**IN THE SUPREME COURT OF MISSISSIPPI**

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No. 2017-CA-00291

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**BURNETTE AVAKIAN,**

*Appellant / Cross-appellee,*

**v.**

**WILMINGTON TRUST NATIONAL ASSOCIATION,**

*Appellee / Cross-appellant.*

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ON APPEAL FROM
THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI
CAUSE NO. 2015-0099-D

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# BRIEF OF APPELLEE / CROSS-APPELLANT

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**ORAL ARGUMENT NOT REQUESTED**

No. 2017-CA-00291
*Burnette Avakian v. Wilmington Trust National Association*

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of Court of Appeals may evaluate possible disqualification or recusal.

1. Burnette Avakian as Executrix of the Estate of Norair Avakian—Appellant/Cross-appellee
2. Bear Stearns Asset Backed Securities Trust 2007-2, Asset-Backed Certificates, Series 2007-2—the Trust
3. Burr & Forman LLP—counsel to the Appellee/Cross-appellant
4. Citibank, N.A.—former trustee
5. Citicorp—affiliate of Citibank, N.A.
6. Citigroup, Inc.—affiliate of Citibank, N.A.
7. Elizabeth Crowell, Esq.—former counsel to the Appellant/Cross-appellee
8. Honorable H. J. Davidson, Jr.—Chancellor
9. Estate of Norair Avakian—Appellant/Cross-appellee
10. Fidelity National Title Insurance Company—insurer
11. Jack H. Hayes, Esq.—counsel to the Appellee/Cross-appellant
12. Taylor A. Heck, Esq.—former counsel to the Appellee/Cross-appellant
13. Edley H. Jones, III, Esq.—former counsel to the Appellee/Cross-appellant
14. JPMorgan Chase Bank, N.A—former mortgage servicer for the Trustee
15. William J. Long, Esq.—counsel to the Appellee/Cross-appellant
16. McGlinchey Stafford, PLLC—former counsel to the Appellee/Cross-appellant

17. Christopher D. Meyer, Esq.—counsel to the Appellee/Cross-appellant

18. Mitchell, McNutt & Sams, P.A.—counsel to the Appellant/Cross-appellee

19. Craig Panter, Esq.—counsel to the Appellant/Cross-appellee

20. Panter Law Firm—counsel to the Appellant/Cross-appellee

21. David Sanders, Esq.—counsel to the Appellant/Cross-appellee

22. Specialized Loan Servicing, LLC—mortgage servicer for the Trustee

23. Stone & Hayes, P.A.—counsel to the Appellee/Cross-appellant

24. Wilmington Trust National Association, as Trustee of the Bear Stearns Asset Backed Securities Trust 2007-2, Asset-Backed Certificates, Series 2007-2—the Appellee/Cross-appellant

*s/ William J. Long*
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## I. STATEMENT OF THE ISSUES

1. The undisputed evidence demonstrates, at most, two possible chains of title for the Promissory Note and the Deed of Trust. Both of those chains of title demonstrate that the Trustee[1] is the holder of both instruments and has been since at least May 2010. Do the two possible chains of title create a genuine issue of material fact as to whether the Trustee is the holder of the instruments?

2. If the Trustee is undisputedly the holder of the Deed of Trust, may it foreclose on Shadowlawn, the property the Deed of Trust encumbers?

3. This is the third litigation between the Avakians and the Trustee regarding the Trustee's rights to a money judgment for breach of the Promissory Note and to foreclose under the Deed of Trust. The Avakians could have, but did not, contend in those proceedings that the Trustee may not be the holder of the Promissory Note or Deed of Trust. Are the Avakians precluded based on principles of res judicata from contending in this proceeding that the Trustee may not be the holder of the Promissory Note or Deed of Trust?

4. The Avakians contended in the chancery court that the Trustee's claims for breach of the Promissory Note and for a judicial foreclosure under the Deed of Trust were time barred. They fail to raise those contentions in their principal brief. Have they waived those issues for this appeal? Does that waiver extend to any proceedings after a remand?

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[1] Wilmington Trust National Association refers to itself as the Trustee. Because it succeeded Citibank as Trustee of the Trust, it does not differentiate between actions Citibank took and those it has taken itself. The Trustee refers to Burnette Avakian as Ms. Avakian, to Norair Avakian as Mr. Avakian, and to the Estate of Norair Avakian as the Estate. The Trustee refers to Ms. Avakian and Mr. Avakian (or his Estate) collectively as the Avakians.

5. Ms. Avakian has engaged in conduct not contemplated by the Deed of Trust. Does the Deed of Trust bar the Trustee's unjust-enrichment claim, which is based on that extra-contractual conduct?

## II. STATEMENT OF THE CASE

### A. The Nature of the Case

This appeal is the latest in a long series of proceedings brought by Ms. Avakian (on her own behalf or on behalf the Estate) to try to keep the Trustee from foreclosing on Shadowlawn, an antebellum mansion located in Columbus, Mississippi. To date, the Trustee has not received a payment on the Promissory Note in over seven years, and the total loan balance is nearly $900,000.

Taken as a whole, the series of proceedings resembles a game of whack-a-mole. Every time the Trustee prevails, Ms. Avakian raises a new legal theory and contends the Trustee must knock the new theory down before being allowed to exercise its foreclosure rights. The Trustee has already whacked three moles—challenges to the validity of the Deed of Trust,[2] the Trustee's standing, and the timeliness of the Trustee's claims. In doing so, the Trustee has prevailed in federal district court, the U.S. Court of Appeals for the Fifth Circuit, two Mississippi chancery courts, and in the Mississippi Court of Appeals.

This case is mole number four. After all of the previous litigation, including two actions she brought herself, Ms. Avakian argues in this appeal that the Trustee may not be the owner of the Promissory Note and the Deed of Trust. Ultimately, that argument fails just like its predecessors. The record shows that the Trustee has the right to enforce the Promissory Note and the Deed of Trust, and the chancery court properly granted summary judgment to the Trustee. Thus, the Court

[2] For the sake of clarity, the Trustee capitalizes Promissory Note and Deed of Trust when referring to the instruments at issue in this case.

should affirm the grant of summary judgment to the Trustee and allow the Trustee, after years of obstruction, to foreclose on Shadowlawn (an antebellum mansion in Columbus, Mississippi) and recoup what it can of its losses.

The chancery court was wrong, however, to grant summary judgment to Ms. Avakian on the Trustee's unjust-enrichment claim. The Deed of Trust does not bar the Trustee from recovering for unjust enrichment because the Deed of Trust does not contemplate Ms. Avakian using litigation to generate years of delay all while running a for-profit bed and breakfast at Shadowlawn. Thus, the chancery court's grant of summary judgment to Ms. Avakian on that issue should be vacated, and that limited portion of the case should be remanded with instructions to enter judgment for the Trustee on liability and to allow any necessary proceedings to determine the Trustee's damages.

**B. The Course of Proceedings and Disposition in the Court Below**

In February 2015, the Trustee filed a four-count complaint in chancery court. (C.P. 1:15–110.) That complaint named both Ms. Avakian and the Estate as defendants, and it sought a judicial foreclosure on Shadowlawn, recovery from the Estate on the Promissory Note, recovery from Ms. Avakian for unjust enrichment, and a judicial declaration of its rights under the Deed of Trust. (C.P. 1:15–24.)

Both Ms. Avakian and the Estate filed answers and counterclaims. (C.P. 1:111–2:245.) Both asserted as an affirmative defense that the Trust's claims were time barred and demanded the Trust prove it owned and held the Promissory Note and Deed of Trust. (C.P. 1:112–13; 2:180–81.) Their collective counterclaims sought a judicial declaration that the Trust's lien on Shadowlawn had been extinguished,

the Deed of Trust is void, and that certain of the Trust's claims were barred by the previous federal litigation; an order requiring that the Deed of Trust be marked as void or satisfied; and money damages based on allegations of slander of title and violation of the Mississippi Litigation Accountability Act. (C.P. 1:126–31; 2:194–99.) The Trustee filed answers to the counterclaims. (C.P. 2:246–84.)

The Trustee moved for partial summary judgment. (C.P. 2:285–5:685.) The Trustee explained that the validity of the Deed of Trust and the timeliness of the Trustee's claims on the Promissory Note had already been finally adjudicated in other proceedings, which precluded Ms. Avakian and the Estate from raising those issues again in this case. (C.P. 2:294–300.) The Trustee pointed to undisputed evidence demonstrating that it owned the Promissory Note and Deed of Trust—an assignment of the Promissory Note and Deed of Trust from EquiFirst Corporation (the original lender) to the Trustee. (C.P. 3:301; *see also* C.P. 3:310–12; 3:354–56.) The Trustee also demonstrated that the Estate was liable for breach of the Promissory Note and that the Trustee was entitled to a judicial foreclosure on Shadowlawn. (C.P. 3:304–06.)

The Avakians responded in opposition. (C.P. 5:686–728.) They contended that there was a genuine issue of material fact as to whether the Trustee owned the Promissory Note and Deed of Trust because of a discrepancy between the document assigning the instruments to the Trustee in 2010 and documents evidencing that EquiFirst had assigned the Promissory Note to EMC Mortgage Corporation in 2006. (C.P. 5:686–92; *see also* C.P. 5:723–27.)

The Trustee filed a reply in support of its motion. (C.P. 5:729–6:754.) In it, the Trustee demonstrated that the Avakians' chain-of-title argument failed. (C.P. 5:733–36.) EMC had assigned the Trustee the Promissory Note by an allonge and that, as part of a pooling and servicing agreement for the Trust, EMC had assigned the Promissory Note to Bear Stearns Asset Backed Securities I LLC, who had then concurrently assigned the Promissory Note to the Trustee. (C.P. 5:750; 6:754.) The Trustee also explained that the previous litigations precluded the Avakians' chain-of-title argument and that the argument failed on the merits because the Trustee's rights under the Deed of Trust were independent of its ownership of the Promissory Note. (C.P. 5:736–46.)

The chancery court held a hearing on the Trustee's motion. (T. at 1–41.) During that hearing, counsel for the Trustee further bolstered the evidence that it had been assigned the Promissory Note and Deed of Trust by showing to the chancery court that it possessed the original collateral file, including the original Promissory Note and allonge with "wet ink" signatures. (T. at 10.)[3]

The chancery court granted the Trustee's motion for partial summary judgment. (C.P. 6:755–62.) Pertinent to the issues now on appeal, the chancery court concluded that the Avakians' first affirmative defense, which questioned the Trustee's standing and demanded proof that the Trustee owned the Promissory Note and Deed of Trust, was barred res judicata. (C.P. 6:760.) Thus, the Trustee received summary judgment on its claim for breach of contract and its requests for a judicial foreclosure and a declaratory judgment. (C.P. 6:762.)

[3] The court reporter incorrectly transcribed "wet ink" as "wedding." (*See id.*)

The Trustee requested that the Court appoint a special commissioner to sell Shadowlawn and enter a preliminary injunction restricting Ms. Avakian's use of Shadowlawn until it was sold. (C.P. 6:764–68.) In response, Ms. Avakian filed a motion for a stay pending appeal. (C.P. 6:771–76.) The parties fully briefed their positions on the two motions. (C.P. 6:777–83, 786–807.)

The chancery court held a hearing. (T. 42–73.) That hearing focused principally on whether the chancery court could certify the partial summary judgment as final under Mississippi Rule of Civil Procedure 54(b) and, if it did, whether it should stay that judgment pending an appeal. The chancery court was reluctant to certify the judgment under Rule 54, but it agreed that additional delay required protections be put in place for the Trustee. (*See* T. 52–67.) The parties resolved that the Trustee would move for a final summary judgment and the chancery court would require Ms. Avakian to add the Trustee to the insurance policies protecting Shadowlawn and would consider requiring Ms. Avakian to pay an equitable amount of rent on the property. (*See* T. 67–72.)[4]

Less than two weeks later, the Trustee moved for summary judgment on its remaining claims. (C.P. 6:808–31.) In that motion, the Trustee explained that Ms. Avakian had continued to use Shadowlawn as a business without making any payments on the debt, which unjustly enriched Ms. Avakian at the Trustee's expense. (C.P. 6:812–14.) The Trustee also showed that the damages for breach of the Promissory Note were $894,356.29. (C.P. 6:811, 829–31.)

[4] After the hearing, the parties filed supplements regarding the fair rental value of Shadowlawn. (C.P. 6:832–37, 6:896–7:912.)

The Avakians responded in opposition. (C.P. 6:838–95.) Ms. Avakian contended that she had not been unjustly enriched because her business had turned little profit. (C.P. 6:839–40, 883–84.) She contended that the Deed of Trust—a contract between the Trustee and Ms. Avakian—barred the unjust-enrichment claim. (C.P. 6:840–43, 865, 884–87.) She also contended that the Trustee's unjust-enrichment claim: (1) was a compulsory counterclaim in the federal-court proceeding; and (2) was barred by the statute of limitations. (C.P. 6:843–47, 865, 887–91.) Although the Avakians expressed concerns that the judicial foreclosure and a judgment on the Promissory Note could create a double recovery, (C.P. 6:847–48, 866, 891–92), the Estate acknowledged that the Trustee was entitled to a judgment on the Promissory Note "for the outstanding principal, interest and late fees," (C.P. 6:849, 893, *accord* C.P. 6:866).

The Trustee filed a reply in support of its motion. (C.P. 7:919–28.) The Trustee explained that its unjust-enrichment claim was based on Ms. Avakian's extra-contractual conduct—using the litigation process as a delay tactic while simultaneously using Shadowlawn to generate rent-free business income. (C.P. 7:923–24.) The Trustee also showed that neither principles of res judicata nor the statute of limitations barred its claim and that it would receive only a single recovery. (C.P. 7:924–26.)

The chancery court held an evidentiary hearing. (T. 74–112.) The parties agreed that the Trustee's summary-judgment evidence accurately stated the damages for breach of contract. (T. 76.) The court heard testimony from Ms. Avakian about the business income Shadowlawn had generated and a fair and

equitable amount of rent for the property. (T. 77–97.) The court received profit-and-loss statements and income-tax returns as evidence. (T. 92–93.) The court also heard argument from counsel. (T. 98–111.)

The chancery court granted the Trustee's motion for final summary judgment in part and denied it in part. (C.P. 7:931–35.) The court held there was no dispute as to the amount of damages for breach of contract—$894,356.29—and granted summary judgment to the Trustee on that claim. (C.P. 7:934–35.) The court granted summary judgment to Ms. Avakian, however, on the Trustee's unjust-enrichment claim, concluding that the Deed of Trust made it an inappropriate remedy. (*Id.*) The chancery court ordered Ms. Avakian to pay $2,500 each month in rent until any appeal was resolved. (C.P. 7:935.) This order resolved all of the issues before the chancery court.

The Avakians filed a notice of appeal. (C.P. 7:936–38.) The Trustee filed a notice of cross-appeal. (C.P. 7:946–48.)

### C. Statement of the Facts

#### 1. The Avakians finance and then refinance Shadowlawn.

In 2002, Mr. and Ms. Avakian bought Shadowlawn, holding the property as joint tenants. (C.P. 5:672.) To finance that purchase, they borrowed money from Southstar Financing, LLC and signed a deed of trust to secure the loan. (*Id.*) In 2004, Mr. Avakian conveyed title to Shadowlawn to Ms. Avakian alone. (*Id.*) He intended that transaction to prevent Ms. Avakian from bearing any liability for the debt should he die. They operated Shadowlawn as a bed and breakfast and an event facility, and Ms. Avakian continues to do so. (T. 78.)

In 2006, Mr. and Ms. Avakian refinanced Shadowlawn, taking out a new loan from EquiFirst Corporation in only Mr. Avakian's name. (C.P. 2:201–37; 3:315–52.) He alone signed the Promissory Note, but they each signed a counterpart copy of the Deed of Trust. (*Id.*)

**2. The Trustee holds the Promissory Note and Deed of Trust.**

*a. The Trustee holds the Promissory Note.*

In November 2006, EquiFirst assigned the Promissory Note to EMC Mortgage Corporation. (C.P. 5:723, 727.)

In early 2007, EMC sponsored the Bear Stearns Asset Backed Securities Trust 2007-2 Asset Backed Certificates, Series 2007-2. (C.P. 6:752.) As part of the creation of that Trust, EMC (the "Sponsor") entered into a Pooling and Servicing Agreement (PSA) with Bear Stearns Asset Backed Securities I LLC (the "Depositor"), Wells Fargo Bank, N.A. (the "Master Servicer") and Citibank, N.A. (the "Trustee"). (C.P. 6:752–54.)[5] Section 2.01 of the PSA provides:

[5] Although the Trustee attached only relevant excerpts of the PSA to its summary judgment reply, the entire PSA is a matter of public record and the Court may properly consider the entire document. *See, e.g.*, *Deutsche Bank Nat'l Tr. Co. v. Frazier*, No. 1:14CV451, 2015 WL 3484846, at *1 n.1 (S.D. Miss. June 2, 2015). The PSA was included in relevant filings with the U.S. Securities and Exchange Commission and is available through the SEC's EDGAR system. *See* Bear Stearns Asset Backed Securities I LLC, Form 8-K (June 11, 2017), https://goo.gl/GERbcr. A slightly more user-friendly version of the same filing may be accessed through a private EDGAR filings database. *See* SECinfo.com, https://goo.gl/s44xAx. If necessary, the Court may take judicial notice of the entire PSA because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Miss. R. Evid. 201(b); *see also* Miss. R. App. P. 10(f); *Enroth v. Mem'l Hosp. at Gulfport*, 566 So. 2d 202, 205 (Miss. 1990) (listing "official public documents, records and publications" as potential sources for judicial notice). For additional background information on the formation of these types of trusts, see *Prudential Insurance Co. of America v. Credit Suisse Securities (USA) LLC*, No. 12-7242, 2013 WL 5467093, at *1 (D.N.J. Sept. 30, 2013).

> The Sponsor hereby sells, transfers, assigns, sets over and otherwise conveys to the Depositor, without recourse, all the right, title and interest of the Sponsor in and to the assets in the Trust Fund.
>
> . . . .
>
> The Depositor, concurrently with the execution and delivery hereof, hereby sells, transfers, assigns, sets over and otherwise conveys to the Trustee for the use and benefit of the Certificateholders, without recourse, all the right, title and interest of the Depositor in and to the Trust Fund.

(C.P. 6:754.) The list of mortgage loans made part of the Trust Fund is located in the Mortgage Loan Schedule (defined on page 19 of the PSA). The Mortgage Loan Schedule is attached to the PSA as Exhibit B, and one of the mortgage loans listed in Exhibit B to the PSA is the Avakian's mortgage loan (denoted as Loan 16683162).

Thus, under the terms of Section 2.01 the PSA, EMC (the Sponsor) assigned the Promissory Note to Bear Stearns Asset Backed Securities I LLC (the Depositor). Bear Stearns Asset Backed Securities I LLC (the Depositor) in turn assigned the Promissory Note to Citibank N.A. as Trustee. (C.P. 6:752.) Furthermore, in May 2010, Mortgage Electronic Registration Systems, Inc., acting for EquiFirst "its successors and assigns" assigned the Promissory Note to Citibank (as Trustee). (C.P. 5:630–32.) As a result, Citibank (as Trustee) became the holder of the Promissory Note as early as early 2007 and no later than May 2010.

In December 2012, Citibank resigned as Trustee and Wilmington Trust succeeded to that role. (C.P. 5:634–67.) As part of the Resignation, Successor Appointment, and Acceptance Agreement, Citibank assigned all of its rights to the entire Trust Fund to Wilmington Trust. (C.P. 5:635.) This agreement was executed by Bear Stearns Asset Backed Securities I LLC, Citibank, and Wilmington Trust

(among others). (C.P. 5:642–44.) Thus, Wilmington Trust—the Trustee—became the holder of the Promissory Note. At some point thereafter, EMC clarified that the current Trustee held the Promissory Note by executing an allonge assigning that Promissory Note to the Trustee. (C.P. 5:750.)

*b. The Trustee holds the Deed of Trust.*

In May 2010, Mortgage Electronic Registration Systems, Inc., acting for EquiFirst and EquiFirst's "successors and assigns," assigned the Deed of Trust to Citibank. (C.P. 5:630–32.) In the alternative, Citibank was assigned the Deed of Trust through the PSA in the same manner it was assigned the Promissory Note. Under either alternative, Citibank (as Trustee of the Trust) held the Deed of Trust by May 2010. When Citibank resigned as Trustee, it assigned the Deed of Trust to Wilmington Trust—the Trustee. (C.P. 5:634–67.)

**3. The history of Ms. Avakian's attempts to use litigation to block the Trustee from foreclosing on Shadowlawn.**

In 2010, Mr. Avakian defaulted on the Promissory Note. (C.P. 3:359–63.) He later died. (C.P. 4:478.) The Lowndes County Chancery Court issued letters testamentary to Ms. Avakian to serve as executrix of the Estate. (C.P. 4:479, 501.)

The Trustee began trying to foreclose on Shadowlawn in December 2010, but it did not foreclose at that time. (C.P. 3:365.) It began foreclosure proceedings a second time in February 2011. (C.P. 3:366.) Once again, the Trustee did not foreclose on Shadowlawn at that time. The Trustee began foreclosure proceedings a third time in May 2012. (C.P. 3:367–69, 379–81.)

Before the Trustee could hold the foreclosure sale, Ms. Avakian filed suit to block the foreclosure, seeking a declaratory judgment that the Deed of Trust was

invalid because she and Mr. Avakian had signed it in counterparts. (C.P. 3:423–31.) The Trustee removed the case to federal court, (C.P. 4:455–59), and the federal district court entered a declaratory judgment in favor of Ms. Avakian. (C.P. 4:462); *see also Avakian v. Citibank, N.A.*, No. 1:12-cv-00139, 2014 WL 346861 (N.D. Miss. Jan. 30, 2014) [*Avakian I*].

The Trustee appealed. (C.P. 4:464–66.) While the appeal was pending, the Trustee sought a stay of the judgment pending appeal. The district court denied the stay. *See Avakian v. Citibank, N.A.*, No. 1:12-cv-00139, 2014 WL 1404569 (N.D. Miss. Apr. 10, 2014) [*Avakian II*]. The U.S. Court of Appeals for the Fifth Circuit, however, granted it. (C.P. 4:468–69.) As part of that stay, the Fifth Circuit "expressly prohibited [the Trustee] from trying to take advantage of the stay by attempting to foreclose upon [Shadowlawn] during appeal." (*Id.*)

While the appeal remained pending, J.P. Morgan Chase (acting on behalf of the Trustee) filed a Statement of Claim against the Estate. (C.P. 4:471–76.) A few months later, the Fifth Circuit reversed, holding that the counterpart copies of the Deed of Trust together formed a single valid Deed of Trust. *See Avakian v. Citibank, N.A.*, 773 F.3d 647, 653 (5th Cir. 2014) [*Avakian III*].

A bevy of filings after the Fifth Circuit decided *Avakian III* led to pending litigation in three different courts. In the order the filings were initially filed, those three litigations were the proceedings on remand in the federal district court (the Federal Case), proceedings in chancery court related to the probate of the Estate (the Probate Case), and this case.

In the Probate Case, the Estate filed a contest of the Trustee's Statement of Claim, arguing that the Federal Case had delayed foreclosure long enough for the Trustee's claim for breach of the Promissory Note, and by extension its claim to foreclose under the Deed of Trust, to become time barred. (C.P. 4:478–84.) The chancery court in the Probate Case held that the Trustee's claims on the Promissory Note and the Deed of Trust were timely brought and that Ms. Avakian (as executrix) was estopped from asserting that the Trustee had filed its Statement of Claim too late. (C.P. 5:671–85.) The Mississippi Court of Appeals affirmed, reaching the same conclusions the chancery court had reached. *See generally Estate of Avakian v. Wilmington Tr. Nat'l Ass'n*, No. 2015-CA-1520, 2017 WL 1331466 (Miss. Ct. App. Apr. 11, 2017) [*Avakian V*]. The Estate moved for rehearing, which was denied. The Estate has petitioned for a writ of certiorari, and the Trustee has opposed that petition. The petition remains pending.

In the Federal Case, the Trustee moved for entry of final judgment in its favor. (C.P. 4:486–87.) In response, Ms. Avakian filed a motion to stay based on the same statute-of-limitations argument she raised in the Probate Case. (C.P. 4:489–91.) She then filed a motion to dismiss the case, arguing that Wilmington Trust's replacement of Citibank as Trustee had mooted the case. (C.P. 4:510–78.) The Trustee responded to the motion to dismiss, arguing that the existence of a justiciable case or controversy was unaffected by its replacement of Citibank as Trustee and that Federal Rule of Civil Procedure 25(c) permitted the litigation to move forward with or without substituting Wilmington Trust as the named defendant. (C.P. 4:580–84.) The federal district court denied the motion to stay,

substituted Wilmington Trust as the named defendant, and entered final judgment in favor of the Trustee. (C.P. 5:669); *see also Avakian v. Citibank, N.A.*, No. 1:12-cv-00139, 2015 WL 4643129 (N.D. Miss. Aug. 4, 2015) [*Avakian IV*].

The third case is this case.

**D. The Standard of Review.**

The Court reviews *de novo* a chancery court's grant or denial of a motion for summary judgment. *See Noone v. Noone*, 127 So. 3d 193, 195 (Miss. 2013). So long as the chancery court reached the right result and there is some reason sufficient to sustain the judgment, the Court should affirm even if it disagrees with the chancery court's reasoning. *See Groundworx, LLC v. Blanton*, No. 2015-CA-00152, 2017 WL 3214579, at *5 (Miss. July 27, 2017); *Pass Termite & Pest Control, Inc. v. Walker*, 904 So. 2d 1030, 1032 (Miss. 2004); *Vinson v. Roth-Roffy*, 829 So. 2d 1250, 1252 (Miss. 2002).

## III. DIRECT APPEAL: SUMMARY OF THE ARGUMENT

In other cases, the Avakians have unsuccessfully advanced three different arguments as to why the Trustee should not be able to recover under the Promissory Note or foreclose under the Deed of Trust. This appeal concerns a fourth argument: the Trustee is purportedly not the holder of the Promissory Note or the Deed of Trust. Just like the previous three, the Avakians' fourth argument fails.

The Avakians incorrectly contend that there are inconsistencies in the chain of assignments of the Promissory Note and Deed of Trust that create material fact issues and preclude summary judgment. But any such inconsistencies are immaterial. Whether the chain of assignments is

- EquiFirst Corporation → Citibank, N.A. as Trustee → Wilmington Trust as Trustee, or
- EquiFirst Corporation → EMC Mortgage Corporation → Bear Stearns Asset Backed Securities I LLC → Citibank, N.A. as Trustee → Wilmington Trust as Trustee,

the Trustee was the holder of both instruments long before litigation arose between the Avakians and the Trustee. Therefore, any dispute as to which chain of title is correct is immaterial because it cannot matter in an outcome determinative sense.

Even if the Court were to conclude that there are material factual questions about the assignment of the Promissory Note, the assignment of the Deed of Trust to the Trustee is sufficient to give the Trustee the power to foreclose on Shadowlawn. Although she may wish to challenge the assignment of the Deed of Trust to the Trustee, Ms. Avakian lacks standing to do so.

Moreover, as the chancery court correctly concluded, any challenge to the Trustee's status as holder of the Promissory Note and Deed of Trust is barred under principles of res judicata. That doctrine precludes parties or their privies from re-litigating claims they did or could have raised in a previous action. Because Ms. Avakian and the Estate could have raised their chain-of-title arguments in the Federal Case, in the Probate Case, or in both cases, they are barred from attempting to re-litigate the issue in this case.

Finally, the Avakians contended in the chancery court that the statute of limitations barred the Trustee's judicial-foreclosure and breach-of-contract claims. Because the Avakians failed to raise those issues in their principal brief, they have waived them. Under law-of-the-case principles, that waiver extends to bar those issues in any proceedings on remand.

For all of these reasons, the chancery court's grant of summary judgment to the Trustee should be affirmed.

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## IV. DIRECT APPEAL: ARGUMENT

### A. The Avakians' chain-of-title argument fails because the undisputed facts show that the Trustee is the holder of the Promissory Note and the Deed of Trust.

Summary judgment is appropriate when "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Miss. R. Civ. P. 56(c). The presence of a mere genuine issue of fact is insufficient to preclude summary judgment. Indeed, the Court has been clear that even a hundred fact issues are insufficient unless at least one of those issues is material. *See CitiFinancial Retail Servs. v. Hooks*, 922 So. 2d 775, 779 (Miss. 2006). An issue is material only when it could affect the outcome of the case. *See id.* ("The presence of fact issues in the record does not per se entitle a party to avoid summary judgment. The court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense . . . ." (quoting *Simmons v. Thompson Mach. of Miss., Inc.*, 631 So. 2d 798, 801 (Miss. 1994)).

In a nutshell, the Avakians' argument for reversal is that the record supposedly creates questions as to when and how the Trustee became the holder of the Promissory Note and the Deed of Trust. The undisputed facts, however, establish that the Trustee holds both instruments. If the undisputed facts provide evidence of multiple chains of title for those instruments, those issues are immaterial because none of them "matters in an outcome determinative sense." *CitiFinancial Retail Servs.*, 922 So. 2d at 779 (quoting *Simmons*, 631 So. 2d at 801). As a result, those cannot preclude summary judgment in favor of the Trustee on both its breach-of-contract claim and its request for a judicial foreclosure.

**1. Under any chain of title the record supports, the Trustee held both the Promissory Note and the Deed of Trust long before the beginning of the Federal Case.**

The undisputed facts demonstrate that the Trustee is the holder of the Promissory Note and the Deed of Trust under one of two chains of title. Under the first:

- Mr. Avakian executed the Promissory Note in favor of EquiFirst in 2006;
- The Avakians simultaneously executed the Deed of Trust in favor of EquiFirst;
- EquiFirst assigned the Promissory Note and Deed of Trust to Citibank as Trustee of the Trust on May 20, 2010; and
- Citibank assigned the Promissory Note and Deed of Trust to Wilmington Trust as Trustee in 2012.

(C.P. 2:201–37, 3:315–56; 5:634–67.) Under this chain, the Trustee has been the holder of the Promissory Note and Deed of Trust since May 20, 2010.

Although the Avakians argue the remaining undisputed facts demonstrate more possible chains of title, there is only one other possibility. The second possible chain of title is:

- Mr. Avakian executed the Promissory Note in favor of EquiFirst in 2006;
- The Avakians simultaneously executed the Deed of Trust in favor of EquiFirst;

- In November 2006, EquiFirst assigned the Promissory Note and Deed of Trust to EMC;
- In early 2007, EMC (through the PSA that created the Trust) assigned the Promissory Note and Deed of Trust to Bear Stearns Asset Backed Securities I LLC;
- Simultaneously, Bear Stearns Asset Backed Securities I LLC (through the PSA that created the Trust) assigned the Promissory Note and Deed of Trust to Citibank as Trustee;[6] and
- Citibank assigned the Promissory Note and Deed of Trust to Wilmington Trust as Trustee in 2012.

(C.P. 2:201–04; 3:350–52; 5:723, 727; 5:634–67; 6:752–74.) Under this chain, the Trustee has been the holder of the Promissory Note and Deed of Trust since early 2007.

The existence of two possible chains of title linking the Promissory Note and Deed of Trust to the Trustee fails to raise a "genuine issue of **material** fact" that would prevent entry of summary judgment. Miss. R. Civ. P. 56(c) (emphasis added). Whichever of the two chains of title is correct, the Trustee became the holder of the Promissory Note and Deed of Trust at least roughly two years before the filing of the Federal Case. As a result, regardless of which chain of title is correct, the Trustee had authority to enforce the Deed of Trust and foreclose on Shadowlawn.

[6] Courts interpreting language in other Pooling and Servicing Agreements that is nearly identical to the language in the PSA have held that language was sufficient to transfer the sponsor's interest in the loans to the resulting trust. *See, e.g.*, *Bank Hapoalim B.M. v. Bank of Am. Corp.*, Nos. 12-cv-4316 & 12-cv-4317, 2012 WL 6814194, at *8 (C.D. Cal. Dec. 21, 2012).

*See Kirby v. Bank of Am., N.A.*, No. 2:09-cv-182, 2012 WL 1067944, at *4 (S.D. Miss. Mar. 29, 2012) (collecting cases); *see also Henderson v. Herrod*, 18 Miss. 631, 633 (1846). And, regardless of which chain of title is correct, the Fifth Circuit's order precluding foreclosure on Shadowlawn tolled the running of the statute of limitations as to the Trustee's claim for a judicial foreclosure and its claim for breach of the Promissory Note. *See Avakian V*, 2017 WL 1331466, at *8–9; *see also* Miss. Code § 15-1-57; (C.P. 4:468–69).

The allonge from EMC assigning the Promissory Note directly to Wilmington Trust as Trustee also fails to raise a genuine issue of material fact. The allonge is fully consistent with Section 2.01 of the PSA. (C.P. 6:754.) Further, because the other two chains of title would have transferred the Promissory Note to the Trustee long before the allonge was executed, it fails to make any outcome determinative difference in the case. *See CitiFinancial Retail Servs.*, 922 So. 2d at 779. At most, it represents a "belt and suspenders" approach to assignment.

Thus, any issues of fact that arise from the two possible chains of title are immaterial; they do not matter in any outcome determinative sense. *See id*. Regardless of which chain of title is correct, the Trustee is entitled to judgment as a matter of law. Therefore, the chancery court's entry of summary judgment was correct and should be affirmed.

**2. The Trustee has the power to foreclose on Shadowlawn independent of its holding the Promissory Note.**

If for any reason the Court were to conclude that a genuine issue of material fact exists as to whether the Trustee holds the Promissory Note, that issue would

have no impact on the Trustee's request for a judicial foreclosure. Because the Trustee is the assignee of the Deed of Trust, it may foreclose.

If a deed of trust authorizes foreclosure, the holder of the deed of trust may foreclose regardless of who holds the corresponding note. *See Patton v. Am. Home Mortg. Servicing, Inc.*, No. 1:11cv420, 2013 WL 1310560, at *3 (S.D. Miss. Mar. 28, 2013). The Deed of Trust here authorizes foreclosure. (C.P. 2:206, 223; 3:317, 334.) Regardless of which chain of title is correct, the Trustee holds the Deed of Trust. (*See* Parts II.C.2.b., IV.A.1., *supra*.) Therefore, although the Trustee holds the Promissory Note, its status as holder of the Deed of Trust would give it the power to foreclose even if it did not hold the Promissory Note.

Any theoretical issue of fact regarding the assignment of the Promissory Note that could arise from the allonge from EMC to Wilmington Trust as Trustee is irrelevant to the foreclosure analysis. At most, the allonge might lead to Ms. Avakian attempting to challenge an assignment of the Deed of Trust that was separate from the assignment of the Promissory Note. Mississippi law is clear, however, that Ms. Avakian lacks standing to make such a challenge. *See Crater v. Bank of N.Y. Mellon*, 203 So. 3d 16, 19 (Miss. Ct. App. 2016) ("[A] borrower not a party to the assignment of one's security interest has no standing to challenge the assignment of that interest.").

The Trustee is undisputedly the holder of the Deed of Trust and has been so since at least May 2010. Because the Deed of Trust independently authorizes foreclosure upon default on the Promissory Note, and because the Estate undisputedly has defaulted on the Promissory Note, the Trustee is entitled to a

judicial foreclosure on Shadowlawn. Therefore, the grant of summary judgment to the Trustee on its judicial-foreclosure claim should be affirmed.

### B. The Avakians' failure to raise their chain-of-title argument in the Federal Case or the Probate Case precludes them from raising it in this case.

The chancery court held that the Avakians' challenge to the Trustee's ownership of the Promissory Note and Deed of Trust was barred res judicata. (C.P. 6:760.) Under the doctrine of res judicata, "when a court of competent jurisdiction enters a final judgment on the merits of an action, the parties or their privies are precluded from re-litigating claims that were decided **or could have been raised** in that action." *Harrison v. Chandler-Sampson Ins., Inc.*, 891 So. 2d 224, 232 (Miss. 2005) (emphasis added and citation omitted). Under Mississippi law, res judicata applies when five requirements are met: (1) identity of the subject matter; (2) identity of the parties; (3) identity of the facts that underlie the claims asserted and relief sought; (4) identity of the quality or character of the person against whom the claim was brought; and (5) a final judgment on the merits. *See EMC Mortg. Corp. v. Carmichael*, 17 So. 3d 1087, 1090 (Miss. 2009); *Harrison*, 891 So. 2d at 232.

It is unclear exactly which of those five requirements the Avakians contend is not met. The gist of their argument appears to be that neither the Federal Case nor the Probate Case expressly held that the Trustee owns the Promissory Note or Deed of Trust. In doing so, they appear to be conflating the requirements for collateral estoppel with the requirements for res judicata. Although collateral estoppel requires an issue to have been "actually litigated and determined by a valid and final judgment," *Jordan v. McKenna*, 573 So. 2d 1371, 1375 (Miss. 1990) (citation

omitted), res judicata bars any claim so long as it could have been brought in the previous proceeding, *see Robinson v. Hosemann*, 918 So. 2d 668, 671–72 (Miss. 2005).

Thus, the only question the Court needs to decide to affirm the chancery court's holding is whether the Avakians could have brought in either the Federal Case or the Probate Case their claim that the Trustee does not hold the Promissory Note or the Deed of Trust. The answer to that question is yes.

Ms. Avakian could have raised her arguments in the Federal Case. All of the information related to the two potential chains of title for both the Promissory Note and the Deed of Trust existed before she filed her lawsuit with the lone exception of the allonge from EMC to Wilmington Trust as Trustee. (C.P. 2:201–37, 3:315–56; 5:723, 727; 5:634–67; 6:752–74.) Thus, she could have pursued in the Federal Case a declaration that the Trustee was not the holder of the Promissory Note or the Deed of Trust and sought discovery on the assignment of those instruments to the Trustee. Additionally, the issue of the propriety of substituting Wilmington Trust as Trustee was actually litigated in the Federal Case. (C.P. 4:510–84; 5:669); *see also Avakian IV*, 2015 WL 4643129. Ms. Avakian could have sought additional discovery on the assignment of the Promissory Note and Deed of Trust to Wilmington Trust as Trustee, which should have turned up the allonge, and levied any additional challenges to the Trustee's status as a holder of the instruments in that proceeding.

The Estate could have raised its arguments in the Probate Case. Again, all of the information related to the two potential chains of title existed before the Estate challenged the Trustee's Statement of Claim. (C.P. 2:201–37, 3:315–56; 5:723, 727;

5:634–67; 6:752–74.) Additionally, the Estate was aware of the substitution of Wilmington Trust as Trustee long before the Probate Case ended in a final judgment for the Trustee. (C.P. 4:510–84; 5:669–85); *see also Avakian IV*, 2015 WL 4643129. The Estate could have sought discovery on the assignments of the instruments, which should have turned up the allonge, and levied any additional challenges to the Trustee's status as a holder of the instruments in that proceeding.

The doctrine of res judicata is designed to prevent "a multiplicity of litigation" and the resulting waste of judicial resources. *Harrison*, 891 So. 2d at 232 (citation omitted). It bars a party from litigating an issue whenever that party did or at least could have raised the issue in a previous proceeding. *See Robinson*, 918 So. 2d at 671–72; *Harrison*, 891 So. 2d at 232. Both Ms. Avakian and the Estate were involved in a previous litigation in which they at least could have raised the same arguments about the assignments of the instruments that they make in this case.[7] Their ability to raise those issues in those previous proceedings is sufficient for principles of res judicata to bar them raising them in this case. *See Robinson*, 918 So. 2d at 671–72; *Harrison*, 891 So. 2d at 232. As a result, the chancery court's grant of summary judgment should be affirmed.

[7] When the chancery court held that the Probate Case barred both parties (under res judicata principles) from pursuing their counterclaims and affirmative defenses regarding the timeliness of the Trustee's claims, it implicitly held that Ms. Avakian and the Estate were in privity with one another. (C.P. 6:759.) The Avakians have failed to challenge that implicit holding on appeal. Thus, if the Court deems that either of them could have raised in a previous proceeding whether the Trustee holds the Promissory Note and Deed of Trust, it should bar both of them from litigating that issue in this case. *See EMC Mortg.*, 17 So. 3d at 1090–91 (concluding the doctrine of res judicata applies to non-parties who stand in privity with a party to the prior action).

### C. The Avakians have waived their arguments that the Trustee's claim for breach of the Promissory Note, and by extension its judicial-foreclosure claim, are time-barred.

In the chancery court, the Avakians essentially contended that the Trustee should have filed a lawsuit against the Estate on the Promissory Note during the pendency of the Federal Case. Because the Trustee did not file that lawsuit, the Avakians contended the Trustee's claim for breach of the Promissory Note was time barred. (C.P. 1:112–13, 126–28, 2:180–81, 194–96, 5:692.) They also argued that, as a result, the Trustee's judicial-foreclosure claim was time barred. (*See id.*)

The chancery court disagreed. (C.P. 6:759.) Noting that the chancery court in the Probate Case had already rejected the Avakian's contention that the Trustee's claim on the Promissory Note is time barred, the chancery court held that the Avakian's statute-of-limitations arguments were barred res judicata. (*See id.*) The chancery court also concluded, in the alternative, that the Avakians' statute-of-limitations arguments lacked merit. (*See id.*) In doing so, it adopted the chancery court's reasoning in the Probate Case. (*See id.*) The Mississippi Court of Appeals has held that reasoning is correct. *See Avakian V*, 2017 WL 1331466 at *8–9.

The Avakians have failed to challenge either of the chancery court's conclusions on this issue. They note that they have appealed the rejection of their statute-of-limitations argument in the Probate Case. (*See* Appellant's Br. at 10–11.) But they fail to argue that the chancery court erred by concluding that principles of res judicata barred them from raising that argument again in this case. And they fail to argue that the chancery court erred by rejecting their statute-of-limitations argument on its merits.

The Avakians' failure to challenge the chancery court's conclusions about the statute of limitations has significant repercussions both on this appeal and on any proceedings that might occur if the Court were to remand. First, because the Avakians have failed to raise the statute-of-limitations argument in their principal brief, they have waived it. *See In re B.A.H.*, No. 2013-CA-02047, 2016 WL 211601, at *15 (Miss. Ct. App. Jan. 19, 2016); *see also Sanders v. State*, 678 So. 2d 663, 669–70 (Miss. 1996). As a result of that waiver, the chancery court's decision that the Avakians' statute-of-limitations arguments fail (both on their merits and because they are barred res judicata) must be affirmed.

Second, because the chancery court's rejection of the Avakians' statute-of-limitations argument must be affirmed, it will be the law of the case in any proceedings on remand. *See Cossitt v. Alfa Ins. Corp.*, 726 So. 2d 132, 141 (Miss. 1998); *Leatherwood v. State*, 539 So. 2d 1378, 1382 (Miss. 1989). It is irrelevant that the Avakians have elected not to challenge the chancery court's decision in this appeal.

> "[A] legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time."

*Capps v. Sullivan*, 13 F.3d 350, 353 (10th Cir. 1993) (quoting *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987)); *accord Goldsby v. State*, 123 So. 2d 429, 434–35 (Miss. 1960); *see also Art Midwest, Inc. v. Clapper*, 805 F.3d 611, 614–15 (5th Cir. 2015) (holding that failure to present an issue in a previous appeal waives that issue for future litigation in the same

proceeding). As a result, although the Court should affirm, if it were to remand for further proceedings, the Avakians' statute-of-limitations argument would be precluded.

## V. CROSS-APPEAL: SUMMARY OF THE ARGUMENT

The Trustee seeks to recover under the equitable doctrine of unjust enrichment based on Ms. Avakian's use of Shadowlawn as a commercial enterprise while simultaneously using serial litigation to block the Trustee from foreclosing on the property. Equity will not suffer a wrong without a remedy, and unjust enrichment is the appropriate remedy for the wrong the Trustee has suffered.

The chancery court was wrong to conclude that the Deed of Trust barred the Trustee from recovering based on Ms. Avakian's unjust enrichment. The conduct by which Ms. Avakian has unjustly enriched herself—operating a commercial business on a residential property while using litigation to block foreclosure on that property—exceeds the scope of her relationship with the Trustee under the Deed of Trust. Neither the Promissory Note nor the Deed of Trust contemplated Shadowlawn being used for commercial purposes. Indeed, the terms of the Deed of Trust make clear that Shadowlawn would be a residential property. Further, the lack of a "rents and profits" or "assignment of rents" provision also demonstrates that Ms. Avakian's conduct is beyond the scope of the Deed of Trust.

The chancery court's grant of summary judgment in favor of Ms. Avakian on the Trustee's unjust-enrichment claim should be vacated, and the claim should be remanded to the chancery court with instructions: (1) to enter a judgment on liability in favor of the Trustee; and (2) to hold whatever additional proceedings are necessary to determine the Trustee's damages.

## VI. CROSS-APPEAL: ARGUMENT

### A. Unjust enrichment is an appropriate remedy for Ms. Avakian's extra-contractual, inequitable conduct.

Ms. Avakian has wronged the Trustee. She accepted the benefit of her husband refinancing a debt secured by Shadowlawn. When Mr. Avakian defaulted on the loan in 2010, the Trustee gained title to Shadowlawn to protect its interest in the debt and to make Shadowlawn available for payment of that debt. *See Anderson v. Kimbrough*, 741 So. 2d 1041, 1047 (Miss. Ct. App. 1999). Nevertheless, Ms. Avakian has refused to pay the debt because she was not a party to the Promissory Note. She has used a series of lawsuits to block the Trustee from foreclosing on Shadowlawn to recoup whatever it can of the money it loaned to her husband. Meanwhile, Ms. Avakian has operated a commercial venture at Shadowlawn—a bed and breakfast and event facility—and profited from that business.

So, the Trustee has received no payment on Mr. Avakian's debt for over seven years. Ms. Avakian has refused to pay the debt and has used litigation to block the Trustee from possessing Shadowlawn (to which the Trustee holds title), which was supposed to secure payment of the debt. And Ms. Avakian has personally profited from operating a business at Shadowlawn, giving her an incentive to generate as much delay as possible. That is wrong.

One of the maxims of equity is that equity will not suffer a wrong without a remedy. *See, e.g.*, *Emmons v. Emmons*, 64 So. 2d 753, 755 (Miss. 1953). Unjust enrichment is a quasi-contract that equity implies when a person possesses "money or property which in good conscience and justice he should not retain but should deliver to another. In these circumstances, equity imposes a duty to refund the

money or the use value of the property to the person to whom in good conscience it ought to belong." *Cates v. Swain*, 215 So. 3d 492, 494–95 (Miss. 2013) (cleaned up).

Ms. Avakian is in possession of money that in good conscience and justice she should not retain—the income Shadowlawn has generated since Mr. Avakian's default. It is unjust for her to derive income from the property while actively blocking and delaying the Trustee's efforts to foreclose.

The chancery court granted summary judgment in favor of Ms. Avakian, concluding that the Deed of Trust barred an unjust-enrichment claim related to the Trustee's right to foreclose. (C.P. 7:934.) The chancery court relied on decisions holding that a party may not recover for unjust enrichment or quantum meruit when there is a written contract that governs the issue. (*See id.* (citing *Johnston v. Palmer*, 963 So. 2d 586, 596–97 (Miss. Ct. App. 2007).)

Although the chancery court states the law correctly, the conduct by which Ms. Avakian has unjustly enriched herself exceeds the scope of the relationship contemplated in the Deed of Trust. Therefore, the Deed of Trust does not bar the Trustee from recovering for that conduct. *Cf. Tupelo Redevelopment Agency v. Gray Corp., Inc.*, 972 So. 2d 495, 515 (Miss. 2007) (holding that a plaintiff could recover on a quantum meruit theory for extra work performed that the express contract did not anticipate); *cf. also Walker v. Williamson*, 131 F. Supp. 3d 580, 595–96 (S.D. Miss. 2015).

The operation of a bed and breakfast and an event facility at Shadowlawn exceeds the scope of the contractual relationship between Ms. Avakian and the Trustee because nothing in the Promissory Note or Deed of Trust contemplates the

property being used for commercial purposes. (C.P. 2:201–37; 3:315–52.) For example, the Deed of Trust makes repeated references to the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq*. (RESPA). (*See, e.g.*, C.P. 3:316, 319.) This shows the Deed of Trust was contemplated to be part of a residential transaction because RESPA "does not apply to credit transactions involving extensions of credit—(1) primarily for business, commercial, or agricultural purposes." 12 U.S.C. § 2606(a). The Deed of Trust also requires that Shadowlawn be the borrower's principal residence for at least a year. (C.P. 3:321.) Thus, the Deed of Trust contemplates that Shadowlawn would be a residential—not commercial—property.

Further, on two separate occasions the Avakians' counsel noted the difference a commercial Deed of Trust might have made. The first occurred at the hearing that focused on a potential Rule 54(b) certified final judgment and a stay pending any appeal from that judgment.

> THE COURT: Does your deed of trust give you the right to the proceeds of the property.
>
> MR. PANTER: No, Your Honor, it does not. It does not have a rents and profits provision as often is the case **in commercial property**.

(T. 64 (emphasis added).) The second occurred at the hearing on the Trustee's motion for final summary judgment.

> MR. PANTER: . . . . Now, some deeds of trust **on commercial property** will have what's called an assignment of rents provision. This is if there is a default, then in addition to being able to foreclose or sue on the note, if you have tenants and the property is generating money, that's considered a sign to the lender, but this one does not have that. That's not the form that was used. They could be using one like that, but they did not.

(T. 103 (emphasis added).) Although Ms. Avakian faults the Trustee (or more accurately, the original lender) for not using a deed of trust geared toward commercial property, that the Deed of Trust used terms geared toward residential property bolsters that the Deed of Trust never contemplated Shadowlawn being used for commercial purposes, making that use outside of its scope.

In short, the chancery court was wrong to grant summary judgment in favor of Ms. Avakian on the Trustee's unjust-enrichment claim. Because Ms. Avakian's conduct falls outside the scope of what the Deed of Trust governs, the Deed of Trust does not bar the award of damages for Ms. Avakian's extra-contractual and inequitable conduct.

## VII. CONCLUSION

The Court should affirm the chancery court's grant of summary judgment in favor of the Trustee. The Court should vacate the chancery court's grant of summary judgment in favor of Ms. Avakian on the Trustee's unjust-enrichment claim and remand with instructions to: (1) enter judgment in favor of the Trustee on that claim; and (2) hold whatever additional proceedings are necessary to determine the Trustee's damages.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 19, 2017, I served a copy of the foregoing document by Notice of Electronic Filing or, if the party does not participate in electronic filing, by First Class United States Mail, on the following:

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