

# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

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May 29, 2012

Sean A. O'Connor  
PO Box 41489  
Charleston SC 29423-0578

James L. Verenes  
PO Drawer 328  
Aiken SC 29802-0328

Re BAC Home Loan v Kinder, Debra  
Appellate Case No 2011-191086

Dear Counsel

This case is scheduled for oral argument at 9 30 a m on Wednesday, June 6, 2012. The following oral argument times have been allocated:

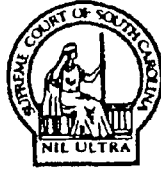
Appellant 10 minutes

Respondent 10 minutes

Appellant in Reply 5 minutes

Very truly yours,

ADMINISTRATIVE ASSISTANT



# The South Carolina Supreme Court

DANIEL E SHEAROUSE  
CLERK OF COURT  
BRENDA F SHEALY  
DEPUTY CLERK

PO BOX 11330  
COLUMBIA S C 29211  
PHONE NO 734 1080

To James L Verenes Esquire  
From Daniel E Shearouse  
Date April 24 2012  
RE June Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules this is to advise that the following case(s) will probably be reached for hearing at the June 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s)

Court will meet the days of June 5 6 7 19 and 20. Please notify this office in writing prior to May 1 2012 as to any scheduling conflicts for the June term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict please advise as to the specific nature of the conflict.

BAC Home Loan v. Kinder, Debra



# The South Carolina Supreme Court

DANIEL E SHEAROUSE  
CLERK OF COURT  
BRENDA F SHEALY  
DEPUTY CLERK

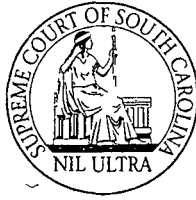
PO BOX 11330  
COLUMBIA S C 29211  
PHONE NO 734 1080

To Sean A O Connor Esquire  
From Daniel E Shearouse  
Date April 24 2012  
RE June Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules this is to advise that the following case(s) will probably be reached for hearing at the June 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of June 5 6 7 19 and 20. Please notify this office in writing prior to May 1 2012 as to any scheduling conflicts for the June term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict please advise as to the specific nature of the conflict.

BAC Home Loan v. Kinder, Debra



# The Supreme Court of South Carolina

DANIEL E SHEAROUSE  
CLERK OF COURT

BRENDA F SHEALY  
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April 4, 2012

Sean A O'Connor, Esquire  
Finkel Law Firm, LLC  
P O Box 41489  
Charleston, SC 29423

James L Verenes, Esquire  
Fox & Verenes  
P O Drawer 328  
Aiken, SC 29802-0328

Re BAC Home Loan v Kinder, Debra

Dear Counsel

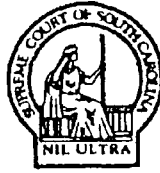
When the roster for the May 2012 term of Court was prepared, the above referenced case was not scheduled. Our records indicate that you are counsel of record in this case.

This case will be placed on the June 2012 Preliminary List of Cases. Court will meet the days of June 5, 6, 7, 19 and 20.

Very truly yours,

CLERK

DES/dmh



# The South Carolina Supreme Court

DANIEL E. SHEAROUSE  
CLERK OF COURT  
BRENDA F. SHEALY  
DEPUTY CLERK

P.O. BOX 11330  
COLUMBIA, S.C. 29211  
PHONE NO. 734 1080

To James L. Verenes Esquire  
From Daniel E. Shearouse  
Date March 21, 2012  
RE May Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the May 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of May 1, 2, 3, 22, and 23. Please notify this office in writing prior to March 28, 2012, as to any scheduling conflicts for the May term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

BAC Home Loan v. Kinder, Debra



# The South Carolina Supreme Court

DANIEL E SHEAROUSE  
CLERK OF COURT  
BRENDA F SHEALY  
DEPUTY CLERK

P O BOX 11330  
COLUMBIA S C 29211  
PHONE NO 734 1080

To Sean A O Connor Esquire  
From Daniel E Shearouse  
Date March 21 2012  
RE May Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules this is to advise that the following case(s) will probably be reached for hearing at the May 2012 term of the South Carolina Supreme Court Our records indicate that you are counsel of record in one or more of these case(s)

Court will meet the days of May 1 2 3 22 and 23 Please notify this office in writing prior to March 28 2012 as to any scheduling conflicts for the May term and any changes or additions of counsel that should be made to the record for the purpose of argument If you do have a scheduling conflict please advise as to the specific nature of the conflict

BAC Home Loan v Kinder, Debra

# The Supreme Court of South Carolina

BAC Home Loan Servicing,  
L P , f/k/a Countrywide Home  
Loan Servicing, L P , successor  
in interest to Defendant  
Mortgage Electronic  
Registration Systems, Inc ,  
MIN # 100039032108093192, Appellant,

v

Debra Kinder, Personal  
Representative of the Estate of  
George William Brelsford, IV  
a/k/a George W Brelsford, and  
Debra Kinder, Personal  
Representative of the Estate of  
Patricia M Brelsford, Respondents

The Honorable Robert A Smoak, Jr  
Aiken County  
Trial Court Case No 2010-CP-02-00172

---

## ORDER

---

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules,  
this appeal is hereby certified for review by the South Carolina Supreme  
Court Upon receipt of this order, the Court of Appeals is hereby directed to  
forward the case file, all records and briefs and any exhibits on file to this  
Court

IT IS SO ORDERED

  
CJ  
FOR THE COURT

Columbia, South Carolina

March 20, 2012

cc Sean A O'Connor, Esquire  
James L Verenes, Esquire  
The Honorable Tanya Gee

**FOX & VERENES**  
*Attorneys and Counsellors at Law*  
322 LAURENS STREET, N W  
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AIKEN, SOUTH CAROLINA 29802 0328  
TELEPHONES (803) 649 6281  
(803) 648 4256  
FAX (803) 641 1216

C LAVAUN FOX  
JAMES L VERENES

REPLY TO  
P O DRAWER 328  
AIKEN, SC 29802 0328

March 27, 2012

The South Carolina Supreme Court  
Daniel E Shearouse, Clerk of Court  
Post Office Box 11330  
Columbia, SC 29211

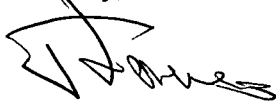
RE BAC Home Loan Servicing, L P , v Debra Kinder, et al  
Case 2010-CP-02-0172

Dear Mr Shearouse

I received your letter of March 21 regarding the May 2012 term While I have no scheduling conflict, I request that this case not be scheduled for May 1, 2 or 3 I have recently gotten back to work after a seven week hospitalization due to a multiple sclerosis exacerbation I am still receiving physical therapy and working a limited schedule I hope that the therapy and new medication that I started yesterday will have me back to a full schedule by the latter part of May

Thank you for considering my request If you have any questions or if there is anything further that you need, please do not hesitate to contact me

Sincerely,



James L Verenes

JLV

Cc Sean A O'Connor, Attorney at Law  
Debbie Kinder

**RECEIVED**  
MAR 29 2012  
S.C. SUPREME COURT  
pm 3-27-12



# The South Carolina Court of Appeals

TANYA A GEE  
CLERK

V CLAIRE ALLEN  
DEPUTY CLERK

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January 5, 2012

James L Verenes, Esquire  
Fox & Verenes  
P O Drawer 328  
Aiken, SC 29802-0328

Re BAC Home Loan v Kinder, Debra  
2011191086

Dear Counsel

We have received your Final Brief of Respondents in the above entitled case on appeal. According to Rule 267 of the South Carolina Appellate Court Rules the cover of this brief should contain the attorney information for the party submitting the brief. Your Final Brief of Respondents contained the attorney information for opposing counsel.

It will be necessary for you to make arrangements for you or someone from your office to come to this office to place labels on the cover of your Final Brief to correct the attorney information. Please notify us prior to your arrival so that these briefs will be immediately available to you.

Very truly yours,

*V. Claire Allen, Deputy*  
CLERK

TAG/ma

cc Sean A O'Connor, Esquire

**FOX & VERENES**  
*Attorneys and Counsellors at Law*  
322 LAURENS STREET, N W  
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C LAVAUN FOX  
JAMES L VERENES

REPLY TO  
P O DRAWER 328  
AIKEN, SC 29802 0328

November 29, 2011

The South Carolina Court of Appeals  
Tanya A Gee, Clerk of Court  
Post Office Box 11629  
Columbia, SC 29211-1629

RE BAC Home Loan Servicing, L P , v Debra Kinder, et al  
Case 2010-CP-02-0172

Dear Ms Gee

Enclosed please find for filing the *Final Brief of Respondent with Certificate of Counsel and Proof of Service* for the above referenced case

If you have any questions or if there is anything further that you need, please do not hesitate to contact me

Sincerely,



Carla Williams, Legal Assistant for  
James L Verenes

JLV/ctw

Enclosure

Cc Sean A O'Connor, Attorney at Law  
Debbie Kinder

**RECEIVED**  
NOV 30 2011  
**SC Court of Appeals**



SEAN A. O'CONNOR  
[SOCONNOR@FINKELLLAW.COM](mailto:SOCONNOR@FINKELLLAW.COM)

REPLY TO  
CHARLESTON LITIGATION

November 29, 2011

The Honorable Tanya Gee  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RE *BAC Home Loan Servicing LP Appellant v Debra Kinder et al Respondents*  
Case No 2010-CP-02-172  
Our File No 33820 42715

Dear Ms Gee

Enclosed for filing as to the above-referenced matter, please find the original and 18 copies of each of the following

- 1 *Record on Appeal*
- 2 *Final Brief of Appellant*
- 3 *Final Reply Brief of Appellant and*
- 4 *Proof of Service (original and 3 copies only)*

We kindly request that you please file same, returning three clocked copies of each in the envelope provided

By copy of this correspondence, we hereby serve a copy of the enclosed upon James L Verenes, attorney for Respondents

Should you have any questions concerning this matter, please do not hesitate to contact our office at your convenience

Kind regards,

FINKEL LAW FIRM LLC

  
Sean A. O'Connor

SAO/aa

Enclosures

cc James L Verenes, Esq

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**Foreclosure**  
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Fax (843) 725 0015



SEAN A. O'CONNOR  
[SOC ONNOR@FINKELLAW.COM](mailto:SOC ONNOR@FINKELLAW.COM)

REPLY TO  
CHARLESTON LITIGATION

November 9, 2011

The Honorable Tanya Gee  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RE *BAC Home Loan Servicing LP Appellant v Debra Kinder et al Respondents*  
Case No 2010-CP-02-172  
Our File No 33820 42715

Dear Ms Gee

Enclosed for filing is *Appellants Proof of Service* as to the Record on Appeal in the above-referenced case, along with three copies, which we kindly ask you to file and return in the attached, self-addressed, stamped envelope

Should you have any questions concerning this matter, please do not hesitate to contact our office at your earliest convenience

Best Regards,

FINKEL LAW FIRM

Sean A O'Connor

SAO/aa  
Enclosures

cc James L Verenes, Esquire

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NOV 15 2011  
SC Court of Appeals

**COLUMBIA**  
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North Charleston SC 29405  
Tel (843) 577 5460  
Fax (843) 725 0015

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Robert A Smoak, Jr , Master-in-Equity for Aiken County

---

Case No 2010-CP-02-172

---

BAC Home Loan Servicing, L P ,  
f/k/a Countrywide Home Loan Servicing, L P ,  
successor in interest to Defendant  
Mortgage Electronic Registration Systems, Inc ,  
MIN # 100039032108093192,

Appellant,

**RECEIVED**  
NOV 15 2011  
SC Court of Appeals

v

Debra Kinder, Personal Representative of  
The Estate of George William Brelsford, IV  
a/k/a George W Brelsford, and Debra Kinder,  
Personal Representative of the Estate of  
Patricia M Brelsford,

Respondent(s)

---

PROOF OF SERVICE

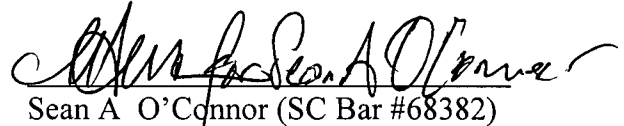
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I certify that I have served the Record on Appeal on Respondent(s) by depositing a copy of same in the United States Mail, postage prepaid, on November 9, 2011, addressed to Respondents' attorney of record, James L Verenes, 322 Laurens Street, N W , Aiken, South Carolina, 29801

BAC Home Loan Servicing, L P v Debra Kinder et al

Case No 2010-CP-02-172

PROOF OF SERVICE

A handwritten signature in black ink, appearing to read "Sean A. O'Connor", written over a horizontal line.

Sean A O'Connor (SC Bar #68382)

FINKEL LAW FIRM LLC

Post Office Box 41489

Charleston, South Carolina 29423

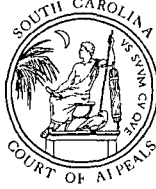
Telephone (843) 577-5460

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soconnor@finkellaw.com

*Attorney for Appellant*

November 9, 2011



# The South Carolina Court of Appeals

TANYA A GEE  
CLERK

V CLAUDE ALLEN  
DEPUTY CLERK

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October 28, 2011

Sean A O'Connor, Esquire  
Finkel & Altman, LLC  
P O Box 225  
Charleston, SC 29402

James L Verenes, Esquire  
Fox & Verenes  
P O Drawer 328  
Aiken SC 29802-0328

Re BAC Home Loan v Kinder Debra  
Case Tracking # 2011191086

Dear Counsel

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules and delivered to our physical address at 1205 Pendleton Street, Columbia SC, 29201.

All parties are further advised that counsel's identifying information for the party filing the brief shall appear on the cover of the brief. You are reminded that the Record on Appeal and all final briefs must be in compliance with the South Carolina Appellate Court Rules in order to be accepted by the Court.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

*V. Claude Allen, Deputy*  
CLERK

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Robert A Smoak, Jr , Master-in-Equity for Aiken County

---

Case No 2010-CP-02-172

---

**RECEIVED**

OCT 12 2011

**SC Court of Appeals**

BAC Home Loan Servicing, L P ,  
f/k/a Countrywide Home Loan Servicing, L P ,  
successor in interest to Defendant  
Mortgage Electronic Registration Systems, Inc  
MIN # 100039032108093192,

Appellant,

v

Debra Kinder, Personal Representative of  
The Estate of George William Brelsford, IV  
a/k/a George W Brelsford, and Debra Kinder,  
Personal Representative of the Estate of  
Patricia M Brelsford,

Respondent(s)

---

**INITIAL REPLY BRIEF OF APPELLANT**

---

Opposing Counsel

James Verenes, Esquire  
Fox and Verenes  
PO Drawer 328  
Aiken, South Carolina 29802-0328  
Telephone (803) 649-6281  
Fax (803) 641-1216  
[jimverenes@aol.com](mailto:jimverenes@aol.com)

ORIGINAL

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**I The Master erred in ruling that the recording of the assignment of the mortgage subsequent to the foreclosure sale barred Appellant BAC from recovery of the surplus funds**

Respondents come before this court seeking to reap an inequitable windfall of surplus funds and thereby deprive Appellant BAC Home Loan Servicing, L P fka Countrywide Home Loan Servicing, L P , successor in interest to Mortgage Electronic Registration Systems, Inc , MIN# 100039032108093192 (“BAC”) of repayment of money indisputably loaned to Dr George William "Jeff" Brelsford, VI (“Borrower”), some \$144,157 94 of which was not repaid In so doing, Respondents, which are Borrower’s estate and heirs, attempt to errantly draw the court’s attention to the timing of the recording of a valid assignment of a mortgage of which they had notice and to improperly apply two recent South Carolina appellate decisions which are factually distinguishable from the case at bar and do not apply to any actions filed before August 8, 2011 <sup>1</sup>

A lien is a legal right or interest that a creditor has in another’s property, lasting usually until a debt or duty that it secures is satisfied Black’s Law Dictionary 1006 (9th ed 2009) See also Sexton v Harleystown Mut Cas Co., 242 S C 182, 191, 130 S E 2d 475, 480 (1963) (Bussey, J , dissenting) A lien that is first in time generally has priority and is entitled to prior satisfaction of the property it binds Powers v Fidelity & Deposit Co of Md, 180 S C 501, 186 S E 523, 527 (1936) (“In the absence of statutory regulation the common law establishes liens in the order of their acquisition, the first in order of the time standing first in order of rank ”)

---

<sup>1</sup> The original summons and complaint in the instant case, Civil Action No 2010 CP 02 00172 was filed on January 26 2010 an amended summons and complaint was filed on February 4, 2010

Under South Carolina law, a mortgage lien is created upon the recording of the mortgage with the recorder of deeds S C Code Ann § 30-7-10 (Law Co-op 1991) The purpose of this statute is to give third parties the opportunity to ascertain the status of title to the property Epps v McCallum Realty Co., 139 S C 481, 138 S E 297, 303 (1927) The purchaser of real estate may rely on the public record of conveyances and instruments affecting title unless he has notice or is chargeable with notice of a claim or interest that is inconsistent with the record Id at 302

Subsequent purchasers are entitled to rely on recorded deeds and plats to determine their rights in respect to property Murrells Inlet Corp v Ward, 378 S C 225, 236, 662 S E 2d 452, 457 (Ct App 2008) However, where a party has constructive notice of a prior interest in real estate, the failure to record is not necessarily fatal to the rights of the prior interest holder Spence v Spence, 368 S C 106, 119, 628 S E 2d 869, 876 (2006)

The assignment of a mortgage note carries with it an equitable assignment of the mortgage by which it was secured Union Nat'l Bank of Columbia v Cook, 110 S C 99, 96 S E 484, 486 (1918) The assignee stands in the shoes of the assignor-mortgagee with regard to the rights and interests under the note and mortgage Twelfth RMA Partners, L P v Nat'l Safe Corp., 335 S C 635, 639-40, 518 S E 2d 44, 46 (Ct App 1999)

Respondents state on Page 6 of their Initial Brief that “[a]nyone who has a lien on the date of the sale loses that status as a lien holder after the sale” This statement is correct only in the limited sense that after the foreclosure sale a former lien holder no longer holds a property interest in the form of an encumbrance upon the subject real property The purchaser at the foreclosure sale indeed emerges with a clear and

unencumbered title, free of the extinguished junior liens. The flaw in the above statement by Respondents is that even after the foreclosure sale, former lien holders, though stripped of their interests in the subject property, do still retain the important right to claim any surplus funds following the sale, in the order of priority from when they still held their respective liens. That right, which is central to this appeal, is obviously not extinguished or otherwise impaired in any way by the completion of the foreclosure sale, otherwise no former lien holder could ever claim surplus funds.

Respondents argue on Page 5 of their Initial Brief, “Because the lien held by MERS pursuant to Mortgage 2 was extinguished by the sale, there was no lien to be assigned to BAC by the purported assignment that was recorded August 20, 2010 and relied upon by BAC.” This argument is likewise plainly erroneous in that any proper surplus funds claimant under Rule 71(c), SCRCP, must always and necessarily be a former holder of a lien which has been extinguished by the foreclosure sale. Importantly, it is solely and exclusively the former lien holder’s interest vis-a-vis the real property which has been extinguished – not the right to later claim surplus funds. Because the right to claim surplus funds has not been extinguished, it is certainly logical to read Rule 71(c) as allowing that right to be transferred by an assignment post-sale but prior to the surplus funds hearing, so long as the lien held by the transferor was otherwise valid and had been properly recorded so as to put on notice any other claimants of the surplus funds, as the MERS mortgage lien indisputably was in this instance.

No prejudice or inequity would result from the adoption of the interpretation of Rule 71(c), SCRCP espoused by Appellant BAC. In contrast, the disposition as urged by

Respondents would be for this court to condone an undeserved windfall and to countenance an unjust forfeiture

A maxim frequently stated and applied is that equity regards substance rather than form See Young v Higbee Co 324 U S 204, 209 (1945) Courts of equity are not restrained by technicalities but may look past mere technical matters to find the real essence of the transactions See Miles v Caldwell, 69 U S 35, 40 (1864) It is not only the right but the duty of a court clothed with equitable jurisdiction to pierce the form and letter of a transaction and look to the substance in determining the rights of the parties affected In re Boitnott, 4 B R 122, 123-24, Bankr W D Va (1980) Equity looks to substance, and not to form, and will not lend its aid to one whose sole ground for seeking such aid is based upon a technicality Bride v Baker, 37 App D C 231, 236 (D C Cir 1911)

Respondents are brazenly asking to be allowed to pocket \$79,405.25 which should not rightfully belong to them based precisely on this very sort of technicality This court should apply the maxims of equity so as to prevent such a grave injustice

A 2000 Illinois opinion, Federal Nat'l Mortgage Ass'n v Kuipers, 732 N E 2d 723 (Ill App Ct 2000), illustrates that a mortgagee's failure to record its assignment of a mortgage does not affect its priority position against a competing lien holder In Kuipers, a dispute concerning lien priority in a mortgage foreclosure proceeding arose between an assignee of a mortgage and a judgment lien creditor, and the court addressed the issue of whether the assignee could retain its priority position over a judgment creditor without having recorded the assignment of its mortgage Id at 725

In Kuipers, the Kuiperses, a married couple, executed a note and mortgage in favor of a lender on July 24, 1994. The note and mortgage were later duly recorded in the appropriate recorder's office on August 1, 1994. Pursuant to the terms between the parties, the note and mortgage were assignable to third parties. Id. On August 3, 1994, the lender assigned the note and mortgage to the Federal National Mortgage Association (FNMA). A creditor obtained a judgment against the Kuiperses on July 26, 1996 and recorded same on June 25, 1997. On September 8, 1998, FNMA filed a foreclosure action after the Kuiperses defaulted on their note. Id. The foreclosure complaint asserted that the judgment creditor's lien was inferior and subordinate to FNMA's first mortgage lien. On October 2, 1998, FNMA recorded the assignment it had received from lender, which recording was more than a month after the filing of the foreclosure action. The judgment creditor answered and counterclaimed, asserting that her judgment lien was recorded prior to the FNMA lien, and therefore had priority. Id.

The judgment creditor argued that the transfer of the note and mortgage extinguished all of the lender's interest and that FNMA did not stand in the shoes of lender with regard to lien priority. FNMA responded by asserting that the lien filed by lender had never been released and that the assignment did not operate to extinguish the lien. Id. FNMA further argued that it was not necessary for it to record the assignment in order to maintain first lien priority, as the original lien provided sufficient notice to third parties of the existence of the first mortgage. FNMA further argued that, after the assignment, it stood in the shoes of the lender. Id.

The court ruled in favor of FNMA, the assignee, holding that "absent the recording of a release of lien the assignee of a mortgage is entitled to any priority

position established by the original mortgagee, up to the principal amount that the mortgage secured at the time of perfection ” Id At 725-26

The Court further stated

While an assignee that fails to record an assignment may find itself in the unenviable situation of having its lien extinguished as an “unknown owner and nonrecord claimant” in a mortgage foreclosure, *the mere failure to record the assignment does not by itself extinguish the mortgage lien or negate the priority position*

Kuipers at 729 (emphasis added)

Similar to the judgment creditor in Kuipers, respondent argues that BAC’s failure to record its assignment before the sale of the foreclosed property negates BAC’s priority position against the borrower’s estate and heirs Respondent failed to cite any authority in support of the position that an assignee who fails to record its assignment loses its priority position against a defaulting mortgagor In addition, respondent does not address the argument and supporting authorities cited in Appellant’s Initial Brief emphasizing the rule that an assignment does not need to be recorded in order for it to be and remain effective as against the mortgagor See Union Nat’l Bank of Columbia v Cook, supra, 110 S C 99, 96 S E at 486, Williams & Co v Paysinger, 15 S C 171 (1881) See also Charles D LeGrand, 27 S C Juris , *Mortgages* § 178 (Aleta M Pillick ed 1996)

Further supporting Appellant’s position is a bankruptcy case from the Sixth Circuit, In re Cook, 457 F 3d 561 (6th Cir 2006) In Cook, a bankruptcy trustee brought an action against an assignee of a mortgage and promissory note to assert the unsecured creditors’ interest in real property mortgaged by the debtors Id at 563 The Sixth Circuit affirmed the district court’s ruling that although the assignee had recorded its assignment

of the mortgage after a petition for bankruptcy was filed by the trustee, the assignee's lien retained its validity as against the borrowers Id The court stated

Bank One was not required to record its interest in the promissory note and the mortgage because, according to the bankruptcy court, the recording of the original mortgage to NCS was "constructive notice that a mortgage lien existed against the Cooks' real property" As a result, Bank One's failure to record the assignment of the mortgage prior to the bankruptcy proceedings "did not affect the perfection of the lien as against the mortgagors and those claiming through them"

Id at 567 The court held that "Bank One's failure to record its mortgage interest prior to the filing of the bankruptcy petition therefore has no effect on its ability to enforce the mortgage against Rogan [mortgagor]" Id at 568

Respondents further argue that Section 30-7-10 affects lien priority position in this instance This position cannot be supported

In addition to protecting subsequent *bona fide* purchasers for value, S C Code Ann § 30-7-10, the South Carolina statute addressing the validity of conveyances, also protects subsequent creditors of a mortgagor Simmons v Greer, 174 F 654 (4th Cir 1909) The words "subsequent creditors" mean only those who become such after the execution of a mortgage, not including the mortgagee Simmons at 656 Section 30-7-10 cannot be read to protect a defaulting mortgagor who had notice of the mortgage lien recorded by the original mortgagee, in this case Quicken/MERS Regarding notice, it must be noted and emphasized that Borrower's estate was making payments to BAC on "Mortgage 2" (the Quicken/MERS loan) up until the time of default on or about January 1, 2010

Section 30-7-10 does not mandate that an assignment must be recorded to preserve the lien and priority position of the original recorded mortgage interest The statute merely provides that, as to third parties who did not have notice of the mortgage,

the effective date of the mortgage lien is the date of recording. Here, the effective date of the Quicken/MERS mortgage lien was April 20, 2007. There is nothing in Section 30-7-10 to suggest that the subsequent assignment to BAC had to be recorded in order for the mortgage lien or its priority position to survive as against the Borrower's estate and heirs in a surplus funds contest.

Even if applicable law supported Respondents' argument regarding the timing of the recording of the assignment, the trial court's ruling should be reversed on the grounds that the principles of equity disfavor a forfeiture. Forfeiture is defined as "divestiture of specific property without compensation without compensation, it imposes a loss by the taking away of some pre-existing valid right without compensation." Black's Law Dictionary 650 (6th ed. 1990). This definition accords closely with the facts of the case at bar, given that it is not disputed that Borrower's estate defaulted on the note associated with Mortgage 2 and that there remains an outstanding balance of more than \$144,157.94, nor is it disputed that BAC gave value to Quicken/MERS for said note and mortgage.

Respondents ineffectually attempt to distinguish the forfeiture decisions cited in Appellant's Initial Brief by stating that "[i]n all of those cases, it was alleged that a party forfeited rights pursuant to some written document or money paid." That statement actually supports BAC's position in that it quite accurately describes the very forfeiture at issue in this appeal. The Master's ruling resulted in a forfeiture of BAC's right to the surplus funds pursuant to a written document (a note and mortgage) and money paid (\$149,000.00 loaned to the borrower on March 21, 2007).

For these and all the foregoing reasons, Respondents' argument that the timing of the recording of the assignment of the subject mortgage into BAC causes said lien to lose its priority position as against the Borrower's estate and heirs in a surplus funds contest is untenable and must fail. Accordingly, the Master's Order Disbursing Surplus Funds and his order denying BAC's motion to alter or amend under Rule 59(e), SCRCP are in error and should be reversed and the surplus funds awarded to BAC.

**II The Master erred in refusing to award the surplus funds to BAC based on his finding that no attorney participated in the closing**

Under the applicable standard of review this court can and should properly reject the Master's highly suspect finding that the HUD-1 settlement statement proves that the subject loan was closed without an attorney. The HUD-1 clearly did not demonstrate that the loan was closed without an attorney, as reflected on the document itself as well as by the Master's own statements in his two orders. The Master was correct when he stated in his December 6, 2010 order that there was insufficient evidence to rule on this fact issue. Yet with no additional evidence having been presented, the Master nonetheless ultimately decided for unexplained reasons that no attorney had participated in the closing. (Order denying BAC's Rule 59(e) motion, filed February 3, 2011.)

Regardless of whether this court chooses to consider the significant and substantively uncontroverted fact that by all reliable indications the Quicken/MERS loan was closed by one Katherine F. Kline, an attorney licensed to practice law in South Carolina, the court is not required to accept the Master's directly antithetical finding that there was no attorney present at the closing. U S Bank Trust Nat'l Ass'n v Bell, 385 S C 364, 684 S E 2d 199 (Ct App 2009). In an appeal from an action in equity tried by a judge alone, an appellate court can find facts in accordance with its view of the

preponderance of the evidence Id South Carolina law recognizes that a relief in equity is always discretionary Ingram v Kasey's Assocs., 340 S C 98, 531 S E 2d 287 (2000) Adhering to the principles of equity, this court should not penalize BAC for alleged unauthorized practice of law – not by BAC itself but by a predecessor in interest – under this incongruous circumstance Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to fullest extent possible Ex Parte Dibble, 279 S C 592, 595, 310 S E 2d 440, 442 (Ct App 1983) This is a case that calls out for such discretion to be exercised

Respondent's Initial Brief fails to address the acutely distinguishing fact that Matrix Financial Services Corp v Frazer, No 26859, 2011 WL 3452078, (S C Aug 8, 2011), and Wachovia Bank, N A v Coffey, 389 S C 68, 698 S E 2d 244, (Ct App 2010), each addressed a situation where the lender which was a party to the appeal and was found to have had engaged in the unauthorized practice of law was also a party to the original loan transaction, which is not the case here BAC acquired the Quicken/MERS loan some two years or more after the closing

Respondent's Brief likewise conspicuously fails to address the fact that that in the August 8, 2011 substitute opinion in Matrix, the South Carolina Supreme Court was unequivocal in stating that the opinion was not to be applied retroactively "We apply this ruling to all filing dates after the issuance of this opinion" Matrix, supra Since the summons and complaint in the foreclosure action from which the instant appeal arises was filed on January 26, 2010, the rule in Matrix which bars recovery by a mortgage lien holder on a loan which was allegedly closed without an attorney cannot and does not

apply in the instant case, even if this court were to accept the Master's shaky finding that the subject loan was closed without an attorney

For these and all the foregoing reasons, Respondents' contention that the loan was closed unlawfully without an attorney as well as their argument that Matrix and Coffey therefore bar recovery by BAC are flawed and unconvincing and should be rejected. The Master's Order Disbursing Surplus Funds and his order denying BAC's motion to alter or amend under Rule 59(e) are in error and should be reversed and the surplus funds awarded to BAC

**CONCLUSION**

For these and all the foregoing reasons, this Court should reverse the ruling of the Master and award the surplus funds in the amount of \$79,405.25 to BAC

Respectfully submitted,

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October 10, 2011

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Robert A Smoak, Jr , Master-in-Equity for Aiken County

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Case No 2010-CP-02-172

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BAC Home Loan Servicing, L P ,  
f/k/a Countrywide Home Loan Servicing, L P ,  
successor in interest to Defendant  
Mortgage Electronic Registration Systems, Inc  
MIN # 100039032108093192,

Appellant,

v

Debra Kinder, Personal Representative of  
The Estate of George William Brelsford, IV  
a/k/a George W Brelsford, and Debra Kinder,  
Personal Representative of the Estate of  
Patricia M Brelsford,

Respondent(s)

---

**DESIGNATION OF MATTER  
TO BE INCLUDED IN RECORD ON APPEAL**

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Pursuant to Rule 209, SCACR, appellant hereby designates the following matter to be included in the record on appeal in this action

- 1 Amended Summons, filed February 2, 2010,
- 2 Amended Complaint, filed February 2, 2010,
- 3 Amended Lis Pendens, filed February 2, 2010,
- 4 Order of Judgment of Foreclosure and Sale, dated June 15, 2010,
- 5 Master's Report on Sale, filed July 21, 2010,
- 6 Summons, Complaint and Lis Pendens, Civil Action No 2010-CP-02-1951, filed August 18, 2010,
- 7 Assignment of Mortgage, recorded August 20, 2010,

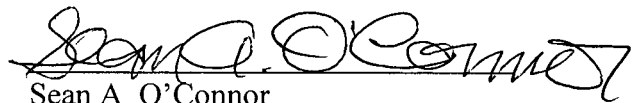
ORIGINAL

- 8 Bank of America Corporation's Verification of Claim for Surplus Funds, filed  
September 3, 2010,
- 9 Transcript of October 28, 2010 Surplus Funds Hearing,
- 10 Order Disposing Surplus Funds, filed December 6, 2010,
- 11 Motion to Alter or Amend Order Disposing Surplus Funds, filed December 21,  
2010,
- 12 Order Denying Motion to Alter or Amend Order Disposing Surplus Funds, filed  
February 3, 2011,
- 13 Notice of Appeal, filed April 21, 2011,
- 14 HUD-1 settlement statement from March 21, 2007 loan closing

The undersigned counsel for the Appellant BAC Home Loan Servicing, L P , f/k/a Countrywide Home Loan Servicing, L P , successor in interest to Defendant Mortgage Electronic Registration Systems, Inc MIN # 100039032108093192, certifies that the Designation contains no matter that is irrelevant to the appeal

Respectfully submitted,

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October 10, 2011

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM AIKEN COUNTY  
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Robert A Smoak, Jr , Master-in-Equity for Aiken County

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Case No 2010-CP-02-172

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BAC Home Loan Servicing, L P ,  
f/k/a Countrywide Home Loan Servicing, L P ,  
successor in interest to Defendant  
Mortgage Electronic Registration Systems, Inc ,  
MIN # 100039032108093192,

Appellant,

v

Debra Kinder, Personal Representative of  
The Estate of George William Brelsford, IV  
a/k/a George W Brelsford, and Debra Kinder,  
Personal Representative of the Estate of  
Patricia M Brelsford,

Respondent(s)

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PROOF OF SERVICE

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I certify that I have served the *Initial Reply Brief Of Appellant and Appellant s Designation of Matter To Be Included In Record On Appeal* upon Respondents by depositing a copy of same in the United States Mail, postage prepaid, on October 10, 2011, addressed to Respondents' attorney of record, James L Verenes, 322 Laurens Street, N W , Aiken, South Carolina, 29801

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BAC Home Loan Servicing, L P v Debra Kinder et al  
Case No 2010-CP-02-172  
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REPLY TO  
CHARLESTON LITIGATION

October 10, 2011

The Honorable Tanya Gee  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RE *BAC Home Loan Servicing LP Appellant v Debra Kinder et al Respondents*  
Case No 2010-CP-02-172  
Our File No 33820 42715  
Case Tracking No 2011191086

Dear Ms Gee

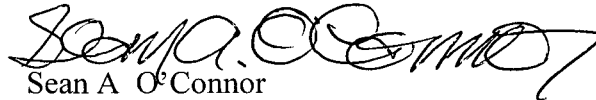
Enclosed for filing as to the above-referenced matter, please find the original and two copies of the *Initial Reply Brief Of Appellant* and *Appellant s Designation of Matter To Be Included In Record On Appeal* along with a Proof of Service We respectfully request that you please return two filed copies to our office in the envelope provided

Should you have any questions concerning this matter, please do not hesitate to contact our office at your earliest convenience

With kind personal regards, we are

Yours very truly,

FINKEL LAW FIRM

  
Sean A O'Connor

SAO/aa  
Enclosures

cc James L Verenes, Esquire

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**SC Court of Appeals**

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Robert A Smoak, Jr , Master-in -Equity for Aiken County

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Case No 2010-CP-02-172

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BAC Home Loan Servicing, L P ,  
f/k/a Countrywide Home Loan Servicing, L P ,  
successor in interest to Defendant  
Mortgage Electronic Registration Systems, Inc  
MIN# 100039032108093192

Appellant,

v

Debra Kinder, Personal Representative of  
The Estate of George William Brelsford, IV  
a/k/a George W Brelsford, and Debra Kinder,  
Personal Representative of the Estate of  
Patricia M Brelsford,

Respondent(s)

---

**INITIAL BRIEF OF RESPONDENTS**

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II   The trial court correctly found that no attorney participated in the closing of the \$149,000 00 loan, which was closed on March21, 2007	
III  The trial court correctly found lack of attorney supervision of the closing on March 21, 2007 conducted by original lender Quicken Loans barred BAC from its claim to the surplus funds	
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## STATEMENT OF ISSUES ON APPEAL

- I The trial court correctly found that execution/recording of the assignment subsequent to the foreclosure sale did not allow recovery of the surplus funds by Appellant BAC Home Loan Servicing, L P f k a Countrywide Home Loan Servicing, L P , successor in interest to Mortgage Electronic Registration Systems, Inc , MIN# 100039032108093192 (“BAC”)
- II The trial court correctly found that no attorney participated in the closing of the \$149,000 00 loan, which closed on March 21, 2007
- III The trial court correctly found lack of attorney supervision of the closing on March 21, 2007 conducted by original lender Quicken Loans barred BAC from its claim to the surplus funds
- IV The trial court correctly found BAC was not a lien holder at the time it filed its claim to the surplus funds

## STATEMENT OF THE CASE

On July 2, 2004, Dr George William "Jeff" Brelsford, VI ("Borrower") executed and delivered a promissory note and mortgage ("Mortgage 1") in principal sum of Thirty Seven Thousand Dollars and Zero Cents (\$37,000 00) to Citizens Bank of Effingham ("CBE") CBE caused Mortgage 1 to be recorded on July 6, 2004 at the Aiken County Register of Mesne Conveyance ("RMC") The real property encumbered by Mortgage 1 was known as 117 Club Villa Drive, Aiken, SC 29803

On March 21, 2007, Borrower delivered a separate and subsequent promissory note to Quicken Loans in the principal sum of One Hundred Forty Nine Thousand Dollars and Zero Cents (\$149,000 00) ("the Note") To better secure the Note, Borrower concomitantly executed and delivered a mortgage ("Mortgage 2") to Mortgage Electronic Registration Systems, Inc ("MERS"), as Nominee for Quicken Loans The real property encumbered by Mortgage 2 was likewise known as 117 Club Villa Drive, Aiken, SC 29803 The \$149,000 00 loan in connection with Mortgage 2 was closed on March 21, 2007 On April 20, 2007, MERS caused Mortgage 2 to be recorded at the Aiken County RMC

Borrower died on August 11, 2009

After default occurred on the loan associated with Mortgage 1 due to payments not being timely received, CBE initiated a civil action against Borrower's estate seeking foreclosure of Mortgage 1, Civil Action No 2010-CP-02-00172 The original summons and complaint was filed on January 26, 2010, an amended summons and complaint was filed on February 4, 2010

Both the estate of Borrower and MERS were duly served with a copy of CBE's summons and complaint. Neither timely filed or served an answer or other response and both were held to be in default. A dispositive hearing was held on May 26, 2010. The Master in Equity for Aiken County ("Master") awarded a judgment of foreclosure and sale by order dated June 15, 2010. The judgment determined that the mortgage lien held by MERS was junior and subordinate to the CBE mortgage lien. The judgment further stated, "The Defendants claim or may claim a lien upon or legal interest in subject property and in the event there is a surplus from the sale of the subject property, such Defendant may present any such lien or legal interest at a hearing subsequent to the sale, in accordance with Rule 71(c), South Carolina Rules of Civil Procedure"

The foreclosure sale occurred on July 6, 2010. The subject property was sold at auction on that date to a third party bidder, one Matthew Fry. The Master issued a Master's Report on Sale filed July 21, 2010 reflecting that the subject property sold for \$116,000.00 and that following disbursement of costs, a surplus remained in the amount of \$79,405.25 (the "surplus funds")

On July 30, 2010, MERS executed a document purporting to assign Mortgage 2 to BAC. That document was recorded on August 20, 2010 in Book 4320, at Page 1877 in the Aiken County RMC.

On or about August 12, 2010, after a default occurred on the loan associated with Mortgage 2 due to payments not being timely received, BAC initiated a civil action seeking foreclosure of Mortgage 2, Civil Action No. 2010-

CP-02-1951 Case no 2010-CP-02-1951 was not adjudicated and was dismissed on August 30, 2010

On or about September 3, 2010, BAC filed a Verification of Claim for Surplus Funds in connection with the CBE mortgage foreclosure. The amount of BAC's outstanding debt on Mortgage 2 at the time of filing the claim was \$144,157.94

On October 28, 2010, the Master conducted a hearing in regards to disposition of the surplus funds in the amount of \$79,405.25. On December 6, 2010, the Master filed an Order Disposing Of Surplus Funds. The Master awarded the surplus funds to the estate of Borrower and Borrower's heirs.

On December 21, 2010, BAC filed a motion under Rule 59(e), SCRPC seeking to have the Master alter or amend his Order Disposing Of Surplus Funds dated December 7, 2010. A hearing was held on the motion on January 31, 2011. The Master denied BAC's Rule 59(e), SCRPC motion via order filed February 3, 2011. The Aiken County Clerk of Court records show that a certified copy of the Master's Order was mailed to the Finkel Law Firm, Attorney for BAC, on February 4, 2011.

On April 21, 2011, BAC filed a Notice of Appeal with the South Carolina Court of Appeals.

### ARGUMENT

**I The trial court correctly found that execution/recording of the assignment subsequent to the foreclosure sale did not allow recovery of the surplus funds by Appellant BAC Home Loan Servicing, L P f k a Countrywide Home Loan Servicing, L P , successor in interest to Mortgage Electronic Registration Systems, Inc , MIN# 100039032108093192 ("BAC")**

The Master sold the property that was the subject of this foreclosure action on July 6, 2010. The property was sold to a third party bidder. The bidder made the required deposit the next day and balance due was paid July 19, 2010. The Court then executed and delivered a Master's deed to the bidder. On July 30, 2010, MERS, the named Defendant in the foreclosure action, executed what is purported to be an assignment of Mortgage 2 and note to BAC. The document was recorded on August 20, 2010 in the records of the Aiken County RMC. Pursuant to the provisions of S C Code Ann § 15-39-880, the lien that was held by MERS at the time of the sale and the delivery of the Master's deed was extinguished. S C Code Ann § 15-39-880, provides

“No lien created by operation of law or agreement of the parties whether of record or authorized by law to be entered of record in any office of any clerk of court or register of mesne conveyance in this state or any transcript, extension, renewal or revival thereof shall constitute a lien or attach or reattach as a lien on real property of the lien debtor or real property in which the lien debtor has an interest after a public sale of such real property at any execution or judicial sale in any action or special proceeding to which the lien creditor is duly made a party as provided by law.”

Because the lien held by MERS pursuant to Mortgage 2 was extinguished by the sale, there was no lien to be assigned to BAC by the purported assignment that was recorded August 20, 2010 and relied upon by BAC.

Rule 71(c), SCRCP governs the disposition of surplus funds resulting from a foreclosure sale. That rule provides in part

“any party to the action or any person who had a lien on the mortgaged premises at the time of the sale upon filing with the Master or any officer conducting the sale a claim of entitlement to the surplus funds may have a hearing to determine such entitlement.”

Therefore, this rule provides that as a prerequisite to being entitled to any surplus funds BAC had to either be a party to the action or someone who had a lien on the mortgaged premises at the time of the sale. It is apparent from the foreclosure pleadings that BAC was not a party to the action. Therefore, BAC's claim to the surplus funds must rely on its claimed status as a lien holder at the time of the sale.

BAC was not a lien holder at the time of the sale. It is undisputed that the purported assignment to BAC was executed July 30, 2010 and recorded on August 20, 2010, after the sale of July 6, 2010. The requirement of Rule 71(c), SCRPC that a claimant to surplus funds hold a lien as of the date of the sale makes sense when read together with S C Code Ann § 15-39-880. Anyone who has a lien on the date of the sale loses that status as a lien holder after the sale. Therefore, the purported assignment executed by MERS did not convey status as a lien holder upon BAC. Since BAC was clearly not a party to the foreclosure preceding and was not a lien holder on July 6, 2010, the Master was correct in ruling that BAC was barred from any claim to the surplus funds.

Appellant has argued that to bar BAC from its claim to the surplus funds would constitute a forfeiture. The Master's ruling in this matter does not constitute a forfeiture. BAC did have a lien on the property at the time that it filed its claim to the surplus funds. The cases relied upon by the Appellant are distinguishable from the present case. Litchfield Co of S Carolina, Inc v Kiriakides, 290 S C 220, 224-25, 349 S E 2d 344, 347 (Ct App 1986) deals with an alleged forfeiture pursuant to the terms of a lease. South Carolina Tax

Comm'n v Metropolitan Life Ins , Co, 266 S C 34, 221 S E 2d 522 (1975) deals with an alleged forfeiture pursuant life insurance policies and the cash value accumulated thereunder Hardin v Horger, 252 S C 298, 166 S E 2d 215 (1969) deals with an alleged forfeiture pursuant to the terms of a trust Clardy v Sorvereign Camp, W O W, 193 S C 444, 8 S E 2d 748 (1940) deals with an alleged forfeiture pursuant to the terms of a life insurance policy and constitution and by-laws of an organization In all of those cases, it was alleged that a party forfeited rights pursuant to some written document or money paid In the instant case, the lien that was held by MERS was extinguished by the Master's sale therefore to affirm the Master's ruling would not constitute a forfeiture For these reasons, the Court's Order is correct and should be affirmed

**II The trial court correctly found that no attorney participated in the closing of the \$149,000 00 loan, which was closed on March 21, 2007**

The Master ruled that BAC was also barred from receiving any of the surplus funds pursuant to the principals established in the cases of Wachovia Bank, N A v Coffey, 389 S C 68, 698 S E 2d 211 (Ct App , May 6, 2010), and Matrix Financial Svcs Corp v Frazer, Op No 26859, 2011 WL 3452078 (S C , August 8, 2010) These cases provided that a lender would be barred from equitable and legal relief if the closing of the loan was not supervised by a South Carolina licensed attorney The only evidence presented to the Court was the settlement statement from the closing of March 21, 2007 In its Initial Brief, the Appellant has attempted to introduce additional evidence on this point To do so clearly violates the provisions of Rule 210(c), SCRCF, which provides in part

“the record shall not however include matter which was not presented to the lower Court or tribunal” In its Order of February 3, 2011, the Master stated,

“However as mentioned herein above, in its prior Order this Court gave notice that in the event of a Rule 59 (e) motion, the Court intended to revisit the issue concerning the possible unauthorized practice of law in association with the closing of BAC’s loan and would afford counsel the opportunity to supplement the record concerning this aspect of the matter No one has proffered any further evidence concerning the circumstances of the closing (the original mortgagor, of course, is deceased) and the Court accordingly finds and holds based on the only evidence in the record (a copy of the HUD-1 closing statement) that no attorney participated in the closing ”

In its Order of December 6, 2010, the Master stated, “since there was insufficient evidence at the hearing for the Court to make a conclusive finding as to this issue (referring to lack of attorney supervision) and because the Court has ruled herein on other grounds, the Court declines to rule on this issue at this time Should however a Motion on Rule 59 (e), SRCP be made on any ground, the Court proposes to revisit this issue and on its on Motion will notify counsel to be prepared to submit evidence as to the circumstances of the closing at that Motion hearing” Both parties were on notice that they would be able to submit any evidence concerning attorney supervision at the hearing on January 31, 2011 The Respondent relied on the settlement statement that was produced at the October 28, 2010 hearing The Appellant certainly had ample opportunity to review its file to submit any further evidence at the January 31 hearing, but did not do so Since there was no further evidence submitted, the Master was certainly free to make a decision based on the only evidence presented to the Court

Therefore, the only evidence presented to the lower Court clearly shows that the principals espoused in Coffey and Matrix was violated and therefore BAC should be barred from any equitable or legal remedy

**III The trial court correctly found lack of attorney supervision of the closing on March 21, 2007 conducted by original lender Quicken Loans barred BAC from its claim to the surplus funds**

The Appellant argues that the rulings in Coffey and Matrix should not be extended to an assignee of the mortgage. However, “in South Carolina, it is well established that an assignee stands in the shoes of its assignor.” Twelfth RMA Partners, L P V National Safe Corp, 335 S C 635, 639-40-518 S E 2d 44 (Ct App 1999), Singletary v Aetna Cas & Sur Co., 316 S C 199, 201 447 S E 2d 869, 870 (Ct App 1994). Therefore, if MERS would be barred from recovery due to its illegal or unlawful conduct and/or unclean hands, BAC would likewise be barred.

The Appellant argues that by being a holder in due course it is not barred by this defense. To allow BAC to use its standing as a holder in due course to avoid the rulings of Coffey and Matrix would run contrary to S C Code Ann § 36-3-305 (a) (1)(ii) which preserves as a defense against a holder in due course the illegality of a transaction which renders the obligation a nullity.

The Appellant argues that Coffey and Matrix were cases involving the original lender. It is true that both cases did involve the original lender however there is no language in either opinion that would indicate that the principals espoused by the Court would not be extended to an assignee. The presence of an attorney to supervise and participate in the closing is required in order to protect

and/or benefit the borrower. To allow an assignee to escape that requirement would defeat one of the principals stated by the Court. It would not matter whether the mortgage was assigned or not. The issue to be addressed is the protection of the borrower by the presence of an attorney whether the matter involves the original lender or an assignee.

The Court therefore was correct in ruling that the BAC should be barred from claiming the surplus funds as a result of the absence of attorney supervision and participation in the closing of March 21, 2007.

**IV The trial court correctly found BAC was not a lien holder at the time it filed its claim to the surplus funds**

BAC is attempting to claim status as a lien holder in order to assert its claim to the surplus funds in this matter. The Master correctly ruled that BAC is not entitled to that status. S.C. Code Ann. § 30-7-10 requires that any document creating a lien on any real property must be recorded in order to be valid. The mortgage that was signed as a part of the closing held on March 21, 2007 was recorded and therefore did constitute a lien on the property, which was sold by the Master. As pointed out by the Appellant in its Initial Brief, there was a lien on the mortgaged premises at the time of the point of sale. However, that lien was held by MERS. Rule 71(c), SCRPC does not merely require that a lien exist, the rule requires that the person who files the claim to surplus funds be the person or entity that holds the lien. Clearly, BAC did not hold a lien on the foreclosed property at the time of sale. The purported assignment was not executed by MERS until July 30, 2010. That assignment was therefore executed after the sale and after the delivery of the Master's deed to the successful bidder. In the Order

of February 3, 2011, the Master stated, "a review of the above dates will reveal that at no time did BAC ever own or hold a lien on the subject property" When MERS executed the purported assignment on July 30, 2010, there was no lien to assign That lien was extinguished on July 19, 2010 upon the Court's execution and delivery of the deed to the successful bidder at the foreclosure sale S C Code Ann § 15-39-880

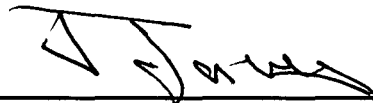
Therefore, the Master correctly ruled that BAC was not a lien holder at the time it filed its claim to the surplus funds

### CONCLUSION

For the foregoing reasons, the Order of the Master should be affirmed and the surplus funds in the amount of \$79,405.25 should be declared the property of the Respondents

Respectfully submitted,

FOX & VERENES



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*Attorney for Respondents*

September 19 2011

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Robert A Smoak, Jr , Master-in –Equity for Aiken County

---

Case No 2010-CP-02-172

---

BAC Home Loan Servicing, L P ,  
f/k/a Countrywide Home Loan Servicing, L P ,  
successor in interest to Defendant  
Mortgage Electronic Registration Systems, Inc  
MIN# 100039032108093192

Appellant,

v

Debra Kinder, Personal Representative of  
The Estate of George William Brelsford, IV  
a/k/a George W Brelsford, and Debra Kinder,  
Personal Representative of the Estate of  
Patricia M Brelsford,

Respondent(s)

---

**DESIGNATION OF MATTER  
TO BE INCLUDED IN RECORD ON APPEAL**

---

Pursuant to Rule 209, SCACR, respondents hereby designates the following matter to be included in the record on appeal in this action


- 1 Amended Summons, filed February 2, 2010,
- 2 Amended Complaint, filed February 2, 2010,
- 3 Amended Lis Pendens, filed February 2, 2010,
- 4 Order of Judgment of Foreclosure and Sale, dated June 15, 2010,
- 5 Master's Report on Sale, filed July 21, 2010,
- 6 Summons, Complaint and Lis Pendens, Civil Action No 2010-CP-02-1951, filed August 18, 2010,

- 7 Assignment of Mortgage recorded August 20, 2010
- 8 Bank of America Corporations Verification of Claim for Surplus Funds, filed September 3, 2010,
- 9 Transcript of October 28, 2010 Surplus Funds Hearing,
- 10 Order Disposing Surplus funds, filed December 6, 2010,
- 11 Motion to Alter or Amend Order Disposing Surplus Funds, filed December 21, 2010,
- 12 Order Denying Motion to Alter or Amend Order Disposing Surplus Funds, filed February 3, 2011,
- 13 Notice of Appeal, filed April 21, 2011,
- 14 Settlement Statement from March 21, 2007 Loan Closing with Quicken Loans, Inc

The undersigned counsel for Respondents Debra Kinder, Personal Representative of The Estate of George William Brelsford, IV a/k/a George W Brelsford, and Debra Kinder, Personal Representative of the Estate of Patricia M Brelsford, certifies that the Designation contains no matter that is irrelevant to the appeal

Respectfully submitted,

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---

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September 19, 2011

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Robert A Smoak, Jr , Master-in -Equity for Aiken County

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Case No 2010-CP-02-172

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BAC Home Loan Servicing, L P ,  
f/k/a Countrywide Home Loan Servicing, L P ,  
successor in interest to Defendant  
Mortgage Electronic Registration Systems, Inc  
MIN# 100039032108093192

Appellant,

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Debra Kinder, Personal Representative of  
The Estate of George William Brelsford, IV  
a/k/a George W Brelsford, and Debra Kinder,  
Personal Representative of the Estate of  
Patricia M Brelsford,

Respondent(s)

---

**PROOF OF SERVICE**

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I certify that I have served the *Initial Brief of Respondent* and *Respondent's Designation of Matter To Be Included In Record on Appeal* on Appellant(s) by depositing a copy of same in the United States Mail, postage prepaid, on September 19, 2011, addressed to Appellant's attorney of record, Sean A O'Connor, Post Office Box 225, Charleston, South Carolina 29402, Charleston, SC 29402

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SC COURT OF APPEALS

BAC Home Loan Servicing, L P , v Debra Kinder, et al  
Case No 2010-CP-02-172  
PROOF OF SERVICE

Respectfully submitted,

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REPLY TO  
P O DRAWER 328  
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September 19, 2011

The South Carolina Court of Appeals  
Tanya A Gee, Clerk of Court  
Post Office Box 11629  
Columbia, SC 29211-1629

RE BAC Home Loan Servicing, L P , v Debra Kinder, et al  
Case 2010-CP-02-0172

Dear Ms Gee

Enclosed please find for filing the *Initial Brief of Respondent* and *Respondent s Designation of Matter To Be Included In Record on Appeal* and the Proof of Service for the above referenced case

If you have any questions or if there is anything further that you need, please do not hesitate to contact me

Sincerely,



Carla Williams, Legal Assistant for  
James L Verenes

JLV/ctw

Enclosure

Cc Sean A O'Connor, Attorney at Law

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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Robert A Smoak, Jr , Master-in-Equity for Aiken County

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Case No 2010-CP-02-172

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BAC Home Loan Servicing, L P ,  
f/k/a Countrywide Home Loan Servicing, L P ,  
successor in interest to Defendant  
Mortgage Electronic Registration Systems, Inc  
MIN # 100039032108093192,

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Debra Kinder, Personal Representative of  
The Estate of George William Brelsford, IV  
a/k/a George W Brelsford, and Debra Kinder,  
Personal Representative of the Estate of  
Patricia M Brelsford,

Respondent(s)

---

**INITIAL BRIEF OF APPELLANT**

---

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**SC Court of Appeals**

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## STATEMENT OF ISSUES ON APPEAL

- I The trial court erred in finding that execution/recording of the assignment subsequent to the sale of foreclosure prevented recovery of the surplus funds by Appellant BAC Home Loan Servicing, L P fka Countrywide Home Loan Servicing, L P , successor in interest to Mortgage Electronic Registration Systems, Inc , MIN# 100039032108093192 (“BAC”)
- II The trial court erred in finding that no attorney participated in the closing on the \$149,000 00 loan which was closed on March 21, 2007, which note and mortgage loan subsequently came to be held by BAC
- III The trial court erred by finding that if no attorney supervised the closing conducted by original lender Quicken Loans, BAC was therefore barred from recovering on its claim for surplus funds
- IV Assuming, *arguendo*, an attorney did not conduct the closing by the original lender, BAC is not barred from recovering the surplus funds

## STATEMENT OF THE CASE

On July 2, 2004, Dr George William "Jeff" Brelsford, VI ("Borrower") executed and delivered a promissory note and mortgage ("Mortgage 1") in the principal sum of Thirty Seven Thousand Dollars and Zero Cents (\$37,000) to Citizens Bank of Effingham ("CBE") CBE caused Mortgage 1 to be recorded on July 6, 2004 at the Aiken County Register of Mesne Conveyance ("RMC") The real property encumbered by Mortgage 1 was known as 117 Club Villa Drive, Aiken, SC, 29803

On March 21, 2007, Borrower delivered a separate and subsequent promissory note to Quicken Loans in the principal sum of One Hundred Forty Nine Thousand Dollars and Zero Cents (\$149,000 00) ("the Note") To better secure the Note, Borrower concomitantly executed and delivered a mortgage ("Mortgage 2") to Mortgage Electronic Registration Systems, Inc ("MERS"), as Nominee for Quicken Loans The real property encumbered by Mortgage 2 was likewise known as 117 Club Villa Drive, Aiken, SC, 29803 The \$149,000 00 loan in connection with Mortgage 2 was closed on March 21, 2007 On April 20, 2007, MERS caused Mortgage 2 to be recorded at the Aiken County RMC

Borrower died on August 11, 2009

After a default occurred on the loan associated with Mortgage 1 due to payments not being timely received, CBE initiated a civil action against Borrower's estate seeking foreclosure of Mortgage 1, Civil Action No 2010-CP-02-00172 The original summons and complaint was filed on January 26, 2010, an amended summons and complaint was filed on February 4, 2010

Both the estate of Borrower and MERS were duly served with a copy of CBE's summons and complaint Neither timely filed or served an answer or other response and both were held to be in default A dispositive hearing was held on May 26, 2010 The Master in Equity for Aiken

County (“Master”) awarded a judgment of foreclosure and sale via order dated June 15, 2010. The judgment determined that the mortgage lien held by MERS was junior and subordinate to the CBE mortgage lien. The judgment further stated, “The Defendants claim or may claim a lien upon on legal interest in subject property and in the event there is a surplus from the sale of the subject property, such Defendant may present any such lien or legal interest at a hearing subsequent to the sale, in accordance with Rule 71(c) South Carolina Rules of Civil Procedure.”

The foreclosure sale occurred on July 6, 2010. The subject property was sold at auction on that date to a third party bidder, one Matthew Fry. The Master issued a Master’s Report on Sale filed July 21, 2010 reflecting that the subject property sold for \$116,000.00 and that following disbursement of costs, a surplus remained in the amount of \$79,405.25 (the “surplus funds”).

MERS assigned Mortgage 2 into BAC by assignment executed on July 30, 2010 and recorded on August 20, 2010 in Book 4320 at Page 1877 in the Aiken County RMC.

On or about August 12, 2010, after a default occurred on the loan associated with Mortgage 2 due to payments not being timely received, BAC initiated a civil action seeking foreclosure of Mortgage 2, Civil Action No. 2010-CP-02-1951. Case no. 2010-CP-02-1951 was not adjudicated and was dismissed on August 30, 2010.

On or about September 3, 2010, BAC filed a Verification of Claim for Surplus Funds in connection with the CBE mortgage foreclosure. The amount of BAC’s outstanding debt on Mortgage 2 at the time of filing the claim was \$144,157.94.

On October 28, 2010, the Master conducted a hearing in regard to disposition of the surplus funds in the amount of \$79,405.25. On December 6, 2010, the Master filed an Order

Disposing Surplus Funds The Master awarded the surplus funds to the estate of Borrower and Borrower's heirs

On December 21, 2010, BAC filed a motion under Rule 59(e), SCRCP seeking to have the Master alter or amend his Order Disposing of Surplus Funds dated December 7, 2010 A hearing was held on the motion in January 31, 2011 The Master denied BAC's Rule 59(e) motion via order filed February 3, 2011 BAC first received written or any notice of the Feb 4, 2011 order on Tuesday, March 22, 2011

On April 21, 2011, BAC timely filed a Notice of Appeal with the South Carolina Court of Appeals

## ARGUMENT

### **I Standard of Review**

An action to foreclose a real estate mortgage is one in equity Dockside Ass'n v Detyens, 294 S C 86, 88, 362 S E 2d 874, 875 (1987) In an equitable action, the appellate court may review the evidence to determine the facts in accordance with its own view of the preponderance of the evidence Hayne Fed Credit Union v Bailey, 327 S C 242, 248, 489 S E 2d 472, 475 (1997) An appellate court is not bound by the trial court's legal conclusions BB&T of South Carolina v Kidwell, 350 S C 382, 387, 565 S E 2d 316, 319 (Ct App 2002), I'On, L L C v Town of Mount Pleasant, 338 S C 406, 411, 526 S E 2d 716, 718-19 (2000), see also S C Const art V, § 5 (providing this state's appellate courts have jurisdiction to correct trial court's erroneous legal findings in law and equity cases), S C Code Ann §§ 14-3-320 and 14-8-200 (1976 & Supp 2001) (providing this state's appellate courts have jurisdiction to correct trial court's erroneous findings of law in equity cases)

**II The trial court erred in finding that execution/recording of the assignment subsequent to the sale of foreclosure prevented recovery of the surplus funds by Appellant BAC**

A Execution/Recording of assignment subsequent to the sale date does not prevent recovery of the surplus funds by BAC

The instant foreclosure sale took place on July 6, 2010. The assignment of the subject mortgage from MERS into BAC was executed on July 30, 2010 and filed with the Aiken County RMC on August 20, 2010. There is no dispute that the subject assignment did occur and that it was recorded more than two months prior to the October 28, 2010 hearing regarding the surplus funds.

Importantly, there is no requirement in South Carolina that a mortgagee in a foreclosure action have a recorded assignment in place prior to a final disposition and sale. “The note is the principal and the mortgage is the incident and follows the note in its delivery from one person to another. When a negotiable note payable to order is indorsed generally by the payee the note and its incident pass in the commercial world by delivery. [t]here is no law in this state that requires assignments of mortgages to be recorded.” Union Nat’l Bank of Columbia v. Cook, 110 S. C. 99, 96 S. E. 484, 486-87 (1918), accord Williams & Co. v. Paysinger, 15 S. C. 171 (1881).

This comports with S. C. Code Ann. § 30-7-10 which makes clear that an instrument is only required to be recorded “so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors), or purchasers for valuable consideration without notice.” S. C. Code Ann. § 30-7-10. “The indexing of recorded mortgages is intended to provide notice to persons making subsequent inquiries.” BB&T of S. Carolina v. Kidwell, 350 S. C. at 389, 565 S. E. 2d at 320. Thus, the statute protects subsequent creditors or purchasers of an instrument who

record an assignment. However, it does not require the current holder of a note to record an assignment of mortgage to receive the benefits of the security instrument. Moreover, the statute is designed, and explicitly states, that it is for the protection of subsequent creditors, not debtors or obligors. Therefore it cannot provide a claim or advantage to an obligor, or a basis to deny relief to a creditor who is the note holder.

Further, while a mortgage is an interest in real property and is not governed by our UCC, the note itself is a negotiable instrument and is covered by UCC Article 3. S C Code Ann. § 36-3-201(1) states in part “Transfer of an instrument vests in the transferee such rights as the transferor has therein.” See also, Twelfth RMA Partners, L P v National Safe Corp., 335 S C 635, 518 S E 2d 44 (Ct App 1999) (“In South Carolina, it is well established that an ‘assignee stands in the shoes of its assignor.’ When a contract is assigned, the assignee should have *all the same rights and privileges*, including the right to sue on the contract, as the assignor. Under the UCC in South Carolina, a ‘[t]ransfer of an instrument vests in the transferee such rights as the transferor has therein.’ S C Code Ann. § 36-3-201 (1976)”) (internal citations omitted)(emphasis added)

In accordance with the case and statutory law outlined here, it is not necessary nor is it required that the holder of a note secured by a mortgage record an assignment in the public records in order to recover surplus funds as a junior lienholder. For these reasons the Master’s Order Disbursing Surplus Funds and his order denying BAC’s motion to alter or amend under Rule 59(e) are in error and should be reversed.

B The existence of the subject mortgage lien held by BAC was a matter of public record.

The existence of the subject mortgage lien held by BAC was made a matter of public record as the MERS mortgage was specifically identified in the Complaint at Paragraph 11 A

Further, Paragraph 16 of the Master's Judgment of Foreclosure and Sale dated June 15, 2010, which identified "Mortgage Electronic Registration Systems, Inc, MIN # 100039032108093192" as a Defendant, states "The Defendants claim or may claim a lien upon on legal interest in subject property and in the event there is a surplus from the sale of the subject property, such Defendant may present any such lien or legal interest at a hearing subsequent to the sale, in accordance with Rule 71(c) South Carolina Rules of Civil Procedure "

Accordingly, no person or entity was prejudiced in any manner by the fact that the assignment of the subject mortgage from MERS into BAC was executed on July 30, 2010 and filed with the Aiken County RMC August 20, 2010, some nine weeks prior to the October 28, 2010 hearing regarding the surplus funds, as the subject lien which was later assigned to BAC was a matter of public record, not only upon its original recording in 2007, but also as referenced in the pleadings and foreclosure judgment in the instant action

Additionally, it is not in dispute that Borrower and/or his estate was aware that the subject Mortgage 2 had been assigned to BAC, as mortgage payments were being directed to BAC up until the time of default on or about January 1, 2010

The Court's order is therefore in error and provides no basis to deny BAC recovery of the surplus funds, and thus should be reversed

C Is not necessary or required that the holder of a note secured by a mortgage record an assignment in the public records in order to establish priority as against the mortgagor

The disposition of surplus funds resulting from a foreclosure sale is governed by Rule 71(c), SCRCF, which provides in part

"[a]ny party to the action or any person who had a lien on the mortgaged premises at the time of sale, upon filing with the master or other officer conducting the sale a claim of entitlement to the surplus fund, may have a hearing to determine such

entitlement [t]he claim must contain the name of the claimant, the nature of the claim, the date the claim arose, and a calculation of the amount claimed ”

In his Order Disposing Surplus Funds dated December 6, 2010, the Master stated as follows

As quoted hereinabove, the rule [71(c) SCRPC] permits a person who had a lien on the mortgage premises at the time of sale to make a claim. A lien is a creature of statute. As to the world at large, a mortgagee does not have a lien on property in this state until he files his mortgage in the appropriate filing office. It is uncontroverted that the mortgage which is the basis for the claimant’s claim was filed, but was filed, and remained in the name of, MERS, at all pertinent times herein. No one examining the public records of Aiken County at the time of the sale or for two months thereafter could have ascertained that the claimant herein claimed to be the lienholder.

Contrary to the position adopted by the Master, it is neither necessary nor required that the holder of a note secured by a mortgage record an assignment in the public records in order to establish priority *as against the mortgagor*. “The object of recording the mortgage is to give notice *to third persons*. The rule is well nigh universal in the United States that, *as between the parties thereto*, the mortgage is just as effectual for all purposes without recording as it is with it.” Bacon v. Northwestern Mutual Life Ins. Co., 131 U.S. 258, 262, 9 S.Ct. 787 (1889)(emphasis added)

It is important to recognize that in this instance, there was, in accordance with Rule 71(c), “a lien on the mortgaged premises at the time of sale.” It was the same mortgage lien which MERS caused to be recorded on April 20, 2007 at the Aiken County RMC. That lien was not released, satisfied, cancelled or otherwise impaired. Nor did the nature or character of the lien or the rights associated with it change in any way when it was assigned from MERS to BAC. “In South Carolina, it is well established that an “assignee stands in the shoes of its assignor.” Twelfth RMA Partners, L.P. v. National Safe Corp., 335 S.Ct. 635, 639-40, 518 S.E.2d 44 (Ct. App. 1999), Singletary v. Aetna Cas. & Sur. Co., 316 S.Ct. 199, 201, 447 S.E.2d 869, 870 (Ct.

App 1994) “When a contract is assigned, the assignee should have all the same rights and privileges, including the right to sue on the contract, as the assignor Under the UCC in South Carolina, a ‘[t]ransfer of an instrument vests in the transferee such rights as the transferor has therein’ S C Code Ann § 36-3-201 (1976)” Twelfth RMA Partners, *supra* “The note is the principal and the mortgage is the incident and follows the note in its delivery from one person to another When a negotiable note payable to order is indorsed generally by the payee the note and its incident pass in the commercial world by delivery [t]here is no law in this state that requires assignments of mortgages to be recorded” Union Nat’l Bank of Columbia v Cook, 110 S C 99, 484, 486-87 (1918), *accord* Williams & Co v Paysinger, 15 S C 171 (1881) “Transfer of an instrument vests in the transferee such rights as the transferor has therein ” S C Code Ann § 36-3-201(1)

This comports with the law in at least one other jurisdiction which has examined this specific issue in a reported decision “[A] person with a vested interest or lien upon the land may assign or convey that interest, and such an assignment or conveyance will be recognized in a surplus money proceeding” Am Holdings Inv Corp v Josey, 899 N Y S 2d 252 (App Div 2010), Chase Manhattan Mtge Corp v Hall, 795 N Y S 2d 67 (App Div 2005)

For these reasons the Court’s order is in error and should be reversed

D The Master’s ruling constitutes a forfeiture which should not be permitted

The fact that the assignment was recorded after the foreclosure sale should have no bearing upon the effectiveness of the mortgage as between mortgagee and its successor in interest (BAC) and Borrower and his successors in interest (estate and heirs) Requiring that a previously recorded mortgage be again recorded in the name of the assignee to avoid a forfeiture as in this instance amounts to an unwarranted elevation of form over substance In this context

the Master's ruling operated to allow Respondents to nullify BAC's valid interest in the property based on a technicality perceived by the Master. As a matter of policy, this result should not stand.

The result of the Master's ruling unquestionably bestowed an unwarranted windfall upon the Borrower's estate and heirs. It is not disputed that Borrower's estate defaulted on the note associated with Mortgage 2 and that there remains an outstanding balance of more than \$144,157.94. Nor is it disputed that BAC gave value for said note and mortgage and became a *bona fide* holder by assignment from Quicken/MERS. It is repugnant to the principles of law and equity for BAC to be barred from recovering the surplus funds and for the Borrower's estate and heirs to receive an unjust windfall. "Forfeitures are not favored in law or equity." Litchfield Co. of S. Carolina, Inc. v. Kiriakides, 290 S.C. 220, 224-25, 349 S.E.2d 344, 347 (Ct. App. 1986), South Carolina Tax Comm'n v. Metropolitan Life Ins. Co., 266 S.C. 34, 221 S.E.2d 522 (1975). "Moreover, forfeitures will be allowed only when intent is clear and no other reasonable construction is possible." Hardin v. Horger, 252 S.C. 298, 166 S.E.2d 215 (1969). "Courts will seize upon even slight evidence to prevent a forfeiture." Clardy v. Sovereign Camp, W.O.W., 193 S.C. 444, 8 S.E.2d 748 (1940). In light of these principles, BAC should be permitted to stand in the shoes of MERS so that it can recover the surplus funds. Law and equity compel that result.

For these reasons the Court's order is in error and should be reversed.

E. The Master failed to determine when the conveyance from Quicken/MERS to occurred.

In finding that BAC did not have a lien in the property at the time of sale, the Master examined only the recorded assignment. While the assignment itself was executed and recorded after the foreclosure sale, the date when MERS delivered the note to BAC was never made part of the record. Because a holder of a note acquires all rights and incidents of the transferor as

stated herein above, the Master erred in finding BAC did not have a lien in the property at the time of sale without making a factual determination as to when the note associated with Mortgage 2 was actually conveyed. If the Court of Appeals is inclined to hold that BAC was required to have a lien on the subject property at the time of the foreclosure sale, it should remand the case to the trial court for a factual determination on this issue.

**III The trial court erred in finding that no attorney participated in the closing on the \$149,000.00 loan which was closed on March 21, 2007, which note and mortgage loan subsequently came to be held by BAC**

During the October 28, 2010 hearing regarding disposition of the surplus funds, the only evidence counsel for Respondents offered the Court to show an attorney did not supervise the closing of the March 21, 2007 loan in connection with Mortgage 2 was a HUD-1 settlement statement that identifies Lender's Services, Inc. (Surplus Funds Hearing Transcript 9 5-7). Counsel for BAC requested on the record that an additional hearing be held in order to present evidence as to whether closing transaction was conducted by an attorney (Surplus Funds Hearing Transcript, 8 17-20).

In his December 6, 2010 Order Disposing Surplus Funds, the Master indicated that he believed the settlement statement was insufficient evidence to rule at that time on the issue of whether an attorney had supervised the closing. The Master chose instead to revisit the issue at the Rule 59(e) motion phase. During the January 31, 2011 hearing on BAC's motion to alter or amend, the Court again heard the parties' arguments on the attorney closing issue. However, no further evidence was admitted into the record. In his February 4, 2011 Order denying BAC's Rule 59(e) motion, the Master again noted there was insufficient evidence to rule on this issue at the time of the December 6, 2010 Order. Yet with no additional evidence having been presented, the Master nonetheless found that no attorney had participated in the closing based on the same

evidence he had previously found insufficient, the HUD-1 settlement statement (Order denying BAC's Rule 59(e) motion, filed February 3, 2011 )

While the settlement statement is stamped with Lender's Services, Inc as the "settlement agent," that information, without more, is insufficient to establish that the closing occurred without the supervision of an attorney Lender's Services regularly acts through persons licensed to practice law in the State of South Carolina At no point was any evidence presented to show that an attorney licensed in South Carolina did not conduct the closing

In fact, BAC is in possession of ample documentary evidence indicating that an attorney was involved in the closing Loan documents which were not available to BAC's counsel at the time of the October 28, 2010 or January 31, 2011 hearings reflect a "Closing Attorney's Statement," which is signed by a "closing attorney" and dated March 21, 2007 The statement indicates that the loan was closed by one Katherine F Kline, an attorney licensed to practice law in South Carolina In addition, on the loan application dated March 14, 2007, Borrower Brelsford lists that same attorney Kline as his preferred counsel

For these reasons the Court's order is in error and should be reversed

**IV Assuming, *arguendo*, an attorney did not conduct the closing by the original lender, BAC is not barred from recovering the surplus funds**

Two recent South Carolina appellate opinions held that a mortgage lienholder was barred from recovering in either law or equity after a mortgage loan was closed without participation by a licensed South Carolina attorney, Wachovia Bank, N A v Coffey, 389 S C 68, 698 S E 2d 244 (Ct App , May 6, 2010), and Matrix Financial Svcs Corp v Frazer, Op No 26859, 2011 WL 3452078 (S C , Aug 8, 2010)

Both opinions are distinguishable from the instant case for several reasons and do not support the position that BAC is barred from recovering the surplus funds in the instant case

In Coffey, the S C Court of Appeals held that a bank which closed a home equity line of credit without attorney supervision—thereby committing the unauthorized practice of law—was barred from all equitable and legal remedies leaving it unable to pursue foreclosure or sue on its note. In Matrix, the S C Supreme Court recognized the same equitable defense in holding that equitable remedies were unavailable to lenders who commit the unauthorized practice of law in the course of a real estate transaction. Matrix further implied that where a lender has engaged in the unauthorized practice of law by closing a loan without attorney supervision, it forfeits all equitable claims concerning that transaction, including those against strangers to the transaction, the prevailing party in Matrix was the holder of a judgment lien against the borrowers.

As a threshold matter, it should be noted that in the substitute opinion in Matrix, which was re-filed August 8, 2011, the South Carolina Supreme Court was unequivocal in stating that the opinion was not to be applied retroactively. “We take this opportunity to definitively state that a lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law. We apply this ruling to all filing dates after the issuance of this opinion.” Matrix, supra. Since the summons and complaint in the foreclosure action from which the instant appeal arises was filed on January 26, 2010, the rule in Matrix which bars recovery by a mortgage lienholder on a loan which was allegedly closed without an attorney cannot and does not apply in the instant case.

Next, it is important to note that in both Coffey and Matrix, the party whose lien rights were forfeited was the same entity which was found to have engaged in the unauthorized practice of law, i.e., the original lender. In neither case was that penalty imposed upon a party who later acquired the loan by assignment for value. Although the S C Supreme Court in Matrix appeared to distance itself from reliance on the doctrine of unclean hands, choosing instead to simply

characterize respondent Matrix's conduct as the unauthorized practice of law,<sup>1</sup> the result for present purposes is the same. Both Wachovia and Matrix were the original lenders. In neither Coffey or Matrix, nor in any reported South Carolina decision before or since, has the forfeiture of lien rights based on having closed a loan without an attorney been imposed upon a subsequent purchaser and assignee of the loan which was not a party to the original transaction.

It is not in dispute that BAC was not the original lender in the instant case and was not involved in any way in the original loan transaction. In fact, at the October 28, 2010 hearing in regard to disposition of the surplus funds, counsel for Respondents acknowledged, "I agree that [BAC] didn't close the transaction, they didn't engage in the unauthorized practice of law." (Surplus Funds Hearing Transcript, 14 23-25)

Coffey and Matrix are distinguishable from the instant case on other grounds as well.

In Matrix, lender brought a foreclosure action against mortgagors. A judgment creditor asserted priority of its enrolled foreign default judgment and the lender, Matrix, sought to be equitably subrogated over a recorded judgment lien held by one Kunding. Matrix had hired a non-lawyer contractor to perform the title search, prepare the closing documents, and close the mortgage refinance loan without the supervision of a licensed attorney. Also, notably, Matrix itself had re-financed its own original loan. Kunding recorded his judgment lien after Matrix's original loan but before the refinance. As stated above, the Supreme Court held that Matrix forfeited all equitable claims due to its unauthorized practice of law. Importantly, however, the Court did not negate Matrix's foreclosure action against the borrowers, the Frazers. It merely barred Matrix's equitable subrogation claim as against the judgment lienholder Kunding.

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<sup>1</sup> We do not believe the doctrine of unclean hands is the appropriate basis for resolution of this case. However, we do agree that even if Matrix met the requirements for equitable subrogation, Matrix would be precluded from receiving that remedy because of its unauthorized practice of law. Matrix, 2011 WL 3452078 (S.C. Aug. 8, 2011).

Matrix's judgment against the Frazers on its foreclosure action was not addressed and the Court was silent as to the availability of legal remedies, i.e., the ability of a lender to recover on a suit on note if barred from foreclosing on its mortgage

In Coffey, the defendant defaulted on a home equity loan which Wachovia had made to her late husband for the purchase of a sailboat Coffey, 389 S C at 76, 698 S E 2d at 248. Prior to his death the defendant's husband had executed a mortgage securing the loan with the couple's home, which was titled in the defendant's name only, not her husband's. Id. An attorney did not oversee the loan closing and Wachovia failed to verify the husband's authority to mortgage the home. Id. After the defendant defaulted on the mortgage, Wachovia brought a foreclosure action against the defendant and claimed unjust enrichment, equitable lien, and prejudgment interest. Id.

The South Carolina Court of Appeals held that the doctrine of unclean hands barred Wachovia's equitable causes of action, Id at 75, while Wachovia's legal causes of action were likewise barred based on the policy of the law that no person be permitted to acquire a right of action from his own unlawful act. Id at 76. In barring Wachovia's legal claims, the Court cited Linder v Ins. Claims Consultants, Inc., 348 S C 477, 560 S E 2d 612 (2002), in which a public adjusting business was not allowed to be compensated for the value of its performance attributable to the unauthorized practice of law.<sup>2</sup> Id. The Court also cited Jackson v Bi-LO Stores, Inc., 313 S C 272, 437 S E 2d 168 (1993), in which a contract to supply hair care products to a chain of stores was secured through bribes was void.<sup>3</sup> Id.

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<sup>2</sup> In Linder an employee insurance adjuster for the defendant Insurance Claims Consultants engaged in the unauthorized practice of law when he advised the plaintiffs regarding the language and interpretation of their insurance policy. Linder 348 S C 477 468 560 S E 2d 612 (2002)

<sup>3</sup> The Court in Wachovia also cited First Union Nat'l Bank of S.C. v. Soden 333 S C 554, 568, 511 S E 2d 372, 379 (Ct. App. 1998) ("The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted

Another factor which operates to distinguish Coffey and Matrix is that in the instant case, BAC is a holder in due course, therefore it took the subject note free from all claims and defenses associated with the original lender allegedly having closed the subject loan without attorney supervision

A “holder in due course” is a person or entity who is a holder of a negotiable instrument, who took it for value, in good faith, without notice that it is overdue or has been dishonored or any defense or claim to it on the part of any person Rosemond v. Campbell, 288 S C 516, 524 (Ct App 1986) A holder in due course of a negotiable instrument takes it free from all claims to it on the part of any person and free from all defenses, including fraud in the inducement and failure of consideration, of a party to the instrument with whom the holder has not dealt Id at 523 If the holder is a holder in due course, the holder takes the instrument free from all claims to it on the part of any other person and free from all defenses of any party to the instrument with whom the holder has not dealt, subject to limited exceptions S C Code Ann §36-3-305 The exceptions are (1) if the transferee is a party to any fraud or illegality affecting the instrument, or (2) as a prior holder, the transferee had notice of a defense or claim against it Thus, a holder in due course is liable for the unclean hands of another Id

Because BAC acquired the note from the original lender without notice of any defense or claim to it on the part of any person, BAC’s status as a holder in due course enables it to defeat the claims to the surplus funds asserted by the Borrower’s estate and heirs

Finally, Respondents should be barred from attacking the validity of BAC’s mortgage lien because they failed to answer and thus defaulted in CBE’s foreclosure action, from which

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unfairly in a matter that is the subject of the litigation to the prejudice of the defendant ) and Arnold v. City of Spartanburg 201 S C 523 523 32 S E 2d 735 738 (1943) ( The expression clean hands means a clean record with respect to the transaction with the defendants themselves and not with respect to others ”)

this appeal arose, in which the complaint asserted the existence and validity of Mortgage 2 and the lien at issue

Illegality is an affirmative defense which must be pled. Rule 8 of the South Carolina Rules of Civil Procedure provides: “In pleading to a preceding pleading, a party shall set forth affirmatively the defenses of illegality and any other matter constituting an avoidance or affirmative defense.” Rule 8, SCRPC. Since Respondents did not answer CBE’s complaint and defaulted, they indisputably failed to plead the affirmative defense of illegality in attacking the validity of BAC’s mortgage lien and were therefore barred from asserting that position in opposing BAC’s claim to the surplus funds. “The appellate courts of this state have said many times that ordinarily a party may not receive relief not contemplated in his pleadings.” Loftis v. Loftis, 286 S.C. 12, 14, 331 S.E.2d 372, 373 (Ct. App. 1985). “While it is true that pleadings must be liberally construed, this rule cannot be stretched so as to permit the judge to award relief not contemplated by the pleadings.” Heins v. Heins, 344 S.C. 146, 152, 543 S.E.2d 224, 227 (Ct. App. 2001). “[T]he failure to plead an affirmative defense is deemed a waiver of the right to assert it.” Collins Entertainment, Inc. v. White, 363 S.C. 546, 563, 611 S.E.2d 262, 270 (Ct. App. 2005).

Nevertheless, the Master in his Order dated February 3, 2011 ruled that BAC was not entitled to recover because the loan was closed illegally, citing S.C. Code Ann. §36-3-305<sup>4</sup>

This ruling by the Master was in error for the reasons explained above and this Court should reverse it. To allow this ruling to stand would permit the Master to torture the meaning and express language of the South Carolina Rules of Civil Procedure in an attempt to implement

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<sup>4</sup> The Master’s Order dated February 3, 2011 stated as follows: “As stated above, §36-3-305 (a) (1) (ii) **preserves as a defense against a holder in due course the illegality** of a transaction which renders the obligation of the party a nullity. Accordingly, the Court finds that the subject closing was conducted illegally and that this defense was properly raised by the parties opposing the motion.” (Emphasis added.)

a flawed vision of what constituted equity and fairness in this instance Courts should not be permitted to torture the language of the Rules in an attempt to further equity and fairness, as “[t]o do so would jeopardize the continuity and uniformity that is essential to the orderly administration of the legal system ” Valentine v Davis, 319 S C 169, 173, 460 S E 2d 218, 220 (Ct App 1995)

For these reasons the Court’s order is in error and should be reversed

**CONCLUSION**

For these and all the foregoing reasons, this Court should reverse the ruling of the Master and award the surplus funds in the amount of \$79,405 25 to BAC

Respectfully submitted,

FINKEL LAW FIRM LLC



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*Attorneys for Appellant*

August 17, 2011

**RECEIVED**  
AUG 19 2011  
SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Robert A Smoak, Jr , Master-in-Equity for Aiken County

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Case No 2010-CP-02-172

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**RECEIVED**

AUG 18 2011

**SC Court of Appeals**

BAC Home Loan Servicing, L P ,  
f/k/a Countrywide Home Loan Servicing, L P ,  
successor in interest to Defendant  
Mortgage Electronic Registration Systems, Inc  
MIN # 100039032108093192,

Appellant,

v

Debra Kinder, Personal Representative of  
The Estate of George William Brelsford, IV  
a/k/a George W Brelsford, and Debra Kinder,  
Personal Representative of the Estate of  
Patricia M Brelsford,

Respondent(s)

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**DESIGNATION OF MATTER  
TO BE INCLUDED IN RECORD ON APPEAL**

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Pursuant to Rule 209, SCACR, appellant hereby designates the following matter to be included in the record on appeal in this action

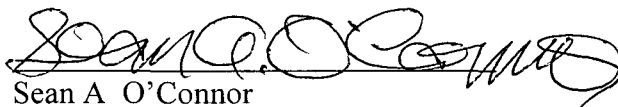
- 1 Amended Summons, filed February 2, 2010,
- 2 Amended Complaint, filed February 2, 2010,
- 3 Amended Lis Pendens, filed February 2, 2010,
- 4 Order of Judgment of Foreclosure and Sale, dated June 15, 2010,
- 5 Master's Report on Sale, filed July 21, 2010,
- 6 Summons, Complaint and Lis Pendens, Civil Action No 2010-CP-02-1951, filed August 18, 2010,
- 7 Assignment of Mortgage, recorded August 20, 2010,

- 8 Bank of America Corporation's Verification of Claim for Surplus Funds, filed  
September 3, 2010,
- 9 Transcript of October 28, 2010 Surplus Funds Hearing,
- 10 Order Disposing Surplus Funds, filed December 6, 2010,
- 11 Motion to Alter or Amend Order Disposing Surplus Funds, filed December 21,  
2010,
- 12 Order Denying Motion to Alter or Amend Order Disposing Surplus Funds, filed  
February 3, 2011,
- 13 Notice of Appeal, filed April 21, 2011

The undersigned counsel for the Appellant BAC Home Loan Servicing, L P , f/k/a  
Countrywide Home Loan Servicing, L P , successor in interest to Defendant Mortgage Electronic  
Registration Systems, Inc MIN # 100039032108093192, certifies that the Designation contains  
no matter that is irrelevant to the appeal

Respectfully submitted,

FINKEL LAW FIRM LLC



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August 17, 2011

Opposing Counsel

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Robert A. Smoak, Jr., Master-in-Equity for Aiken County

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Case No. 2010-CP-02-172

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**RECEIVED**  
AUG 19 2011  
**SC Court of Appeals**

BAC Home Loan Servicing, L.P.,  
f/k/a Countrywide Home Loan Servicing, L.P.,  
successor in interest to Defendant  
Mortgage Electronic Registration Systems, Inc.,  
MIN # 100039032108093192,

Appellant,

v

Debra Kinder, Personal Representative of  
The Estate of George William Brelsford, IV  
a/k/a George W. Brelsford, and Debra Kinder,  
Personal Representative of the Estate of  
Patricia M. Brelsford,

Respondent(s)

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PROOF OF SERVICE

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I certify that I have served the *Initial Brief Of Appellant and Appellant's Designation of Matter To Be Included In Record on Appeal* on Respondent(s) by depositing a copy of same in the United States Mail, postage prepaid, on August 17, 2011, addressed to Respondents' attorney of record, James L. Verenes, 322 Laurens Street, N.W., Aiken, South Carolina, 29801

BAC Home Loan Servicing, L P v Debra Kinder et al  
Case No 2010-CP-02-172  
PROOF OF SERVICE



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*Attorney for Appellant*

August 17, 2011



SEAN A O CONNOR  
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REPLY TO  
CHARLESTON LITIGATION

August 17, 2011

The Honorable Tanya Gee  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RE *BAC Home Loan Servicing LP Appellant v Debra Kinder et al Respondents*  
Case No 2010-CP-02-172  
Our File No 33820 42715  
Case Tracking No 2011191086

Dear Ms Gee

Enclosed for filing as to the above-referenced matter, please find the original and two copies of the *Initial Brief Of Appellant* and *Appellant s Designation of Matter To Be Included In Record On Appeal*, along with a Proof of Service We respectfully request that you please return the filed copies to our office in the envelope provided

Should you have any questions concerning this matter, please do not hesitate to contact our office at your earliest convenience

With kind personal regards, we are

Yours very truly,

FINKEL LAW FIRM

  
Sean A O'Connor

SAO/aa  
Enclosures

cc James L Verenes, Esquire

**RECEIVED**  
AUG 19 2011  
SC Court of Appeals

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# The South Carolina Court of Appeals

BAC Home Loan Servicing, L P , f/k/a  
Countrywide Home Loan Servicing,  
L P , successor in interest to Defendant  
Mortgage Electronic Resgistration  
Systems, Inc , MIN #  
100039032108093192,

Appellant,

v

Debra Kinder, Personal Representative  
of the Estate of George William  
Brelsford, IV a/k/a George W  
Brelsford, and Debra Kinder, Personal  
Representative of the Estate of Patricia  
M Brelsford,

Respondents

The Honorable Robert A Smoak, Jr  
Aiken County  
Trial Court Case No 2010-CP-02-00172

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## ORDER

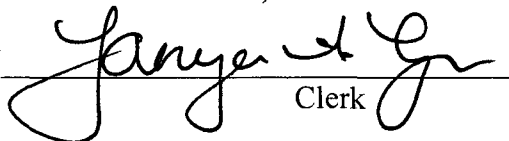
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Pursuant to a conference call with the parties, the due date for the Appellant's Initial Brief and Designation of Matter has been extended to August 17, 2011. The Respondents' Initial Brief and Designation of Matter shall be served and filed by September 19, 2011, and the Appellant's Initial Reply Brief and Designation of Matter are due twenty days thereafter.

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE

BY

  
Clerk

Columbia, South Carolina

cc Sean A O'Connor, Esquire  
James L Verenes, Esquire

**FILED**

*Master 7/5/11*



# The South Carolina Court of Appeals

JOHN CANNON FEW  
CHIEF JUDGE

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TELEPHONE (803) 734 1890  
FAX (803) 734 2573  
E MAIL [jfew@sccourts.org](mailto:jfew@sccourts.org)

June 20, 2011

Sean A. O'Connor, Esquire  
Finkel & Altman, LLC  
P O Box 225  
Charleston, SC 29402

James L. Verenes, Esquire  
Fox & Verenes  
P O Drawer 328  
Aiken, SC 29802-0328

Re BAC Home Loan v Kinder, Debra  
Case Tracking # 2011191086

Dear Counsel

This letter serves as an Order granting Appellant's request for an extension of time in which to file the Appellant's Initial Brief and Designation of Matter. I have extended the due date until July 18, 2011. I realize that this extension may not give you all the time you need to complete the Appellant's Initial Brief and Designation of Matter. I have set a conference call for 10:45 a.m. on Friday, July 1, 2011, to discuss an overall approach to setting due dates for all filings in this appeal.

**The Appellant's Counsel is responsible for initiating the conference call by getting all parties on the phone at the allotted time.** The call should last less than ten minutes. The participants in the call will include counsel for all parties and me. In preparation for the call, please consider the other time commitments you have in the near future so we can discuss a suitable timeframe for all parties to complete their briefs. If the time scheduled for the conference call creates a conflict, please contact the Clerk's Office at 734-1890 with all counsel on the phone. We will reschedule the call to suit you.

I look forward to talking to you on Friday, July 1, 2011.

Sincerely yours,

*John Cannon Few, by Tracy A. G.*  
John Cannon Few

6/23/11  
**FILED**



SEAN A. O'CONNOR  
[SOCONNOR@FINKELLAW.COM](mailto:SOCONNOR@FINKELLAW.COM)

REPLY TO  
CHARLESTON LITIGATION

June 15, 2011

The Honorable Tanya Gee  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RE *BAC Home Loan Servicing LP Appellant v Debra Kinder et al Respondents*  
Case Tracking No 2011191086  
Case No 2010-CP-02-172  
Our File No 33820 42715

Dear Ms Gee

Per the request and instruction of the Clerk's office, enclosed for filing is the original letter by the undersigned dated May 2, 2011, requesting the transcript of the hearing in this matter before the Hon Robert A Smoak, Jr, Master-In-Equity for Aiken County, held on October 28, 2010 at 10 00 a m The requested transcript was received on May 18, 2011

There are no other transcripts comprising the record in this matter, as no court reporter appeared nor was an audio recording made at the later hearing on Appellant BAC's Rule 59(e) SCRCP motion to alter or amend, held on January 31, 2011

Should you have any questions concerning this matter, please do not hesitate to contact our office at your earliest convenience

With kind personal regards, we are

Yours very truly,

FINKEL LAW FIRM LLC

  
Sean A O'Connor

**RECEIVED**  
JUN 17 2011

SAO/jla  
Enclosures

**SC Court of Appeals**

cc James L Verenes, Esquire

**COLUMBIA**  
1201 Main Street Suite 1800  
Post Office Box 1799 (29202)  
Columbia SC 29201  
Tel (803) 765 2935  
Fax (803) 252 0786

**CHARLESTON**  
**Litigation Real Estate & REO**  
3955 Faber Place Drive Suite 200  
Post Office Box 225 (29402)  
North Charleston SC 29405  
Tel (843) 577 5460  
Fax (843) 577 5135

**CHARLESTON**  
**Foreclosure**  
3955 Faber Place Drive Suite 200  
Post Office Box 71727 (29415)  
North Charleston SC 29405  
Tel (843) 577 5460  
Fax (843) 725 0015

*RE BAC Home Loan Servicing LP v Debra Kinder et al*  
*Case No 2010-CP-02-172*  
*Our File No 33820 42715*  
*Page 2*

bcc Teresa A Woods  
Carrie B Daugherty  
Betsy Stucky  
Felisha D Jackson  
Casheena A Chaney

# FINKEL LAW FIRM LLC

SEAN A O'CONNOR  
SOCONNOR@FINKELLAW.COM

REPLY TO  
CHARLESTON LITIGATION

May 2, 2011

VIA REGULAR U S MAIL

Ray Swartz and Associates  
312 N Cedar Street  
Summerville, SC 29483

RE *Citizens Bank Of Effingham vs Debra Kinder Personal Representative of The Estate of George William Brelsford IV a/k/a George W Brelsford Debra Kinder Personal Representative of the Estate of Patricia M Brelsford Dedra Kinder Individually Kathleen Brelsford French Robin Brelsford Landes Mortgage Electronic Registration Systems Inc MIN# 100039032108093192 and Woodside Plantation Property Owners Association*  
Civil Action No 2010 CP-02-172  
Our File No 33820 42715

Dear Sir/Madam

Our firm represents the Appellant in the above-referenced matter Pursuant to Rule 207(a)(1) of the South Carolina Appellate Court rules, please accept this letter as a formal request for a copy of the transcript for the hearing held before the Honorable Robert A Smoak, Jr , Master-In-Equity for Aiken County held on October 28, 2010 at 10 00 a m Said hearing was in regard to a claim by Bank of America Corp for surplus funds following a foreclosure sale

If you require a deposit or advance payment of the anticipated costs, please notify our office in writing so that we may timely remit payment

With kind personal regards, we are

Yours very truly,

FINKEL LAW FIRM LLC

  
Sean A O'Connor

SAO/lms  
Enclosures

**RECEIVED**

JUN 17 2011

**SC Court of Appeals**

**COLUMBIA**  
1201 Main Street Suite 1800  
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Foreclosure  
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North Charleston SC 29405  
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Fax (843) 725 0015

*Re The Estate of George Brelsford  
(Appeal caption Citizens Bank of Effingham vs Debra Kinder et al )  
Civil Action Number 2010-CP 02 0172  
Our File Number 33820 42715  
May 2 2011  
Page 2*

cc Bradley L Boni, Esquire  
P O Box 652  
Aiken, SC 29802

James L Verenes, Esquire  
Fox & Verenes  
P O Drawer 328  
Aiken, SC 29802

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Robert A Smoak, Jr , Master-in-Equity for Aiken County

---

Case No 2010-CP-02-172

---

RECEIVED

JUN 09 2011

SC Court of Appeals

BAC Home Loan Servicing, L P ,  
f/k/a Countrywide Home Loan Servicing, L P ,  
successor in interest to Defendant  
Mortgage Electronic Registration Systems, Inc  
MIN # 100039032108093192,

Appellant,

v

Debra Kinder, Personal Representative of  
The Estate of George William Brelsford, IV  
a/k/a George W Brelsford, and Debra Kinder,  
Personal Representative of the Estate of  
Patricia M Brelsford,

Respondent(s)

---

**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME  
TO SERVE THE INITIAL BRIEF AND DESIGNATION OF MATTER**

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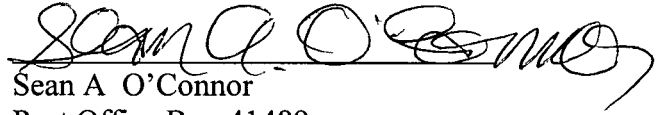
Undersigned counsel for Appellant BAC Home Loan Servicing, L P respectfully moves before the Court for a thirty (30) day extension of time in which to serve the Initial Brief and Designation of Matter The Initial Brief and Designation of Matter are due to be served upon opposing counsel on or before Friday, June 17, 2011 If the requested enlargement is granted, the new due date would be Monday, July 18, 2011

6-17-11 158  
7-18-11

The grounds for this motion are other pressing deadlines of the undersigned  
Respondents, through their counsel of record, have consented to this motion

Respectfully submitted,

FINKEL LAW FIRM LLC



Sean A O'Connor  
Post Office Box 41489  
North Charleston, South Carolina 29423  
Telephone (843) 577-5460  
Facsimile (843) 577-5135  
[soconnor@finkellaw.com](mailto:soconnor@finkellaw.com)

*Attorneys for Appellant*

June 6, 2011

Opposing Counsel

James Verenes, Esquire  
Fox and Verenes  
PO Drawer 328  
Aiken, South Carolina 29802-0328  
Telephone (803) 649-6281  
Fax (803) 641-1216



SEAN A O'CONNOR  
[SOCONNOR@FINKELLLAW.COM](mailto:SOCONNOR@FINKELLLAW.COM)

REPLY TO  
CHARLESTON LITIGATION

June 6, 2011

The Honorable Tanya Gee  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RE *BAC Home Loan Servicing LP Appellant, v Debra Kinder et al Respondents*  
Case No 2010-CP-02-172  
Our File No 33820 42715  
Case Tracking No 2011191086

Dear Ms Gee

Enclosed for filing is Appellants' Motion for Enlargement of Time to Serve the Initial Brief and Designation of Matter in the above-referenced case, along with three copies, which we kindly ask you to file and return in the attached, self-addressed, stamped envelope Enclosed also is check number 5518 in the amount of \$25 00 for the filing fee

Should you have any questions concerning this matter, please do not hesitate to contact our office at your earliest convenience

With kind personal regards, we are

Yours very truly,

FINKEL LAW FIRM

  
Sean A O'Connor

SAO/jla  
Enclosures

cc James L Verenes, Esquire

**RECEIVED**

JUN 09 2011

**SC Court of Appeals**

**COLUMBIA**  
1201 Main Street Suite 1800  
Post Office Box 1799 (29202)  
Columbia SC 29201  
Tel (803) 765 2935  
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**Foreclosure**  
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North Charleston SC 29405  
Tel (843) 577 5460  
Fax (843) 725 0015

154  
6-17-11



# The South Carolina Court of Appeals

TANYA A. GEE  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1015 SUMTER STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE (803) 734 1890  
FAX (803) 734 1839  
www.sccourts.org

May 3, 2011

Sean A. O'Connor, Esquire  
Finkel & Altman, LLC  
P O Box 225  
Charleston, SC 29402

Re Citizens Bank v Kinder, Debra  
Case Tracking # 2011191086

Dear Counsel

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address 1015 Sumter Street, Columbia, S C 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the

notification requirements of Rule 207(a)(5), SCACR also, please advise the Court in writing upon receipt of the transcript

**NOTE** If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S C Code Ann Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases

- 1) any final judgment from the circuit court which includes a sentence of death,
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58,
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance,
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state,
- 5) any final judgment from the circuit court pertaining to elections and election procedure,
- 6) any order limiting an investigation by a State Grand Jury under S C Code Ann Section 14-7-1630,
- 7) any order of the family court relating to an abortion by a minor under S C Code Ann Section 44-41-33

Very truly yours,  
Tanya A Gee  
CLERK

VGA  
TAG/ec

cc James L Verenes, Esquire  
The Honorable LIZ Goddard



# The South Carolina Court of Appeals

TANYA A GEE  
CLERK

V CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11679  
COLUMBIA SOUTH CAROLINA 29211  
1015 SUMTER STREET  
COLUMBIA SOUTH CAROLINA 29201  
TELEPHONE (803) 734 1890  
FAX (803) 734 1839  
www.sccourts.org

May 3, 2011

Sean A O'Connor, Esquire  
Finkel & Altman, LLC  
P O Box 225  
Charleston, SC 29402

Re Citizens Bank v Kinder, Debra  
Case Tracking # 2011191086

Dear Counsel

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

*V Claire Allen, Deputy*

CLERK

TAG/ec

cc James L Verenes, Esquire  
The Honorable Liz Goddard

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM AIKEN COUNTY

Robert A Smoak, Jr , Master-In-Equity

---

Case No 2010-CP-02-172

---

**RECEIVED**  
APR 22 2011

**SC Court of Appeals**

BAC Home Loan Servicing, L P ,  
f/k/a Countrywide Home Loan Servicing, L P ,  
successor in interest to Defendant  
Mortgage Electronic Registration Systems, Inc ,  
MIN # 100039032108093192,

Appellant,

v

Debra Kinder, Personal Representative of  
The Estate of George William Brelsford, IV  
a/k/a George W Brelsford, and Debra Kinder,  
Personal Representative of the Estate of  
Patricia M Brelsford,

Respondent(s)

---

NOTICE OF APPEAL

---

BAC Home Loan Servicing, L P , f/k/a Countrywide Home Loan Servicing, L P  
("BAC") successor in interest to Defendant Mortgage Electronic Registration Systems, Inc ,  
MIN # 100039032108093192 ("MERS"), by and through its undersigned counsel, appeals the  
order of the Honorable Robert A Smoak, Jr , dated Dec 7, 2010, which had denied BAC's claim  
to the surplus funds of \$79,405.25 following a foreclosure by Citizens Bank of Effingham and

BAC Home Loan Servicing, L P v Debra Kinder et al  
Case No 2010-CP-02-172  
NOTICE OF APPEAL

sale to a third party bidder, and instead awarded those funds to the estate of the borrower, and appeals the order dated Feb 4 , 2011, denying BAC's timely motion under Rule 59(e), SCRCP, which sought to alter, amend or set aside Judge Smoak's above-referenced earlier order of Dec 7, 2010

Appellant first received written or any notice of the Feb 4, 2011 order on Tuesday, March 22, 2011, when it was e-mailed to Attorney Sean A O'Connor by Respondents' counsel James L Verenes Neither Attorney O'Connor nor Appellant received a copy of the Feb 4, 2011 order from the court

(SIGNATURE ON FOLLOWING PAGE)

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BAC Home Loan Servicing, L P v Debra Kinder et al  
Case No 2010-CP-02-172  
NOTICE OF APPEAL

Respectfully submitted,

April 21, 2010

  
Sean A O'Connor (SC Bar # 68382)  
FINKEL LAW FIRM LLC  
Post Office Box 225  
Charleston, South Carolina 29402  
Telephone (843) 577-5460  
Facsimile (843) 577-5135  
soconnor@finkellaw.com

Defendants' counsel

James L Verenes  
P O Drawer 328  
Aiken, S C 29802  
803-649-6281  
803-641-1216 (fax)  
jimverenes@aol.com

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Robert A Smoak, Jr , Master-in-Equity for Aiken County

---

Case No 2010-CP-02-172

---

BAC Home Loan Servicing, L P ,  
f/k/a Countrywide Home Loan Servicing, L P ,  
successor in interest to Defendant  
Mortgage Electronic Registration Systems, Inc ,  
MIN # 100039032108093192,

Appellant,

v

Debra Kinder, Personal Representative of  
The Estate of George William Brelsford, IV  
a/k/a George W Brelsford, and Debra Kinder,  
Personal Representative of the Estate of  
Patricia M Brelsford,

Respondent(s)

---

PROOF OF SERVICE

---

I certify that I have served the Notice of Appeal on Respondent(s) by depositing a copy of same in the United States Mail, postage prepaid, on April 21, 2011, addressed to Respondents' attorney of record, James L Verenes, 322 Laurens Street, N W , Aiken, South Carolina, 29801

BAC Home Loan Servicing, L P v Debra Kinder et al  
Case No 2010-CP-02-172  
PROOF OF SERVICE

A handwritten signature in black ink, appearing to read "Sean A. O'Connor". The signature is written in a cursive style with a horizontal line through the middle.

Sean A O'Connor (SC Bar #68382)  
FINKEL LAW FIRM LLC  
Post Office Box 225  
Charleston, South Carolina 29402  
Telephone (843) 577-5460  
Facsimile (843) 577-5135  
soconnor@finkellaw.com  
*Attorney for Appellant*

April 21, 2011



SEAN A. O'CONNOR  
[SOCONNOR@FINKELLLAW.COM](mailto:SOCONNOR@FINKELLLAW.COM)

April 21, 2011

The Honorable Tanya Gee  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

REPLY TO  
CHARLESTON LITIGATION

**RECEIVED**

APR 22 2011

**SC Court of Appeals**

RE *BAC Home Loan Servicing L P Appellant v Debra Kinder et al Respondents*  
Case No 2010-CP-02-172  
Our File No 33820 42715

Dear Ms Gee

Enclosed for filing is Appellants' Notice of Appeal in the above-referenced case, along with three copies, which we kindly ask you to file and return in the attached, self-addressed, stamped envelope Also enclosed are the following

- 1 Proof of Service of the Notice of Appeal,
- 2 A copy of each of the two Orders being challenged, and
- 3 This firm's check numbered 5507 in the amount of \$100 00 for the filing fee

Should you have any questions concerning this matter, please do not hesitate to contact our office at your earliest convenience

Best Regards,

FINKEL LAW FIRM

  
Sean A. O'Connor

SAO/  
Enclosures

cc The Honorable Robert A. Smoak, Jr  
Master in Equity, County of Aiken  
109 Park Avenue SE, Room 211  
Aiken, South Carolina 29801

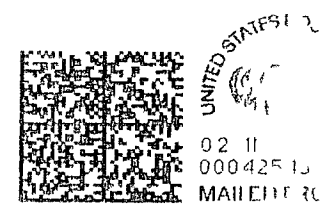
**COLUMBIA**  
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*RE BAC Home Loan Servicing L P v Debra Kinder et al*  
*Case No 2010-CP-02-172*  
*Our File No 33820 42715*  
*Page 2*

James L Verenes, Esquire  
P O Drawer 328  
Aiken, SC 29801

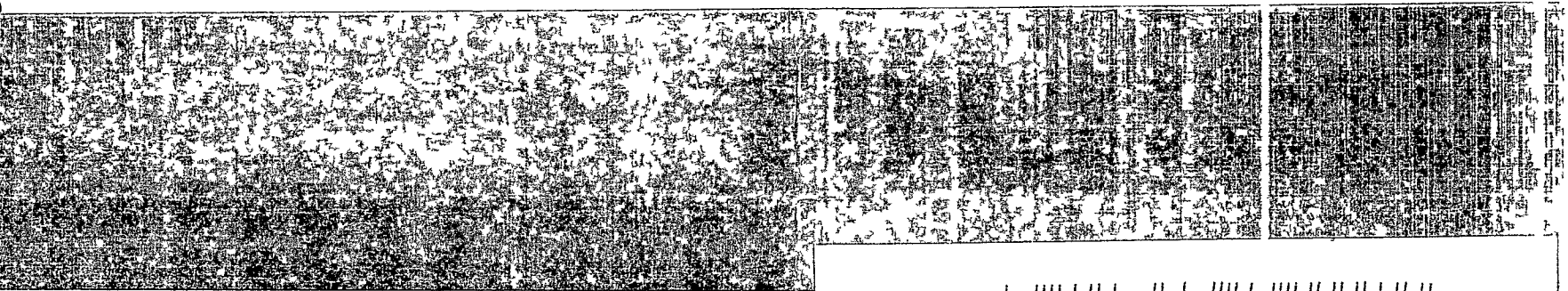
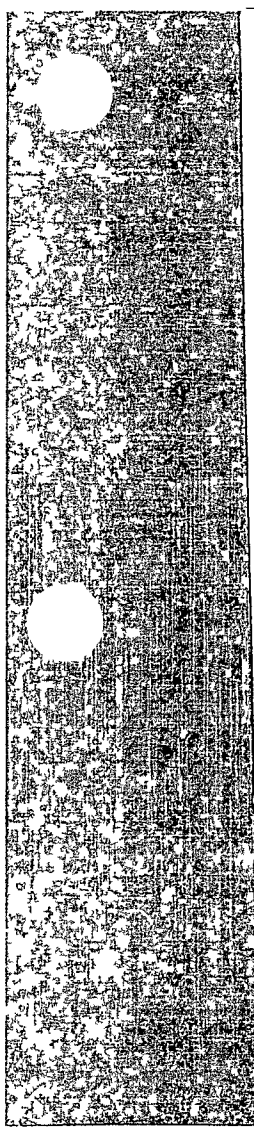


**FINKEL**  
LAW FIRM LLC

P O Box 225  
Charleston SC 29402

**JA 33820 42715**

The Honorable Tanya Gee  
SC Court of Appeals  
Clerk of Court  
1015 Sumner Street  
Columbia South Carolina 29201



STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF AIKEN )

IN THE COURT OF COMMON PLEAS

Citizens Bank Of Effingham )  
 )  
Plaintiff/s, )

CASE NO 2010-CP-02-00172

Vs )

ORDER DISPOSING OF  
SURPLUS FUNDS

Debra Kinder, Personal Representative of )  
The Estate of George William Brelsford, IV )  
a/k/a George W Brelsford Debra Kinder )  
Personal Representative of the Estate of )  
Patricia M Brelsford\*Debra Kinder )  
Individually Kathleen Brelsford French )  
Robin Brelsford Landes Mortgage )  
Electronic Registration Systems, Inc )  
MIN# 100039032108093192 and )  
Woodside Plantation Property Owners )  
Association )

Defendant/s )

FILED 12 6 10  
Liz Godard  
Clerk C P & G S  
Anita Knoepfle 1/50  
Deputy Clerk

Pursuant to a Judgment of Foreclosure and Sale in the within case dated June 15 2010 and after due advertisement according to law the undersigned sold the real estate which secured the subject loan on July 6 2010 to the highest bidder, a non-party to the action After deducting the amounts due to the lender and to the Court, a surplus remains in the amount of \$79 405 25

The disposition of surplus funds resulting from foreclosure sales is governed by Rule 71 (c) of the South Carolina Rules of Civil Procedure which provides inter alia the following (a)ny party to the action or any person who had a lien on the mortgaged premises at the time of the sale upon filing with the master or other officer conducting the sale a claim of entitlement to the surplus fund may have a hearing to determine such entitlement (t)he claim must contain the name of the claimant, the nature of the claim, the date the claim arose, and a calculation of the amount

#1  
12/7/10

STATE OF SOUTH CAROLINA  
COUNTY OF AIKEN  
I Liz Godard Clerk of Court of Common Pleas and General Sessions for Aiken County South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

DEC 07 2010

Liz Godard  
C.C.P. & G. S. Aiken County S.C.  
Anita Knoepfle  
Deputy Clerk

claimed" BAC Home Loan Servicing, L P , f/k/a Countrywide Home Loan Servicing L P successor in interests to Mortgage Electronic Registration Systems Inc MIN #100039032108093192 filed a timely claim in the form prescribed by the Rule in the amount of \$144,157 94

The Court held a hearing concerning the surplus on October 28, 2010 at which counsel for the claimant appeared as did counsel for several of the defendants opposing the claim

The claimant was not a party to this foreclosure action although its predecessor in interest Mortgage Electronic Registration Systems, Inc etc (hereafter 'MERS') was MERS was duly served with the Amended Summons and Complaint herein but did not respond and was held to be in default in the Judgment of Foreclosure and Sale The amended complaint alleged that the mortgage held by this defendant was junior to the mortgage being foreclosed herein

As required by Rule 71 (c) the verified claim submitted by the claimant states the date the claim arose which is represented to be January 1 2010 Date of Default As further required by the rule concerning the nature of the claim the claim states that the subject mortgage was assigned to the claimant herein by assignment recorded August 20 2010 in Book 4320 at Page 1877 (which may be found in the Office of the R M C for Aiken County) This document being relevant to the issue at hand and being of public record, the Court has examined same and finds that the date of execution of this assignment is July 30 2010 and (as stated hereinabove) it was recorded August 20 2010 The undersigned sold the subject property on July 6 2010 some 24 days before the execution of the assignment and 45 days before the assignment was recorded As quoted hereinabove the rule permits a person who had a lien on the mortgage premises at the time of sale to make a claim A lien is a creature of statute As to the world at large a mortgagee does not have a lien on property in this state until he files his mortgage in the appropriate filing office It is

#2  
p45

uncontroverted that the mortgage which is the basis for the claimant's claim was filed but was filed and remained in the name of, MERS, at all pertinent times herein. No one examining the public records of Aiken County at the time of the sale or for two months thereafter could have ascertained that the claimant herein claimed to be the lienholder. As stated above, the lienholder of record at the time of sale had been properly made a party and served with the suit papers but had made no response nor did it attempt to protect its interest by bidding at the sale. The Court has even attempted to give the claimant the benefit of the doubt by ascertaining the actual date of the mortgage assignment as opposed to its date of recordation but even the execution date postdates the date of sale.

For the foregoing reasons, the Court finds and holds that the Claim for Surplus filed on September 6, 2010 was not made by a qualified claimant and is therefore void.


The Court notes that there was considerable discussion at the surplus funds hearing concerning the possibility that the mortgage loan which forms the subject of the claimant's claim may have been closed without any participation therein by a South Carolina licensed attorney in violation of South Carolina law. Since there was insufficient evidence at the hearing for the Court to make a conclusive finding as to this issue and because the Court has ruled herein on other grounds, the Court declines to rule on this issue at this time. Should, however, a motion under Rule 59 (e) be made on any ground, the Court proposes to re-visit this issue and on its own motion will notify counsel to be prepared to submit evidence as to the circumstances of the closing at that motion hearing.

The Court therefore finds that the persons entitled to the surplus funds in the amount of \$79,405.25 are the defendants Debra Kinder, Personal Representative of The Estate of George William Brelsford IV a/k/a George W. Brelsford, Debra Kinder, Personal Representative of the

#3  
rd

Estate of Patricia M Brelsford Debra Kinder Individually Kathleen Brelsford French and Robin Brelsford Landes and the Court is hereby directed to disburse these funds to them through their attorney after the time(s) for filing Rule 59 (e) motions and/or appeal have expired

December 6 2010  
Aiken, South Carolina

  
Robert A Smoak Jr  
Master-in-Equity

#4  
M.J.

**Settlement Statement**  
Optional Form for  
Transactions without Sellers

U S Department of Housing  
and Urban Development

IT# | E STATE

B Approval No 2502 04

Name & Address of Borrower  
George W Brelsford  
  
4 Old South Court 14H  
Bluffton SC 29910


Name & Address of Lender  
Quicken Loans Inc (Lender) 1 800 620-8588  
20555 Victor Parkway  
Livonia MI 48152

Property Location (if different from above)  
117 Club Villa Drive  
Aiken SC 29803

Settlement Agent  
LSI (LENDER S SERVICES INC )  
Place of Settlement 4 Old South Ct 14-H  
Bluffton SC 29910

Loan Number  
3210809319

Settlement Date 03/21/07  
Disbursement Date 03/21/07

801	Loan origination fee % to Quicken Loans	0 00	1301	Survey to	0 00
802	Loan discount 1.25% to Quicken Loans	1 862 50	1302	Post inspection to	0 00
803	Appraisal DON TOOLE AND ASSOC (K22) (04) 8000	315 00	1303	Sub Agree to	0 00
804	Credit report to KFD (Kroll Factual Data)	7 37	1304	Tax Related Service Fee	0 00
805	Inspection fee to	0 00	1305a	Document Preparation	0 00
806	Wire Fee	0 00	1305b		
807	Flood Life of Loan Coverage First American	5 00	1307	Express Mail/Courier Fee	45 00
808	Flood Cert Fee First American Flood	10 50	1308	Debts to be paid(per addendum)	0 00
809	Underwriting Fee to Quicken Loans Inc	495 00	1309	Taxes Owed	0 00
810	Processing Fee to Quicken Loans Inc	575 00	1310	Escrow Holdback	0 00
811	CLO Fee to Lending Tree (LPOC) 700 00*	0 00	1311	VOD/VOM/VOR to	0 00
812					
813					
814					
888	TSI Appraisal Services	80 00	1501	COUNTRYWIDE HOME LOANS	82 450 95
901	Int from 03/21/2007 to 04/01/2007 @ \$ 26 90 per day 11 days	295 90	1502	CITIZENS BANK	30 462 95
902	Mortgage insurance premium for _____ months to		1503		
903	Hazard insurance premium for 1 year(s) to State Farm	0 00	1504		
904	Flood insurance to	0 00	1505		
905			1506		
1001	Hazard insurance 9 mos @ \$ 74 67 per mo	672 03	1507		
1002	Mortgage insurance mos @ \$ per mo		1508		
1003	City property taxes 8 mos @ \$ 169 84 per mo	1 358 72	1509		
1004	County property taxes mos @ \$ per mo				
1005	Annual assessments mos @ \$ per mo				
1006	mos @ \$ per mo				
1007	mos @ \$ per mo				
1008	Aggregate Acct Adjustment mos @ \$ per mo	74 74			
1101	Settlement or closing fee to LSI (LENDER S SERVIC	525 00	* LPOC Fee has been paid by Quicken Loans 		
1102	Abstract or title search to LSI (LENDER S SERVIC	235 00			
1103	Title examination to LSI (LENDER S SERVIC	0 00			
1104	Title insurance binder to LSI (LENDER S SERVIC	0 00			
1105a	Doc Preparation to	0 00			
1105b	Deed Preparation to	0 00			
1106	Notary fees to	0 00			
1107	Attorneys fees to (includes above item numbers)	0 00			
1108	Title insurance to LSI (LENDER S SERVIC (includes above item numbers)	190 88			
1109	Lender's coverage \$ 149 000 00	0 00			
1110	Owner's coverage \$	0 00	1600	Loan Amount	\$ 149 000 00
1111	Additional Closing Fee	0 00	1601	Plus Deposit Previously Received	\$ 400 00
1112	Coordination/Binder Fee to LSI (LENDER S SERVICES INC )	0 00	1602	Minus Total Settlement Charges (line 1400) * POC Not in Total	\$ 6 701 16
1113	Adtl Endorsement Fee	75 00	1603	Minus Total Disbursements to Others (line 1520)	\$ 112 913 90
1114			1604	Equals Disbursements to Borrower (after expiration of any applicable rescission period required by law)	\$ 29 784 94
1201	Recording fees	28 00	Borrower(s) Signature(s)		
1202	City/county tax/stamps	0 00	X George W Brelsford X		
1203	State tax/stamps	0 00			
1204	Assignment Fee	0 00			
1205	(Misc) Rec /Trans Cost	0 00			
1206					
1207					
1208					

**Citizens Bank Of Effingham vs Debra Kinder**

CHECK ONE.

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

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

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

Dated at Aiken South Carolina this 7th day of December 2010

Court Reporter

\_\_\_\_\_  
PRESIDING JUDGE -

This judgment was entered on the 7th day of December 2010 and a copy mailed first class this 7th day of December 2010 to attorneys of record or to parties (when appearing pro se) as follows

**Bradley L Bont** P O Box 652 Aiken SC 29802

**James L Verenes Fox & Verenes** P O Drawer 328  
Aiken SC 29802-0328  
**Joseph T Merli Finkel Law Firm** P O Box 71727  
North Charleston SC 29415  
Master

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)  
*Liz Godard by W. Ruppel*  
Liz Godard - Clerk of Court

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF AIKEN )

IN THE COURT OF COMMON PLEAS

Citizens Bank Of Effingham, )  
 )  
 )  
Plaintiff/s, )

CASE NO 2010-CP-02-00172

Vs )  
 )

ORDER

Debra Kinder, Personal Representative of )  
The Estate of George William Brelsford, IV )  
a/k/a George W Brelsford, Debra Kinder, )  
Personal Representative of the Estate of )  
Patricia M Brelsford, Debra Kinder, )  
Individually, Kathleen Brelsford French, )  
Robin Brelsford Landes, Mortgage )  
Electronic Registration Systems, Inc )  
MIN# 100039032108093192, and )  
Woodside Plantation Property Owners )  
Association )  
 )  
Defendant/s )

STATE OF SOUTH CAROLINA  
COUNTY OF AIKEN  
I, Liz Godard, Clerk of Court of Common Pleas and General  
Sessions for Aiken County South Carolina do hereby certify  
that the foregoing constitutes a true and correct copy of the  
original documents which have been filed in my office, this  
4 day of February, 2011  
Liz Godard  
C.C.P. & G.S. Aiken County S.C.  
Angel Miles  
Deputy Clerk

FILED 3 February 2011  
Liz Godard  
C.C.P. & G.S.  
3:10pm Angel Miles  
Deputy Clerk

Before the Court at this time is a motion made pursuant to Rule 59 (e) of the S C Rules of Civil Procedure wherein BAC Home Loan Servicing, L P f/k/a Countrywide Home Loan Servicing, L P ("BAC") successor in interest to defendant Mortgage Electronic Registration Systems, Inc MIN# 100039032108093192 ("MERS") seeks the alteration or amendment of this Court's Order Disposing of Surplus Funds dated December 6, 2010 Present at the motion hearing were Sean A O Connor of the Finkel Law Firm, LLC, attorney for the movant and James L Verenes, attorney for the defendants opposing the motion

After reviewing the articulate arguments made at the hearing for, and against, the motion and the appropriate matters referenced therein, the Court finds, holds and orders as follows

#1  
MERS

In the above referenced Order of December 6, 2010, the Court ruled that the claimant, BAC was not qualified to make a valid claim for the surplus because BAC was not a party to the action or a person who had a lien on the mortgaged premises at the time of sale as specifically required by Rule 71 (c) of the South Carolina Rules of Civil Procedures, which governs the disposition of surplus funds resulting from foreclosure sales. The Court further noted that there had been considerable discussion at the initial surplus funds hearing concerning the possibility that the mortgaged loan had been closed without any participation therein by a South Carolina licensed attorney, in violation of state law, a subject which has attracted intense scrutiny from our appellate courts in the past few months. The subject order stated that since it was based on other grounds and that the court felt that there was insufficient evidence in the record at that time to rule on the attorney issue, the court proposed to revisit this issue only in the event that any Rule 59 (e) motion were to be made on any ground, and that counsel would be afforded the opportunity to supplement the record accordingly. The present motion was timely made after the subject Order and both issues are back before the Court at this time.

BAC's arguments against the Court's Rule 71 (c) ruling that BAC lacked the standing to make a claim under the Rule may be summarized as follows. First, BAC's predecessor in interest did hold a valid lien against the mortgaged property at the time of sale (which is uncontroverted because the predecessor in interest, MERS, was made a party to the foreclosure for that very reason, and its lien was known to all of the other parties). Second, it was not necessary for the assignment of the mortgage to have been recorded (citing the Union National Bank of Columbia case, etc. and the recording statutes, which are meant to cut off the rights of subsequent creditors or purchasers and the failure to record does not give rise to any defense on the part of debtors or obligors). Those defendants opposing BAC's claim are the personal representative, devisees and/or

#2  
M.S.

descendants of the original debtor/obligor, who is deceased) Third, citing from S C U C C Section 36-3-201 and case law based thereon, BAC asserts that it stepped into the shoes of the predecessor in interest when the assignment was finally effected, which presumably included the right to file a claim for the surplus in this case

As to the unauthorized practice of law issue, BAC seeks to distinguish the present case from the two extremely important decisions made in 2010 by our appellate courts, the Coffey and Matrix cases, on the ground that in each of those cases, the party held to be in violation of the unclean hands doctrine was the original lender, whereas in the present case BAC is the assignee of the original lender, which insulates BAC from any defense of a party to the instrument with whom it has not dealt, citing the Rosemond v Campbell case In support of this position, BAC further asserts that it is a holder in due course of the note giving rise to its claim and declares that this status means that it took the note free from all defenses of any party to the instrument with whom the holder has not dealt subject to (inter alia) an exception if the transferee is a party to any fraud or illegality affecting the instrument

At this time it will be helpful to review the chronology of events pertinent to this matter The underlying foreclosure action was commenced by the filing of the Lis Pendens and Summons and Complaint on January 8, 2010 The judicial sale pursuant to the foreclosure took place on July 6 2010 at which a third party was the high bidder The bidder made his required deposit on the day of sale and paid the remaining balance due on July 19, 2010, at which time the Court executed and delivered a Master's Deed (Title to Real Estate) to the subject property to the bidder On July 30, 2010, MERS, the predecessor in ownership of the loan which forms the basis for BAC's claim, purported to assign the subject mortgage and the note which it secured to BAC This assignment was recorded on August 20 2010

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A review of the above dates will reveal that at no time did BAC ever own or hold a lien on the subject property. The lien of its mortgage (and that of the first mortgage being foreclosed in this action) were extinguished on July 19, 2010 upon the Court's execution and delivery of its deed to the purchaser. There was no lien to assign in the purported subsequent assignment dated July 30, 2010. Since a mortgage is merely an instrument which creates a lien on specific property to secure an indebtedness, all the assignment transferred, as to the mortgage, was an empty shell since the lien no longer existed. As mentioned hereinabove, BAC claims to be the holder in due course of the note which the mortgage once secured. The note itself is not of record herein, and there is little or no evidence that it is in fact a negotiable instrument and if so, that it was properly negotiated to BAC. Nevertheless, assuming that the subject note is a negotiable instrument and that BAC is the holder in due course thereof, BAC took the note together with such rights as the transferor had therein, per § 36-3-201, including, possibly the right to apply for ownership of some or all of the surplus funds herein to apply to the indebtedness.\*

However, as mentioned hereinabove, in its prior Order this Court gave notice that in the event of a Rule 59 (e) motion, the Court intended to revisit the issue concerning the possible unauthorized practice of law in association with the closing of BAC's loan and would afford counsel the opportunity to supplement the record concerning this aspect of the matter. No one has proffered any further evidence concerning the circumstances of the closing (the original mortgagor, of course, is deceased) and the Court accordingly finds and holds based on the only evidence in the record (a copy of the HUD-1 closing statement) that no attorney participated in the closing. This clearly brings the matter under the recent Coffey and Matrix cases which hold that creditors in such cases are barred from enforcing any equitable or legal remedies therein because of unclean hands.

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(See paragraph at foot of page 6 and top of page 7 below.)

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not in

As stated hereinabove BAC asserts that its holder in due course status protects it from any defense as to this issue because any unclean hands were those of its predecessor in ownership of the subject loan and not its own. In support of this assertion, as stated above, BAC claims that §36-3-305 contains few exceptions to the basic rule that a holder in due course takes the instrument free from all defenses of any party to the instrument with whom the holder has not dealt, one of the exceptions being (quoting from BAC's motion) " (1) if the transferee is a party to any fraud or illegality affecting the instrument " ) The language in the motion does not accurately reflect the language in the statute, of which the pertinent part reads " the right to enforce the obligation of a party to pay an instrument is subject to the following

(1) a defense of the obligation based on

(ii) – duress, lack of legal capacity or illegality of the transaction which, under other law nullifies the obligation of the obligor )

The 2008 revision of the statute substantially rewrote it and, among other things, eliminated the language in the prior version including " defense of any party to the instrument with whom the holder has not dealt " Even the prior version of the statute, which included language as to the illegality of the transaction being an exception, does not limit the illegality to illegality to which the transferee is a party

The recent Coffey and Matrix decisions have sent a resounding message to mortgage lenders and originators that the Buyer's case and subsequent cases mean what they say and violations thereof may carry severe consequences

Both of the cases state unequivocally that such violations constitute not only unclean hands but unlawful acts (emphasis added) As stated above, §36-3-305 (a) (1) (ii) preserves as a defense against a holder in due course the illegality of a transaction which renders the obligation of the

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M

party a nullity. The words illegal and unlawful are synonymous. Accordingly, the Court finds that the subject closing was conducted illegally and that this defense was properly raised by the parties opposing the motion. The Court notes that Chapter 3 of Title 36 does not contain a definition of the word "obligor" (the defense referenced above is reserved to obligors). The parties opposing the motion herein admittedly are not debtors under the subject note because they did not obligate themselves to pay it, either originally or by assumption, and therefore are not obligors per se. Nevertheless, it is inconceivable that the General Assembly in revising §36-3-305, intended to cut off a valid defense owned by an obligor at the time of his death, upon his death, thus depriving his beneficiaries from raising same in order to preserve their interests in property belonging to him at his death.

Finally, as to this issue the Court finds that the movants' reliance on the language extracted from the Rosemond case is unwarranted. A review of the cases cited in Rosemond in support of the language shows that the only South Carolina cases cited precede the implementation in South Carolina of the U C C by several decades. Furthermore, the Rosemond case actually arose out of a credit sale transaction governed by the Consumer Protection Code and not the U C C since the note in the Rosemond case was non-negotiable and the holder was not a holder in due course.

In summary the Court denies the motion herein and continues in effect its Order dated December 6, 2010 as supplemented herein.

As to the first issue, the standing of BAC to file a claim, the Court reiterates its finding and holding in its Order Disposing of Surplus Funds as if set forth verbatim herein, and further finds that not only is there no evidence that BAC's predecessor in interest, MERS, specifically assigned its right to pursue the surplus funds under Rule 71 (c), SCRCF, to BAC, it does not appear that the drafters of the civil procedure rules ever contemplated such an assignment after the

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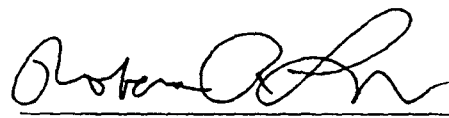
extinguishment of the lien BAC never held a lien on the property, the sale of which generated the surplus funds it is now seeking

As to the second issue, unauthorized practice of law/unclean hands, the Court finds that the loan was closed unlawfully, or illegally as stated in §36-3-305 (a) (1) (ii), that this defense penetrates the holder in due course armor claimed by BAC, and this defense survived the death of the obligor and was properly raised by his beneficiaries who are entitled to the surplus funds

The court is again ordered to disburse the surplus funds herein as directed in its Order dated December 6, 2010

IT IS SO ORDERED

February 3 2011  
Aiken, South Carolina

  
\_\_\_\_\_  
Robert A. Smoak, Jr  
Master-in-Equity

#7  
M.S.

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

JUDGMENT IN A CIVIL CASE  
CASE NO 2010CP0200172

**Citizens Bank Of Effingham vs Debra Kinder**

CHECK ONE

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

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

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

Dated at Aiken, South Carolina, this 4th day of February, 2011

Court Reporter

\_\_\_\_\_  
**PRESIDING JUDGE**

This judgment was entered on the 3rd day of February 2011 and a copy mailed first class this 4th day of February 2011 to attorneys of record or to parties (when appearing pro se) as follows

Bradley L Boni P O Box 652 Aiken SC 29802

Copy to Master

James L Verenes Fox & Verenes P O Drawer 328 Aiken SC 29802 0328

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Sean A O Connor Turner Padgett Graham & Laney PA P O Box 22129 Charleston SC 29413 2129

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

*Liz Godard by Angel Miles*  
\_\_\_\_\_  
Liz Godard Clerk of Court