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**Oct 19 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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Appeal from Marion County  
Court of Common Pleas

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The Honorable W. Haigh Porter, Special Referee

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Case Number 2019-CP-33-00853  
Appellate Case No. 2021-00340

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Avatar Partners CT, LLC, .....Respondent,

-v-

HSGCHG Investments, LLC f/k/a Carolina  
Entertainment Complex, LLC, Partners 95  
LLC, Oil Barons, Inc., and Robert D.  
Hartmann, Sr. .... Appellants

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APPELLANTS' FINAL BRIEF

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Louis H. Lang, SC Bar No. 3127  
CALLISON TIGHE & ROBINSON, LLC  
1812 Lincoln St., Ste. 200  
PO Box 1390  
Columbia SC 29202-1390  
Telephone: 803-404-6900  
Facsimile: 803-404-6902  
Email: [louislang@callisontighe.com](mailto:louislang@callisontighe.com)  
**ATTORNEYS FOR APPELLANTS**

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**STATEMENT OF ISSUES ON APPEAL**

**I.**

**Did the Circuit Court err in denying Appellants' Motion to Dismiss or in the Alternative for an Equitable Stay when the issues in this case are virtually identical to a foreclosure action then pending in Connecticut involving the same debt and the same parties and, alternatively, did the Circuit Court err in denying Appellants' an equitable stay when such stay was justified by circumstances which outweighed any potential harm to Avatar?**

**II.**

**Did the Special Referee err in concluding Appellants' affirmative marshalling of assets defense is not supported by South Carolina law when it clearly is?**

**III.**

**Did the Special Referee err in not dismissing the Respondent's foreclosure action when it is undisputed that the Respondent does not own the entire interest in the mortgage it seeks to foreclose?**

**IV.**

**Did the Special Referee err in admitting into evidence a letter from Respondent's counsel to Appellants' counsel which was the basis of Respondent's debt amount testimony when no proper foundation was laid for the admission of the letter?**

**V.**

**If foreclosure of Respondent's mortgage is ordered, did the Special Referee err in concluding the request to sell Appellants' property in lots or parcels was not supported by South Carolina law?**

## **STATEMENT OF THE CASE**

Respondent, Avatar Partners CT, LLC (“Avatar”) filed its Complaint on December 17, 2019 (Complaint, ROA 155).

Appellants, HSGCHG Investments, LLC, f/k/a Carolina Entertainment Complex, LLC, Partners 95, LLC, Oil Barons, Inc., and Robert D. Hartmann, Sr. (collectively “Appellants”), filed their Notice of Motion and Motion for Dismissal under Rule 12(b)(8), SCRPC, or Alternatively for an Equitable Stay, on March 20, 2020 (Motion to Dismiss, ROA 48), which was denied by Order entered June 30, 2020 (Order Denying Motion to Dismiss, ROA 24). Appellants filed their Answer on July 13, 2020 (Answer, ROA 145).

The case was referred to the Honorable W. Haigh Porter as Special Referee for Marion County by Order entered July 14, 2020 (Order of Reference, ROA 22). The case was tried on December 14, 2020, and the Special Referee’s Order and Judgment of Foreclosure and Sale was entered on March 1, 2021 (Order and Judgment of Foreclosure and Sale, ROA 1).

Appellants timely filed their Notice of Appeal on March 31, 2021 (Notice of Appeal, ROA 30).

## **STATEMENT OF FACTS**

This foreclosure action involves approximately 248.52 acres in Marion County, South Carolina.

### **Facts pertinent to Issue on Appeal I.**

Avatar’s Complaint, filed December 17, 2019, alleges that Appellants Partners 95, LLC, Oil Barons, Inc., and HSGCHG Investments, LLC, signed and delivered a promissory note dated January 22, 2015, for \$2,000,000.00<sup>1</sup>, the payment of which was secured by a mortgage on

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<sup>1</sup> The principal amount of the note and mortgage was later increased to \$3,500,000.00. Order and Judgment of Foreclosure and Sale, ROA 6.

property in Marion County, South Carolina. (Compl. ¶¶ 6 and 7, ROA 155 - 156). Avatar further alleges on the same day the \$2,000,000.00 note was signed, Appellant, Robert D. Hartmann, Sr. signed and delivered a “Recourse Guaranty” agreement, guaranteeing payment of the note by Appellants, Partners 95, Oil Barons, Inc., and HSGCHG Investments, LLC, (Compl. ¶ 19, ROA 160). Avatar sought a declaration by the Court of the amount due under the note, foreclosure of the mortgage, a deficiency judgment against the note makers, a judgment against Hartmann under the “Recourse Guaranty,” and recovery of certain personal property it allegedly has perfected liens against. (Compl. Prayer for Relief, ¶¶ 1, 2, and 4, ROA 162).

Nearly six months before this lawsuit was filed, on June 20, 2019, Avatar filed an action in Superior Court, New Haven Judicial District, Connecticut, naming these same Appellants as Defendants (Connecticut Lawsuit). (*See* Exhibit “A” to Motion to Dismiss, ROA 53).

The Connecticut Lawsuit alleges that Appellants, Partners 95, LLC, Oil Barons, Inc., and HSGCHG Investments, LLC signed and delivered the same promissory note dated January 22, 2015, for \$2,000,000.00, the payment of which was secured by a mortgage on property in East Haven and Branford, Connecticut. (Connecticut Lawsuit Compl. ¶¶ 6, 7 [the Connecticut Lawsuit Complaint has two paragraph 7’s], ROA 54 - 55). The Connecticut Lawsuit Complaint further alleges on the same day the \$2,000,000.00 note was signed, Appellant, Robert D. Hartmann, Sr., signed and delivered the same “Recourse Guaranty” agreement, as alleged in this lawsuit, guaranteeing payment of the note by Appellants, Partners 95, LLC, Oil Barons, Inc., and HSGCHG Investments, LLC. (Connecticut Lawsuit Compl. ¶ 9 [the Connecticut Lawsuit Complaint has two paragraph 9’s], ROA 55). The Connecticut Lawsuit Complaint seeks foreclosure of the East Haven and Branford mortgages, a deficiency judgment against the \$2,000,000.00 note makers, and a judgment against Robert D. Hartmann, Sr., under the “Recourse Guaranty.” (Connecticut

Lawsuit Compl. Prayer for Relief, ¶¶ 1 [the Connecticut Lawsuit Complaint has two paragraph 1's] and 2, ROA 69 - 70).

In response to the Connecticut Lawsuit Complaint, on December 5, 2019, Appellants filed an Answer, asserting five “Special Defenses,” and eleven Counterclaims. (*See* Exhibit “B,” attached to the Motion to Dismiss, ROA 85).

As set out in Appellants’ Motion to Dismiss, from the filing of Appellant’s Connecticut Lawsuit Answer to the filing of Appellants’ Motion to Dismiss in this case, there were 22 additional docket entries in the Connecticut lawsuit, the last noted occurring on March 18, 2020, with a hearing scheduled for March 23, 2020. (*See* Exhibit “C,” a copy of the “Superior Court Case Look-up” available on-line, which includes the referenced docket entries which total 58, attached to Appellants’ Motion to Dismiss, ROA 141).

Facts Pertinent to Issue on Appeal II.

Testimony at the foreclosure hearing by Appellant, Robert D. Hartmann, Sr., the Appellants’ principal, included his opinion that the developed Marion County property would be worth well over \$50,000,00.00. Joe McMillan also testified on behalf of Appellants as to his expert opinion as a real estate broker that the Marion County property was worth \$42,080,000.00. (Order and Judgment of Foreclosure and Sale, ¶¶ 28 and 29, ROA 11). The Order and Judgment of Foreclosure and Sale determined the debt owed under the note and mortgage to be \$5,387,468.34, through December 14, 2020. (Order of Foreclosure and Sale, ¶¶ 42 and 43, ROA 13).

Facts Pertinent to Issue on Appeal III.

The note secured by the mortgage Avatar seeks to foreclose is dated January 22, 2015, recorded January 23, 2015, in the ROD for Marion County. (Order and Judgment of Foreclosure and Sale, ROA 1).

The original mortgagor was not Avatar, but a separate entity, Avatar Capital Finance, LLC. On January 23, 2015, immediately after Avatar's mortgage was signed and recorded, by assignment recorded in the Marion County ROD at book 318, page 61 on the same day (First Assignment), Avatar Capital Finance, LLC assigned its interest in the mortgage to 18 individuals and entities in varying percentages, these percentages adding up to 100% of the interest formerly held by Avatar Capital Finance, LLC. (Order and Judgment of Foreclosure and Sale, ROA 1, and Avatar Ex. No. 6, ROA 400).

By assignment dated February 19, 2016, recorded March 11, 2016, in Marion County ROD at book 334, page 195 (Second Assignment), the same individuals and entities, in the same percentages as the First Assignment, assigned their respective interests back to Avatar Capital Finance, LLC. (Order and Judgment of Foreclosure and Sale, ROA 1, and Avatar Ex. No. 6, ROA 400).

By assignment dated March 11, 2016, recorded July 19, 2016, in the Marion County ROD at book 347, page 81 (Third Assignment), Avatar Capital Finance, LLC, assigned its interest in the mortgage Avatar seeks to foreclose to 24 individuals and entities. However, in doing so, Avatar Capital Finance, LLC assigned only 99.40343% of its interest in the mortgage Avatar seeks to foreclose, retaining .59657%. (Order and Judgment of Foreclosure and Sale, ROA 1, and Avatar Ex. No. 6, ROA 400).

By assignment dated February 27, 2019, recorded November 13, 2019, in the Marion County ROD at book 476, page 292 (Fourth Assignment), the individual and entity assignees under the Third Assignment, assigned their respective interests to Avatar. However, in doing so, a .7143% interest in the note and mortgage remained unassigned. (Order and Judgment of Foreclosure and Sale, ROA 1, and Avatar Ex. No. 6, ROA 400). Avatar holds a 98.68913% interest

in the mortgage it seeks to foreclose, leaving two individuals or entities owning the balance of the mortgage – 1.31087%.

Facts Pertinent to Issue on Appeal IV.

Avatar’s exhibit number 12 is a letter dated December 7, 2020, addressed to Appellants’ counsel, and begins with the sentence, “[o]ur firm has been instructed to provide you with a quote for the amount required to pay off the above-referenced loan as of December 14, 2020.” There follows a table showing what purports to be the pay-off of the loan secured by the mortgage Avatar seeks to foreclose. (Avatar Ex. No. 12, ROA 484). Attached to the letter is a third page which appears to be a summary of the debt Avatar asserted was secured by its mortgage.

As further explanation of what Avatar’s exhibit number 12, Avatar’s witness testified that it was “... a letter authored by you [Avatar’s counsel] addressed to [Appellants’ counsel] and it is a Statement of Account for the payoff on this loan.” (Trans. of Dec. 14, 2020, hearing, p. 25, ROA 190). When asked to further clarify what Avatar’s exhibit number 12 was, Avatar’s witness said the letter “... was prepared by Carla Stadler, in our office, who reports to me, and I reviewed it with her, and it was prepared from the records that we maintain as a Servicer of this loan.” (Trans. of Dec. 14, 2020, hearing, p. 26, ROA 191). Avatar’s witness was then asked if “those records are maintained in your regular course of business as a loan services...” to which he responded “[t]hat’s correct.” (*Id.*).

Appellants objected to the admission of Avatar’s exhibit number 12, asserting that the document was not prepared in the ordinary course of Avatar’s business and that it was not the ordinary practice of Avatar to prepare such a document. Avatar’s exhibit number 12 was admitted over Appellant’s objection and forms the basis for the proof of the amount Avatar asserts is owed

under the note, the payment of which is secured by the mortgage Avatar seeks to foreclose. (Trans. of Dec. 14, 2020, hearing, ROA 191 - 193).

Facts Pertinent to Issue on Appeal V.

Appellants' exhibit number 1 is a Broker's Opinion of Value, regarding which Joe McMillan testified at the December 14, 2020, hearing. (Appellants' Ex. No. 1, ROA 494 - 497, and Trans. of December 14, 2020, hearing, ROA 235 - 253).

As shown in Appellants' exhibit number 1, supported by the testimony of Mr. McMillan and Mr. Hartmann, the property encumbered by the mortgage Avatar seeks to foreclose is being subdivided into several tracts – an 11.32- acre commercial tract, an 8.42-acre entertainment venue tract, a 7.42-acre community village tract, a 19-acre recreational vehicle park, a 39-acre multi-family housing tract, and 636 single family home lots. Appellants requested the property be sold by tracts, to maximize the sales proceeds realized from any foreclosure sale. The Special Referee refused, saying such request was not “supported under South Carolina law.” (Order and Judgment of Foreclosure and Sale, ROA 12).

**STANDARDS OF REVIEW**

This is a foreclosure action, with affirmative defenses sounding in equity. Regarding all but the evidentiary issues, this Court has jurisdiction to find facts in accordance with its own views of the preponderance of the evidence. *Townes Asso., Ltd. v. Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 776 (1976).

Regarding the evidentiary issue, the admission of evidence is within the discretion of the trial court. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005).

## ARGUMENT

### I.

**The Circuit Court erred in denying Appellants' Motion to Dismiss or in the Alternative for an Equitable Stay because the issues in this case are virtually identical to a foreclosure action then pending in Connecticut involving the same debt and the same parties and, alternatively, the Circuit Court erred in denying Appellants an equitable stay because such a stay was justified by circumstances which outweighed any potential harm to Avatar.**

Rule 12(b)(8), SCRCF, provides a case may be dismissed if “another action is pending between the same parties for the same claim.” Our courts have interpreted Rule 12(b)(8), and its predecessor statute, narrowly, applying it only when there is an identity of the parties, causes of action and relief. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 106, 674 S.E.2d 524, 531 (Ct. App. 2009) (citations omitted).

The parties to this action and the Connecticut Lawsuit are identical. This action and the Connecticut Lawsuit seek enforcement of the payment provisions of the same note and guaranty. To enforce either, Avatar must establish the amount owed under the note and guaranty. Both actions sought a deficiency judgment against the makers of the note.

The only difference between the two lawsuits is the collateral – property in South Carolina and Connecticut. Appellants respectfully assert that the Connecticut Lawsuit is so substantially similar to this action, that under Rule 12(b)(8), this action should have been dismissed and the Circuit Court erred in not doing so.

“[Rule 12(b)(8)] applies where the parties, subject matter and remedies are precisely the same, and ... also where they are only substantially the same.” *Id.*, quoting *Beatty v. Liberty Mut. Ins. Group*, 893 N.E.2d 1079, 1084 (Ind. App. Ct. 2008).

Accordingly, Appellants respectfully request the Order and Judgment of Foreclosure and Sale be reversed and the case dismissed.

As an alternative to dismissal, Appellants asked the Circuit Court for an equitable stay. “An equitable stay may be invoked if justified by circumstances which outweigh any potential harm to the party against whom it is operative. In making this determination, the court ‘must weigh competing interest and maintain an even balance.’” *Marine Bros., Inc. v. Marine Midland Realty Credit Corp.*, 307 S.C. 213, 216, 414 S.E.2d 167, 169 (1992), quoting *United States Central Building Supply, Inc. v. Wilke*, 685 F.Supp. 936, 938 (D.C. Md. 1988).

The Connecticut Lawsuit was filed nearly six months before this lawsuit. Based on the docket entries, the parties to the Connecticut Lawsuit had engaged in extensive motion practice and some discovery before this lawsuit was filed. The Connecticut Lawsuit sought establishment of the same debt this lawsuit sought, a deficiency judgment and a judgment on the same guaranty.

Further, the Appellants asserted in the Connecticut Lawsuit, five “Special Defenses” (which appear comparable to our affirmative defenses) and eleven counterclaims. Appellants argued to the Circuit Court they should not be put to the expense of litigating virtually the same facts and law in two courts in different states separated by over seven hundred miles. Appellants also argued that Avatar would suffer no prejudice if this case was stayed – it too will not have been put to the expense of litigating the same facts and issues in different courts separated by hundreds of miles.

Appellants respectfully submit the Circuit Court erred in denying their Motion to Dismiss and, upon that denial, further erred in denying them an equitable stay. Appellants respectfully request the Order and Judgment of Foreclosure and Sale be reversed, and the action dismissed. Alternatively, Appellants respectfully request the Order and Judgment of Foreclosure and Sale be

reversed, and the matter returned to the Special Referee to be held in abeyance under an equitable stay until the Connecticut Lawsuit has been disposed of.

## II.

### **The Special Referee erred in concluding Appellants' affirmative marshalling of assets defense is not supported by South Carolina law because it clearly is.**

The Master found that Appellants' "equitable defenses of marshalling assets ... [is] not supported under South Carolina law." (Order and Judgment of Foreclosure and Sale, ROA 11). This is error.

Appellants' Third Defense asserted Avatar should have to marshal their assets, i.e., the Marion County property and the Connecticut property, because the value of the Marion County property exceeds the debt under the note Avatar seeks to enforce by its Connecticut and South Carolina actions.

South Carolina recognizes the doctrine of marshalling assets. *Strickland v. Chaplin*, 199 S.C. 203, 18 S.E. 2d 736 (1942).

"The doctrine of Marshaling Assets is defined as an equitable principal upon which the legal rights of creditors are controlled in order to accomplish an equitable distribution of funds in accordance with the superior equities of different parties entitled to share therein." Schwartz, *Marshaling Assets for Benefit of Mortgagor*, 5 Notre Dame Law Review 208 (Jan. 1, 1930).

Schwartz goes on to opine that:

The old idea that securities would not be marshalled at the request of the debtor is no longer unqualifiedly true if ever was. As far as mortgagors are concerned, the statement that the debtor has no right to have securities marshalled is generally made in such a manner as to suggest that the mortgagor is a person not entitled to any consideration: i.e., he is given a lien on his property, and if he does not pay the debt, he is not to be permitted to offer any suggestion to the mortgage concerning its collection.

*Id.* at 210.

This is the equitable principal under which Appellants submitted the Special Referee should proceed, but which he rejected.

Testimony at the hearing by Appellant, Robert D. Hartmann, Sr., the Appellants' principal, included his opinion that the developed Marion County property would be worth well over \$50,000,00.00. Joe McMillan also testified on behalf of Appellants as to his expert opinion as a real estate broker that the Marion County property was worth \$42,080,000.00. (Order and Judgment of Foreclosure and Sale, ¶¶ 28 and 29, ROA 11, and Trans. of December 14, 2020, hearing, ROA 250).

Either figure is well over the debt to which Avatar's representative testified. Because Avatar sought in South Carolina and seeks in Connecticut to enforce its security agreements against property in both states, and because the South Carolina property exceeds the debt amount Avatar may enforce, Appellants established that Avatar should be compelled to marshal its assets, selling only sufficient encumbered assets to satisfy its debt.

The Special Referee erred in concluding otherwise. Appellants respectfully request the Order and Judgment of Foreclosure and Sale be reversed in this respect, and the case remanded to the Special Referee with directions to require the marshaling of the encumbered assets and the sale of only such assets as a sufficient to satisfy the debt.

### III.

**The Special Referee erred in not dismissing the Respondent's foreclosure action because it is undisputed that Avatar does not own the entire interest in the mortgage it seeks to foreclose.**

Avatar asserts in its foreclosure complaint it is "the present lien holder of the..." mortgage it seeks to foreclose. It may be "a" lien holder, but it is not the only lien holder, a matter brought to the Special Referee's attention during the trial and at the close of the evidence wherein

Appellants requested the Special Referee dismiss Avatar's complaint on this basis. (Trans. of December 14, 2020, hearing, ROA 215 - 216 and ROA 294). In addressing this issue, the Special Referee says Avatar's "testimony indicates that it was its belief that all interest in [its mortgage] had been assigned [to it] at the time the foreclosure was commenced." The Special Referee goes on to say that "if any fractional interest remains outstanding, it is due to administrative oversight and not the intent of the parties." Finally, the Special Referee concludes Avatar is the "real party in interest" and therefore has standing to foreclose a mortgage it does not completely own, and that it "would not be difficult to obtain any assignments needed to effectuate a 100% assignment of the mortgage" Avatar seeks to foreclose. (Order and Judgment of Foreclosure and Sale, ROA 9 - 10).

Based on the documents admitted at trial, Avatar Capital Finance, LLC still owns a .59657% interest in the mortgage because of the failure of the Third Assignment to convey all of Avatar Capital Finance, LLC's interest in the mortgage to third parties. In addition, the Fourth Assignment failed to convey the .7143% interest in the mortgage from Theodore B. Smith, III, IRA #2015255268 to Avatar.<sup>2</sup>

This issue is not one of standing, it is one of proof and the failure of that proof. A plaintiff, even a lender, should not be allowed to plead it is the owner and holder of a mortgage, when the proof establishes that it is not the only owner and holder of the mortgage.

Appellants respectfully request the Order and Judgment of Foreclosure and Sale be dismissed.

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<sup>2</sup> Appellants were mistaken at trial, asserting a 3.457167% interest in the mortgage remained in Avatar Capital Finance, LLC. (Trans. of Dec. 14, 2020, hearing, ROA 216).

#### IV.

**The Special Referee erred in admitting into evidence a letter from Respondent's counsel to Appellants' counsel which was the basis of Appellants' debt amount testimony because no proper foundation was laid for the admission of the letter?**

Rule 803(6), SCRE, provides an exception to the hearsay rule for certain documents that can be shown to be,

A memorandum, report, records, etc., in any form, of acts, events, conditions, or diagnoses, are admissible as long as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court.

There is no testimony that Avatar's exhibit 12, which forms the only basis for Avatar's proof of the debt, was prepared in the regular course of Avatar's business. Avatar's exhibit 12, dated December 7, 2020, a week before the December 14, 2020, foreclosure hearing, is simply a letter from Avatar's counsel to Appellants' counsel containing a summary of the debt Avatar claims is due under the note, the payment of which is secured by the mortgage it seeks to foreclose. There is no testimony this letter was "prepared near the time of the event recorded," or was "prepared in the regular course of" Avatar's business.

The attachment to the letter is similarly lacking in foundation for admission into evidence. When asked to explain the letter, Avatar's witness described it as "... a letter authored by you [Avatar's counsel] addressed to [Appellants' counsel] and it is a Statement of Account for the payoff on this loan." (Trans. of Dec. 14, 2020, hearing, p. 25, ROA 190). When asked to further clarify what Avatar's exhibit number 12 was, Avatar's witness said the letter "... was prepared by Carla Stadler, in our office, who reports to me, and I reviewed it with her, and it was prepared from the records that we maintain as a Servicer of this loan." (Trans. of Dec. 14, 2020, hearing, p. 26,

ROA 26). Avatar's witness was then asked if "those records are maintained in your regular course of business as a loan servicer..." to which he responded "[t]hat's correct." (*Id.*).

Appellants respectfully submit this is an insufficient foundation for admission of Avatar's exhibit number 12 because there is no testimony that the letter, or its attachment, was prepared in the ordinary or regular course of Avatar's business or that it was the regular practice of Avatar to prepare such a document. It was, therefore, improperly admitted and cannot support live testimony regarding its contents.

There being no other documentary evidence of the debt Avatar asserted was secured by the mortgage it sought to foreclose, Appellants respectfully submit the testimony of Avatar's witness based on Avatar's exhibit number 12 was inadmissible hearsay. "We hold Rule 803(6) does not apply to admit live testimony offered to prove the contents of a recording containing hearsay when that record is not offered in evidence." *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 72, 773, S.E.2d 607, 614 (Ct. App. 2015).

The Special Referee erred in admitting Avatar's exhibit number 12 and, there being no other evidence of the debt amount claimed by Avatar to be secured by the mortgage it seeks to foreclose, the Order and Judgment of Foreclosure and Sale should be reversed, and the case dismissed.

## V.

**If foreclosure of Respondent's mortgage was ordered, the Special Referee erred in concluding that Appellants' encumbered property be sold in lots or parcels because such a request was not supported by South Carolina law.**

The Special Referee ruled that "... while a foreclosure sounds in equity, [Appellants'] ... request to divide and sell the property as separate parcels [is] not supported under South Carolina law."

Appellants respectfully submit this is error.

It has heretofore been the uniform practice, as well as a generally sanctioned discretionary power of a Court of Equity, in cases of the foreclosure and sale of real property mortgages to order the whole mortgaged property sold, or in some cases so much as may be necessary to satisfy the mortgage debt, costs, and expenses, and for this purpose may direct that lands be divided and sold in lots or separate parcels.

*Watson v. Fowler*, 165 S.C. 288, 297, 163 S.E. 640, 643 (1932), quoting *Prudential Ins. Co. v. Lemmons, et al.*, 159 S.C. 121, 155 S.E. 591 (1930). Cited with approval in *Fed. Land Bank of Cola. v. Wood*, 284 S.C. 505, 327 S.E.2d 360 (Ct. App. 1985)

The Court has the discretion to sell property in foreclosure by lots or parcels to maximize the return for the lender and minimize the loss for the borrower.

The testimony of Appellants' broker and Appellants' principal establish the South Carolina property can be sold in lots or parcels to maximize the value of the property thus sold and minimize the loss to the Appellants.

Given the circumstances, Appellants respectfully submit if the Court affirms the other aspects of the Order and Judgment of Foreclosure and Sale, it should, nevertheless, return the case to the Special Referee with directions that the Special Referee sell the South Carolina property at foreclosure by lots or parcels.

### **CONCLUSION**

Appellants respectfully request the following relief:

As to Issue on Appeal I, reverse the Circuit Court and dismiss this case or, alternatively reverse the Circuit Court and remand the case with instructions to stay the case pending disposition of the Connecticut Lawsuit.

As to Issue on Appeal II, reverse the Order and Judgment of Foreclosure and Sale in part, and remand with instructions to direct Avatar to marshal the encumbered assets and to sell only such assets as are sufficient to satisfy Avatar's debt.

As to Issue on Appeal III, reverse the Order and Judgment of Foreclosure and Sale, and dismiss Avatar's Complaint.

As to Issue on Appeal IV, reverse the Order and Judgment of Foreclosure and Sale, and dismiss Avatar's complaint.

As to Issue on Appeal V, reverse the Order and Judgment of Foreclosure and Sale in part, and remand the case with instructions to sell the property by lots or parcels.

Respectfully submitted,

/s/ Louis H. Lang

Louis H. Lang, SC Bar No. 3127

CALLISON TIGHE & ROBINSON, LLC

Post Office Box 1390

Columbia, South Carolina 29202-1390

Telephone: 803-404-6900

[LouisLang@callisontighe.com](mailto:LouisLang@callisontighe.com)

ATTORNEYS FOR APPELLANTS

October 19, 2021  
Columbia, South Carolina