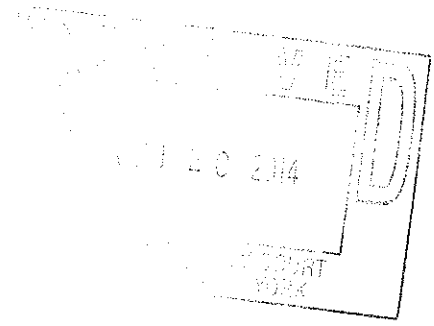
Docket #0060 Date Filed: 6/20/2014

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June 18, 2014

Clerk of Court
United States Bankruptcy Court
Southern District of New York
One Bowling Green
New York, NY 10004-1408

RE: NO. 12-12020 RESIDENTIAL CAPITAL, LLC
ADV. CASE: 12-01936-mg

Dear Clerk:

Enclosed, please find the *PLAINTIFF'S OBJECTION TO DECLARATION OF LAUREN GRAHAM DELEHEY, CHIEF LITIGATION COUNSEL FOR THE RESCAP LIQUIDATING TRUST, IN SUPPORT OF DEBTORS' MOTION FOR DISMISSAL OF ADVERSARY PROCEEDING PURSUANT TO BANKRUPTCY RULE 7012(B) AND FRCP 12(B)(1) AND 12(B)(6) OR, IN THE ALTERNATIVE, PERMISSIVE ABSTENTION PURSUANT TO 28 U.S.C. §1334(C)(1)* and *PLAINTIFF'S REPLY IN OPPOSITION TO rescap liquidating TRust's Supplemental Brief in support of DEBTORS' MOTION FOR DISMISSAL OF ADVERSARY PROCEEDING PURSUANT TO BANKRUPTCY RULE 7012(b) AND FRCP 12(b)(1) AND 12(b)(6) OR, IN THE ALTERNATIVE, PERMISSIVE ABSTENTION PURSUANT TO 28 U.S.C. §1334(c)(1)* to be filed in the above referenced matter.

Thank you for your assistance.

Sincerely,

Jennifer L. Wilson

1212020140701000000000006

Jennifer L. Wilson, *Sui Juris*
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UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Jennifer L. Wilson, Plaintiff, v. Residential Capital, LLC, et al., Defendants.	ADV. CASE: 12-01936 CASE NO: 12-12020
In re RESIDENTIAL CAPITAL, LLC et al., Debtors.	Chapter 11 Jointly Administered

PLAINTIFF'S REPLY IN OPPOSITION TO RESCAP LIQUIDATING TRUST'S SUPPLEMENTAL BRIEF IN SUPPORT OF DEBTORS' MOTION FOR DISMISSAL OF ADVERSARY PROCEEDING PURSUANT TO BANKRUPTCY RULE 7012(B) AND FRCP 12(B)(1) AND 12(B)(6) OR, IN THE ALTERNATIVE, PERMISSIVE ABSTENTION PURSUANT TO 28 U.S.C. §1334(C)(1)

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TO THE HONORABLE MARTIN GLENN UNITED STATES BANKRUPTCY JUDGE:

INTRODUCTION

01. Plaintiff, Jennifer L. Wilson ("Wilson"), submits this Reply in opposition to Debtor's Supplemental Brief in support of its Motion to Dismiss as instructed by the Court at the hearing on May 1, 2014.

02. The Court established the issues to be addressed; 1) does Ms. Wilson's Complaint get res judicata effect in this court; or 2) has Ms. Wilson raised sufficient allegations of fraud in the procurement of the judgment; and 3) if so, whether this Court grants relief or whether she has to go back to the North Carolina state court to do that. "So I want that addressed in the brief."[1]

03. The Court acknowledged Wilson's allegation of fraud upon the state court[2] at the hearing. Therefore, any failure by Wilson to allege fraud upon the state court in the Complaint is supplanted.

04. Wilson has concurrently filed herewith "PLAINTIFF'S OBJECTION TO DECLARATION OF LAUREN GRAHAM DELEHEY, Chief Litigation Counsel for the ResCap Liquidating Trust, IN SUPPORT OF DEBTORS' MOTION FOR DISMISSAL OF ADVERSARY PROCEEDING PURSUANT TO BANKRUPTCY RULE 7012(b) AND FRCP 12(b)(1) AND 12(b)(6) OR, IN THE ALTERNATIVE, PERMISSIVE ABSTENTION PURSUANT TO 28 U.S.C. §1334(c)(1)" ("Obj. Delehey Declaration"). Wilson makes reference to the Delehey Declaration periodically in the following.

[1] See CT p. 50, l. 25, and p. 51, ll. 1-6.
[2] See CT p. 50, ll. -24 ("Here, the allegation is that there was a fraud on the court, the state court, in connection with the mortgage foreclosure with respect to the representations that were made as to who owned or held the note.")

FRAUD ON THE STATE COURT BARS APPLICATION OF RES JUDICATA

05. Preclusion may be cited as "Claim Preclusion" and is synonymous in some jurisdictions with "Res Judicata". Preclusion may also be cited as "Issue Preclusion" and is synonymous in some jurisdictions with "Collateral Estoppel."

06. It is decided The Full Faith and Credit Act, 28 U.S.C. S 1738, requires that federal courts "give a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984).

07. However cited, the doctrine of Preclusion may only be applied to decision of a legal or equitable issue, by a court of competent jurisdiction.

08. A court of competent jurisdiction "is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have a standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into court with clean hands. He must be frank and fair with the court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matters in controversy should be placed before the court. Story's Equity Jurisprudence, 14th ed., § 98." (*Keystone Driller Co. v. General Excabator Co.*, 290 U.S. 240, 244 (Dec. 4, 1933); and *Shawkee Mfg. v. Hartford Co.*, 322 U.S. 271, 273 (May 15, 1944)).

09. "The unclean hands doctrine derives from the equitable maxim that 'he who comes into equity must come with clean hands.' This maxim 'closes the doors of a court of equity to one tainted with inequitableness or bad faith and relative to the matter in which he seeks relief, however improper may have been

the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity'*Bein* v. *Heath,* 6 How. 228, 247. Thus while 'equity does not demand that its suitors shall have led blameless lives,' *Loughran* v. *Loughran,* 292 U.S. 216, 229, as to other matters, it does require that they shall have acted fairly and without **fraud or deceit** as to the controversy in issue. *Keystone Driller Co.* v. *General Excavator Co.,* 290 U.S. 240, 245; *Johnson* v. *Yellow Cab Co.,* 321 U.S. 383, 387; 2 Pomeroy, Equity Jurisprudence (5th Ed.) §§ 379-399. This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is 'not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.' *Keystone Driller Co.* v. *General Excavator Co., supra,* 245, 246. Accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. **Any willful act** concerning the cause of action which rightfully can be said **to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor.**" (*Precision Inst. Mfg. Co. v. Automotive Maintenance Mach. Co.,* 324 U.S. 806, 814 (1945); also see *Web-Adviso v. Trump,* 927 F. Supp. 2d 32, 48 (2013))[3] (Emphasis added).

FRAUD ON THE COURT ALLEGATIONS ARE SUFFICIENT

10. Debtor asserts one of the findings of the Superior Court "is the identity of the holder of the Note, which it found to be SunTrust Bank. (See Debtor's Supplemental Brief ¶ 7)

[3] Residential Funding Company, LLC ("RFC") knew, pursuant to the Supplemental Prospectus and the Assignment and Assumption Agreement, it owed a duty to oversee all servicing activities and any outsourcing will not relieve the master servicer of any of its responsibilities or liabilities under the pooling and servicing agreement. (See Obj. Delehey Declaration ¶¶ 04 and 08.) Therefore, RFC must have possessed prior knowledge of the fraudulent acts being perpetrated on the state court by its agent SunTrust Bank.

11. North Carolina law is clear "Ownership is not indespensible to holdership." (*In re Cooke*, 246 S.E.2d 801, 805 (1978)

12. "Possession" means "The fact of having or holding property in one's power; the exercise of dominion over property. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object." (Black's Law 8th ed.)

13. It "is the fact of possession which is significant in determining whether a person is a holder, and the absence of possession defeats that status," *see In re Foreclosure of Connolly*, 63 N.C. App. at 550, 306 S.E.2d at 125, "[m]ere possession" of a note by a party to whom the note has neither been indorsed nor made payable "*does not suffice* to prove ownership or holder status. *See Econo–Travel Motor Hotel Corp.*, 301 N.C. at 203, 271 S.E.2d at 57 (emphasis added)." (*In re Adams*, 693 S.E.2d 705, 710 (2010).[4]

14. ""[T]he type of fraud necessary to sustain an independent action attacking the finality of a judgment is narrower in scope than that which is sufficient for relief by timely motion" under Rule 60(b)(3) for fraud on an adverse party. *Gleason,* 860 F.2d at 558. "'[F]raud upon the court' as distinguished from fraud on an adverse party is limited to fraud which seriously affects the integrity of the normal process of adjudication." *Id.* at 559 (citing *Kupferman v. Consol.*

[4] Since the NOTE was payable to SunTrust Mortgage, Inc. d/b/a Sun America Mortgage, Inc an Assignment of the Note and Deed of Trust transferring ownership interest from SunTrust Mortgage, Inc. d/b/a Sun America Mortgage, Inc. (assignor) to SunTrust Bank (assignee) was necessary to obtain an order of the court authorizing the foreclosure. Although technically accurate the statement in the Delehey Declaration at ¶ 14 "The Assignment does not appear to have been recorded in Cabarrus County Register" it is not wholly accurate. Counsel for SunTrust Bank, either on their own initiative or at the direction of SunTrust Bank, filed the Assignment of the Note and Deed of Trust in the Superior Court Cabarrus County. A certified to be a true and correct copy, by the Superior Court Cabarrus County, of the Assignment is filed in the record of the United States District Court Western District North Carolina Case No. 3:10-cv-00573, Dkt. # 15-7. Absent the filing of the Assignment, the Superior Court could not make the determination SunTrust Bank was the holder. Therefore, the filing of the assignment was necessary to complete the scheme, thereby perpetrating fraud upon the court to secure an order of foreclosure. RFC in its supervisory role of sub-servicers knew or should have known these facts. (See Obj. Delehey Declaration ¶¶ 4 & 8).

Research & Mfg. Corp., 459 F.2d 1072, 1078 (2d Cir. 1972)). Fraud upon the court should embrace "only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner **its impartial task** of adjudging cases." *Hadges,* 48 F.3d at 1325 (quoting *Kupferman,* 459 F.2d at 1078 (internal quotation marks omitted)). Fraud upon the court **must be established by clear and convincing evidence**. *See Madonna v. United States,* 878 F.2d 62, 65 (2d Cir.1989)." (*King v. First Amer. Invest., Inc.*, 287 F.3d 91, 95 (Mar. 2002)) (Emphasis added).

COURT MAY GRANT RELIEF, SET ASIDE STATE COURT JUDGMENT FOR FRAUD UPON THE COURT

15. "Fraud on the court is not your "garden-variety fraud." *George P. Reintjes Co. v. Riley Stoker Corp.,* 71 F.3d 44, 48 (1st Cir.1995)." (*Fox ex rel., Fox v. Elk Run Coal Co., Inc.*, 739 F.3d 131, 135 (Jan. 2014)).

16. In "*Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* when it set aside a fraudulently obtained ruling by finding that it was the product of one party's "**deliberately planned and carefully executed scheme**" that severely undermined the "integrity of the judicial process." 322 U.S. 238, 245-46, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). The Court held that ordinary cases of fraud would not suffice to violate the "deep rooted policy in favor" of finality but that, on the facts before it, the aggrieved party could not "have been expected to do more than it did to uncover the fraud." *Id.* at 244, 246, 64 S.Ct. 997. (*Id. Fox ex rel.*, at 136).[5]

[5]Debtor would have this Court believe appeal of the Clerk of the Superior Court Order to proceed with foreclosure was a state court remedy Plaintiff failed to avail, nor did Plaintiff seek to enjoin the foreclosure. (Debtor's Supplemental Brief ¶ 4). First, Plaintiff sought to enjoin the sale on Nov. 12, 2010 in the U.S. District Court Western District North Carolina (Charlotte) Case no. 3:10-cv-00573, Dkt. # 3. Second, Debtor alleges Plaintiff's complaint filed with the North Carolina Commissioner of Bank ("NCCB") "demonstrates that she knew enough to challenge the foreclosure before it took place on November 15, 2010" (Debtor's Supplemental Brief, Fn. 7, pp. 7 & 8). Plaintiff's allegations in the NCCB complaint were/are based upon conversations with the servicer (SunTrust Mortgage, Inc.) and Mortgage Electronic Registration Systems, Inc., these conversations fail to rise beyond the level

17. "*The Alleged Fraud on the Court.* King's motion to vacate for fraud committed upon the court is not subject to the one year limitation period. Fed. R.Civ.P. 60(b); *see also Hadges v. Yonkers Racing Corp.,* 48 F.3d 1320, 1325 (2d Cir. 1995); *Gleason v. Jandrucko,* 860 F.2d 556, 558-59 (2d Cir.1988)." (*King v. First Amer. Invest., Inc.*, at 94 *supra*).

18. Proving fraud on the court thus presents, under Supreme Court and circuit precedent, a very high bar for any litigant. (*Fox ex rel.*, at 136-37 *supra*).

19. "[A]s often happens with a rule, there is an exception. The savings clause in Rule 60(d)(3) permits a court to exercise its inherent equitable powers to obviate a final judgment after one year for "fraud on the court." The Supreme Court addressed this doctrine in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, when it set aside a fraudulently obtained ruling by finding that it was the product of one party's "deliberately planned and carefully executed scheme" that severely undermined the "integrity of the judicial process. 322 U.S. 238, 245-46, 64 S.Ct. 997, 88 L.Ed. 1250 (1944)." (*Id.* at 135-36).

20. Admittedly, Plaintiff is not schooled in the law, however Plaintiff fails to see how Debtor came to the interpretations in *Kelleran v. Andrijevic*, 825 F.2d 692, at 694 (1987) expressed in Debtor's Supplemental Brief at ¶ 15. The K*elleran* court was clear, "The bankruptcy court, therefore, was bound to the liability determinations in the state judgment unless *an exception existed to prevent operation of the judgment's preclusive effect.* Bankruptcy courts may look beyond a state court default judgment where the judgment was procured by collusion or fraud, *Margolis v. Nazareth Fair Grounds & Farmers Market,* 249 F.2d 221, 223-25 (2d Cir.1957), or where the rendering court lacked jurisdiction,

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of hearsay. (See Delehey Declaration, Exhibit 5). Third, discovery is not permitted on an appeal of the Order of the Clerk of the Superior Court and any subsequent appeal would be limited to the record. It was not until the Scoliard Declaration that facts presented themselves to prove fraud upon the court. Therefore, the statements made by Wilson during the hearing on May 1, 2014, see CT. p. 34, ll. 4-15, are true in all material respect.

Heiser v. Woodruff, 327 U.S. 726, 736, 66 S.Ct. 853, 858, 90 L.Ed. 970 (1946). Andrijevic concedes that neither of these exceptions applies here." (*Id.* at 694).

21. Both the Bankruptcy of the Debtor and the foreclosure of Plaintiff's home are rooted in equity. Just as this Court is empowered to set aside a state court judgment claim against the bankrupt for fraud, the Court possesses reciprocal authority to set aside a state court authorized foreclosure.[6] (*Heiser v.Woodruff,* 327 U.S. 726, 731 (1946).

22. The "the cited conduct related to the events that made up the *subject matter* of the state court action and indeed formed the basis of Laing's counter- and third-party claims against Bradshaw and Johnson. If fraud was involved at all, it was clearly not of the sort required under *Bulloch* and *Browning* to justify vacatur of the judgment obtained. Furthermore, since Laing's underlying allegations of breach of fiduciary duty and collusion were litigated in the state court action, they cannot serve now as the basis for collateral attack of the very judgment rendered in favor of Bradshaw and Johnson thereon. *See Browning,* 826 F.2d at 343 (Court in *Throckmorton* made clear that judgment could not be set aside for ground "which was actually presented and considered in the judgment assailed," quoting *Throckmorton,* 98 U.S. at 66); *cf. Heiser,* 327 U.S. at 736, 740, 66 S.Ct. at 857, 860 (collateral attack on judgment on grounds of fraud cannot be sustained when those grounds themselves have been rejected by the court in which judgment was rendered). Obviously, if judgments *resolving* disputes involving fraud were treated, for preclusion purposes, as judgments *procured by*

[6] "The court below, in rejecting petitioner's plea of *res judicata,* and in directing inquiry into the merits of the original cause of action and into the allegation of fraud in procurement of the judgment, rested its decision upon the ground that the bankrupt's trustee had failed to place before the California district court any contention or proof that petitioner's testimony, particularly as to the value of the converted property, was perjured, that the bankrupt was not indebted to petitioner, or that the allegations of the complaint were untrue. The court, relying on *Pepper* v. *Litton, supra,* also held that the bankruptcy court, being a court having equity powers, was not bound by the principles of *res judicata* as to issues which were not pressed before the California district court, and that the authority of the bankruptcy court as a court of equity included the power to inquire into the validity of the claim upon which the judgment, presented as a claim against the estate, was based."

the very conduct they address, no truly final judgment in fraud litigation would be possible. We accordingly adhere to the restrictive formulation of "fraud on the court" in assessing Laing's invocation of the *Heiser* fraud exception to collateral estoppel, which we hold inapplicable to the circumstances of this case." (*In re Laing*, 945 F.2d 354, 358 (1991).[7]

23. *Conklin v. Anthou*, 495 Fed. Appx. 257 (3rd. Cir. 2012), unlike Plaintiff, filed multiple cases in both federal and state court, thus the Conklin court appropriately applied the Rooker Feldlman doctrine, "to the extent that Conklin is attempting to solicit direct federal review of the Pennsylvania courts' decisions, he is directly complaining of injuries caused by the state-court judgments and his efforts are therefore barred by Rooker-Feldman." The Conklin court did not address nor did Conklin allege fraud upon the court.[8]

CONCLUSION

The doctrine of Preclusion (res judicata, collateral estoppel), like the Rooker-Feldman doctrine, fall victim to fraud upon the state court. Plaintiff has plead and offered the Court sufficient evidence of Debtor's agency relationship to SunTrust Bank,[9] its duty to supervise the sub-servicer throughout the state court proceedings and by way of that relationship is liable to Plaintiff for the fraud

[7] Unlike the instant case, breach of fiduciary duty and collusion were litigated in state court. Therefore, the norms of disclosure in adjudicating a cause of action took place in the state court. By mere virtue of the application of the North Carolina foreclosure statutes Wilson was barred from seeking any discovery, let alone timely discovery, to avail the state court remedies.

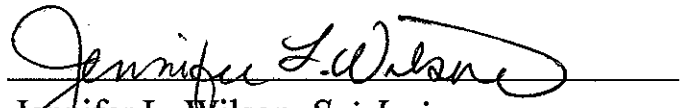
[8] Fraud upon a Court renders that court's judgment a nullity, not just voidable but VOID. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-245 (1944) ("From the beginning there has existed along side the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry. *Marine Insurance Company v. Hodgson*, 7 Cranch 332, 3 L.Ed. 362; *Marshall v. Holmes*, 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870. This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule. ... where the occasion has demanded, where enforcement of the judgment is 'manifestly unconscionable', *Pickford v. Talbott*, 225 U.S. 651, 657, 32 S.Ct. 687, 689, 56 L.Ed. 1240, they have wielded the power without hesitation.").

[9] Sections 3.01 through 3.04 of the Pooling and Servicing Agreement establish the contractual relationship between the Master Servicer (RFC) and the Sub-servicer (SunTrust Mortgage, Inc.) (See United States District Court, Western District of North Carolina (Charlotte) Case No. 3:10-cv-00573 lodged as Docket nos. 20-2.

perpetrated upon the state court. This Court possesses the inherent power as a court of equity to set aside the state court order authorizing the foreclosure sale for fraud upon the court.

Date: June 18, 2014

Respectfully,



Jennifer L. Wilson, *Sui Juris*
4365 School House Commons, 500-251
Harrisburg, NC 28075
Ph.: 704-773-1712

CERTIFICATE OF SERVICE

I, Jennifer L. Wilson, plaintiff in the above captioned action, certify:

That on 18th day of June 2014, I served a true copy of the "PLAINTIFF'S REPLY IN OPPOSITION TO ResCap Liquidating Trust's Supplemental Brief in support of DEBTORS' MOTION FOR DISMISSAL OF ADVERSARY PROCEEDING PURSUANT TO BANKRUPTCY RULE 7012(b) AND FRCP 12(b)(1) AND 12(b)(6) OR, IN THE ALTERNATIVE, PERMISSIVE ABSTENTION PURSUANT TO 28 U.S.C. §1334(c)(1)", and all attachments thereto.

By email on the following shown in Exhibit A attached hereto and incorporated herein by reference.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on June 18, 2013

Jennifer L. Wilson

Jennifer L. Wilson, *Sui Juris*
4365 School House Commons, 500-251
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Certificate Service
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