THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price
South Carolina Circuit Court Judge

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Appellate Case No. 2020-001204

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TEMISAN ETIKERENTSE and IJOEMA ETIKERENTSE .....Appellants,

v.

SPECIALIZED LOAN SERVICING, LLC .. ..... Respondent.

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# APPELLANTS' INITIAL BRIEF

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January 20, 2021
Mt. Pleasant, South Carolina

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## INTRODUCTION

In 2008, a South Carolina District Bankruptcy Court recognized that: "[u]nder South Carolina law one finds the general proposition that '[t]he plaintiff in a foreclosure suit should be the real, beneficial owner of the mortgage debt.' 27 S.C. Juris. Mortgages § 107." *In re Woodberry*, 383 B.R. 373, 379 (Bankr. Ct. D.S.C. 2008). "Despite the statement of the general proposition," the *Woodberry* Court found that "it appears that foreclosures and motions for relief from the stay are frequently brought by parties other than the beneficial owner…by virtue of its *pecuniary interest* in collecting payments under the terms of the note and mortgage." *Id.*

That is exactly what has occurred here.

In fact, the record establishes the [redacted] ("SLS" or "Respondent"). Testimony also exists from the attorney for the purported foreclosing party (Wilmington Trust) that *Respondent SLS* (1) retained the law firm of Riley Pope & Laney, LLC ("RPL Firm"), and (2) directed him "to file a foreclosure action naming Wilmington Trust as the Plaintiff." [Wlodarczyk Affidavit]. These acts certainly establish the basis that SLS is responsible for the entirety of Plaintiff Wilmington Trust's ("Wilmington") foreclosure action against the client. In fact, SLS Assistant Vice President Mark McCloskey has **importantly** conceded that their actions are derivative of its servicing agreement with Wilmington by testifying that, "at all times, SLS has acted only as servicer of the note and mortgage on behalf of the holder [sic] of the same, which is Wilmington." [McCloskey Affidavit].

Moreover, on April 23, 2020, SLS executed a "Stipulation and Consent to the Issuance of a Consent Order." ["Stipulation"]. By this Stipulation, SLS has consented to the issuance by the Consumer Finance Protection Bureau of Administrative Proceeding File No. 2020-BCFP-0002, *In the Matter of: Specialized Loan Servicing, Consent Order* dated May 7, 2020, ("Consent Order"). The Consent Order (signed by SLS) states "the facts necessary to establish the [Bureau of Financial Protection's] jurisdiction over Respondent and the subject matter of this action" under 12 U.S.C. §§ 5563 & 5565.

Therein, SLS admitted "the following law violations: (1) Respondent violated the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 *et seq.*, its implementing regulation, Regulation X, 12 C.F.R. part 1024, and the Consumer Financial Protection Act of 2010 (CFPA) by taking prohibited foreclosure actions against certain borrowers, in violation of 12 C.F.R. § 1024.41(f)(2) and (g); and (2) Respondent violated RESPA, Regulation X, and the CFPA by failing to send or timely send evaluation notices to certain borrowers, in violation of 12 C.F.R. § 1024.41(c)(1)." *Id.* ¶. 1.

Summary judgment, therefore, should not have been granted by the circuit court.

## ISSUES ON APPEAL

DOES THE CIRCUIT COURT HAVE APPELLATE JURISDICTION OVER A FINAL UNAPPEALED ORDER OF A FEDERAL BANKRUPTCY COURT?

No.

DOES THE CIRCUIT COURT HAVE APPELLATE JURISDICTION OVER A FEDERAL AGENCY'S FINDING IN A CONSENT ORDER?

No.

DID THE CIRCUIT COURT IGNORE THE MYRIAD OF RECORDS AND TESTIMONY PRODUCED BY RESPONDENT RAISING GENUINE ISSUES OF MATERIAL FACT?

Yes.

## STATEMENT OF THE CASE

On June 15, 2007, through his attorney in fact [his wife, Ijeoma Etikerentse], Temisan Etikerentse issued a $1,402,500.00 *Interest Only Adjustable Rate Note* ("Note") to Countrywide Home Loans, Inc. ("CHL" or "Originator"). Repayment of the Note was secured by a Mortgage (the "Mortgage") on the real property located at 783 Navigators Run, Mount Pleasant, S.C., in the name of Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for CHL.

On or before August 1, 2007, CHL negotiated, via blank endorsement, the Note to EMC Mortgage Corporation ("Sponsor") as the Seller/Sponsor of a separate pool of 3,186 notes and mortgages.

EMC then sold and transferred the pool to the depositor, *Structured Asset Mortgage Investment II, Inc.,* ("SAMI II") who in turn sold and transferred it to REMIC Trust, *Bear Stearns ALT-A Trust II, 2007-1,* ("BALTA II") under EIN 30-0183252. [PSA].

This REMIC Trust was created and was governed by a Pooling and Servicing Agreement ("PSA"), which designated Citibank, N.A. as the Indentured Trustee to hold the qualified mortgages for the exclusive benefit of the holder of the certificates that represent interest in the Trust ("Certificateholders 2007-1"). [PSA II § 2.02.]

Also, pursuant to the PSA, CHL retained mortgage servicing rights for the mortgage loans it originated absent any equitable title. *See also* 11 U.S.C. § 541(d). [PSA II § 2.02.]

For reasons not ultimately clear, on November 16, 2008, CHL accelerated the Note. [Notice of Intent to Accelerate, Oct 17, 2008.]

Then, on April 23, 2009, CHL was renamed Bank of America Home Loans ("BAC Home Loans") and two years later, BAC Home Loans was acquired by Bank of America, N.A. ("BANA") on June 30, 2011.

[redacted]

Sometime thereafter, Citibank resigned and was replaced by Wilmington Trust, N.A. ("Wilmington") as the indentured Trustee; and on November 1, 2012, BANA named SLS as its *subservicer*.

[redacted]

[redacted]

Thereafter, on March 16, 2015, SLS *again* wrote to Etikerentse and again disclosed that "THIS IS FOR INFORMATIONAL PURPOSES ONLY, THIS COMMUNICATION IS FROM A DEBT COLLECTOR." This letter, however, stated that the December 2014 Modification has been denied because "you have failed to comply with the terms of the offer by not returning the fully executed modification documents" that were never provided. [3/16/2015 Ltr.]

Once again, SLS disclosed that "[t]he requirements for this evaluation were set forth and performed in accordance with the Pooling and Servicing Agreement between Specialized Loan Servicing, LLC and WILMINGTON TRUST, NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE TO CITIBANK, N.A. AS TRUSTEE OF

STRUCTURED ASSETS MORTGAGE INVESTMENT II INC., BEAR STEARNS ALT-A TRUST II, MORTGAGE PASS-THROUGH CERTIFICATES 2007-1." [SLS Discovery].

[redacted]

[redacted]

In the spring of 2016, SLS retained the RPL Firm in Columbia, and directed that attorney Damon C. Wlodarczyk ("Wlodarczyk") "to file a foreclosure action naming Wilmington Trust as the Plaintiff." [Wlodarczyk Affidavit at ¶ 2].

On April 8, 2016, a foreclosure complaint naming *Wilmington Trust as Successor Trustee to Citibank as Trustee on behalf of the Holders of Bear Stearns Alt-A Trust II, Mortgage Pass Through Certificates, Series 2007-1* was filed in Charleston County. [Case

number 2016-CP-10-1987.] Specifically, its cause of action was based on non-payment of a discharged debt by Bankruptcy Court David Duncan on December 12, 2014!

Through his attorney, Dr. Etikerentse answered, counterclaimed and brought a third party claim against SLS. The gravamen of his complaint is SLS failed to adhere to loss mitigation disclosures required under 12 C.F.R. § 1024.41 before filing various foreclosure related pleadings and motions.

It should further be remembered that in this case, Wilmington Trust went into default on the counterclaim; its attorney testified in an affidavit that: "my firm was retained by Specialized Loan Servicing ('SLS') to bring an action for foreclosure on behalf of the Plaintiff." Being paid by SLS to institute the claim, RPL Firm initially felt that it would defend the third-party action. (*Id*. at ¶ 8). But then counsel for SLS – Nelson Mullins – *appeared for Wilmington Trust* to set aside an entry of default in 2016-CP-10-1987. Thus, this is further proof that Wilmington Trust is simply a part that SLS ***directed its legal team to name as the foreclosing party to escape actions undertaken by it alone***.

**Procedural History**

Eventually, the matter came before the Circuit Court on motions for summary judgment – one by SLS (filed October 17, 2019), which Plaintiffs filed its memorandum in opposition on July 10, 2020; and one by Wilmington Trust (filed on January 31, 2020), covered by the same July 10, 2020 memorandum by Appellants.

Hearings were held virtually on July 13, 2020 and July 15, 2020 before the Honorable Bentley D. Price. He issued a Form 4 Order of July 22, 2020 granting SLS's Motion for Summary Judgment (which the undersigned received written notice of on July

22, 2020) but denying Wilmington Trust's motion. He also invited the parties to submit formal orders.

Out of an abundance of caution, Appellants filed their full Motion to Reconsider on July 29, 2020; Judge Price denied this motion by Form 4 Order of August 5, 2020 without necessity of a hearing.

On August 6, 2020 SLS submitted a proposed formal order; on August 14, 2020, SLS filed a Motion to Alter or Amend to include findings of fact and conclusions of law. Judge Price entered the formal order prepared by counsel for the Respondent on August 17, 2020.

The instant appeal was then filed by Appellants nine (9) days later on August 26, 2020 and filed with the Charleston County Clerk of Court on August 27, 2020.

## STANDARD OF REVIEW

The Court of Appeals reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Lemmons v. Macedonia Waterworks, Inc.*, 431 S.C. 182, 191, 841 S.E.2d 471, 474 (Ct. App. 2020). Rule 56(c), SCRCP, provides that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Further, when a circuit court grants summary judgment on a question of law, such as statutory interpretation, the appellate court must review the ruling de novo. *Wright v. PRG Real Estate Mgmt., Inc.*, 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019).

Because Appellant raises pre-emption of a South Carolina's regulatory or adjudicatory powers, "[s]uch a determination of congressional intent and of the boundaries and character of a pre-empting congressional enactment is one of federal law. Pre-emption, the practical manifestation of the Supremacy Clause, is always a federal question." *Longshoremen v. Davis,* 476 U.S. 380, 388 (1986). Any procedural ruling would therefore implicate an underlying question of federal law and state law is not an independent and adequate state ground to support the Circuit Court's judgment. *Id.*

Based upon the Constitutional questions raised this appeal lies in the original jurisdiction of the South Carolina Supreme Court. When, like here, "the notice of appeal is filed in the wrong appellate court, the appellate court in which the matter is filed *shall* issue an order transferring the case to the appropriate appellate court." Rule 204(a), South Carolina Appellate Court Rules ("SCACR"). Rule 204(b) SCACR is clearly **inapplicable**.

Any motion to certify would therefore be unnecessary because Rule 204(a)'s use of the term "shall" indicates the transfer of the appeal is a mandatory rule. *See, e.g., South Carolina Police Officers Retirement Sys. v. Spartanburg,* 301 S.C. 188, 190, 391 S.E.2d 239, 244 (1990) ("shall" is considered mandatory under principles of statutory interpretation); *South Carolina Dep't of Highways & Pub. Transp. v. Dickinson,* 288 S.C. 189, 191, 341 S.E.2d 134, 135 (1996) ("Ordinarily the use of the word 'shall' in a statute means that the action referred to is mandatory.").

## LEGAL ARGUMENT

### A. Rule 14 Argument.

SLS's primary ground for summary judgment under Rule 14(a), SCRCP, is predicated on the assertion by its Affiant Mark McCloskey that it "is not and has never been a party to the note or mortgage at issue in this action, or a successor thereto." ["McCloskey Affidavit"]. SLS argues therefore "it cannot possibly be liable, in whole or in part, for Wilmington's foreclosure claim against the Plaintiffs."

Under Rule 14, the third-party plaintiff [Etikerentse] must have a substantive claim against the third- party defendant founded upon derivative liability. *Smith v. Tiffany*, 419 S.C. 548, 560, 799 S.E.2d 479, 486 (2017). Both the term "servicer" and "servicing" are defined by federal regulations promulgated under 12 U.S.C. § 2601, *et seq*., known as the "Real Estate Settlement Procedures Act of 1974" ("RESPA[1]"). *See* 12 C.F.R. § 1024.2(b). "Servicer means a person responsible for the servicing of a federally related mortgage loan." *Id.* Fatal to Respondent's position is its concession that "at all times, SLS has acted only as servicer of the note and mortgage on behalf of the holder [sic] of the same, which is [Wilmington Trust as Trustee]." ["McCloskey Affidavit"]. Based on McCloskey's affidavit testimony SLS cannot pass the definition of a servicer who is also "the person who makes or holds such loan." *Id.*

It is therefore axiomatic that SLS's ability to receive "any scheduled periodic payments from a borrower pursuant to the terms of any federally related mortgage loan, including amounts for escrow accounts under section 10 of RESPA (12 U.S.C. § 2609),

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[1] RESPA is a remedial consumer protection statute, and it imposes obligations upon servicers of federally related mortgage loans. [*See* HAMP/SCUTPA/RESPA argument , p. 14, infra].

and making the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the…servicing contract," 12 C.F.R. § 1024.2(b)[2], are derivative of "the person who makes or holds such loan." *Id.*

What really matters here is SLS' reliance upon its pecuniary interest as a servicer to both retain and direct Attorney Johnson to file a [redacted] as well as hire and direct attorney Wlodarczyk "to file a foreclosure action naming Wilmington Trust as the Plaintiff." *Companion Property Casualty Insurance Company v. U.S. Bank, National Association,* 2016 WL 3027552, C/A 3:15-cv-01300-JMC (D.S.C. 2016) (declaring that "Third-Party Defendants need only have a 'pecuniary interest in the transaction.'"); *see also Roberts v. Peterson*, 292 S.C. 149, 152, 355 S.E.2d 280, 281 (Ct. App. 1987) (noting that where the state rule has adopted the language of a federal rule, federal cases interpreting the federal rule are persuasive).

There is no dispute that Bankruptcy Courts in South Carolina allow servicers to file *Motions for Relief from Stay* based on "[t] he general rule is that a mortgage servicer has standing by virtue of its pecuniary interest in collecting payments under the terms of the note and mortgage." *In re Woodberry*, 383 B.R. 373, 379 (Bankr. Ct. D.S.C. 2008). Absent the Bankruptcy Court [redacted], the Circuit Court would be

[2] 12 C.F.R. 1024.2(b) allows a servicer to "receive" payments and in no way authorizes a servicer (who is not the owner or holder of the loan) to enforce the Note and Mortgage. *See Butner* v. *United States*, 440 U. S. 48, 54-55 (1979), "[p]roperty interests are created and defined by state law. The justifications for application of state law are not limited to ownership interests, but apply with equal force to security interests, including the interest of a mortgagee." *Butner, supra,* at 55.

without jurisdiction over the foreclosure action filed April 2016. *Kalb v. Feuerstein*, 308, U.S. 433, 439 (1940) ("The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, state or federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law."); *Ritzen Group Inc. v. Jackson Masonry, LLC,* 140 S.Ct. 582, 585 (2020) (Under the Bankruptcy Code, Appellant's filing a Chapter 7 petition for bankruptcy automatically "'operates as a stay' of creditors' debt-collection efforts outside the umbrella of the bankruptcy case. 11 U.S.C. § 362(a)."; *see also Id.* at 590 (elucidating that a bankruptcy court's "[r]uling on a motion for stay relief, it is true, will determine where the adjudication of an adversary claim will take place—in the bankruptcy forum or state court.").

In a similar vein, had SLS not relied on *Bank of America v. Draper*, 405 S.C. 214, 222, 746 S.E.2d 478, 482 (Ct. App. 2013), where the S.C. Court of Appeals ignored its Constitutional duty to be bound by decisions of the U.S and S.C. Supreme Courts, and agreed with the "general view, which has been accepted in this jurisdiction and others, that a loan servicer is a 'party in interest' and has standing by virtue of its pecuniary interest in collecting payments under the terms of the note and mortgage" then *no* foreclosure action would have been filed at all. Testimony exists from the attorney for the purported foreclosing party that SLS *alone*: (1) retained and paid the RPL Firm and (2) directed him "to file a foreclosure action naming Wilmington Trust as the Plaintiff."

Consequently, a non-party is subject to impleader only if there is a basis to assert that he is liable to the named defendant(s) for all or part of the plaintiff's claim. *Smith v. Tiffany*, 419 S.C. at 560, 799 S.E.2d at 486 (2017). The outcome of the principal claim

must impact the third-party defendant's liability. *First Gen. Serv. of Charleston v. Miller*, 314 S.C. 349, 341-342, 445 S.E. 2d 446, 447 (1994). A foreclosure action presents just such an imminent loss to the mortgagor.

It is irrelevant whether the bankruptcy court [redacted] was correct or "otherwise."[3]

**The only question before this Court is whether the United States Bankruptcy Court had jurisdiction** [redacted]. *See Williamson v. Berry*, 49 U.S. 495, 543 (1850), ("[w]henever the right to property is claimed to have been changed under a judgment or decree by a court, and it is set up as a defense in another court, the jurisdiction of the former may be inquired into."). Clearly, because a bankruptcy court's order resolving a creditor's motion for relief from the automatic stay constitutes a final order, then under the United States Supreme Court's decision *Ritzen Group*, the bankruptcy

[3] This appeal does not ask our state courts to an attempt to admonish a federal court and the certified bankruptcy attorneys before it who overlooked a nearly three century old statute establishing the "rights and title of mortgagor and mortgagee" in South Carolina. *See* S.C. Code Ann. § 29-3-10 (2007). In South Carolina, "the mortgagor shall be deemed the owner of the land and the mortgagee as owner of the money lent or due and the mortgagee shall be entitled to recover satisfaction for such money out of the land by foreclosure and sale according to law." S.C. Code Ann. § 29-3-10 (2007); *see also Butner* v. *United States*, 440 U. S. 48, 54-55 (1979), "[p]roperty interests are created and defined by state law. The justifications for application of state law are not limited to ownership interests, but apply with equal force to security interests, including the interest of a mortgagee." *Butner, supra*, at 55.

The statute remains unchanged today and its history is cited as: 1962 Code Section 45-51; 1952 Code Section 45-51; 1942 Code Section 8701; 1932 Code Section 8701; Civ. C. 1922 Section 5223; Civ. C. 1912 Section 3460; Civ. C. 1902 Section 2374; G. S. 2299; R. S. 1893.

court's jurisdiction cannot be questioned. 140 S.Ct. at 585. SLS therefore cannot now assert it alone has not caused Appellant to face the very real danger of foreclosure.

Here, there is more than enough basis to assert the claim against SLS, because: (1) there is not a lawyer truly representing Wilmington, nor is Wilmington really involved; (2) SLS is paying and directing both sets of lawyers; (3) there are no Wilmington documents supporting the foreclosure, but in fact all of the relevant documents produced in the case are from SLS; (4) even the lawyer for "Wilmington" is also asking for summary judgment based on SLS's affidavit; and (5) controlling the foreclosure process by hiring the RPL Firm (purported counsel for Wilmington Trust). Thus, SLS cannot prevail on its Rule 14 and the circuit court should be reversed in its grant of summary judgment to SLS.

**B. HAMP/SCUTPA/RESPA Argument.**

The Appellant also alleges that the foreclosure action would have never occurred if Respondent had properly fulfilled its disclosure requirements pertaining to loss mitigation options under 12 C.F.R.§ 1024.41. This is a question of federal law and some background is necessary:

In the wake of the 2008 financial crisis, Congress established the Consumer Financial Protection Bureau ("CFPB"), an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 124 Stat. 1376.

In addition, Congress enacted a new prohibition on "any unfair, deceptive, or abusive act or practice" by certain participants in the consumer-finance sector, 12 U.S.C. § 5536(a)(1)(B), as well as transferred the administration of 18 existing federal statutes to

the CFPB, including 12 U.S.C. § 2601, *et seq*. known as the Real Estate Settlement Procedures Act of 1974 ("RESPA"). *See* 12 U.S.C. §§ 5512(a), 5481(12), (14).

Citing "widespread concern among mortgage market participants, consumer advocates, and policymakers regarding pervasive problems with servicers' performance of loss mitigation activity in connection with the financial crisis, including lost documents, non-responsive servicers, and unwillingness to work with borrowers to reach agreement on loss mitigation options," 78 F.R. 10816, the Consumer Finance Protection Bureau added 12 C.F.R. § 1024.41 "Loss Mitigation Procedures" to RESPA in 2013. Those problems are incorporated in the Appellant's Third-Party claims against Respondent.

SLS's summary judgment motion rest on two arguments. First, SLS asserts that other than the Home Affordable Modification Program ("HAMP"), no other loss mitigation program is available to the Appellant. And second, SLS argues that no actual damages exist now, and that the Appellant needs to wait until after he has lost his home in foreclosure to assert a RESPA violation.

Respondent's own testimony and records, however, utterly rejects the first argument, and pursuant to 12 U.S.C. § 5563(d)(4), no court has jurisdiction to provide SLS relief on its assertion that no actual harm was done to homeowners like the Appellant.

1.

The record reveals that on December 12, 2014, SLS notified Etikerentse that he had been approved for a "Standard Modification Program," *not HAMP*, and disclosed that "[t]he requirements for this evaluation were set forth and performed in accordance with the Pooling and Servicing Agreement between Specialized Loan Servicing, LLC and WILMINGTON TRUST, NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE

TO CITIBANK, N.A. AS TRUSTEE OF STRUCTURED ASSETS MORTGAGE INVESTMENT II INC., BEAR STEARNS ALT-A TRUST II, MORTGAGE PASS-THROUGH CERTIFICATES 2007-1." [SLS Discovery]. No request for documentation was attached therein because no modification was offered. The notice itself discloses "THIS IS FOR INFORMATIONAL PURPOSES ONLY, THIS COMMUNICATION IS FROM A DEBT COLLECTOR" because ***"approval of any offer must be submitted to the bankruptcy court."*** [SLS Discovery].

Section 524 of the Bankruptcy Code sets forth the effects of a discharge. Pursuant to § 524(c), reaffirmation agreements made after the granting of a discharge under § 727 are unenforceable without bankruptcy court notice and approval. [redacted]

On March 16, 2015, SLS again wrote Etikerentse and again disclosed that "THIS IS FOR INFORMATIONAL PURPOSES ONLY, THIS COMMUNICATION IS FROM A DEBT COLLECTOR." The letter misleads Appellant by stating that the December 2014 Modification has been denied because "you have failed to comply with the terms of the offer by not returning the fully executed modification documents" that were never provided. Again, SLS disclose that *HAMP was not the program* for which Appellant could obtain a modification: "[t]he requirements for this evaluation were set forth and performed in accordance with the Pooling and Servicing Agreement between Specialized Loan Servicing, LLC and WILMINGTON TRUST, NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE TO CITIBANK, N.A. AS TRUSTEE OF STRUCTURED

ASSETS MORTGAGE INVESTMENT II INC., BEAR STEARNS ALT-A TRUST II, MORTGAGE PASS-THROUGH CERTIFICATES 2007-1." [March 16, 2015 Ltr.].

[redacted]

[redacted] In fact, **as shown below**, SLS has conceded that it failed to maintain **these records!**

Under RESPA, "the [Consumer Financial Protection] Bureau did not intend to create a private right of action for borrowers to enforce, in private litigation, any requirements that are imposed by owners or assignees of mortgage loans (including investors or guarantors) on servicers to mitigate losses for such parties." 78 F.R. 10822. That is not what is happening here.

**"Rather, the Bureau intended that borrowers could enforce the loss mitigation procedures against servicers to ensure that servicers complied with the appropriate procedural steps before commencing or completing the**

**foreclosure process when a borrower had submitted a complete loss mitigation application." *Id*. The gravamen of Appellant's Third-Party complaint against SLS is failure to comply with RESPA's notification procedures.** Appellant has clearly alleged and the record supports that his action is grounded in the fact that when, like here, a servicer fails to provide documents to the borrower to complete the loss mitigation process. *See* 12 C.F.R. § 1024.41(b)(4).

2.

Congress also vested the CFPB with potent enforcement powers. The agency has the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court. 12 U.S.C. §§ 5562, 5564(a), (f). In doing so, Congress gave the CFPB extensive rulemaking, enforcement, and adjudicatory powers, including the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, prosecute civil actions in federal court, and issue binding decisions in administrative proceedings. The CFPB may seek restitution, disgorgement, injunctive relief, and significant civil penalties for violations of the 19 federal statutes under its purview.

Importantly, on April 23, 2020, SLS executed a "Stipulation and Consent to the Issuance of a Consent Order." ["Stipulation"]. By this Stipulation, SLS has consented to the issuance of Administrative Proceeding File No. 2020-BCFP-0002, *In the Matter of: Specialized Loan Servicing, Consent Order* dated May 7, 2020, ("Consent Order") and "the facts necessary to establish the [Bureau of Financial Protection's] jurisdiction over Respondent and the subject matter of this action." under 12 U.S.C. §§ 5563 & 5565.

SLS has admitted "the following law violations: (1) Respondent violated the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 *et seq*., its implementing regulation, Regulation X, 12 C.F.R. part 1024, and the Consumer Financial Protection Act of 2010 (CFPA) by taking prohibited foreclosure actions against certain borrowers, in violation of 12 C.F.R. § 1024.41(f)(2) and (g); and (2) Respondent violated RESPA, Regulation X, and the CFPA by failing to send or timely send evaluation notices to certain borrowers, in violation of 12 C.F.R. § 1024.41(c)(1)." *Id*. ¶. 1.

Moreover, pursuant to Section VII of the Consent Order, SLS has been ordered to engage in a comprehensive plan to *identify* and compensate those harmed and in the interim, "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order or to review, modify, suspend, terminate, or set aside any such notice or order." 12 U.S.C. § 5563(d)(4). Simply put, SLS agreed, in consideration for a smaller fine, that it was liable because it failed to maintain records to support any assertion that it had complied with 12 C.F.R. § 1024.41. SLS cannot now ask the Circuit Court to find such compliance ***now*** when it already admitted to its regulator that it did not comply, just last year! SLS's own discovery states that what it asserts to be a modification approval was in fact, sent for "informational purposes only."

Additionally, both because the RPL Firm and Nelson Mullins have "actual notice" of the Consent Order, they must engage in certain "affirmative actions" prior to proceeding with motions for summary judgement on behalf of their client, SLS.

Clearly, if Nelson Mullins, as argued in SLS' Motion, is not aware that 12 C.F.R. § 1024.41 is a regulation promulgated under RESPA, then no such affirmative review has

occurred. Thus, neither SLS cannot proceed, nor its lawyers can proceed on behalf of their client, in the instant motions.

Nor can the Circuit Court reverse the shifting of the burden requiring SLS to determine damages it caused the Appellant. In analyzing the same language in a similar statute [12 U.S.C. § 1818(i)(1)] the United States Supreme Court had declared: "Congress has spoken clearly and directly: '[N]o court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any [Board] notice or order under this section.'" *Board of Governors, FRS v. MCorp Financial, Inc.*, 502 U.S. 32, 44 (1991).

3.

Having established under the issuance of the Consent Order with its federal regulator (Administrative Proceeding File No. 2020-BCFP-0002) that SLS failed to adhere to its loss mitigation obligations under RESPA, the Court's finding that Appellant has "failed to establish any genuine issues of material fact as to any RESPA violation by SLS or related damages" to establish violations of The South Carolina Unfair Trade Practices Act ("SCUPTA"), S.C. Code § 39-5-10 *et seq*., necessarily fails as a matter of law. [Order]

SCUPTA provides for both civil actions brought by private citizens and enforcement actions brought by the Attorney General on behalf of the State. S.C. Code Ann. §§ 39-5-50(a), -110(a), -140(a) (1985); *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 57, 777 S.E.2d 176, 189 (2015).

S.C. Code Ann. § 39-5-140(a) requires no more than "any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by Section 39-

5-20 may bring an action individually, but not in a representative capacity, to recover actual damages." *See Freemantle v. Preston*, 398 S.C. 186, 194-95, 728 S.E.2d 40, 44 (2012) (holding that where the appellant asserted he was a citizen of South Carolina, then "[n]othing more" was required under statute).

The terms "unfair" and "deceptive" are not defined in SCUTPA; rather, in section 39-5-20(b) of the Act, the General Assembly **directs that in construing those terms, the courts of our state "will be guided by" decisions from the federal courts, the Federal Trade Commission Act (FTCA), and interpretations given by the Federal Trade Commission (FTC)**.

That reason is simple – Congress has authorized the FTC, not state courts, to decide what constitutes unfair, deceptive and abusive practices as they relate to interstate commerce. Equally clear is that violations of the procedures, as alleged by the Appellant, are indeed considered unfair and deceptive by the FTC and made enforceable under 12 U.S.C. § 2605(f). *See* 12 C.F.R. § 1024.41(a).

Thus, SLS's Consent Order "shall be prima facie evidence in an action brought under Section 39-5-140 that the respondent used or employed a method, act or practice declared unlawful by Section 39-5-20." S.C. Code Ann. § 39-5-140(c).

## CONCLUSION

The federal government regulates the interaction of a servicer (like SLS), with consumers – *not* the several states. In addition to state law, there exist 18 federal statutes that prohibit "any unfair, deceptive, or abusive act or practice" by certain participants in the consumer-finance sector. *See* 12 U.S.C. §§ 5512(a), 5481(12), (14).12 U.S.C. § 5536(a)(1)(B).

This is why, in 2011, Congress consolidated the administration of those 18 federal statutes under the CFPB. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 124 Stat. 1376. To reduce the complexity, the United States Supreme Court has provided a "noncanonical formulation" *City of Arlington, Texas, v. FCC*, 133 S.Ct. 1863, 1868 (2013), first elucidated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* is rooted in a background presumption of congressional intent: namely, "that Congress, when it left ambiguity in a statute" administered by an agency, "understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Id.* (citing *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 740-741 (1996)). *Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, *not by the courts but by the administering agency*. *See also AT&T Corporation v. Iowa Utilities Bd.*, 525 U.S. 366, 397 (1999).

Under this lens, it is easy to conclude that SLS's actions were not only derivative of its servicing agreement with Wilmington Trust, but violated federal and state law and have directly led to a foreclosure action being filed against Appellant.

For these reasons, the Defendants/Third-Party Plaintiffs respectfully request that the Court overturn the Circuit Court's grant of the instant motion.

Respectfully submitted,

s/ Robert B. Varnado

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April 14, 2021
Mt. Pleasant, South Carolina

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price
South Carolina Circuit Court Judge

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Appellate Case No. 2020-001204

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TEMISAN ETIKERENTSE and IJOEMA ETIKERENTSE .....Appellants,

v.

SPECIALIZED LOAN SERVICING, LLC ..... Respondent.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that their ***Appellants' Initial Brief and Designation of Matter*** in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on this day to the following:

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January 20, 2021
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