THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Joseph F. Strickland, Master in Equity Court Judge

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Case No. 2020-CP-000069

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U.S. Bank, National Association, as trustee for the Holders of the Banc of America Funding Corporation, 2008-FTI,

Respondent,

V

Rhonda Lewis Meisner a/k/a Rhonda L. Meisner, Bank of America, N.A. and SCBT of whom Rhonda L. Meisner is the

Appellant.

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# FINAL BRIEF OF THE APPELLANT

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March 16, 2021

s/Rhonda Lewis Meisner
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Appellant

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## STANDARD OF REVIEW

A mortgage foreclosure action is an action in equity. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E. 2d 472, 475 (1997) The appellate Court reviews factual findings and legal conclusions in an equitable action de-novo. Lewis v. Lewis 392 S.C. 382, 388-89, 709 S.E. 2d 650, 653-54 (2011). Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 248, 715 S.E.2d 348, 352 (Ct. App. 2011). Determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

## STATEMENT OF THE CASE

## THIS COURT'S PREVIOUS RULINGS

The appellant Rhonda Meisner appealed the Order of the Honorable DeAndrea Benjamin striking the jury trial and for mandatory reference which this court denied on February 13, 2019. This Court determined the only issue under review was whether the counter claims entitled the appellant to a jury trial, which this Court determined a jury trial was not available as right; the petition for rehearing was denied on February 28, 2019; a petition for a writ of certiorari was filed on April 23, 2019; the Respondent's entered a notice of appearance in the Supreme Court on May 13, 2019; however, the petition for certiorari was denied on June 28, 2019, and the remittitur was issued. Previously, the appellant, Rhonda Meisner, appealed the denial of her motion to dismiss which this Court found to be interlocutory.

## TRIAL COURT PROCEEDINGS

As an initial matter, the trial court issued an order dismissing this case on 9/12/2017, in a blanket omnibus order. However, at the time of the omnibus order, this case was on appeal and not subject to the order because the trial court did not have jurisdiction over the case. Likewise, the order restoring the case on 4/1/2019 was of no effect because the order dismissing the case was void or a nullity due to the appellate jurisdiction. Therefore, all the counter claims and cross claims of the appellant were not dismissed when the Omnibus order of dismissal and reinstatement was inadvertently entered in this case.

U.S. Bank "US Bank" initiated a foreclosure action (first mortgage) on March 31, 2014 against the appellant, Rhonda Meisner "Meisner" and attached an assignment of the note and mortgage from Bank of America, N.A. "Bank of America" to US. Bank, that was dated April 2, 2014. The assignment was notarized on April 3, 2014, by a notary, in a different state. **(2014-CP-40-02063) (hearing July 10, 2014 p. 295:23-25; 6:1-12).** Bank of America and SCBT now South State Bank (South State Bank) were also named defendants. Previously, SOUTH State Bank, a junior lien holder, (in the same property), filed a foreclosure action and named both Bank of America and Meisner as defendants. In the earlier case (2013-CP-40-07144), Bank of America answered the suit and claimed ownership of the same note and mortgage (first mortgage) that U.S. Bank now claims and used to initiate the current mortgage foreclosure suit. **(hearing July 10, 2014 R. p. 289:10-15) (R. p. 292: 8-20).**

Bank of America also claimed ownership of a different note and mortgage that had been paid off years earlier, **(HELOC)(R. pp. 324-330 ).**The appellant filed a motion to dismiss pursuant to S.C.R.P. Rule 12(b)(7) and 12(b)(8) based on Bank of America and U.S. Bank's claimed ownership in the same note and mortgage in the previously filed suit by SCBT and requested that

U.S. Bank's foreclosure action be dismissed and the cases consolidated for adjudication. **(R. p. 288:17-25; 289-290:1-16)**

A hearing was held on the motion on July 10, 2014; however, prior to the hearing, SCBT voluntarily dismissed Bank of America as a defendant and changed SCBT's cause of action to a suit on a note, which SCBT also subsequently dropped and dismissed. (2013-CP-40-07144) During the July 10, 2014 hearing, appellant Meisner argued the case should be dismissed based on the defective assignment of the note and mortgage which occurred after the lawsuit was filed. **(June 10. 2014 hearing Record p.295:5-11,17-25; p. 296:1-15).** The Court denied all motions. **(R.p.8)** Meisner filed a motion to alter and amend and requested a ruling on the alternative oral motions to dismiss based on the fact the plaintiff/respondent presented inadequate evidence that it owned the note and mortgage at the time U.S. Bank filed the lawsuit **(T. hearing June 10, 2014 R. 303:14-26).** Additionally, because U.S. Bank claimed the default occurred prior to the assignment of the note and mortgage based on the date of the filings, U.S. Bank would be considered a third-party creditor because they purchased and assumed the note and mortgage after US Bank said Meisner defaulted. **(R. 305: 6-16).**

The appellant, Rhonda Meisner, filed a motion to dismiss based on lack of standing because the lawsuit was filed on March 31, 2014 and U.S. Bank attached an assignment dated April 2, 2014 and notarized April 3, 2014. **(T. hearing June 10, 2014 R. p. 295:22-25;6:1-15 )** Meisner claimed U.S. Bank was not the real party in interest based on Bank of America's reported claim to the note and mortgage that U.S. Bank was seeking to foreclose. **(T. hearing June 10, 2014 R.p. 300:18-21 )** The challenge to real party in interest and standing was subsequently determined by this Court as interlocutory so the appeal was dismissed.

Subsequently, the plaintiff U.S. Bank submitted an Order of referral for the foreclosure action to the Clerk of Court for signature and execution. **(R. p. 19-21)**

The Order created by the U.S. Bank, and presented to the Clerk of Court for execution, included findings of fact and conclusions of law. **(R. pp.19-21)** The South Carolina rules of civil procedure do not provide a mechanism for the clerk of court to make findings of fact and conclusions of law. **(R. p.18).**

US BANK filed for summary judgment on April 15, 2019 and the hearing was scheduled for July of 2019 and subsequently rescheduled and heard October 29, 2019. The Court of Appeals issued the remittitur on June 10, 2019. A motion to alter and amend was scheduled and heard on December 7, 2019. This Appeal follows:

## ARGUMENT

### I. The Master in Equity erred when it determined US Bank was the real party in interest and possessed the requisite standing to foreclose on the note and mortgage.

As an initial matter, the Master in Equity determined it had subject matter jurisdiction to hear the summary judgment motion, which was filed while the case was still under the jurisdiction of the appellate courts. **(R. p. 163:11-23** ) The appellant argues a motion for summary judgment is a substantive motion and because the order on appeal was the mode of trial, the Master in Equity did not have jurisdiction to entertain the motion until the final order was issued and the remittitur sent establishing lower court jurisdiction. Because the respondent did not re-file a motion for summary judgment *after* jurisdiction was obtained by the circuit court, the Master in Equity erred in acting on the faulty motion or on no motion at all since the filed motion occurred at a time the circuit court did not have jurisdiction.

As such, the appellant argues the Master in Equity did not have jurisdiction over the case when the motion for summary judgment was filed. A motion for summary judgment is

a substantive motion and required to be filed 10 days prior to the hearing. Here, however, the circuit court could not entertain a summary judgment motion because the order being appealed was a "mode of trial" issue which was outside the allowable motions when the order of reference and striking the jury demand which was the order on appeal.

**A. US Bank did not own the note or mortgage at the time of the breach in contract.**

US Bank alleged the breach in contract occurred July of 2013; however, the assignment of the mortgage and note did not occur until April of 2014. **(R. p. 295:22-25; 6:1-15)**As such, US Bank was assigned a breached contract without

**B. US Bank did not own the note and mortgage at the time it filed its complaint for foreclosure, as evidenced by the pleadings.**

The assignment of the mortgage from Bank of America to U.S. Bank is a defective instrument that was executed after the lawsuit was filed. Therefore, the Court should have found, the respondent was not the real party in interest because the note and mortgage were assigned by Bank of America into US Bank *after* U.S. Bank filed this lawsuit. **(R. p. 295:22-25;6:1-15)(R. pp.41-44)(R.46) South** Carolina law requires a lawsuit to be brought in the name of the real party in interest. The defendant has the obligation to object early in the litigation, or risk waiver of the objection to the real party in interest if the objection is not raised early. WeSavFinancial Corp. v. Lingefelt, 316 S.C. 442, 450 S.E.2d 580 (1994).

Standing must be determined prior to the Court having a justiciable controversy. If South Carolina law provided that a party could file a lawsuit based on a *future interest,* this would create great uncertainty as to who was entitled to be a plaintiff and who could initiate a proceeding which could include many potential plaintiffs. As the Supreme Court ruled in Lennon, "[A] threshold inquiry for any court is a determination of justiciability, i.e. whether the litigation presents an active case or controversy. 'No justiciable controversy is presented

unless the plaintiff has standing to maintain the action. Lennon v. South Carolina Coastal Council, 330 S.C. 414, 415, 498 S.E. 2d 906, 906 (Ct. App. 1998) The Supreme Court of the United States ruled that the *only* party that has standing to sue in a mortgage foreclosure action is the holder of both the note and the mortgage. Carpenter v Longen, 83 U. S. 16 Wall. 271 (1872). As the Supreme Court in Carpenter noted, "[T]his case is a different one from what it would be if the mortgage stood alone, or the note was non- negotiable or had been assigned after maturity". Id. at note 2. "[T]he note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." Id. at note 3. Here, the note and mortgage were assigned *after* the alleged default making the owner of the note and mortgage a third-party debt-collector. This assignment occurred *after* the initiation of the foreclosure action, so on March 31, 2014, the filed assignment indicates that Bank of America was the owner of the note and mortgage at the time the lawsuit was filed because the assignment unto US Bank occurred two days later. There is no evidence US Bank had standing (ownership of the note and mortgage) to pursue the foreclosure action on March 31, 2014. **(R.46 )(R. pp.41-44.)** US Bank's arguments that they possessed the original note at the foreclosure hearing does not help them cure the fact they did not own the note or mortgage on March 31, 2014 when the lawsuit was filed. **(R.41-44).**

Immediate possession of the note later in the litigation cannot cure the fact the respondent did not own the paper on the day the lawsuit was filed. While the assignment is not required to be filed it is required to be executed before the lawsuit to have standing to file the lawsuit.

**C. Bank of America, N.A. claimed ownership of the same mortgage and note in its original answer and in a different proceeding.**

The Parties representations to the Court via the filings suggest the "real party in interest" is Bank of America, N.A., as the assignment of the note and mortgage occurred, *after* the breach in contract and *after* the lawsuit was filed in the Court. (emphasis by appellant). Therefore, U.S. Bank is a third- party creditor because they received the assignment after the loan was in default status. This is due to the fact a real party in interest is for the benefit of the defendant. The requirement to object early avoids multiple suits by multiple plaintiffs by requiring the defendant to speak early in the litigation if the plaintiff has not been properly identified. Here, both Bank of America and U.S. Bank have claimed ownership of the *same* note and the *same* mortgage (albeit in different lawsuits and the initial answer of this lawsuit). **(R. pp.114-117).** Bank of America and US Bank's representations created a genuine issue as to the proper plaintiff, the real party in interest, and whether the plaintiff/respondent, U.S. Bank had standing to initiate the foreclosure action. **(R.p.115)** The Court should not have granted summary judgment as the plaintiff appears to not have a justiciable interest in the lawsuit. **(R.pp 126:16-25;127:1-11** ). In this case, it is the co-defendant and/or the plaintiff that the appellant alleged breached the note contract. The determination of which entity owned the note and mortgage at the time of the alleged breach is central to the counterclaims and cross-claims in this lawsuit as appellant Meisner alleges as do the respondents that Bank of America owned the note and mortgage at the time of the breach. **(R.p.114-17).** The Court should have found genuine issues of material fact exists and required US bank to prove it owned the note and mortgage at the time it filed the lawsuit.

Additionally, the Court should have found the assignment of the note and mortgage was *not* properly executed because the assignment of the mortgage was notarized one day later in a different state and as such and did not transfer ownership of the note and the

mortgage from Bank of America to the respondent/plaintiff U.S. **Bank. (R.p.311).** In addition, The assignment and notarization being defective, it was executed and notarized after the foreclosure action was filed. **(R.p 311).**

Bank of America represented to the Circuit Court, in an earlier foreclosure action, that Bank of America possessed an ownership interest in the very same note and mortgage. **(R.p.289:10-15; 292:8-20) (R. p. 289: 3-10; 307:4-9).** The representation of Bank of America to the Court creates a material controversy regarding the real party in interest and the ownership of the note and mortgage as both U.S. Bank and Bank of America,

the predecessor in title, claim ownership. **(R. p. 114) (R. p.303:4-15; 307:4-15)** The representation of the plaintiff is that the note and mortgage were assigned, after Bank of America breached the contract, which made Bank of America, N.A. the real party in interest instead of U.S. Bank. **(R.p. 303 lines 2-8).**

Bank of America and appellant Meisner executed the note and the mortgage

in 2003 **(R.pp.313-320).** The executed note agreement contained a clause that Bank of America would automatically draft payments for the mortgage. This automatic drafting via agreement, would continue until appellant Meisner requested in writing, to cease the debits. Appellant Meisner never requested cessation of the debits. **(R. p.236:17-25;237 )** As such, any transfer of the instrument, (the note and mortgage previously owned by Bank of America) would include the terms of the instrument including the requirement to draft the payments from appellant Meisner's bank account as usual. **(R. p 166:2-25;167:1-12)**

U.S. Bank alleged in its complaint and asserted that it is the successor in interest to Bank of America; however, the evidence (the assignment) to support the assertions may not be legally sufficient to support the assertions. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231, (1990) holding modified by City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774 (2004) ("It is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record.") (internal quotation marks and citations omitted).Ctr. for Legal Reform v. Rakowsky, C/A No. 3:14-cv-01674- JFA (D.S.C. Nov. 14, 2014). Here, the assignment of the note and mortgage purported to occur on April 2, 2014 and notarized *one day later* while the alleged breach of contract occurred purportedly in 2013. Therefore, there is no injury to U.S. Bank as it purchased or was assigned a "breached contract" and as such is a third- party creditor, that is not entitled to foreclosure because its predecessor in interest, Bank of America, was the breaching party. **(R.p.130:17-25:131:1-7)**

**The Master in Equity erred when it determined US Bank was entitled to Summary Judgment.**

**A. The circuit court did not have jurisdiction over the case when the summary judgment motion was filed and a subsequent motion for summary judgment was not filed when the circuit court acquired jurisdiction, so that relief could be granted.**

US Bank was not entitled to summary judgment because (1) The circuit Court did not have subject matter jurisdiction when the motion for summary judgment was filed (2) US Bank is not the real party in interest; (3) did not possess the requisite standing for relief in a mortgage foreclosure action; and (4) the summary judgment motion did not adjudicate all claims in the case.

Summary judgment is only appropriate when there is "no genuine issue as to any material fact and [...] the moving party is entitled to judgment as a matter of law." Rule 56, SCRCP (emphasis added).

Here, the appellant brought to the attention of the Master in Equity that the Circuit Court did not have jurisdiction at the time the motion for summary judgment was filed and therefore, there was not a proper motion for summary judgment before the court. **(R. p.163:12-23)** For the Court to act, it must have subject matter jurisdiction at the time the action (motion for summary judgment) is initiated. In Muller, the Supreme Court made it clear that the circuit court acquires jurisdiction *after* the remittitur is received. Muller v. Myrtle Beach Golf & Yacht Club, 313 S.C. 412, 415, 438 S.E. 2d 248, 250 (1993).

A motion for summary judgment is a substantive motion that should follow the rules of civil procedure which require the motion to be filed and served 10 days prior to the hearing with affidavits served 2 days prior to hearing. SCRCP Rule 56 (c). Here, it is undisputed, based on the electronic time stamp of the filings, the Motion for Summary was filed at a time the circuit court did *not* have jurisdiction over the case and as such, did not have authority to hear *that* motion for summary judgment. **(R. p.163:10-25:164:1-2)** The appellant objected that the motion for summary judgment was not valid; however, US Bank never corrected the procedural defect or refiled the motion for summary judgment 10 days in advance of the hearing, as required once the circuit court obtained jurisdiction. **(R. p.164:1-2)**

**B. US Bank is not the real party in interest because the case was filed before the assignment unto US Bank.**

US Bank is not the real party in interest and is not entitled to the relief requested in the motion for summary judgment. BAC v. Kinder Op. No. 27146 (S.C, Sup. Ct. Filed July 25, 2012).

While an assignment is not required to be *filed or recorded* to be valid, black letter law states the assignment does have to *occur* before initiation of any lawsuit to have standing to pursue the foreclosure action. Bank of America claimed ownership of the note that is the subject of this foreclosure action in another case. **(R. p. 114-117) (R. p 157-161).** The transfer from Bank of America unto US Bank occurred *after* this lawsuit was initiated via assignment of the note and mortgage from Bank of America unto US. Bank. **(R. p. 167: 1-5) (R. p.418)**

**C. All the Claims were not adjudicated by the motion for summary judgment and as such summary judgment was not proper.**

First, the appellant pointed out that all issues before the Court could not be adjudicated with the summary judgment motion as required by SCRCP Rule 56 (d) because the cross-claim defendants, Bank of America and South State Bank did not attend. **(R.p.167:6-25;168:1;pps179-186)(R. 131:14-25).** The respondent admitted the legal claims needed to be adjudicated prior to the equitable foreclosure action. **(R.147:25;148-149:1-15)** There remains an issue of fact as to whether Bank of America or US Bank owned the note as of the filing of the case. Also, Bank of America failed to file a satisfaction of mortgage for many years after notice which provides for a statutory fine of two times the amount of the mortgage which was not contemplated in the equitable apportionment. **(R p. 179-187) (R. p. 132:10-25;133-34:1-17) (R. 133:1-21).**

The respondent's attorney and the judge had extensive discussion about the fact the request for satisfaction of mortgage had to be in writing based on the Statute of Frauds. However, the appellant stated this Honorable Court ruled the request could be oral. James Bostic, respondent,v. American Home Mortgage Servicing, Inc. No. 4278 Decided July18, 2007.

v. American Home Mortgage Servicing, Inc. No 4278 Decided July 18, 2007.**(R. p.138:10-25).** The appellant once again reminded the court the terms of the drafting of the mortgage payments were made as part of the note and therefore any assignment of the note came with it the duty to draft. **(R. p. 141:5-13).** The Court specifically asked the appellant the status of the counter claims but did not order further proceedings once the court was informed the counter claims and cross claims had not been adjudicated as required by SCRCP Rule 56 (d). **(R. pp.146:7-14;147-153)**

Additionally, the appellant argued the transfer occurred after the lawsuit was filed and Bank of America claimed ownership in another case. **(R. p. 178:16-20)**

The appellant argued that the absence of Bank of America at the hearing prevented all claims to be adjudicated. **(R. p. 179: 25 lines 4-22)** The appellant argued the duty to draft the payments as a term in the note required compliance as the elected payment agreement. **(T. Oct. 29, 2019 Hearing p 26 p. 27 lines 1-7)** Further an assignment of the note or transfer of servicing required the elected terms of drafting the payment. **(T. Oct. 29, 2019 Hearing p 29 lines 9-25) (T. Oct. 29, 2019 Hearing p 30 p. 31 lines1-2)** The appellant further argued it is not equitable to avoid a clear agreement that was in the note then call the note in default. **(R. p.180:19-24)**

**"The** party moving for summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 729 (Ct. App. 2005).

Here, there were multiple issues of material fact that were brought to the attention of the Master in **Equity, including (1) The fact the substantive** motion was made when the circuit court did not have jurisdiction as argued above. (2) the fact US Bank was not the real party in interest as argued above and (3) the counterclaims and cross claims could not be adjudicated

because Bank of America and South State Bank did not attend the hearing. **(R. p.167:6-25;168:1.)**

Importantly, Bank of America did not join in the motion for summary judgment that US Bank filed on April 15, 2019. **(R. p.163:6-25;164-65:1)** Bank of America erroneously believed the cross and counter claims were eliminated when the Omnibus Order was entered in this case; however, as previously argued, the Omnibus Order did not apply to this case because the Court of Appeals had jurisdiction over the case and the circuit court's blanket order had no effect on this case. This case was appealed on

US Bank acknowledged that one of the cross claims involved them as a counter claim. **(R.p.167:13-25; 168:1)** US Bank's argument aside, clearly the claims for abuse of process involve US Bank as a counter claim as it was the plaintiff. However, as argued the parties are misaligned and if Bank of America is the real party in interest then the cross claims are counterclaiming. Once the parties are properly aligned, the other arguments for real party of interest allow for no recovery by US Bank and recovery for the abuse of process. **(R.pp.69-84)**

As argued, US Bank has not put forth the requisite evidence attached to the summary judgment motion in the form of affidavits and/or other evidence on the counterclaims for the Court to rule on summary judgment of the counterclaims. **(Rp. 167:6-25)** In fact, the evidence in the case file specifically evidences summary judgment is not appropriate as to the counterclaims based on the filings of the appellant in the counterclaims. **(R. pp. 69-84)** To wit, all the elements have been pled for Abuse of process, breach of contract, breach of contract accompanied by a fraudulent act.

The appellant avers the breach in the terms of the note by the respondent or its predecessor in title do not allow for foreclosure as an equitable remedy. Rather, as the party that breached the note contract, the appellant argues the assignor does not have the right to foreclose because its predecessor in title breached the contract.

In fact, because the respondent acquired the note and mortgage after the breach, the respondent is in fact a third-party debt collector and not entitled to foreclosure or attorney's fees. **(Rp. 172:3-19)** The only remedy for a third-party debt collector is that of a suit on a note, which provides for a jury trial. The defendant craves reference to the record to show the counterclaim of abuse of process cannot be dismissed on summary judgment.

The South Carolina Supreme Court has made clear that a Bank's failure to enter satisfaction of a mortgage (even for a home equity line of credit) exposes the Bank to liability for its failure to satisfy the mortgage. Regions Bank v. Strawn, Opinion No. 27555 Heard Sept. 23, 2014 filed August 5, 2015. Here, because the liability of Bank of America, N.A. may exceed any claim Bank of America, N.A. has to monies owed, summary judgment is inappropriate.**(R.p.176:4-25)** In fact, since Bank of America, N.A. was the drafter and previous owner of the note and mortgage that was transferred unto U.S. Bank and is the subject of this controversy, the amount owed on the cross claims must be adjudicated before the Court can determine if any amount is owed to both the plaintiff and the cross claimant. **(R. p. 147:25;148; 149:1-15)** Violations of S.C. Code Ann. § 29-3-310 creates liability for punitive damages under S.C. Code § 29-3-320 pursuant to Strawn. Id. The appellant testified that as of the day of the hearing for summary judgment the HELOC 2005 loan was not paid off and Bank of America was requested to do so. **(R.p.140:11-25;141-143).** The appellant also testified the amount of the loan was $25,000 and that

The questions of material fact as to which entity owns the note and mortgage (U.S. Bank or Bank of America, N.A.) creates a material issue of fact and precludes summary judgment. The defendant further argues the motion for summary judgment should be stayed because the referral to the master in equity is under appeal based on the mode of trial. Additionally, the defendants have argued the right to a jury trial is interlocutory and should be determined after the conclusion of the trial.

D. **Bank of America, a co-defendant, and predecessor in title drafted the note and mortgage and was not present at the summary judgment hearing.**

US Bank motioned the Court to adjudicate a foreclosure action at a time when the circuit court did not have jurisdiction. Additionally, the other co-defendants were absent at the summary judgment hearing and the appellant objected that the hearing could not proceed because all defendants were not present. **(R. p. 169:16-25; 16:1-4).** It was argued that US Bank was not the note drafter and as such the appellant's arguments regarding breach of the note were not able to be answered by US Bank's attorneys. Bank of America did not attend the hearing and therefore could not answer the breach of contract claims, even though they were noticed. **(R. p.169: 16-25; p. 16:1-4)** As argued in the hearing, the amount determined to be owed by the predecessor in title could not be determined without all the parties in attendance. **(R. p. 172;173:1-22)** U.S. Bank admitted there was confusion as to the parties and who owned the note and mortgage at the time of not only the filing of summary judgment but as of the filing of the original lawsuit. **(R. p. 174) (R. p. 41)(R. p. 311).** Bank of America, N.A. did not rejoin the motion for summary judgment filed in April of this year. Therefore, at the hearing Bank of America's, lack of appearance should have

resulted in the defendant Rhonda Meisner's award of the statutory treble damages for failure to file a satisfaction of mortgage which was the testimony of the self- represented defendant, during the hearing. **(R. p.186:2-25; 187:1-17;)** Additionally, because Bank of America, N.A. was the predecessor in title and an affidavit was attached and filed on August 2, 2019. This created a material issue of fact as to whether Bank of America, N.A. breached the agreement before transferring the note; therefore, making US Bank a third-party debt collector and unable to collect attorney's fees. **(R.143:3-6; p.191:18-25;192,193:1-23)** South Carolina law requires the debt to be determined prior to the sale of the mortgaged properties. The appellant corrected the misapprehension of the time and date of the assignment as after the initiation of the lawsuit. **(R.p.126:16-25;176:12-5;177:1-2).** While as such, all the claims could not be adjudicated via the summary judgment hearing.

"In determining whether any triable issues of fact exist, the evidence and all inferences which can reasonably be drawn from the evidence must

Koester v. Carolina Rental Center, Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). Additionally, "[e]ven when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Id. Moreover, "[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Miller at 200. Finally, "because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." M

**E. US Bank did not prove summary judgment was warranted.**

The multiple issues of material fact preclude summary judgment and the materials attached to the motion for summary judgment including the deposition testimony of the defendant and the affidavit of indebtedness prepared by a non-party servicer, without a witness, does not entitle US bank to summary judgment. In the Motion to Alter and Amend hearing the appellant specifically noted the portions of her deposition included and attached to summary judgment did not warrant summary judgment. **(R. p.150: p. 28:4-14).** Additionally, as argued at the summary judgment motion and the Motion to Alter and Amend, the defendant specifically noted the legal claims should be decided before the equitable claims. **(R. p.148:2-8).** Sides v. Greenville Hosp. Sys., 362 S.C. 250, 255, 607 S.E. 2d 362, 364 (Ct. App.2004) The respondent did not provide a witness to testify as to the validity of the indebtedness which was created by a third- party servicer and not a party to the case. As such, there is no way proof of indebtedness was proper, which must be proved prior to foreclosure. **(R. p. 132:5-25:133)** The respondent argued the note was available at the summary judgment hearing; however, the respondent did not enter the note into evidence and the action before the court is a foreclosure not a suit on a note. **(R.p. 157:3-20)** In any event, the respondent did not prove its summary judgment claims.

The appellate court retained jurisdiction of the case until the remittitur was issued and the proceedings were returned to the circuit court. Here, the motion for summary judgment was filed before the circuit court had regained jurisdiction. **(R. p. 163:12-25; 164:1-2)** Muller v. Myrtle Beach Golf and Yacht Club, 313 S.C. 412, 438 S.E. 2d 248 (1993). Conflicting claims of ownership creates a material issue of fact which requires the services of a fact finder and precludes summary judgment. The South Carolina Supreme Court has held that the non-moving party, in cases that do not involve a federal question, is

required to submit only 'a mere scintilla' of evidence to withstand a summary judgment challenge. Hancock v. Mid-South Management Co. Inc., 673 SE. ,2d 801, 381 S.C. 326. (1994). The defendant has met this burden; therefore, summary judgment must be denied.

Additionally, the conflicting claims of the co-defendant and the plaintiff create a material issue of fact whether US Bank, who filed the motion for summary judgment is entitled to relief as an entity with standing to pursue the relief. Summary judgment is a drastic remedy and should be invoked cautiously so that no person will be improperly deprived of a trail. Baughman v.

American Tel. & Tel Co., 306 S.C. 101, 112, 410 S.E. 2d 537 543 (1991).

The Master in Equity improperly granted summary judgment when US BANK claimed the account was not paid as agreed; however the defendant stated it was US Bank's predecessor in title that failed to properly draft the payments and craved reference to the actual note between the defendant and Bank of America. It was Bank of America that drafted the agreement and U.S. Bank did alter the terms by not complying with the agreement.

## III. The Master in Equity erred when it awarded attorney's fees.

### A. The respondent is not entitled to attorney's fees as a third-party debt collector.

Pursuant to the filings in this case, US bank is a third party debt collector because US Bank received the note and mortgage after the breach of contract by Bank of America. **(R. p. 175:11-25)**. As of the filing date of the lawsuit, which was March 31, 2014, Bank of America was the owner of the note and mortgage based on the assignment of the mortgage. **(R p. 126:16-25;)** If the court determines that Bank of America is the real party in interest, then US Bank cannot claim attorney's fees. **(R.p. 148:23-25:149:1-15).** The respondent argued that Bank of America did not make a claim in this case for the note and mortgage; however, in their first answer to the lawsuit, Bank of America claimed ownership

of this note and mortgage **(R.pp.56-9; R. p.149:4-15).**

**B. The respondent did not submit an affidavit of indebtedness.**

US Bank did not submit an affidavit of indebtedness. While a servicer can file a foreclosure action, the servicer did not file the foreclosure case here. The servicer Mr. Cooper was not a party and therefore there is no basis to explain how the affidavit of indebtedness submitted by Mr. Cooper implicates US Bank without a witness. **(R. p. 150:4-15)** That is because even if the affidavit of indebtedness was a normal business record. Mr. Cooper cannot submit its business records for US Bank.(R. ) It is solely the respondent's responsibility to prove its case; however, the respondent did not provide a witness to explain the business records of the servicer and how the records are accurate for the respondent.

The Appellant avers pursuant to Hancock, she is only required to submit a scintilla of evidence to defeat summary judgment. Here, the fact the assignment from Bank of America unto US Bank occurred after the respondent failed to debit the account and after the lawsuit was filed, is such a scintilla of evidence. Hancock v. Mid-South Management Co. Inc., 673 SE. ,2d 801, 381 S.C. 326. (1994).

For the reasons outlined above, and all references to the record, the appellant respectfully requests this Honorable Court reverse the Master in Equity and dismiss the respondents foreclosure case as having been filed by a non-party and remand the case for trial to adjudicate the cross and counter claims.

Respectfully Submitted,

*s/RhondaMeisner*

March 24, 2021

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The appellant certifies this final brief complies with Rule 211(b) SCACR.

Respectfully,

3/24/2021

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
MASTER IN EQUITY
The Honorable Joseph M. Strickland

Case No. 2020-000069

U.S. Bank, National Association, as trustee for the Holders of the Banc of America Funding Corporation, 2008-FTI, — Respondent

v.

Rhonda Lewis Meisner a/k/a Rhonda L. Meisner, Bank of America, N.A. and SCBT of whom Rhonda Meisner is the — Appellant.

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SC Court of Appeals

PROOF OF SERVICE The appellant certifies she has served a copy of her Final Brief by emailing the only party who presented a brief to bcalub@mcguirewoods.com.

March 24, 2021

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