Should be Dismissed Pursuant to Rule 12(b) and 13(a), SCRCF.

Not only does Defendants’ Answer raise insufficient defenses to the Complaint for foreclosure, the two counterclaims asserted are barred due to Defendants failure to timely assert them two years ago and prior to their defaulting in the action. The two counterclaims asserted are for: (1) alleged unauthorized practice of law and (2)

alleged violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). Because these claims relate directly to the origination of Defendants' loan and the enforceability of the Mortgage, which is the subject of the foreclosure action, they must be dismissed pursuant to Rule 12(b) and 13(a), SCRCP.

In South Carolina, a party must bring as a counterclaim any claim it has against the opposing party if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim and does not require the presence of additional parties over which the court cannot acquire jurisdiction. See S.C. R. Civ. P. 13(a). Thus, if a counterclaim is compulsory, but is not raised within 30 days, a party is precluded from asserting the claim at a later time. See, e.g., *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997) (stating that "if a counterclaim is compulsory, but not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action"); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 62, 566 S.E.2d 863, 865 (Ct. App. 2002) ("The South Carolina Reporter's Note following Rule 13 states: '[c]ounterclaims arising out of the same transaction or occurrence that is the subject of the action are 'compulsory' under Rule 13(a) and are barred by *res judicata* or estoppel by judgment if not asserted.'").

As outlined below, the two counterclaims asserted in Defendants' Answer and Counterclaim are unmistakably compulsory and should have been asserted by January 29, 2010, and are now improper. The South Carolina Supreme Court has adopted the "logical relationship" test for determining whether a claim is a compulsory counterclaim under Rule 13(a), SCRCP. *N.C. Fed. Savings & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989) ("We hereby adopt the logical

relationship test.”). Under the logical relationship test, a counterclaim is compulsory if there is *any* logical relationship between the claim and the counterclaim. *See id.* (finding a logical relationship between the enforceability of a note, which was the subject of a foreclosure action, and the validity of a purported oral agreement which, if performed, would have avoided default on the note). In this case, Defendants two counterclaims relate to the alleged “unauthorized practice of law” in the origination and/or modification of their loan and, therefore, bear a logical relationship to the circumstances surrounding the foreclosure. *See, e.g., Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 614, 682 S.E.2d 498, 502 (Ct. App. 2009) (holding that a “fraud counterclaim arises out of the same mortgage transaction,” and, therefore “is compulsory”); *Wells Fargo Bank, N.A. v. Smith*, No. 4988, 2012 S.C. App. LEXIS 176, at *9–10 (Ct. App. June 13, 2012) (noting that the logical relationship determination is “made by asking whether the counterclaim would affect the lender’s right to enforce the note and foreclose the mortgage”).

Essentially, to allow Defendants to proceed on the counterclaims outlined in the Answer and Counterclaim would usurp the policy and judicial efficiency behind Rule 13(a), SCRPC and reward Defendants for their dilatory conduct in the foreclosure action. *See Stark Truss Co. v. Superior Constr. Corp.*, 360 S.C. 503, 512, 602 S.E.2d 99, 102 (Ct. App. 2004) (“Rule 13(a), SCRPC, provides that compulsory counterclaims must be asserted along with a responsive pleading. As Appellants were in default and failed to timely file and serve their answer, they also failed to timely assert their counterclaims. In this instance, we find that the circuit court did not err in dismissing the Appellants’ counterclaims.”). Accordingly, under Rule 13(a),

Defendants' counterclaims relate to the enforceability of the Note and the origination of the loan and, therefore, have a logical relationship to the foreclosure action. Having failed to file these counterclaims on or before January 29, 2010, Defendants are barred from doing so at this juncture. Therefore, CitiMortgage seeks dismissal of the counterclaims, with prejudice.

III. Defendants' Counterclaims Fail to State Facts Sufficient to Constitute a Cause of Action.

In addition to the lack of timeliness in asserting the counterclaims, Defendants' counterclaims fail to state facts sufficient to constitute a cause of action and, therefore, must be dismissed pursuant to Rule 12(b) or Rule 12(c) of the South Carolina Rules of Civil Procedure.

A. There is no private right of action for the unauthorized practice of law.

In the two counterclaims, Defendants attempt to create a cause of action for the unauthorized practice of law where none does or could exist in South Carolina. Defendants caption one counterclaim as the "Unauthorized Practice of Law," (*See* Ans. & Countercl. ¶¶ 26-28), and base the second counterclaim for alleged violation of the SCUTPA on the unauthorized practice of law, (*See id.* at ¶¶ 29-34), which does not provide for a private right of action. On that basis, CitiMortgage is also entitled to dismissal of the counterclaims pursuant to Rule 12(b)(6), SCRCPP.

While South Carolina law is clear that several stages of a loan closing must be conducted by an attorney, it is similarly clear that the alleged unauthorized practice of law does not provide for a private right of action for borrowers. In *State v. Buyers Services, Co.*, 292 S.C. 426, 433, 357 S.E.2d 15, 19 (1987), the South

Carolina Supreme Court held that “real estate and mortgage loan closing should be conducted only under the supervision of attorneys, who have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of this court.” Any failure to have an attorney present and conduct the loan closing results in the unauthorized practice of law. *See, e.g., Doe v. McMaster*, 355 S.C. 306, 314, 585 S.E.2d 773, 777 (2003) (stating that the “preparation of real estate instruments by lay persons constitute[s] the unauthorized practice of law”). However, it is the South Carolina Supreme Court that has the “duty to regulate the practice of law in South Carolina,” not borrowers. *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 496, 560 S.E.2d 612, 622 (2002); S.C. Const. art. V, § 4.

In *Linder*, the plaintiffs argued that “once an act is declared to be the unauthorized practice of law, then the circuit court has jurisdiction to hear various causes of action, including a tort action for damages.” 348 S.C. at 496, 560 S.E.2d at 622. The South Carolina Supreme Court disagreed, holding that there is “no private right of action in South Carolina for the unauthorized practice of law.” *Id.* at 496, 560 S.E.2d at 623. Instead, the Court noted that an “interested individual” may bring a “declaratory judgment action in [the Supreme Court’s] original jurisdiction to determine the validity of the conduct.” *Id.* That “interested individual” could not pursue a tort claim, such as negligence, for the complained conduct. The reasoning outlined above was reaffirmed in subsequent opinions by the South Carolina Court of Appeals and South Carolina Supreme Court. *See, e.g., Franklin v. Chavis*, 371 S.C. 527, 535, 640 S.E.2d 873, 877 (2007) (“There is no private right of action in South Carolina for the unauthorized practice of law.”); *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118,

124-25, 634 S.E.2d 5, 8 (Ct. App. 2006) (dismissing the action after noting that there is no private right of action for the unauthorized practice of law and that “[e]very allegation in the complaint ultimately stems from the Hambrick’s assertion that Ditech engaged in the unauthorized practice of law during the loan transaction”). Thus, it is clear in South Carolina that a party cannot maintain a cause of action for damages based on the unauthorized practice of law.

In this case, Defendants rely solely on the allegation that they were deprived of legal representation when their loan was closed and/or modified in asserting the two counterclaims. Because Defendants rely solely on the alleged unauthorized practice of law to support these claims, they fail as a matter of law. Accordingly, CitiMortgage requests dismissal of both counterclaims pursuant to Rule 12(b), SCRPC.

B. The counterclaims are barred by a three-year statute of limitations.

In addition to there not being a private right of action for the unauthorized practice of law, Defendants’ two counterclaims are barred by the statute of limitations and, therefore, are subject to dismissal pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure.² The two claims relate to either the origination of Defendants’ loan in 2005 or the alleged loan modification executed in 2009. In either instance, the counterclaims are barred by a three year statute of limitations.

Defendants’ loan was originated on February 4, 2005 and allegedly modified³ on April 1, 2009. (*See* Compl. ¶ 7, Ans. & Countercl. ¶¶ 27, 30.) It is on

² Even if the unauthorized practice of law is deemed a valid claim, it is barred by a three-year statute of limitations, as noted in Subsection A, *supra*.

³ CitiMortgage does not acknowledge the validity of Defendants’ allegation that an attorney is required to

those two dates that Defendants would have allegedly been deprived of legal representation related to the loan transaction. Moreover, in South Carolina, there is a three-year statute of limitations on SCUTPA claims. See S.C. Code Ann. § 39-5-150 (outlining the statute of limitations on a SCUTPA claim as three years). Thus, Defendants had three years from February 4, 2005 and three years from April 1, 2009, to assert these counterclaims. In this case, Defendants did not serve an Answer and Counterclaim until May 3, 2012. Because Defendants' counterclaims should have been asserted before February 4, 2008, and before April 1, 2012, they are barred by the applicable statute of limitations. See *Maier v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) (noting that the "statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to 'act with some promptness'"); see also *Watson v. Goldsmith*, 205 S.C. 215, 221, 31 S.E.2d 317, 319 (1944) (noting that in equity there is an "interest of the state that there should be an end of litigation").

The policy behind the statute of limitations is clear: It "provide[s] potential defendants with certainty that after a set period of time, they will not be hailed into court to defend time-barred claims." *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 175-76, 609 S.E.2d 548, 552 (Ct. App. 2005) (internal citation omitted). CitiMortgage should not be asked to defend against counterclaims that should have been asserted in advance of the untimely Answer and Counterclaim served in this case. Because the statute of limitations has run on Defendants' counterclaim for alleged violation of the SCUTPA, the claim is time-barred, and this Court should grant

be present for execution of a loan modification agreement.

CitiMortgage's motion for judgment on the pleadings as to the SCUTPA and unauthorized practice of law claims.

IV. The Administrative Order Does Not Allow For Defendants' Late-Filed Answer and Counterclaim.

Defendants will likely argue in response to this Motion that the language of the Administrative Order allows them to file an Answer and Counterclaim following completion of the foreclosure intervention process. Their position is not consistent with the plain language of the Administrative Order or the South Carolina Rules of Civil Procedure and, therefore, must be rejected by this Court. Further, the language relied upon by Defendants in making their argument would only apply in those situations where there is not a default by the borrowers or a judgment entered prior to the start of the foreclosure intervention process.

The Administrative Order specifically provides that in "all mortgage foreclosure actions pending on May 9, 2011, before any merits hearing in the case, *or* if an order of foreclosure has been entered, before any foreclosure sale," the Plaintiff shall serve a notice of right to foreclosure intervention. S.C. Admin. Order No. 2011-05-02-01, Sec. B(1) (emphasis added). Accordingly, during this process the litigation, including a hearing *or* a foreclosure sale, is stayed. The Administrative Order goes on to state that "[n]o foreclosure hearing *or* foreclosure sale may be held in the foreclosure action until the Mortgagee's attorney certifies" compliance with the Administrative Order. *Id.* (emphasis added). Thus, reading these provisions together, the Administrative Order provides that the litigation may not proceed to a hearing, if one has not already been held, or in the event that a judgment has been issued, to a sale,

until the Plaintiff's attorney certifies that the foreclosure intervention process has been completed.

Subsection (e) of Section B⁴ of the Administrative Order then provides that when the Defendants are denied foreclosure intervention, the denial must be mailed to "all known addresses of the Mortgagor" and the notice "shall also state that the Mortgagor has 30 days from the date of mailing of notice of denial of relief to file and serve an answer or other response to the Mortgagee's summons and complaint." *Id.* at B(1)(e). Implicit in this subsection, and when read in conjunction with the previous sections, is the understanding that if the action has already gone to judgment and only a sale is pending, Defendants will not file an answer because the time period provided by the South Carolina Rules of Civil Procedure for filing and serving an answer has necessarily expired. The use of the word "or" in subsection B(1) evidences that the Supreme Court contemplated a situation where the foreclosure had already gone to judgment and, therefore, the tolling of the answer would only apply where the foreclosure hearing had not yet been held or the borrowers had not defaulted in the foreclosure action. In this case, Defendants both defaulted in the action and a judgment has been entered against them. Regardless of their default and this Court's Judgment, Defendants now contend, based on subsection (e) of the Administrative Order, that their Answer and Counterclaim is timely regardless of their previous default and the judgment issued against them in 2010. Essentially, Defendants argue that their time to Answer was tolled following issuance of the Administrative Order and completion of the foreclosure intervention process. This cannot be the case.

⁴ Subsection B applies to those matters pending before May 9, 2011, as in this case that has been pending for almost three years.

A. The Administrative Order does not contemplate vacatur of judgments, nor does it repeal Rules 55 and 60 of the South Carolina Rules of Civil Procedure.

For Defendants' argument to be successful, this Court would necessarily have to find that the Administrative Order vacated all prior foreclosure judgments issued before May 9, 2011, in those cases in which the property had not been sold and that it effectively repealed Rules 55 and 60 of the South Carolina Rules of Civil Procedure, which are a part of the South Carolina Code of Laws. The Administrative Order does not do either of these things and, therefore, the only conclusion available to the Court here is that Defendants' Answer and Counterclaim, filed two years after they were served with the Complaint for foreclosure, is untimely.

In this case, Defendants were properly served with the Summons and Complaint for foreclosure on December 30, 2009. At that time, the Administrative Order was not in existence and likely not even contemplated by the South Carolina Supreme Court. Pursuant to Rule 12(a), the Defendants had "30 days after service of the complaint upon [them]," to file an answer. S.C. R. Civ. P. 12(a). At that time, Defendants were also required to "state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party." S.C. R. Civ. P. 13(a). Thus, Defendants had until January 29, 2010 to serve their answer and assert any compulsory counterclaims they had against CitiMortgage. Here, Defendants failed to serve an Answer and Counterclaim on or before January 29, 2010 and the Court entered the judgment against them. Pursuant to the South Carolina Rules of Civil Procedure, Defendants were in default and any attempt to obtain relief from that default had to be addressed by Rule 55(b), SCRCP. Additionally, if Defendants believed the

Judgment was issued in error, they had to obtain relief pursuant to Rule 60, SCRCp. Defendants have not taken action under either provision of the South Carolina Rules of Civil Procedure for relief from default or relief from judgment and, instead, seek a ruling that their Answer and Counterclaim served on May 3, 2012, is timely pursuant to the terms of the Administrative Order issued a year after the Judgment on May 2, 2011. A fair reading of the Administrative Order does not support Defendants' contentions. *See Collins v. Sigmon*, 299 S.C. 464, 468, 385 S.E.2d 835, 837 (1989) (noting that "the ancient maxim that 'equity aids the vigilant and diligent' operates to deprive [the party] of any possible relief in equity"); *Hemingway v. Mention*, 228 S.C. 211, 217, 89 S.E.2d 369, 372 (1955) (noting the long-recognized maxim that "[e]quity aids the vigilant, not those who slumber on their rights").

Defendants' argument necessarily fails because the Administrative Order specifically contemplates the issuance of judgments prior to foreclosure intervention, and does not mention vacatur of those judgments or relief from default for mortgagors. As noted above, the Administrative Order specifies that when a mortgage foreclosure action is already pending on May 9, 2011, foreclosure intervention must be completed before any merits hearing in the case *or* "before any foreclosure sale," if an order of foreclosure has already been entered. *See id.* at Sec. B(1). As in this case, where a foreclosure judgment is already entered, the parties are only required to complete foreclosure intervention prior to the sale being scheduled. This comports with the purpose of the Administrative Order, which is to:

insure that eligible homeowners and lender-servicers have been afforded the benefits of loan modification or other loss mitigation where possible, and to insure that the

procedures for handling issues relating to such efforts are handled uniformly throughout the State, so that mortgage foreclosure actions are not unnecessarily dismissed, delayed or *inappropriately concluded* while loan modification or other loss mitigation efforts are being pursued.

Id. (emphasis added). Nowhere does it contemplate vacating those judgments that had already been entered by May 9, 2011, or setting aside default for all mortgagors that were served and failed to answer prior to the issuance of the Administrative Order. Thus, the plain terms of the Administrative Order do not override the mechanisms outlined by the South Carolina Rules of Civil Procedure for relief from default judgment or for vacatur of properly entered judgments.

B. The Director of Court Administration addressed these issues in a June 7, 2011 letter.

On June 7, 2011, Rosalyn W. Frierson, the Director of Court Administration, issued a letter addressing several provisions of the Administrative Order, including subsection (e), related to the tolling of the time for serving an answer. *See* June 7, 2011 Ltr. from Rosalyn Frierson, attached hereto as Exhibit "A." In the letter, it notes that she was "asked by the Chief Justice to respond to the concerns" addressed by two attorneys regarding the Administrative Order. *See id.* Having considered those "concerns" related to Subsection B(1)(e), Ms. Frierson stated as follows:

[T]he tolling of the time to answer in the foreclosure action is to be just as in other cases where the time to answer is suspended, either by agreement, or rule. Regarding cases pending on May 9, 2011, where a Mortgagor was not in default when served with the notice of the right to foreclosure intervention, and elects to participate in foreclosure intervention, the Mortgagor will

have 30 days from the date of mailing of the notice of denial of relief to respond to the complaint. *If the Mortgagor is already in default, relief from default is by the usual Rule 55 and Rule 60 procedure.* As to the actions filed after May 9, where the Mortgagor elects to participate in foreclosure intervention, the time to answer is tolled, and the Mortgagor has 30 days from mailing of the notice of denial to answer the complaint.

Id. (emphasis added). Thus, the Administrative Order has already been addressed by Court Administration with respect to this issue, and the Court should grant CitiMortgage's Motion because it is the only reading consistent with the plain language of the Administrative Order, the South Carolina Rules of Civil Procedure, and Court Administration's explanation of the Administrative Order.

Subsection (e), as explained above, does not override Rules 55 and 60 of the South Carolina Rules of Civil Procedure. The tolling of the time to answer only applies in those instances where the borrower is not in default when he or she is served with the notice of right to foreclosure intervention. In this case, Defendants were in default in 2010, and a judgment was issued against them that was never subsequently vacated by the Administrative Order or any other Court order. On this basis, Defendants were "already in default" by the time they were served with the Notice of Right to Foreclosure Intervention on November 7, 2011. *See Ex. A, June 7, 2011 Ltr. from Rosalyn Frierson.* Accordingly, Defendants were required to receive relief from default pursuant to Rule 55 and relief from judgment pursuant to Rule 60 before they could properly serve an Answer and Counterclaim in this action. The Administrative Order does not change this conclusion.

C. CitiMortgage did not waive the default when it served the notice of denial of foreclosure intervention.

Defendants may also argue that when CitiMortgage's previous foreclosure counsel served the Notice of Denial of Foreclosure Intervention on April 3, 2012, it waived any default on the part of Defendants and, therefore, they timely served their Answer and Counterclaim. In making this argument, Defendants will likely rely on the language in the Notice of Denial prepared and mailed by CitiMortgage's foreclosure counsel providing that they have 30 days to serve an answer. Because the Notice of Denial is a form response that mirrors the Administrative Order, it serves only to reiterate the language of the Administrative Order which, as noted above, does not contemplate an Answer in this default situation. Therefore, the form language taken from the Administrative Order does not result in a waiver of Defendants' default by CitiMortgage.

Waiver is "protective only" and may only be "invoked as shields, and not as [an] offensive weapon[]." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 345, 415 S.E.2d 384, 387 (1992). As defined by South Carolina law, waiver is "a voluntary and intentional abandonment or relinquishment of a known right." *Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (1994) (citing *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)). "[I]n order to constitute a waiver the person against whom the waiver is claimed must have full knowledge of his rights and of facts which will enable him to take effectual action for the enforcement of such right." *Sims v. Ham*, 275 S.C. 369, 372, 271 S.E.2d 316, 318 (1980) (internal citation omitted). Moreover, a waiver may be "express or implied."

Zeller v. Cumberland Truck Sales, 272 S.C. 558, 562, 253 S.E.2d 111, 112 (1979).

“[W]here an implied waiver is claimed, caution must be exercised, for waiver will not be implied from doubtful acts.” *Id.* (citing 28 Am. Jur. 2d, *Estoppel and Waiver*, § 160.) In this case, it cannot be held that CitiMortgage waived the default of Defendants that occurred two years ago when the Administrative Order mandates the inclusion of this information in a Notice of Denial of Foreclosure Intervention before the sale may proceed.

As noted above, the Administrative Order states that prior to resuming the foreclosure action, and lifting the stay, the Mortgagee must certify that a “notice of the denial of loan modification or other means of loss mitigation has been served on the Mortgagor by mailing such notice to all known addresses of the Mortgagor; provided, that such notice, *shall also state* that the Mortgagor has 30 days from the date of mailing of notice of denial of relief to file and serve an answer.” S.C. Admin. Order No. 2011-05-02-01, Sec. B(1)(e). While this language is mandated by the Administrative Order in a Notice of Denial, it does not result in a waiver of Defendants’ previous default. As outlined above, the Administrative Order does not contemplate vacating judgments or setting aside default when a Mortgagee merely complies with the terms of the Order. Therefore, CitiMortgage did not waive any right to argue Defendants’ untimeliness in serving a responsive pleading in this case.

CONCLUSION

For the reasons stated above, CitiMortgage respectfully requests that this Court grant its Motion to Strike, Dismiss and/or for Judgment on the Pleadings as to Defendants’ Answer and Counterclaim. This memorandum is based on the pleadings

and filings in this case, the South Carolina Rules of Civil Procedure, the governing case law and authorities, and such other arguments that may be made at the hearing on this matter.

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7/10, 2012

Exhibit A



South Carolina Court Administration
South Carolina Supreme Court
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June 7, 2011

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Dear Attorneys Ballard and Muckenfuss:

I have been asked by the Chief Justice to respond to the concerns expressed in both of your letters regarding the May 2, 2011, Administrative Order related to Mortgage Foreclosure Actions. I inform you that the Chief Justice has considered the questions posed and has determined that there is no need to amend or modify the order at this time. However, I will attempt to clarify some of your questions related to the Administrative Order.

First, as the nature of the order is procedural, no conflict with efforts to deal with the mortgage foreclosure crisis at the federal level is intended. Further, I am not aware of any contest over federal preemption involving similar procedural directives in other states. Secondly, the overall purpose of the order was to remedy breakdowns in communications between lender-servicers and borrowers related to loss mitigation efforts, and to assure that interested homeowner-borrowers are afforded a fair opportunity to take advantage of available relief. Since the execution of the order, concerns regarding these matters have been confirmed by reports from active cases. Thus, the order provides for a reliable point of contact for borrowers with their lender-servicer, namely, the lender-servicer's attorney. This avoids a fundamental

disconnect between the borrower and the lender-servicer that leads a borrower to misunderstand, or be misled, as to the status of the foreclosure litigation and its consequences.

Additionally, the trial court depends on the lender-servicer's attorney for information concerning the status of loss mitigation efforts between the borrower and the lender-servicer. The attorney is under a duty to provide relevant and candid information to the court about the case, including loss mitigation. Such information directly affects whether a case can proceed, or should be dismissed. That does not always occur, because the attorney is unaware of that circumstance, and thus, cannot advise the court.

For these reasons, the involvement of the lender-servicer's attorney at every stage of the foreclosure process is critical, and the order so provides. The order is not intended to preclude all contact between borrower and lender-servicer. Rather, it provides that the lender-servicer's attorney must be involved in the process, so that the trial court can be adequately apprised of all proceedings in the case, and handle the case accordingly. The order should not heighten Rule 11 standards for the lender-servicer's attorney. As with all litigation, an attorney may reasonably rely on information provided by the client in the handling of the case. The problem has been that the attorney is not made privy to all such information.

Notwithstanding that the order will stand as drawn, there are a few matters raised as concerns that fairly deserve comment. Concerning the forms to be used in implementing the order, specific forms for that purpose will not be provided by the court. Adequate forms have already been created by attorneys, and the trial courts are not requiring specific language, so long as the intent of the order is carried out.

In paragraph A(1), concerning who is entitled to participate in foreclosure intervention, the definition of "Mortgagor," read in context includes only parties involved in the mortgage transaction in question.

In paragraph A(5), "foreclosure intervention" includes all policies and processes or procedures actually employed by a Mortgagee, if any. The order does not impose a requirement to create policies, processes or procedures, or to use those of other lender-servicers, or of government agencies having no oversight or control of the loan in question. Procedures in this State for loans subject to HAMP oversight are dealt with by prior administrative orders.

In paragraph B(1)(e) of the order, the tolling of the time to answer in the foreclosure action is to be just as in other cases where the time to answer is suspended, either by agreement, or rule. Regarding cases pending on May 9, 2011, where a Mortgagor was not in default when served with the notice of the right to foreclosure intervention, and elects to participate in foreclosure intervention, the Mortgagor will have 30 days from the date of mailing of the notice of denial of relief to respond to the complaint. If the Mortgagor is already in default, relief from default is by the usual Rule 55 or Rule 60 procedure. As to actions filed after May 9, where the Mortgagor elects to participate in foreclosure intervention, the time to answer is tolled, and the Mortgagor has 30 days from mailing of the notice of denial to answer the complaint.

Finally, consistent with the intent and purpose of the order, if a Mortgagor has already participated in a foreclosure intervention process provided by a Mortgagee, but has either failed to qualify for relief, or has defaulted under a loss mitigation agreement, the provisions of the order have been satisfied, and the Mortgagee has complied with the order. In such case, the Mortgagee will certify compliance through its attorney, and provide the trial court the relevant documents to support such certification. The foreclosure action can then proceed unabated.

Nothing in the order is intended to preclude renewed efforts on the part of the parties to seek foreclosure intervention after the initial process has been completed without success. Where foreclosure intervention as contemplated by the order has been denied, the foreclosure action can proceed toward completion without further abatement, even though the parties may continue efforts at foreclosure intervention while the foreclosure action proceeds. However, the lender-servicer's attorney will retain the "point of contact" role, and the responsibility of providing reliable information to the trial court, as discussed above.

While the Administrative Order will not be modified, all orders are subject to some interpretation as they are implemented in actual cases. That should be permitted to occur in this instance. Such interpretations are always subject to further review.

I trust that this response will be helpful in dealing with the concerns you have raised.

Sincerely,



Rosalyn W. Frierson, Director
S.C. Court Administration

CERTIFICATE OF SERVICE

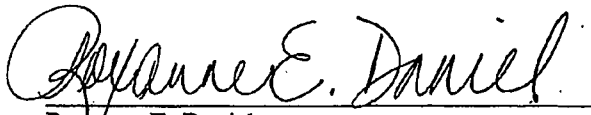
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins
Riley & Scarborough LLP, attorneys for CitiMortgage, Inc., do hereby certify that I have
served all counsel in this action with a copy of the pleading(s) hereinbelow specified by
mailing a copy of the same by United States Mail, postage prepaid, to the following
address(es):

Pleadings:

**MEMORANDUM IN SUPPORT OF MOTION TO STRIKE,
DISMISS AND FOR JUDGMENT ON THE PLEADINGS**

Counsel Served:

Bridget D. Swing, Esquire
Foreclosure Defense Law Firm, LLC
P.O. Box 8246
Greenville, SC 29604



Roxanne E. Daniel
Administrative Assistant

July 10, 2012

FILED-CLERK OF COURT
GREENVILLE, SOUTH CAROLINA
PAUL E. WOOD
2012 JUL 12 9:30

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
CitiMortgage, Inc.)
Plaintiff,)
vs.)
William H. Smith, Jr. a/k/a William)
H. Smith, Angella S. Smith, The)
South Carolina Department of)
Revenue,)
Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No. 2009-CP-23-11051

DEFENDANTS WILLIAM H. SMITH, JR. &
ANGELLA S. SMITH'S MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S MOTION TO
STRIKE, DISMISS AND FOR JUDGMENT ON
THE PLEADINGS

FILED - CLERK OF COURT
GREENVILLE
PAUL B. WICK

2012 JUL 11

COME NOW Defendants William H. Smith and Angella S. Smith, by and through their undersigned counsel, and hereby submit this Memorandum in Opposition to Plaintiff's Motion to Strike, Dismiss, and For Judgment on the Pleadings and states as follows:

I. Under the clear and unambiguous language of the May 2011 Administrative Order, Defendants Answer and Counterclaims were timely filed.

Plaintiff asserts in its Motions that Defendants did not answer within the default period established by Rules 12(a) and 55 of the South Carolina Rules of Civil Procedure. Plaintiff's Complaint was originally served on Defendants on December 30, 2009. A Judgment of Foreclosure and Sale was entered on April 27, 2010 and the property sold on June 7, 2010. An Order setting aside the June 7, 2010 sale was entered on or about July 1, 2010.

At issue in this case is whether the May 2, 2011 Order permits a defendant to respond or otherwise answer a foreclosure complaint after the 30 day default period to answer has expired.

As this Court is aware, the South Carolina Supreme Court has issued two administrative orders in response to statewide problems borrowers and lenders were experiencing in the loan

modification and loss mitigation process. Administrative Order 2011-05-02-01 (hereinafter “May 2011 Order”) was issued, in part, because of the continued reports to the Court of a breakdown in communications between borrowers and lender-servers resulting in foreclosures moving forward without regard to ongoing loss mitigation efforts. See May 2011 Order, para 4. The Order is meant “to insure that eligible homeowners and lender-servicers have been afforded the benefits of loan modification and loss mitigation where possible, and to insure that the procedures for handling issues related to such efforts are handled uniformly throughout the State, so that mortgage foreclosure actions are not unnecessarily dismissed, delayed or inappropriately concluded while loan modification or other loss mitigation efforts are being pursued”. May 2011 Order, para 6. The May 2011 Order further provides that: “In all mortgage foreclosure actions pending on May 9, 2011, before any merits hearing in the case, **or if an order of foreclosure has been entered, before any foreclosure sale**, the Mortgagee shall, through its attorney of record, file with the court and serve upon every Mortgagor a notice of the Mortgagor’s right to foreclosure intervention. **All proceedings in the foreclosure action shall be stayed until completion of such foreclosure intervention.** *Id.* at B. (1) (emphasis added). The Order continues by stating that “No foreclosure hearing or foreclosure sale may be held in the foreclosure action until the Mortgagee’s attorney certifies that notice of the denial of loan modification or other means of loss mitigation has been served on the Mortgagor by mailing such notice to all known addresses of the Mortgagor; provided, **that such notice shall also state that the Mortgagor has 30 days from the date of mailing of notice of denial of relief to file and serve an answer or other response to the Mortgagee’s summons and complaint.**” *Id.* at (B)(1)(e) (emphasis added).

Under Article 5 §4 of the Constitution of the State of South Carolina 1895, the State Supreme Court is given the power to “make rules governing the administration of all the courts of the State.” In addition, [s]ubject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts. As the administrative head of the state judicial system, the Chief Justice has the authority to issue administrative orders controlling the courts in this State. *McCormick County Council v. Butler*, 361 S.C. 92, 603S.E.2d 586 (2004).

Plaintiff contends that the use of the word “or” in subsection B(1) of the May, 2011 Order “evidences the Supreme Court contemplated a situation where the foreclosure had already gone to judgment and, therefore, the tolling of the answer would only apply where the foreclosure hearing had not yet been held or the borrowers had not defaulted in the foreclosure action”. Defendants respectfully disagree with Plaintiff’s interpretation. The May, 2011 Order clearly provides defendants thirty days from the date of mailing of a notice of denial of foreclosure intervention to file an answer or other response. The Order should be honored and strictly enforced. Plaintiff’s memorandum in support of their motion also refers to a letter from the director of the S.C. Court Administration, Ms. Rosalyn Frierson. The letter is addressed to attorneys that are not involved in this case and addresses specific questions posed by those attorneys. As such, Defendants would submit that the letter is not relevant to the case at bar and should have no bearing on the Court’s ruling in this case. Further, Ms. Frierson’s view or interpretation of the May, 2011 Administrative Order has no precedential value as it is the Order itself which the Court must interpret.

Under the clear language of the May 2011 Order, Defendants must be given the opportunity to file and serve and answer or other response to the Plaintiff’s summons and

complaint. As such Defendants answer as well as its two compulsory counterclaims should be allowed.

II. Plaintiff's waived the default when it served the notice of denial of foreclosure intervention.

Plaintiff's own interpretation of the May, 2011 Order was that Defendants had an opportunity to answer the foreclosure complaint as evidence by Plaintiff's April 3, 2012 letter to Defendants stating that "Pursuant to South Carolina Supreme Court Administrative Order 2011-05-02-01 "the Mortgagor has 30 days from the date of mailing of notice of denial of relief to file and serve an answer or other response to the Mortgagee's summons and complaint"." A true and correct copy of the April 3, 2012 letter is attached hereto as Exhibit "A". The Plaintiff mailed its notice of denial of foreclosure intervention on April 3, 2012 and told the Defendants that they had thirty days from the date of mailing to file and serve an answer or other response to its Complaint. The Defendant timely filed their answer on May 3, 2012. Even if the Court determines that the May, 2011 Order does not allow the Defendants to file an answer, the Plaintiff should be estopped from claiming that the Defendants were not allowed to file it May 3, 2012 answer as it specifically extended to the Defendant a right to answer its complaint in the April 3, 2012 letter.

Plaintiff's memorandum in support of its Motion to Strike, Dismiss, and for Judgment on the Pleadings appears to argue that Plaintiff did not waive any default by the Defendants because it did not have full knowledge of its rights and that its offer to allow Defendants 30 days from the mailing of the notice of denial was extended by the Plaintiffs only because the Administrative Order required them to provide this information to the Defendant prior to a foreclosure sale.

Plaintiff's memorandum in Support of Motion to Strike, Dismiss and For Judgment on the Pleadings, pages 21-22.

Defendants respectfully disagree with Plaintiff's logic. If the Administrative Order mandates the inclusion of the language, then the Administrative Order must be read to mean that the Order provides the Defendants an opportunity to answer. In addition, if Plaintiff believed, as it argues now, that the Order did not provide an opportunity for Defendants to file and serve an answer 30 days from the mailing of the denial letter, then they should have stated that in the letter. They did not.

III. Plaintiff's Motion to Dismiss pursuant to SCRPC 12(b) or 12(c) should be denied.

Plaintiff asserts that Defendants' Counterclaims should also be dismissed under Rule 12(b) because no private right of action exists in South Carolina for unauthorized practice of law claims citing *Linder v. Insurance Claims Consultants, Inc.*, 348 S.C. 477, 560 S.E.2d 612 (2002) and, more topic-appropriately, *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 124-125, 634 S.E.2d 5, 8 (Ct. App. 2006). In essence, Plaintiff's assertion is that all claims of unauthorized practice of law are the sole jurisdiction of the Supreme Court. The Supreme Court held in *Linder* and re-asserted in the *Hambrick* decision that there is no private right of action for money damages based on the unauthorized practice of law. Defendants concede that its South Carolina Unfair Trade Practices counterclaim may be improper under the *Linder* and *Hambrick* line of cases; however, Defendants believe that its sixth defense and first counterclaim is permissible as it is not seeking money damages from Plaintiff.

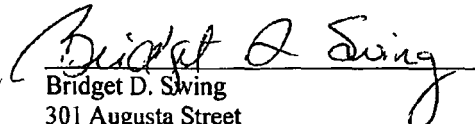
Defendants would direct the Court's attention to *Wachovia Bank v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010) in which the Court of Appeals held that a mortgagee, having

engaged in the unauthorized practice of law by closing a mortgage loan without attorney supervision, came to the court with “unclean hands” and thus was barred from seeking the equitable relief of foreclosure. Similarly, in *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 140, 714 S.E.2d 532, 535 (2011), the Supreme Court held 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.” (emphasis added)

In the instant matter, Defendants are not asserting a private right of action for money damages but are asserting an affirmative defense to the Plaintiff’s attempt to foreclose on their home. Defendants’ have alleged that Plaintiff has “unclean hands” because it engaged in the unauthorized practice of law by closing a loan modification without attorney supervision. Because of Plaintiff’s inequitable actions, it should be barred from seeking the equitable remedy of foreclosure now.¹

WHEREFORE, Defendants William H. Smith and Angella S. Smith request that Plaintiff’s Motion to Strike, Dismiss and for Judgment on the Pleadings be denied for the reasons set forth above and for other good cause.

Respectfully submitted this 11 day of July, 2012.


Bridget D. Swing
301 Augusta Street
PO Box 8246
Greenville, SC 29604
Attorney for Defendants

¹ This exact issue is currently before the Supreme Court in the case of *Warrington v. The Bank of South Carolina* with oral arguments only recently being heard by the South Carolina Supreme Court.

EXHIBIT A



ROGERS TOWNSEND
ATTORNEYS AT LAW

ROGERS TOWNSEND & THOMAS, PC
DEFAULT SERVICES DEPARTMENT

POST OFFICE BOX 100200 (29202)
220 EXECUTIVE CENTER DRIVE
COLUMBIA, SOUTH CAROLINA 29210
P 803.744.4444 F 803.343.7013
WWW.RTT-LAW.COM

April 3, 2012

William H. Smith, Jr.
2812 Brushy Creek Road
Greer, SC 29650

Angella S. Smith
2812 Brushy Creek Road
Greer, SC 29650

Re: NOTICE OF FORECLOSURE INTERVENTION DENIAL
PROPERTY ADDRESS: 2812 Brushy Creek Road, Greer, SC 29650
RTT File No.: 011654-03607

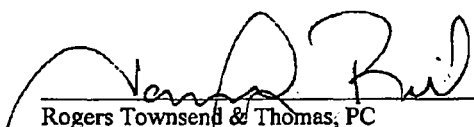
Dear Sir/Madam:

My firm and its client have received and processed your request for foreclosure intervention in the above referenced case. A review of your application indicates that you are not eligible for foreclosure intervention as contemplated by South Carolina Supreme Court Administrative Order 2011-05-02-01, because you failed to return a completed financial package. In addition, a letter requesting trailing documents was sent to you on January 24, 2012 with a deadline date of February 7, 2012. Unfortunately, my office never received a completed financial package in response to either of our letters as of March 9, 2012.

Please be advised that in accordance with South Carolina Supreme Court Administrative Order 2011-05-02-01, my client will immediately resume this foreclosure action. Accordingly, you should take whatever actions you or your attorney deem appropriate to protect your legal rights.

Pursuant to South Carolina Supreme Court Administrative Order 2011-05-02-01, "the Mortgagor has 30 days from the date of mailing of notice of denial of relief to file and serve an answer or other response to the Mortgagee's summons and complaint."

Very Truly Yours,



Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958)
Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
Eve Moredock Stacey (SC Bar #5300)
Robert P. Davis (SC Bar #74030)
Vance L. Brabham, III (SC Bar #71250)
Kelsey K. Lipscomb (SC Bar #77519)
Andrew A. Powell (SC Bar #100210)

Cheryl H. Fisher (SC Bar #15213)
Jennifer W. Rubin (SC Bar #16727)
Michael P. Morris (SC Bar #73560)
Mary R. Powers (SC Bar #16534)
William S. Koehler (SC Bar #74935)
Jaclynn B. Goings (SC Bar #77501)
Andrew W. Montgomery (SC Bar #79893)

220 Executive Center Drive
Columbia, SC 29210

Post Office Box 100200 (29202)
(803) 744-4444

Columbia, South Carolina

Rogers, Townsend & Thomas is a Debt Collector. This is an attempt to collect a debt and any information obtained will be used for that purpose. However, if you have previously received a discharge in bankruptcy, this is not and should not be construed as an attempt to collect a debt, but only as an attempt to enforce a lien.

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
CitiMortgage, Inc.)
Plaintiff,)
vs.)
William H. Smith, Jr. a/k/a William)
H. Smith, Angella S. Smith, The)
South Carolina Department of)
Revenue,)
Defendants.)

IN THE COURT OF COMMON PLEAS

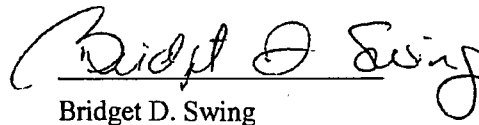
C.A. No. 2009-CP-23-11051

CERTIFICATE OF SERVICE

The undersigned attorney of record for Defendants William H. Smith and Angella S. Smith hereby certifies that the foregoing Memorandum in Opposition to Plaintiffs Motion to Strike, Dismiss and for Judgment on the Pleadings was served upon the following addressee via electronic mail by sending a copy to the following email address:

Ms. Sarah Nielson
Sarah.Nielson@nelsonmullins.com

This the 11 day of July, 2012.


Bridget D. Swing

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

CitiMortgage, Inc.,

Plaintiff,

v.

William H. Smith, Jr. a/k/a William H. Smith;
Angella S. Smith; The South Carolina Department
of Revenue;

Defendant(s).

IN THE COURT OF COMMON PLEAS

DOCKET NO. 09-CP-23-11051

NOTICE OF FORECLOSURE INTERVENTION

Deficiency Judgment Waived

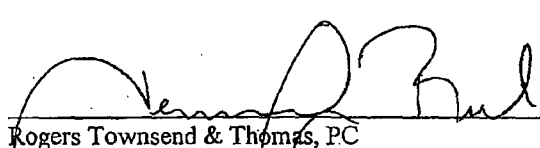
(011654-03607)

PLEASE TAKE NOTICE THAT pursuant to the South Carolina Supreme Court Administrative Order 2011-05-02-01, you may have a right to Foreclosure Intervention.

To be considered for any available Foreclosure Intervention, you may communicate with and otherwise deal with the Plaintiff through its law firm, Rogers Townsend & Thomas, PC.

Rogers Townsend & Thomas, PC represents the Plaintiff in this action. Our law firm does not represent you. Under our ethical rules, we are prohibited from giving you any legal advice.

You must submit any requests for Foreclosure Intervention consideration within 30 days from the date you are served with this Notice. **IF YOU FAIL, REFUSE, OR VOLUNTARILY ELECT NOT TO PARTICIPATE IN FORECLOSURE INTERVENTION, THE FORECLOSURE ACTION MAY PROCEED.**


Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958)
Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
Eve Moredock Stacey (SC Bar #5300)
Robert P. Davis (SC Bar #74030)
Vance L. Brabham, III (SC Bar #71250)
John P. Fetner (SC Bar #77460)
Andrew W. Montgomery (SC Bar #79893)
Benjamin J. Powell (SC Bar #77205)
220 Executive Center Drive
Columbia, SC 29210

Cheryl H. Fisher (SC Bar #15213)
Jennifer W. Rubin (SC Bar #16727)
Michael P. Morris (SC Bar #73560)
Mary R. Powers (SC Bar #16534)
William S. Koehler (SC Bar #74935)
Jaclynn B. Goings (SC Bar #77501)
Kelsey K. Lipscomb (SC Bar #77519)
Taryn M. Zange (SC Bar #70357)

Post Office Box 100200 (29202)
(803) 744-4444

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

CitiMortgage, Inc.,

Plaintiff,

v.

William H. Smith, Jr. a/k/a William H. Smith;
Angella S. Smith; The South Carolina Department
of Revenue;

Defendant(s).

IN THE COURT OF COMMON PLEAS

DOCKET NO. 09-CP-23-11051

CERTIFICATE OF MAILING

Deficiency Judgment Waived

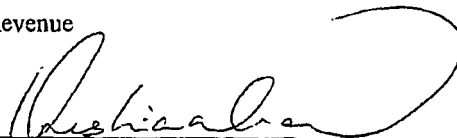
(011654-03607)

Pursuant to the South Carolina Supreme Court Administrative Order 2011-05-02-01 the undersigned, says that he/she mailed a copy of the Notice of Foreclosure Intervention in the above-referenced foreclosure action upon the owner(s), mortgagor(s) and/or debtor(s) by placing a copy of the Notice of Foreclosure Intervention in the United States Mail, postage paid, to be mailed to the said Defendant(s) at the following addresses this 7 day of November, 2011:

William H. Smith, Jr. a/k/a William H. Smith
2812 Brushy Creek Rd
Greer, SC 29650

Angella S. Smith
2812 Brushy Creek Rd
Greer, SC 29650

Ronald W. Urban
South Carolina Department of Revenue
Office of General Counsel for Litigation
P.O. Box 12265
Columbia, SC 29211
Attorney for The South Carolina Department of Revenue


Oneshia Diamond

Request for Foreclosure Intervention

RTT No.: 011654-03607

Docket No.: 09-CP-23-11051

This document is exchanged exclusively for the purpose of foreclosure intervention pursuant to S.C. Supreme Court Administrative Order 2011-05-02-01.

☐ I am the owner but do not occupy the property.

☒ I am the owner of and occupy the following property as my principal residence: 2812 Brushy Creek Road, Greer, SC 29650

Is this street address correct? ☒ Yes ☐ No

If Yes, please include proof of occupancy such as a utility bill, military orders, voter registration card, etc.

If No, what is the correct street address: _____

☐ I am actively working with the mortgage company to resolve my mortgage account's delinquency and last spoke with the mortgage company on _____

☒ I submitted a complete loss mitigation package to the mortgage company on Jan. 2010

I am interested in the following type(s) of loss mitigation (please note that you may not qualify for any or all of these foreclosure intervention options):

☐ Reinstatement

☐ Payoff

☐ Payment Plan

☐ Forbearance Agreement

☒ Loan Modification (fmv)

☒ Deed in Lieu

☒ Short Sale

Other: Loan modification at fmv
also we will be retaining attorney
to assist with foreclosure intervention.

Contact #'s:

Home: N/A

Cellular: 864-361-0397 - Angella
864-361-0101 - William Jr.

Work: cannot call

Other: N/A

May we leave a phone message? At home ☒ Yes ☐ No

On your cellular phone: ☒ Yes ☐ No At work ☐ Yes ☒ No

May we call your cell phone? ☒ Yes ☐ No

May we send you an e-mail message? ☒ Yes ☐ No

Email: angiesmith6@charter.net

PRINT NAME: Angella S. Smith

William H. Smith, Jr.
Angella S. Smith (Signature)

Date: November 28, 2011

Please note, if you are represented by counsel in the foreclosure action Rogers Townsend & Thomas will only communicate with you through your counsel.

Rogers Townsend and Thomas PC is a debt collector. This is an attempt to collect a debt and any information obtained will be used for that purpose.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

CitiMortgage, Inc.,

Plaintiff,

v.

William H. Smith, Jr. a/k/a William H. Smith;
Angella S. Smith; The South Carolina Department
of Revenue;

Defendant(s).

(011654-03607)

IN THE COURT OF COMMON PLEAS

DOCKET NO. 09-CP-23-11051

ATTORNEY CERTIFICATION
Deficiency Judgment Waived
(Mortgagor Denied)

FILED CLERK OF COURT
GREENVILLE CO. SC

2012 APR -4 A 9:20

Pursuant to Supreme Court Administrative Order 2011-05-02-01 ("the Order"), and upon information and belief, the undersigned attorney hereby certifies the following:

- 1) That the Mortgagor, as defined by the Order, has been served with notice of right to foreclosure intervention;
- 2) That Plaintiff or its designated agents have received and examined all records and documents (if any) submitted by the Mortgagor to evaluate the loan for foreclosure intervention;
- 3) That the Mortgagor has been given a full and fair opportunity to submit any additional information pertaining to the subject loan to Plaintiff or its agents for consideration;
- 4) That after a complete review of all available information, Plaintiff has determined, as of March 9, 2012 that the Mortgagor does not qualify for any foreclosure intervention options as contemplated by the Order;

ENTERED COMPUTER

- 5) That on April 3, 2012, a Notice of Foreclosure Intervention Denial was served on the Mortgagor(s) as required by the Order and Plaintiff has not entered into any other settlement agreements with the Mortgagor(s) as of the date stated in Plaintiff's Notice of Foreclosure Intervention Denial.

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958)
Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
Eve Moredock Stacey (SC Bar #5300)
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(803) 744-4444

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

CitiMortgage, Inc.,

Plaintiff,

v.

William H. Smith, Jr. a/k/a William H. Smith;
Angella S. Smith; The South Carolina Department
of Revenue;

Defendant(s).

IN THE COURT OF COMMON PLEAS

DOCKET NO. 09-CP-23-11051

CERTIFICATE OF MAILING
Deficiency Judgment Waived

CLERK OF COURT
GREENVILLE, SC

APR - 4 A 9:20

(011654-03607)

Pursuant to the South Carolina Supreme Court Administrative Order 2011-05-02-01 the undersigned, says that he/she mailed a copy of the Attorney Certification in the above-referenced foreclosure action upon the parties listed below by placing a copy of the Attorney Certification in the United States Mail, postage paid, to be mailed to the parties set forth below at the following addresses this 2 day of April, 2012:

William H. Smith, Jr. a/k/a William H. Smith
2812 Brushy Creek Rd
Greer, SC 29650

Angella S. Smith
2812 Brushy Creek Road
Greer, SC 29650

Ronald W. Urban
South Carolina Department of Revenue
Office of General Counsel for Litigation
P.O. Box 12265
Columbia, SC 29211
Attorney for The South Carolina Department of Revenue


Lauran Hutchins



ROGERS TOWNSEND
ATTORNEYS AT LAW

ROGERS TOWNSEND & THOMAS, PC
DEFAULT SERVICES DEPARTMENT

POST OFFICE BOX 100200 (29202)
220 EXECUTIVE CENTER DRIVE
COLUMBIA, SOUTH CAROLINA 29210
P 803.744.4444 F 803.343.7013
WWW.RTT-LAW.COM

April 3, 2012

William H. Smith, Jr.
2812 Brushy Creek Road
Greer, SC 29650

Angella S. Smith
2812 Brushy Creek Road
Greer, SC 29650

Re: NOTICE OF FORECLOSURE INTERVENTION DENIAL
PROPERTY ADDRESS: 2812 Brushy Creek Road, Greer, SC 29650
RTT File No.: 011654-03607

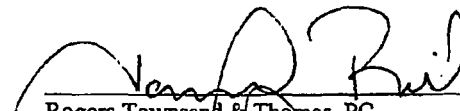
Dear Sir/Madam:

My firm and its client have received and processed your request for foreclosure intervention in the above referenced case. A review of your application indicates that you are not eligible for foreclosure intervention as contemplated by South Carolina Supreme Court Administrative Order 2011-05-02-01, because you failed to return a completed financial package. In addition, a letter requesting trailing documents was sent to you on January 24, 2012 with a deadline date of February 7, 2012. Unfortunately, my office never received a completed financial package in response to either of our letters as of March 9, 2012.

Please be advised that in accordance with South Carolina Supreme Court Administrative Order 2011-05-02-01, my client will immediately resume this foreclosure action. Accordingly, you should take whatever actions you or your attorney deem appropriate to protect your legal rights.

Pursuant to South Carolina Supreme Court Administrative Order 2011-05-02-01, "the Mortgagor has 30 days from the date of mailing of notice of denial of relief to file and serve an answer or other response to the Mortgagee's summons and complaint."

Very Truly Yours,



Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

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Reginald P. Corley (SC Bar #69453)
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Mary R. Powers (SC Bar #16534)
William S. Koehler (SC Bar #74935)
Jaclynn B. Goings (SC Bar #77501)
Andrew W. Montgomery (SC Bar #79893)

220 Executive Center Drive
Columbia, SC 29210

Post Office Box 100200 (29202)
(803) 744-4444

Columbia, South Carolina

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Diane Argabright

From: Simmons, Judge Charles <CSimmons@greenvillecounty.org>
Sent: Thursday, July 19, 2012 9:52 AM
To: Bridget Swing; Sarah Nielsen
Subject: Citi v. Smith 2009-11051

Follow Up Flag: Follow up
Flag Status: Completed

Ladies,

As I recall, the only outstanding issue is whether language in the Chief Justice's Admin Order allows the Smith's to file pleadings under the unique facts of this case.

I am compelled to rule that the Admin Order, since the Smith's were already in default, the matter had proceeded to hearing, a Foreclosure Order had been entered, and the sale held (which was later set aside to allow possible modification) does not give the Smith's such a right. When read as a whole, the Admin Order does not resurrect procedural or substantive rights. Further, this ruling is consistent with the position of Court Administration in its letter of June 7, 2011. And, finally, based upon the exhaustive efforts over a protracted period (after the Foreclosure Order had been entered on April 27, 2010 and the sale set aside) of time between the parties attempting modification (which was not successful) the intent of the Admin Order was complied with.

I would ask that Ms. Nielsen prepare an Order within 21 days.

Judge Simmons

Charles B. Simmons, Jr., Judge
Greenville County Courthouse
305 East North Street, Suite 313
Greenville, SC 29601

Phone: (864) 467-8556
Fax: (864) 467-8401

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Diane Argabright

From: Bridget Swing <bridget@foreclosuredefensefirmsc.com>
Sent: Thursday, July 19, 2012 3:25 PM
To: Simmons, Judge Charles
Cc: Sarah Nielsen
Subject: Re: Citi v. Smith 2009-11051

Judge Simmons:

Would the court be willing to address the April 23, 2012 letter from Plaintiff's previous council providing the Defendants an opportunity to respond to the complaint and the waiver arguments presented at the hearing so that the court's reasoning could be included in the final Order? Thank you in advance for your consideration.

Respectfully,

Bridget D. Swing

On Thu, Jul 19, 2012 at 9:51 AM, Simmons, Judge Charles <CSimmons@greenvillecounty.org> wrote:

Ladies,

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Bridget D. Swing, Attorney
301 Augusta Street
Greenville, SC
tel & fax 864-551-4353

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THANK YOU.

Diane Argabright

From: Simmons, Judge Charles <CSimmons@greenvillecounty.org>
Sent: Thursday, July 19, 2012 5:03 PM
To: Bridget Swing
Cc: Sarah Nielsen
Subject: RE: Citi v. Smith 2009-11051

I apologize for overlooking that issue.

While that language in the letter is troubling, it is consistent with the language in the Admin Order at issue. I find the letter does not rise to the level of a waiver and/or agreeing to set aside the previous default and Order. I am asking Ms. Nielsen to incorporate this in the Order she will be drafting.
Judge Simmons

Charles B. Simmons, Jr., Judge
Greenville County Courthouse
305 East North Street, Suite 313
Greenville, SC 29601

Phone: (864) 467-8556
Fax: (864) 467-8401

From: Bridget Swing [<mailto:bridget@foreclosuredefensefirm.com>]
Sent: Thursday, July 19, 2012 3:25 PM
To: Simmons, Judge Charles
Cc: Sarah Nielsen
Subject: Re: Citi v. Smith 2009-11051

Judge Simmons:

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Judge Simmons

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Greenville County Courthouse

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--

Bridget D. Swing, Attorney
301 Augusta Street
Greenville, SC
tel & fax 864-551-4353

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NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master-in-Equity

Case No. 2009-CP-23-11051

CitiMortgage, Inc.,

Respondent,

vs.

William H. Smith, Jr. a/k/a William H.
Smith; Angella S. Smith.; The South Carolina
Department of Revenue

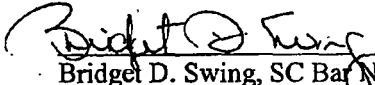
Of whom William H. Smith, Jr. a/k/a William
H. Smith and Angella S. Smith are

Appellants.

NOTICE OF APPEAL

William H. Smith, Jr. a/k/a William H. Smith and Angella S. Smith appeal the order of the Honorable Charles B. Simmons, Jr. dated August 8, 2012. Appellants received written notice of entry of this order on August 9, 2012.

September 5, 2012


Bridget D. Swing, SC Bar No. 13616
Foreclosure Defense Law Firm, LLC
PO Box 8246
Greenville, SC 29604
Tel & Fax: (864) 551-4353
Attorney for Appellants

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SEP 06 2012
SC Court of Appeals

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2012 SEP 10 P 4:36

Other Counsel of Record:

Sarah B. Nielsen
Nelson Mullins Riley & Scarborough, LLP
PO Box 11070 (29211-1070)
Columbia, SC 29201
Tel: (803) 799-2000
Attorney for Respondent

Ronald W. Urban
S.C. Department of Revenue
PO Box 12265
Columbia, SC 29211
Attorney for Co-Defendant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master-in-Equity

Case No. 2009-CP-23-11051

CitiMortgage, Inc.,

Respondent,

vs.

William H. Smith, Jr. a/k/a William H.
Smith; Angella S. Smith.; The South Carolina
Department of Revenue

Of whom William H. Smith, Jr. a/k/a William
H. Smith and Angella S. Smith are

Appellants.

CERTIFICATE OF SERVICE

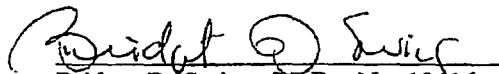
The undersigned attorney of record for Appellants William H. Smith, Jr. a/k/a William H.
Smith and Angella S. Smith hereby certifies that the foregoing Notice of Appeal was personally
served upon the following addressee:

Sarah B. Nielsen
Nelson Mullins Riley & Scarborough, LLP
Meridian, 17th Floor
1320 Main Street
Columbia, SC 29201

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2012 SEP 10 P 4:36

This the 6 day of September, 2012.

A handwritten signature in cursive script, reading "Bridget D. Swing", written over a horizontal line.

Bridget D. Swing, SC Bar No. 13616
Foreclosure Defense Law Firm, LLC
PO Box 8246
Greenville, SC 29604
Tel & Fax: (864) 551-4353

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master-in-Equity

Case No. 2009-CP-23-11051

CitiMortgage, Inc.,

Respondent,

vs.

William H. Smith, Jr. a/k/a William H. Smith; Angella S. Smith; The South
Carolina Department of Revenue

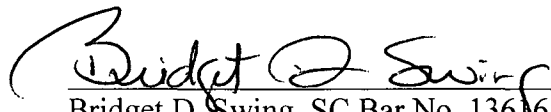
Of whom William H. Smith, Jr. a/k/a William
H. Smith and Angella S. Smith are

Appellants.

Certificate of Counsel

The undersigned hereby certifies that Appellants' Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

January 9, 2013
Greenville, SC


Bridget D. Swing, SC Bar No. 13616
Foreclosure Defense Law Firm, LLC
111 East North Street
PO Box 8246
Greenville, SC 29604
Tel & Fax: (864) 551-4353
Attorney for Appellant

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JAN 31 2013
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master-in-Equity

Case No. 2009-CP-23-11051

Appellate Case No. 2012-212894

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SC Court of Appeals

CitiMortgage, Inc.,

Respondent,

vs.

William H. Smith, Jr. a/k/a William H. Smith; Angella S. Smith.; The South
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Of whom William H. Smith, Jr. a/k/a William H. Smith and Angella S. Smith are

Appellants.

PROOF OF SERVICE

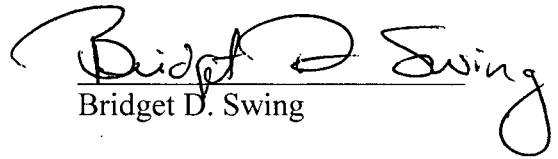
I, the undersigned attorney of record for Appellants, do hereby certify that I have served all counsel in this action with a copy of the Record on Appeal and Certificate of Counsel in the above referenced matter by mailing a copy of same via Federal Express Overnight Delivery, postage prepaid to the following addresses:

[party names and counsel signature on following page]

ORIGINAL

Thad H. Westbrook
Sarah B. Nielsen
1320 Main Street, 17th Floor
Columbia, SC 29201

Ronald Urban/Milton Kimpson
S.C. Department of Revenue
301 Gervais Street
Columbia, SC 29201


Bridget D. Swing

This 14th day of January, 2013

Greenville, SC