THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Carol A. Tolen, Special Referee

Opinion No. 5784 (S.C. Ct. App. filed Nov. 25, 2020)

ArrowPointe Federal Credit Union, Respondent,

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

Shaun C. Blake, Esq.
Andrew B. Walker, Esq.
Rogers Lewis Jackson Mann & Quinn, LLC
PO Box 11803
Columbia, SC 29211
(803) 256-1268

Sean Foerster, Esq.
Rogers Townsend & Thomas, PC
PO Box 100200
Columbia, SC 29202
(803) 744-1855
Attorneys for Petitioner

Other Counsel of Record:
Christy C. Jones, Esq.
Sherpy & Jones, P.A.
P.O. Box 5977
Columbia, SC 29205 (29250)
(803) 356-3326, X102

Jonathan M. Milling, Esq.
Milling Law Firm, LLC
2810 Devine Street
Columbia, SC 29205
(803) 451-7700
Attorneys for Respondent

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on January 13, 2021.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the equitable doctrine of replacement mortgage is not the common law of South Carolina, believing that unintended windfalls in favor of junior creditors must be addressed by the Legislature?
2. Did the Court of Appeals err in not reaching the issue of prejudice and failing to hold that Respondent suffered no material prejudice in this matter, or at least no prejudice sufficient to bar the equitable application of the doctrine of replacement mortgage?

STATEMENT OF THE CASE

On March 27, 2012, Respondent initiated this action in the Fairfield County Court of Common Pleas, Case No. 2012-CP-20-00132, seeking to foreclose a mortgage securing an equity line of credit (the "LOC Mortgage") given by Jimmy E. Bailey and Laura Jean Bailey ("Baileys") to Respondent. (App. 124-132). As a part of its foreclosure, Respondent sought declaration that the LOC Mortgage was a first lien with priority over all others. (Id.). Petitioner[1] opposed Respondent's claim for declaratory relief and sought to foreclose its mortgage (the "Second Mortgage") granted by the Baileys together with a declaration that the Second Mortgage was senior to the LOC Mortgage under the equitable doctrine of replacement mortgage. (App. 133-

[1] As noted by the Court of Appeals in the Opinion (App. 2), Petitioner has several predecessors in interest, including Quicken Loans, Inc., JP Morgan Chase Bank, and DLJ Mortgage Capital, Inc., its direct predecessor. Unless stated otherwise, "Petitioner" herein includes reference to Petitioner's predecessors for narrative purposes.

153). The Special Referee denied Petitioner's motion for summary judgment, concluding the doctrine of replacement mortgage, as stated in the Restatement (Third) of Property (Mortgages) § 7.3 (1997), does not reflect the common law of South Carolina. (App. 120-123).

Petitioner and Respondent submitted a Stipulation of Facts on March 13, 2017. (App. 272-278). The following facts relevant to this Petition are undisputed:

At all times pertinent hereto, the Baileys owned 247 Morninglow Drive in Winnsboro, South Carolina. (App. 272-273.). The Baileys gave a mortgage to Petitioner in October 2009 (the "First Mortgage"), which was in a senior lien priority position on the subject property at the time of its recording. (App. 273, 425-428). The First Mortgage secured a note in the principal amount of $256,500.00 plus interest. (App. 165). The First Mortgage specifically stated it "secures to Lender: (1) the repayment of the Loan, and all renewals, extensions and modifications of the Note…." (Id.).

A week after the recording of the First Mortgage, the Baileys gave Respondent the LOC Mortgage, which secured an equity line of credit in the principal amount of $99,000.00. (App. 273, 468-474). The Baileys and Respondent "intended the [LOC Mortgage] to be a junior mortgage on the Subject Property second in lien priority position behind the First Mortgage." (App. 274). Respondent recorded the LOC Mortgage on November 4, 2009. (Id.).

Nineteen (19) days later, the Baileys refinanced, paid off, and replaced their first note with the Petitioner, then totaling $257,459.04, with a note to the Petitioner in the principal amount of $296,000.00. (App. 274-275, 476-481, 511-512). As part of this transaction, the senior First Mortgage was replaced by the Second Mortgage, with the First Mortgage remaining of record until it was replaced by the recording of the Second Mortgage on December 15, 2009. (App. 274-275, 485-510). Notably, Petitioner relied upon a licensed South Carolina attorney, Stacey E. Besser,

Esq., f/k/a Stacey Pope Gardner, Esq., to conduct this transaction. (App. 275).

While Petitioner was on record notice of the LOC Mortgage recorded earlier that month, Petitioner did not have actual knowledge of the LOC Mortgage when it refinanced the Bailey's note and replaced its First Mortgage. (App. 275). Moreover, during the diligence portion of the refinance transaction, the Baileys signed an affidavit misrepresenting the truth, indicating that "there are no outstanding home improvement loans, mortgages, deeds of trust, or equity lines of credit, recorded or unrecorded" other than the First Mortgage. (App. 275, 370). Likewise, Respondent continued to believe that it was in junior lien position until July 2011 when it discovered the First Mortgage had been replaced by the Second Mortgage. (App. 319).

After considering the Stipulation of Facts and other evidence submitted, the Special Referee granted Respondent's Motion for Summary Judgment on January 18, 2018. (App. 109-119) ("2018 Order"). The 2018 Order recognized that Petitioner's debt on its note secured by the Second Mortgage was $436,609.23, as of March 13, 2017, plus accrual, while Respondent's debt on its note secured by the LOC Mortgage was $187,201.60 as of March 13, 2017, plus accrual. (App. 111-112).

The Court of Appeals affirmed the judgment of the Special Referee in this matter. ArrowPointe Fed. Credit Union v. Bailey, Op. No. 5784 (S.C. Ct. App. filed Nov. 25, 2020) (App. 1-10) (the "Opinion"). Petitioner now seeks a writ of certiorari to review that reported decision.

ARGUMENT

1. THE COURT OF APPEALS SHOULD HAVE HELD THAT SOUTH CAROLINA COMMON LAW RECOGNIZES THE EQUITABLE DOCTRINE OF REPLACEMENT MORTGAGE TO AVOID UNINTENDED WINDFALLS IN FAVOR OF SUBSEQUENT CREDITORS.

Rule 242(b), SCACR and the jurisprudence of this Court states that it may grant a writ of certiorari where a special reason exists, such as the presentation of a novel question of law and

where the decision of the Court of Appeals conflicts with a prior decision of this court. S.C. Dep't of Soc. Servs. v. Benjamin, 430 S.C. 235, 236, 844 S.E.2d 373 (2020); Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC, 422 S.C. 211, 213, 810 S.E.2d 856, 857 (2018). This case turns solely on a novel question of law left unresolved by Matrix Fin. Services Corp. v. Frazer, 394 S.C. 134, 138, 714 S.E.2d 532, 534 (2011). If left unaddressed, the Opinion's reasoning undermines and conflicts with a long history of decisions by this Court and other jurisdictions that equitably avoid unintentional windfalls by the otherwise rigid application of our race-notice statute.

a. Matrix was unable to resolve an important, open question of common law.

In Matrix, three (3) members of this Court concluded that the lender was not entitled to priority lien status under the doctrine of equitable subrogation because "equitable subrogation is simply not a remedy available to a lender that refinances the original debt owed to it." Id. The majority opinion explicitly noted: "Matrix is not asserting priority under a theory of replacement and modification. … We do not decide whether a lender that refinances its own debt could attain priority under the theory of replacement and modification illustrated in section 7.3 of the Restatement (Third) of Property (Mortgages)." Id. In his dissenting opinion, Justice Pleicones recognized the import of this statement:

> It appears that the majority would agree with me that a refinancer has a right to lien priority, if that refinancer uses the theory of "replacement and modification" rather than equitable subrogation. Heretofore, South Carolina has used the doctrine of equitable subrogation to restore a refinancer's lien to priority, and I would not reverse this order because it used this theory rather than the newly announced "replacement and modification" rule.

Id. at 141, 714 S.E.2d at 535–36. In his opinion, Justice Kittredge concurred in the result due to Matrix's unauthorized practice of law in closing the refinance mortgage without a licensed attorney, but he stated he would not reach the issue of equitable subrogation in Matrix. Id. at 140, 714 S.E.2d at 535.

A writ of certiorari is needed because the unresolved question in Matrix and the reasoning provided in the Opinion in this case draws into question whether, and to what extent, South Carolina's common law will continue to afford equitable protections to first-lien refinancers to prevent unintended windfalls to those who intended to be junior lienholders. *See* Indep. Nat. Bank v. Buncombe Prof'l Park, LLC, 411 S.C. 605, 769 S.E.2d 663 (2015) (granting a writ of certiorari, reversing the Court of Appeals' decision, and finding petitioner to be equitably subrogated to the original first mortgage on the property.); *see also* Enter. Bank v. Fed. Land Bank, 139 S.C. 397, 138 S.E. 146 (1927) (holding that a lender who pays the original mortgage itself, or furnishes money to the mortgagor to pay off an existing mortgage, pursuant to an agreement by which the lender will give a new mortgage, has the equitable right to be subrogated to the paid-off mortgage); James v. Martin, 150 S.C. 75, 147 S.E. 752, 758 (1929) ("One satisfying a lien note at the request of the property owner, upon the understanding that he is to have new security upon the property released, acting in ignorance of a second mortgage lien upon the property, although it is on record, is entitled to subrogation to the rights of the first lien holder."); Meaders Bros. v. Skelton, 234 S.C. 134, 107 S.E.2d 1 (1959) (holding, *per curiam*, where property was subject to duly recorded first and second mortgages and loan was made to mortgagor to pay off first mortgage, lender was subrogated to first mortgagee's lien and lender's lien was superior to that of second mortgagee to extent of payment of principal and interest on first mortgage).

Following Matrix, lenders, lien holders, practitioners, and trial courts require this Court's clear direction regarding the status of the doctrine of replacement mortgage in South Carolina. At the root of the confusion is the absence of any apparent reason why equity would distinguish between a refinancer who repays the debt and replaces the mortgage of another first lien holder rather than its own. *See* Bank of Am., N.A. v. Prestance Corp., 160 Wash. 2d 560, 579, 160 P.3d

17, 27 (2007) ("It is common sense that the same lender should not lose priority for renegotiating a mortgage with the debtor. Why should it be any different when a new lender renegotiates that same mortgage? As long as the junior interests are not materially prejudiced, then equitable subrogation maintains the proper priorities.") Indeed, this Court quoted favorably a lengthy passage from Seeley v. Bacon, 34 A. 139, 141 (N.J. Ch. 1896) in its decision in Enterprise Bank; in the quoted passage, the Court of Chancery of New Jersey explicitly acknowledged that Seely, the party who refinanced in part his own first lien, was entitled to be equitably subrogated to his rights in the original mortgage. 139 S.C. 397, 138 S.E. at 150.

Given the absence of any meaningful difference between a refinancer that replaces another's first lien rather than its own, Matrix has been relied upon to support South Carolina's embrace of the doctrine of replacement mortgage. For example, Honorable Marvin H. Dukes, III observed in another matter in 2017 that the Matrix decision "gives credence" to the Restatement (Third) of Property (Mortgages), and he concluded that the equitable principles of replacement mortgage as stated in § 7.3 should be applied to establish the priority of the replacement mortgage at issue. (App. 544-555).[2] Therefore, a writ of certiorari is needed to provide the guidance lacking in the Opinion on this important issue of common law.

b. The Opinion conflicts with the reasoning of numerous decisions of this Court and the common law recognized in other jurisdictions.

The Opinion provides no reasoning why South Carolina's equitable common law would avail a refinancer who repays the debt and replaces the mortgage of another first lien holder but would utterly frustrate a refinancer who refinanced and replaced its own. Instead, deviating from

[2] Petitioner does not rely on Judge Duke's Order as controlling authority, but rather to illustrate the need for a writ of certiorari and a clear statement from this Court and the availability of equitable doctrines in determining lien priority in South Carolina.

this Court's past decisions, the Opinion denounces equitable protections for any refinancer from the harsh effects of our race-notice statute. In so doing, the Opinion relies merely on a student comment in the University of Baltimore Law Review that criticizes courts for adopting any of the equitable subrogation provisions discussed in the Restatement (Third) of Property (Mortgages). (App. 8-9). Ultimately, the Opinion concludes that deviations from our race-notice statute are beyond the reach of equity and the doctrines reflected in the Restatement, but instead lie solely within the province of our Legislature. (App. 9).

This reasoning, however, deviates from the doctrine of *stare decisis* and is places the Opinion in direct conflict with the majority's opinion in Matrix, which cites with approval Restatement (Third) of Property (Mortgages) § 7.6 and notes that our common law is consistent with the Restatement and its comments. Matrix Fin. Servs. Corp. v. Frazer, 394 S.C. 134, 138, 714 S.E.2d 532, 534 (2011); *see* Matthews v. Dennis, 365 S.C. 245, 249, 616 S.E.2d 437, 439 (Ct. App. 2005) (the Supreme Court citing to the Restatement (Third) Property to discuss the different types of implied easements); *see also* Goodwin v. Johnson, 357 S.C. 49, 55, 591 S.E.2d 34, 37 (Ct. App. 2003) (using the factors articulated by the Restatement for guidance in determining what to consider when establishing an easement by necessity).

Likewise, the Opinion's reasoning conflicts with our long-standing common law tradition of applying equitable notions to avoid unintentional windfalls that would otherwise arise under our race-notice statute. *See* Dodge City of Spartanburg, Inc. v. Jones, 317 S.C. 491, 454 S.E.2d 918 (Ct.App.1995) (providing the same equitable relief sought by Petitioner here; holding Carolina First enjoyed the priority held over an intervening lien when its refinance transaction paid off its own prior debt and mortgage, as well as one held by First Federal); *see also* Indep. Nat. Bank, 411 S.C. at 609, 769 S.E.2d at 665 ("The principal's constructive knowledge of a prior mortgage does

not defeat a claim for equitable subrogation"); *see also* Enter. Bank, 139 S.C. 397, 138 S.E. 146, 148 (1927) ("The doctrine of subrogation is said to be one of equity and benevolence, and the basis is the doing of complete, essential, and perfect justice between all the parties without regard to form, and its object is the prevention of injustice.") (internal quotation omitted); James, 150 S.C. 75, 147 S.E. at 758 (applying the holding in Enterprise Bank). Actions to determine lien priority have long been the province of our courts sitting in equity. If the Opinion is correct and its reasoning stands, then South Carolina's doctrine of equitable subrogation is subject to the same critique and is drawn into question by the Opinion.

The Opinion recognized that there exists "the trend toward adopting some form of replacement mortgage doctrine in sister states" (App. 8); this appears to be understatement. *See* Burney v. McLaughlin, 63 S.W.3d 223, 231 (Mo. Ct. App. 2001) (stating that the rule stated in § 7.3 of the Restatement is consistent with Missouri common law and noting, "cases in which a junior mortgage lien is elevated above the paramount mortgage are the exception and not the rule."); *see also* Bay Minette Prod. Credit Ass'n v. Citizens' Bank, 551 So. 2d 1046, 1048 (Ala. 1989) (replacement mortgage filed by a mortgagee does not "release" an original first lien so as to render the replacement mortgage subordinate to an intervening lien); Cont'l Lighting & Contracting, Inc. v. Premier Grading & Utilities, LLC, 227 Ariz. 382, 389 (Ariz. Ct. App. 2011) (adopting the replacement mortgage doctrine as stated in §7.3); Home Fed. Sav. & Loan Ass'n v. Citizens Bank of Jonesboro, 861 S.W.2d 321, 323 (Ark. App. 1993) (Arkansas common law has long recognized the equitable doctrine of replacement mortgage); Nikooie v. JPMorgan Chase Bank, N.A., 183 So. 3d 424, 429 (Fla. Dist. Ct. App. 2014) (recognizing that §7.3 is consistent with Florida common law); UnionBank v. Thrall, 872 N.E.2d 542, 546-47 (Ill. App. Ct. 2007) (stating the replacement mortgage doctrine has been the common law of Illinois for over 100

years); Jackson & Scherer, Inc. v. Washburn, 496 P.2d 1358, 1366 (Kan. 1972) (the replacement mortgage retains priority absent an intention to give priority to the intervening lien and absent paramount equities); E. Bos. Sav. Bank v. Ogan, 701 N.E.2d 331, 334 (Mass. 1998) (acknowledging Massachusetts recognizes § 7.3); CitiMortgage, Inc. v. MERS, 813 N.W.2d 332, 335 (Mich. App. 2011) (§7.3 of the Restatement reflects Michigan common law); Resolution Tr. Corp. v. Barnhart, 862 P.2d 1243, 1248 (N.M. Ct. App. 1993) ("where a senior mortgagee discharges its mortgage of record and contemporaneously takes a new mortgage, the senior mortgagee's lien is not subordinated to intervening liens in the absence of (1) evidence of an intent to subordinate, or (2) paramount equities in favor of junior lienholders that justify subordinating the senior mortgagee's lien."); Norstar Bank v. Morabito, 201 A.D.2d 545, 547 (N.Y. App. 1994) (retaining priority for replacement mortgage in refinance transaction); Shanks v. Phillips, 55 S.W.2d 258, 261 (Tenn. 1932) (mortgagee who replaces its prior lien in the same transaction as new lien does not lose priority absent paramount equities); Sheppard v. Interbay Funding, LLC, 305 S.W.3d 102, 107 (Tex. App. 2009) (citing with favor §7.3); Nature's Sunshine Prod., Inc. v. Watson, 2007 UT App 383, ¶ 16, 174 P.3d 647, 652 (relying on §7.3 as controlling law in Utah); Chase Manhattan Bank, N.A. v. Miller, 39 V.I. 123, 128 (Terr. V.I. 1998) (stating §7.3 undoubtedly applies in the Virgin Island territories); Kim v. Lee, 31 P.3d 665, 670, opinion corrected, 43 P.3d 1222 (Wash. 2001) (adopting replacement mortgage as stated in § 7.3); Iowa Cty. Bank v. Pittz, 211 N.W. 134, 137 (Wis. 1926) (replacement mortgage filed by mortgagee permitted to retain his first lien status except to the extent of prejudice suffered by intervening lien holder).

In contrast, while the Opinion refers to the replacement mortgage doctrine as the "minority approach," Petitioner is unaware of any jurisdiction that has plainly rejected Restatement (Third)

of Property (Mortgages) § 7.3, and the Opinion cites to none. A writ of certiorari will allow this Court to clearly state whether South Carolina intends to be the first to directly reject § 7.3 of the Restatement.

c. The doctrine of replacement mortgage is the common law in South Carolina.

The Restatement articulates the doctrine of replacement mortgage as follows:

> (a) If a senior mortgage is released of record and, as part of the same transaction, is replaced with a new mortgage, the latter mortgage retains the same priority as its predecessor, except
>
> (1) to the extent that any change in the terms of the mortgage or the obligation it secures is materially prejudicial to the holder of a junior interest in the real estate, or
>
> (2) to the extent that one who is protected by the recording act acquires an interest in the real estate at a time that the senior mortgage is not of record.

Restatement (Third) of Property (Mortgages) § 7.3 (1997 & June 2020 update). The Court of Appeals erred in failing to recognize that the doctrine of replacement mortgage reflects the long-standing equitable principles embraced by the common law of this Court. *See, e.g.,* United Carolina Bank v. Caroprop, Ltd., 316 S.C. 1, 4, 446 S.E.2d 415, 417 (1994) ("Finally, our holding imposes no injustice upon [the second mortgage holder], it having knowingly taken a *second* mortgage from [a co-tenant]. [The other co-tenant's] payment of the [first] mortgage in no way disadvantages [the second mortgage holder], which has done nothing to advance its priority.") (emphasis in the original); *see also* Enter. Bank, 139 S.C. 397, 138 S.E. 2d at 149. ("And so, if one loans on a mortgage without actual notice of a prior recorded mortgage for the purpose of satisfying a vendor's lien on the mortgaged land which was superior to the prior mortgage, the second mortgagee is subrogated to the vendor's lien to the amount that the money so loaned was actually applied to the extinguishment of such lien") (internal quotation omitted). A writ of certiorari is

necessary to correct this error in the Opinion.

This Court's recognition of the doctrine of replacement mortgage should be retrospective. "The general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively." Carolina Chloride, Inc. v. S.C. Dep't of Transp., 391 S.C. 429, 433, 706 S.E.2d 501, 503 (2011) (citation and quotation marks omitted); Miranda C. v. Nissan Motor Co., 402 S.C. 577, 586, 741 S.E.2d 34, 39 (Ct. App. 2013) (quoting 20 AM.JUR.2D COURTS § 150 (2013): "[I]t is said that, unlike legislation, which is presumptively prospective in operation, judicial decisions are presumptively retrospective.").

2. THE COURT OF APPEALS SHOULD HAVE HELD THAT RESPONDENT SUFFERED NO PREJUDICE, OR AT LEAST NO PREJUDICE SUFFICIENT TO BAR THE EQUITABLE APPLICATION OF THE DOCTRINE OF REPLACEMENT MORTGAGE.

The Restatement §7.3(a)(1) states that the replacement mortgage doctrine is limited to the extent that any change in the terms of the mortgage or the obligation it secures is materially prejudicial to the holder of a junior interest in the real estate. The Court of Appeals did not reach this issue because it concluded that the replacement mortgage doctrine is not a part of South Carolina's common law.

In this instance, the replacement mortgage did not materially prejudice Respondent, who took a junior lien with knowledge that the First Mortgage was an adjustable-rate mortgage that specifically secured "the repayment of the Loan, and all renewals, extensions and modifications of the Note…." (App. 273). The comments to §7.3 observe that when, as here, the original mortgage puts language in the public record that demonstrates the senior mortgagor's ability to increase the amount secured by its current or future loans, then the intervening lienholder is on notice that the senior debt can increase and should temper its lending decisions accordingly.

Reporters' Note, cmt. d, Restatement (Third) of Property (Mortgages) § 7.3. These is no substantive difference between a "modification" and "new loan" in this context. *See* UPS Capital Business Credit v. Abbey, 975 A.2d 548, 551 (N.J. Super. Ct. Ch. Div. 2009). ("This 'new loan' was in effect a 'modification' as well as a 'renewal' … the court finds that the proceeds of the (Replacement) mortgage were used to take the place of the original (replaced) mortgage, which was a superior lien by recordation and by agreement to plaintiff's mortgages."); *see also* Restatement (Third) of Property (Mortgages) § 7.3, cmt. B and illus. 5; 59 C.J.S. Mortgages § 331. Because Respondent knew and intended its lien to be subordinate to any rate changes or increases in the principal debt secured by the First Mortgage, Respondent suffers no prejudice by the Second Mortgage being given full priority.

However, even if this Court differs with the reasoning of the Restatement § 7.3 and determines that a junior lien holder with prior notice of a senior lien with a variable interest rate and a future advance clause nevertheless suffers substantial prejudice if the replacement mortgage secures additional principal or a fixed rate of interest following the refinance, then the potential prejudice in this instance is not so substantial so as to prevent the equitable application of the doctrine of replacement mortgage entirely. In this case, Respondent states that Petitioner's refinance impaired its equity position by $38,540.96 (App. 398). If this Court determines that Respondent's equity position is materially impaired, then both the Restatement and South Carolina common law provides that the replacement mortgage retains its first position except to the extent of the impairment. *See* Restatement (Third) of Property (Mortgages) § 7.3, cmt. B and illus. 2; Meaders Bros., 234 S.C. 134, 137, 107 S.E.2d 1, 2–3 (1959).

CONCLUSION

As the Supreme Court of Washington has noted, the Restatement's approach furthers

important public policy objectives by "facilitating more refinancing," "stem[ming] the threat of foreclosure," and saving homeowners "billions of dollars on title insurance premiums." Prestance Corp., 160 P.3d at 28. Therefore, Petitioner asks, respectfully, that this Court grant its petition for a writ of certiorari to answer the question left open in this Court's majority opinion in Matrix and to settle the current status and role of South Carolina's equitable common law in the field of mortgage and loan refinancing, a matter of significant public concern.

Respectfully submitted,

February 11, 2021

s/ Shaun C. Blake
Shaun C. Blake, Esq.
Andrew Bryant Walker, Esq.
Rogers Lewis Jackson Mann & Quinn, LLC
PO Box 11803
Columbia, SC 29211
(803) 256-1268
sblake@rogerslewis.com
dwalker@rogerslewis.com

&

Sean Matthew Foerster, Esq.
Rogers Townsend & Thomas, PC
PO Box 100200
Columbia, SC 29202
(803) 744-1855
Attorneys for Petitioner