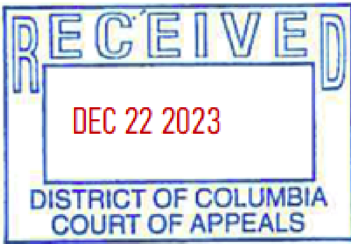

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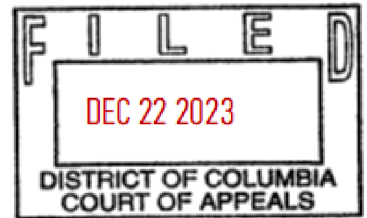

DISTRICT OF COLUMBIA COURT OF APPEALS

LOLILLIAN J. SMITH,

Appellant,

v.

WILMINGTON SAVINGS FUND SOCIETY, FSB D/B/A Christina Trust,
Not in its Individual Capacity but Solely as Owner Trustee of Residential Credit
Opportunities Trust II, *et al.*

Appellees.

ON APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

BRIEF OF APPELLANT LOLILLIAN SMITH

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RULE 28(a)(2)(A) STATEMENT

The parties to the case are Appellant LoLillian Smith, and Appellees Wilmington Savings Fund Society, FSB D/B/A Christina Trust, Not In Its Individual Capacity But Solely As Owner Trustee Of Residential Credit Opportunities Trust II; Nationstar Mortgage, LLC D/B/A Mr. Cooper; Gregory Allan Jefferson; Gerard Fryar; and SJ&F Builders, LLC. Appellee Nationstar is the successor-in-interest to previous parties Rushmore Loan Management Services LLC and Capital One, N.A.

In Superior Court, Rachael Flanagan and Scott Lempert of Cohen Milstein were pro bono counsel for Ms. Smith; Richard Lash, of Buonassissi, Henning & Lash, PC, was counsel for Wilmington; Aaron Neal of McNamee Hosea represented Rushmore; Edward Cohn, Matthew Fischer, and Kevin Hildebeidel of Cohn, Goldberg, and Deutsch, LLC represented Capital One, along with Stephen Hessler of Offit Kurman. Jefferson, Fryar, and SJ&F were not represented. No amici appeared.

In this Court, Thomas Landers, Daniel Martin, and Meghan Greenfield represent Ms. Smith as pro bono counsel, in affiliation with the Legal Aid Society of the District of Columbia. Mr. Lash continues to represent Wilmington. Peter Duhig represents Nationstar. Jefferson, Fryar, and SJ&F are not represented. No intervenors or amici have appeared in this Court at the time of this filing.

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STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal because it is an appeal of a final order of the Superior Court of the District of Columbia that affected the possession of property and changed the status quo. D.C. Code § 11-721(a)(2)(C); *Jenkins v. Parker*, 428 A.2d 367, 369 (D.C. 1981). The Superior Court orally granted summary judgment on September 29, 2022, and entered a written order granting summary judgment on February 7, 2023. A Notice of Appeal was timely filed with this Court on March 9, 2023, within thirty days of entry of judgment. D.C. App. R. 4(a)(1).

STATEMENT OF THE ISSUES

This is a "foreclosure rescue scam" case concerning whether Appellee Wilmington Savings Fund Society ("Wilmington") has a property interest in Appellant LoLillian Smith's family home. Wilmington asserts that it does based on a junior mortgage taken out on the property by two foreclosure rescue scam artists. Ms. Smith asserts that it does not because the fraudulent quitclaim deed purporting to grant the defrauders title was void, or alternatively because Wilmington's predecessor-in-interest was not a bona fide lender without notice of the fraud. The Superior Court granted summary judgment to Wilmington on only the issue of notice.

This appeal concerns the following issues:

1. *a.* Did the Superior Court err by failing to rule on Ms. Smith's argument that the quitclaim deed to her defrauders was void, when Wilmington would have no interest in Ms. Smith's home if the deed were void?

b. Alternatively, did the Superior Court err by summarily holding that the deed was not void?

2. *a.* Did the Superior Court err by failing to rule on Ms. Smith's argument that a lender's notice must be measured when its deed of trust is recorded, given it is undisputed that Wilmington's predecessor had actual notice of the fraud before recording its deed of trust?

b. Did the Superior Court err by ruling on summary judgment that Wilmington's predecessor-in-interest was not on "inquiry" notice of the fraud, when Wilmington would have no interest in the home if there was notice?

STATEMENT OF THE CASE

Appellee Nationstar's predecessor-in-interest, non-party Capital One, N.A., brought a judicial foreclosure action against Ms. Smith's home in 2017, after which Appellees Jefferson and Fryar—through their corporate entity, SJ&F Builders, LLC ("SJ&F")—defrauded Ms. Smith into conveying her home to them. Complaint for Judicial Foreclosure, Nov. 1, 2017; App. 111–15. The men then obtained a second mortgage on the property from Wilmington's predecessor-in-interest, non-party Visio Financial Services ("Visio"). App. 440. After discovering the fraud with the help of the D.C. Housing Authority ("DCHA"), Ms. Smith filed a third-party complaint against her defrauders in the foreclosure action and obtained a default judgment voiding the fraudulent conveyance. App. 120. Wilmington intervened and moved to reconsider the judgment so it could argue it was a bona fide purchaser. Motion to Reconsider, Aug. 10, 2020.

The Superior Court granted Wilmington's motion to reconsider and ordered discovery on whether Visio had obtained a valid property interest. App. 161. Wilmington moved for summary judgment after discovery closed, and the court entered summary judgment in Wilmington's favor, ruling that Visio had not been on notice of the fraud, making Visio (and, therefore, Wilmington) a bona fide lender. App. 512. Ms. Smith timely appealed on March 9, 2023, within thirty days after entry of written judgment. App. 515.

STATEMENT OF FACTS

I. Ms. Smith Purchases her D.C. Home in 2001 to Raise her Children.

Appellant LoLillian Smith is a life-long D.C. resident who owns her home on Varney Street in Southeast D.C. App. 61. Ms. Smith purchased her home in 2001 and—like many of us—built her life in that home, raising her children there. *Id.* Also like many of us, Ms. Smith could not afford the full purchase price of her home in cash, so she took out a mortgage, which was eventually transferred to Nationstar. Complaint for Judicial Foreclosure ¶ 8, Nov. 1, 2017.

II. Ms. Smith's Long-Time, Trusted Friend Defrauds Her of Title through a Foreclosure Rescue Scam.

Ms. Smith is a single mother with a high school education, who has supported her family with a combination of part-time and self-employed work. She began experiencing financial difficulties in 2017. App. 429–30. After falling behind in her mortgage payments, Ms. Smith's lender filed a foreclosure complaint later that year. Complaint for Judicial Foreclosure, Nov. 1, 2017.

Ms. Smith shared the news about the foreclosure with her friend Gregory Jefferson, whom she had known and trusted for many years. App. 62. Ms. Smith knew him as a building contractor who worked on various properties, and the two were close friends with each other and each other's families. App. 62, 64.

Mr. Jefferson responded to the news by offering to help Ms. Smith solve her foreclosure crisis. App. 64. Drawing on his experience working on homes,

Mr. Jefferson told Ms. Smith that they could go into business together as an LLC in which they would both be members, and the LLC would take over ownership of Ms. Smith's home. App. 64–65. The LLC's income would pay the mortgage, and Ms. Smith could stay in her home with a new job and new financial security for her family. App. 64–66. When Ms. Smith asked why she needed to transfer her home to the LLC, Mr. Jefferson told her that was the way they "had to do it" for the LLC to pay her mortgage, utilities, and "everything pertaining to the house." App. 67.

To assure Ms. Smith that she would retain her home, Mr. Jefferson presented her with incorporation papers for "SJ&F Builders, LLC" ('S' for Smith, 'J' for Jefferson, and 'F' for the third member of the team, Fryar). At Ms. Smith's insistence, Mr. Jefferson also drafted an addendum to the proposed deed stating that the Varney Street house "will always belong to LoLillian Smith who is a [sic] active member of SJ&F Builders LLC, in which the Deed will reflect her ownership. All utilities will be paid for by SJ&F Builders and property taxes."[1] App. 65–66, 444. Thus believing that she was merely transferring the home to herself in a new corporate form where her long-time, trusted friend would support her, Ms. Smith signed a quitclaim deed to SJ&F Builders on February 12, 2018. App. 447. The handwritten deed showed consideration of $0, reflecting

[1] Mr. Jefferson signed this addendum on Jan. 9, 2018. Ms. Smith also signed it. She did not sign a separate addendum dated Jan. 12, 2018. App. 444.

Ms. Smith's belief that she was not selling her home. App. 447.

Unfortunately, Mr. Jefferson had no intention of working with Ms. Smith or allowing her to retain ownership of her home. There was no job for Ms. Smith in the new LLC, and Mr. Jefferson became physically and verbally abusive with her. App. 72. The LLC did not pay Ms. Smith's utilities, and her water company shut her water off. App. 67–68. Ms. Smith was emotionally devastated by the betrayal and unable to maintain steady employment. App. 77–78.

Worst of all, despite Ms. Smith's demands and Mr. Jefferson's express representations, SJ&F was incorporated in North Carolina with no mention of Ms. Smith. App. 456–67. As the Superior Court found, this allowed Jefferson and Fryar to defraud Ms. Smith out of her home with Ms. Smith reasonably believing she retained ownership.

The fraud perpetrated on Ms. Smith was an example of a foreclosure rescue scam, which is often designed to strip the equity out of the victim's home.[2] This

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[2] *See generally* Elizabeth Renuart & Steve Tripoli, *Dreams Foreclosed: The Rampant Theft of Americans' Homes Through Equity-Stripping Foreclosure "Rescue" Scams*, NATIONAL CONSUMER LAW CENTER (2005), *available at* https://filearchive.nclc.org/foreclosure_mortgage/scam/report-foreclosure-rescue-scams-2005.pdf; *see also* Amanda Abrams, *Foreclosure Crisis Spawns a Wave of Rescue Scams*, WASHINGTON POST (Jan. 18, 2013), https://www.washingtonpost.com/realestate/foreclosure-crisis-spawns-a-wave-of-rescue-scams/2013/01/17/ec704c42-4a18-11e2-820e-17eefac2f939_story.html; Kevin Grasha, *Man sentenced for nationwide foreclosure relief scam after trying to disqualify judge*, CINCINNATI ENQUIRER (Oct. 5, 2023),

type of scheme has proliferated throughout the country over the last several years, including in D.C. Unlike here, the perpetrator of the scam is often someone previously unknown to the victim. *See Johnson v. Wheeler*, 492 F. Supp. 2d 492, 495 (D. Md. 2007) ("Typically, a homeowner facing foreclosure is identified by a rescuer through foreclosure notices published in the newspapers or at government offices."). These schemes can take various forms, but at its core the defrauder acquires a home in (or at risk of) foreclosure by promising to help the homeowner pay its debts. Often, the defrauder promises to transfer the home back to the homeowner, and in the meantime the homeowner becomes a rent-paying tenant in their home. *Id.* at 495–96. Several states have passed laws prohibiting such schemes,[3] and many government entities and even some businesses have published materials explaining the signs of a possible foreclosure rescue scam.[4]

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https://www.cincinnati.com/story/news/crime/2023/10/05/lorin-buckner-sentenced-for-nationwide-foreclosure-relief-scam/71074811007.

[3] *E.g.*, D.C. Code § 42-2432(a) ("It shall be unlawful, for compensation or gain … to engage in … a foreclosure rescue transaction"); *see generally* John C. Murray, *Court Decisions and State Statutes Send Warning to "Foreclosure Consultants"*, 43 REAL PROP. TR. & EST. L.J. 571 (2008) (compiling laws in eighteen states).

[4] *E.g.*, Rocket Mortage, *Common Mortgage Scams In 2023 And How To Avoid Them*, https://www.rocketmortgage.com/learn/mortgage-scams; Experian, *Beware of Foreclosure Rescue Scams*, https://www.experian.com/blogs/ask-experian/beware-of-foreclosure-rescue-scams; D.C. Department of Insurance, Securities, and Banking, *Protect Yourself from Mortgage and Foreclosure Rescue Scams* (July 7, 2015), *available at*

III. Visio Issues Ms. Smith's Defrauders a Second Mortgage Despite Multiple Red Flags.

In April 2018, only two months after fraudulently acquiring Ms. Smith's home for free, the defrauders used it as collateral to apply for an adjustable-rate mortgage refinance loan in SJ&F's name from Visio Financial Services, Inc. ("Visio").[5] App. 431.[6] Several red flags arose over the ensuing eight months as Visio and its settlement agent, ServiceLink, LLC ("ServiceLink"), worked to close the loan and then record Visio's deed of trust. Visio generally failed to take even modest steps to probe any of these issues.

A. Visio Evaluates the Loan Over Six Months as Numerous Red Flags Emerge

Visio knew from the quitclaim deed[7] that the defrauders paid nothing for Ms. Smith's home, and that they were seeking more than $100,000 in cash proceeds from the loan. App. 224. This was a cash-out refinance, where the loan

https://disb.dc.gov/sites/default/files/dc/sites/disb/page_content/attachments/Protect%20Yourself%20from%20Mortgage%20and%20Foreclosure%20Rescue%20Scams%207-7-15.pdf.

[5] Whereas the trial court papers generally use "Intervenor" to refer either to Visio or Wilmington, this brief identifies Visio and Wilmington by name.

[6] Visio's Loan File contains emails and notes written by various Visio or ServiceLink employees. Visio staff include Hannah Glenn, Nicholas Sevier, and Cody Smart, while ServiceLink staff include Michele Bilby, Ginger Metzel, Tonia Dupain, Dawn Currin, and Daniel Greggs.

[7] Nothing in the record suggests that the defrauders provided Visio or ServiceLink with the handwritten addendum signed by both Ms. Smith and Mr. Jefferson stating that her home "will always belong" to Ms. Smith. App. 444.

exceeds prior mortgages and the excess amount takes the form of cash proceeds to the borrower.[8] These cash proceeds generally reflect the equity in a home, so Visio knew the equity in Ms. Smith's house must have exceeded $100,000.[9] Also, Visio knew the quitclaim deed was handwritten, and Visio noted the deed erroneously left the "LLC" out of SJ&F's name. App. 432.

In addition, Visio obtained SJ&F's operating agreement and articles of organization showing that SJ&F was formed in December 2017, only about two months before SJ&F obtained Ms. Smith's home for free. App. 324 & 327.

ServiceLink advised Visio it needed SJ&F's "owner's title policy," given the "multiple prior owner liens and mortgages on title." App. 432. Indeed, Visio required borrowers to have such policies. App. 462. But a Visio employee wrote that Jefferson and Fryar had "no idea what I am asking for when I ask for an

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[8] Cash-out refinance loans generally have a higher risk of default than other types of refinance loans. Federal Housing Finance Agency, Office of Inspector General, *Recent Trends in Enterprise – Cash-out Refinances*, at 5 (September 27, 2021), *available at* https://www.fhfaoig.gov/sites/default/files/WPR-2021-008.pdf.

[9] *See* JPMorgan Chase & Co., *Tapping Home Equity*, at 10 (2020), *available at* https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/institute/pdf/Institute-Home-Equity-Report_ADA.pdf; Jonathan Russell, Mortgage Professional America, *Cash out refinance: Definition and how it works* (Jan. 4, 2023), https://www.mpamag.com/us/mortgage-industry/guides/cash-out-refinance-definition-and-how-it-works/431813 ("cash-out refinance allows you to convert home equity into money; the amount is based on the equity you have built up in your property"); Hannah Lapin, Visio Lending, *Grow Your Rental Portfolio with a Cash-Out Refinance* (Mar. 17, 2022, 2:24 PM), https://www.visiolending.com/blog/guide-to-cash-out-refinancing.

[owner's title policy] and still haven't gotten a straight answer about whether or not they have one!" App. 321. Visio then learned that the men did not conduct their purchase using a title company. Instead, they prepared their own deed and did not obtain an owner's title policy. *Id.* This also meant that SJ&F assumed the liens on Ms. Smith's home. App. 287. Despite Visio's requirement that borrowers provide an owner's title policy, Visio moved ahead with processing the loan.

Visio "only finance[s] rent ready property." App. 463. Accordingly, SJ&F presented Visio with a lease to the property that stated a rent of $2,100 and a tenant named Moses Pernell. App. 494. But the record does not otherwise reflect that such a person lived in Ms. Smith's home or whether this person even existed. To the contrary, Ms. Smith has continuously lived in her home since purchasing it in 2021, and Visio knew that fact because it conducted or ordered an appraisal.[10] *Id.* However, nothing in the record suggests Visio ever looked into this glaring discrepancy between the named tenant, Moses Pernell, and the person actually living in the home, Ms. Smith.

B. Visio Struggles to Obtain Payoff Statements

Visio sought payoff statements from the existing lienholders who consistently said they had not been notified of any transfer of Ms. Smith's home.

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[10] Wilmington has not disputed this fact, nor has it disputed that Ms. Smith has lived in her home continuously since she bought it in 2001. App. 3.

For example, due to this lack of notification, the D.C. Water and Sewer Authority initially "rejected the payoff for Lillian's [sic] borrower's authorization." App. 311. When Visio asked ServiceLink why processing SJ&F's loan was "taking so long," App. 299, ServiceLink explained it "had to obtain judgment payoffs for a prior owner which took longer than anticipated as the creditors were not even aware the property was sold." App. 298–99. After facing delays, in early July, Visio's Operations Manager communicated to ServiceLink that this loan "needs to be made top priority." App. 298.

After seeking a payoff statement from the DCHA, ServiceLink noted that DCHA was "holding up the payoff because they don't understand how this property was sold to [the defrauders] and [DCHA] not be notified of the situation." App. 295. Still, ServiceLink asked DCHA to "place an urgent rush on this updated payoff." App. 294. After DCHA said it needed a "final settlement statement" executed by Ms. Smith and SJ&F, App. 293, ServiceLink reached out to SJ&F's attorney, Michael Gross. Mr. Gross explained to ServiceLink that he did not have any signed documents because he did not handle the purchase. App. 292. ServiceLink then learned from Mr. Jefferson that Mr. Gross "only completed a title search on the property but nothing more." *Id.* Mr. Gross also told ServiceLink: "The parties made their own arrangements outside this office and I do not know what they did." App. 291. ServiceLink noted, "DC Housing is stating that they

feel this is a way to abuse way to pay these liens [sic].” App. 287.

DCHA alerted Ms. Smith in early August that Jefferson and Fryar might be trying to scam her, and they recommended she hire an attorney. App. 431. Ms. Smith then approached Legal Aid, who connected her with pro bono trial counsel. App. 497.

After further delays in obtaining updated payoffs, in early August, Visio’s Operations Manager communicated to his own staff and ServiceLink: “I cannot stress enough how important it is what we wrap this up quickly. At this point, [ServiceLink] has not provided stellar service and I expect to see an improvement soon.” App. 282. Later, in early September, Visio communicated to ServiceLink that Visio’s executives were “a little concerned because of the amount of liens and what not.” App. 262.

When ServiceLink asked Rushmore’s counsel for an updated payoff statement in early August, Rushmore’s counsel responded by asking: “Do you have an authorization from Ms. LoLillian Smith? Ms. Smith is the borrower of the loan in question.” App. 287. Nothing in the record suggests that either Visio or ServiceLink made any attempts to obtain Ms. Smith’s authorization—or directly communicate with her at all—in the period before the loan closing and disbursement of funds.

Instead, ServiceLink asked Jefferson and Fryar if they “have contact with

[Ms. Smith] or if we can watch the mail at the property of 1104 Varney Street"—i.e., ServiceLink wanted to monitor Ms. Smith's mail. App. 276. In mid-August, ServiceLink reported to Visio that Mr. Jefferson "has been in contact with Ms[.] Smith this entire week trying to get the payoff from Rushmore but they will only mail this document to Ms. Smith." App. 273.

C. Visio Closes the Loan and Learns of Ms. Smith's Fraud Claim Before Recording a Deed of Trust.

After months of difficulties and delays, the loan closing finally took place on Oct. 8, 2018, and the loan funds were disbursed two days later. On Oct. 8, SJ&F and Visio executed Visio's deed of trust granting Visio a security interest in Ms. Smith's home. Also at closing, SJ&F executed a corrected quitclaim deed, in which "SJ & F Builders" granted Ms. Smith's home to "SJ&F Builders LLC" for zero consideration. Ms. Smith's signature is not on this corrected deed; only Jefferson and Fryar's signatures appear on it. App. 451. In addition, it was not until Nov. 2, 2018 that Mr. Fryar signed the second-to-last page of the deed of trust—a "Security Affidavit – Class 1." Smith's expert report states that this security affidavit was a "part of the deed of trust without which the deed of trust was not properly recordable," which Wilmington never explicitly disputed. App. 199.

More than two months after disbursement of the loan funds, Visio's deed of trust was recorded on Dec. 13, 2018, along with the corrected quitclaim deed

identifying the grantee as "SJ&F Builders LLC." App. 216, 440 & 442.

In terms of the foreclosure action in Superior Court, as early as June 4, the loan file shows that Visio was aware of a "pending court action" involving Ms. Smith's home. App. 315. And the trial docket reflects that on Aug. 24, 2018, an attorney appeared on Ms. Smith's behalf at a status hearing that day. The docket notes for the hearing say this attorney "indicate[d] that this matter involves a foreclosure rescue scam." App. 557.

On Oct. 17, 2018, Visio learned that Rushmore's counsel told ServiceLink that Ms. Smith "has filed a lawsuit against Mr. Fryar stating the purchase was a fraudulent transfer and she was duped (rescue scam)." App. 251. On the same day, ServiceLink communicated this news internally through an email with the subject line, "URGENT – DO NOT ISSUE POLICY [REDACTED] FRYAR – LOAN #[REDACTED]." *Id.* This email body stated: "Please hold off on issuing this [title insurance] policy due to the pending litigation." *Id.*

On Oct. 23, 2018, a ServiceLink employee wrote to her colleagues and Visio staff: "Please work to get a borrower's authorization from Ms. Smith so we can speak with Rushmore on this issue. Going forward all payoffs must be updated before we close on any loans and must be within 2 weeks of the closing so these issues do not arise again." App. 246. Visio's Operations Manager added: "ServiceLink – we're having trouble verifying what is correct in all this. Let's just

push to obtain an auth[orization] from Ms. Smith so we can make sure the Rushmore payoff satisfies their mortgage. We're in a bit of a he-said, she-said situation here, let's get the facts." App. 245.

In late December 2018, an internal ServiceLink email indicates that someone at the company did some research into "the court records," which showed both that "Ms. Smith is trying to get title back and the foreclosure scam." App. 234. A different ServiceLink employee responded: "Ok, weird as we have no pending litigation of record as [others at ServiceLink] researched this previously and could not locate." App. 233. The loan file does not specify when ServiceLink's earlier litigation research took place. In any event, after Aug. 24, 2018, anyone doing even a modestly diligent review of the court docket for Ms. Smith's case would have seen the Aug. 24th docket entry—not buried within a court filing, but plain on the face of the docket—stating that Ms. Smith was claiming "this matter involves a foreclosure rescue scam."[11] App. 557.

IV. Ms. Smith Sues Her Defrauders in the Foreclosure Action.

Ms. Smith's foreclosure action (the case underlying this appeal) was pending while the foreclosure rescue scam took place. Ms. Smith had been searching for an

[11] Wilmington obtained the deed of trust from Visio by means of two assignments. On Dec. 10, 2018, Visio assigned the deed of trust to Wilmington Savings Fund Society, FSB, not in its individual capacity but solely as Owner Trustee of VFS Nepenthe Trust. App. 353. Then, on May 8, 2019, this entity assigned the deed of trust to Appellee Wilmington. App. 357.

attorney since the D.C. Housing Attorney advised her to do so, and the Superior Court extended her answer deadline to November 2018 while she did so. Status Hearing, Aug. 24, 2018; App. 67, 557. In November 2018, pro bono trial counsel appeared for Ms. Smith and explained the foreclosure rescue scam, prompting Ms. Smith's lender to file an amended complaint including the fraudsters. Rushmore Amended Complaint, Mar. 7, 2019.

In October 2019, Ms. Smith answered and filed a third-party complaint against Mr. Jefferson, Mr. Fryar, and SJ&F. Answer, Mar. 26, 2019; App. 1–33. The Superior Court entered default against third-party defendants SJ&F, Mr. Jefferson, and Mr. Fryar later that year after they failed to appear. Default, Dec. 20, 2019. Ms. Smith then filed for default judgment against them. Motion for Default Judgment, Feb. 11, 2020.

The Superior Court held an ex parte proof hearing in February 2020 to hear evidence on default judgment. At that hearing, Ms. Smith testified that Mr. Jefferson had taken advantage of her to execute the foreclosure rescue scam, and she explained the representations and documents that made her believe the fraudulent deed transferred title to herself as part of SJ&F. App. 62–67. After hearing Ms. Smith's testimony, the Superior Court granted Ms. Smith's motion for default judgment, awarded her $30,000 in damages, and voided the fraudulent quitclaim deed, restoring her title to the house. App. 120.

V. After the Case is Closed, and Well Over a Year after Visio was on Actual Notice of Ms. Smith's Claims, Wilmington Intervenes.

Despite having been put on actual notice in October 2018 of Ms. Smith's claim to the property Visio sought as collateral, Visio never intervened in Ms. Smith's foreclosure action to protect its security interest. Visio failed to do so even though ServiceLink had decided not to insure Visio's loan, and after Visio confirmed for itself ServiceLink's report that Ms. Smith was challenging the quitclaim deed's validity. On Jan. 8, 2019, Rushmore's counsel even provided ServiceLink with the name and contact information of Ms. Smith's counsel, App. 230, but nothing in the record suggests that ServiceLink or Visio ever contacted them. The next day, a ServiceLink executive shared internally that Mr. Jefferson "feels strongly that claims counsel needs to be engaged as early as possible." *Id.* Despite these numerous signals and opportunities, the record does not indicate that Visio ever sought to represent itself in court.

Twenty-one months after Visio learned of Ms. Smith's claims, Visio's successor-in-interest, Wilmington, moved to intervene. This was on June 29, 2020, shortly after the Superior Court held the quitclaim deed was void. No party opposed Wilmington's motion to intervene, which the Superior Court granted on July 30, 2020. In its motion, Wilmington stated its intention to ask the Superior Court, among other things, (i) to reconsider its June 15, 2020 order declaring the quitclaim deed void ab initio, and (ii) to dismiss Count VII of Ms. Smith's Third-

Party Complaint alleging that the quitclaim deed was unconscionable and, consequently, void and unenforceable. On Aug. 10, 2020, as planned, Wilmington filed a motion to reconsider the Superior Court's June 15, 2020 order holding that the quitclaim deed was void ab initio.

VI. The Court Grants Wilmington's Motion to Reconsider and Orders Discovery on Two Issues.

The Superior Court held a hearing on Wilmington's motions in February 2021. Over the course of that hearing, the Superior Court expressed concern about Wilmington's due process right to present its case, but also Ms. Smith's right to discovery before ruling on summary judgment.

This led to two colloquies that informed the court's ruling. Ms. Smith's pro bono trial counsel first asked the court to deny the motion to reconsider because the fraudulent deed was void and Wilmington was on inquiry notice, but if it granted that motion, at least "please don't dismiss" because "we haven't had discovery" and the motion for summary judgment contained "a lot of misrepresentation." App. 149, 151–52. Second, the court asked Wilmington's counsel if granting the motion to reconsider would moot the motion for summary judgment or to dismiss, and counsel responded: "It could. . . . I think that there is enough there . . . [b]ut I don't think that's nearly as important to my client as being able to have a day in court." App. 154–55. "So you could . . . deny the motion to

dismiss, deny the motion for summary judgment and have a trial on the third-party complaint with my client as a defendant." App. 155.

Following these colloquies, the Superior Court issued oral rulings. The court denied Wilmington summary judgment and granted reconsideration of its previous default judgment from void to voidable, thus giving Wilmington a chance to argue that it was a bona fide purchaser. App. 160.

However, the court made clear that "granting the motion to reconsider and amend the judgment in the manner that is proposed does not mean that there will be a different result as far as Ms. Smith is concerned; it simply would mean that not [sic] everybody's due process rights will have been acknowledged and respected." App. 159–60. The court then explained that it was revising its ruling because default judgment was "based on the representations of only one of the parties who are part of this conversation. We need to figure out whether that was fraud in the factum or fraud [sic] inducement. . . . So I do agree with [pro bono counsel] that there needs to be additional information exchanged regarding the nature of the fraud here." App. 160–61.

Based on this order, the parties conducted discovery and submitted summary judgment briefs on whether the deed was procured by fraud in the factum or fraud in the inducement. Motion for Summary Judgment, Feb. 24, 2022; Opposition to Motion for Summary Judgment, March 7, 2022.

VII. The Court Grants Summary Judgment to Wilmington on Only the Bona Fide Lender Issue.

On Feb. 10, 2022, Wilmington sought summary judgment in its favor on whether the quitclaim deed was void or voidable, and, if voidable, whether Visio was a bona fide lender. On Sept. 29, 2022, the Superior Court held a hearing on Wilmington's summary judgment motion and granted it. The Superior Court reduced this ruling to a written order issued on Feb. 7, 2023, holding that "the cumulative 'red flag' factors alleged to put Intervenor on inquiry notice were not legally sufficient to do so, thus Intervenor was not disqualified from being a bona fide purchaser for value." App. 512. The Superior Court did not provide any other written reasoning for this ruling. In its Feb. 7, 2023 Order, the Superior Court also dismissed with prejudice Count VII of Ms. Smith's Third-Party Complaint as to Wilmington. App. 513. Ms. Smith timely appealed.

SUMMARY OF ARGUMENT

This Court should reverse and remand to the Superior Court for further proceedings. The Superior Court reversibly erred in two ways: first by failing to rule on Ms. Smith's argument that the fraudulent quitclaim deed was void, and second by ruling that Wilmington's predecessor was a bona fide lender without notice. At a minimum, this Court should vacate and remand for a trial on the merits so that the Superior Court can address genuine disputes of material fact.

First, this Court should reverse and remand because the Superior Court failed to rule on a meritorious argument that Ms. Smith presented below. The Superior Court made a simple error below that this Court can correct with a narrow ruling. Namely, after Wilmington belatedly intervened in the case to assert its property interest, the Superior Court ordered discovery and briefing on whether the fraudulent quitclaim deed was procured by fraud in the factum (which would render the deed void and Wilmington would take nothing) or fraud in the inducement (which would render the deed voidable and require Wilmington to show that it was a bona fide lender without notice). Wilmington moved for summary judgment on that issue, and Ms. Smith opposed summary judgment because the fraudulent quitclaim deed was void. But the Superior Court never ruled on this issue, erroneously concluding that it had already settled the point. This was error, and this Court should remand for the Superior Court to make that determination in the first instance.

Had the Superior Court reached the issue, Ms. Smith would have prevailed. The undisputed facts below demonstrate that Ms. Smith had no knowledge of an "essential term" of the transaction: that she would be transferring her home to Jefferson and Fryar. The fraudulent deed was therefore void ab initio, and Ms. Smith's defrauders never had a valid interest in her home to which Wilmington's deed of trust could attach.

Second, this Court can independently reverse and remand because the Superior Court erred by granting summary judgment to Wilmington when the undisputed facts demonstrated that its predecessor had notice of the fraud. Assuming that the fraud against Ms. Smith merely rendered the deed voidable, Visio could take a valid property interest only if it was a bona fide lender for value, meaning it had no actual, constructive, or "inquiry" notice of the fraud. The Superior Court failed to rule on Ms. Smith's argument on the threshold issue that Visio's notice should have been tested when it recorded its deed of trust, even when the undisputed facts reflect that Visio was on *actual* notice of the fraud before that date. This Court should clarify the recordation date is the correct date to test notice, which makes this is a straightforward case of actual notice.

Alternatively, Visio was on inquiry notice before the loan closing date because several red flags created enough uncertainty about title that Visio should have conducted a reasonable inquiry into ownership. Such an inquiry would have revealed the fraud, putting Visio on inquiry notice. To the extent any of these facts are insufficient for this Court to reverse on legal grounds, this Court should vacate and remand for trial because there are triable issues of material fact.

STANDARD OF REVIEW

This Court reviews summary judgment rulings de novo with no deference to the Superior Court, "conducting an independent review of the record in

considering whether the motion was properly granted." *District of Columbia v. Design Ctr. Owner (D.C.) LLC*, 286 A.3d 1010, 1019 (D.C. 2022) (citation omitted). In so reviewing, this Court applies the "same standard" as the Superior Court and may only affirm a grant of summary judgment if, "when viewing the record in the light most favorable to the non-moving party, there are no genuine issues of material facts in dispute, and the moving party is entitled to judgment as a matter of law." *Square 345 Ltd. P'ship v. District of Columbia*, 927 A.2d 1020, 1023–24 (D.C. 2007).

ARGUMENT

The Superior Court reversibly erred by granting Wilmington summary judgment, leaving Ms. Smith with an over-$230,000 lien on her family home from a loan issued to those who fraudulently took that home from her. Specifically, after permitting Wilmington to enter the case over 21 months after Visio first learned of Ms. Smith's fraud claim, the Superior Court made two reversible errors.

First, after ordering discovery and briefing on whether the quitclaim deed was void or voidable, the Superior Court erred by failing to rule on that issue. This alone is grounds for reversal as, had it evaluated the issue, the Superior Court would have concluded that the deed was void and Wilmington had no valid property interest regardless of its knowledge of the fraud. This Court should remand for the Superior Court to make that determination in the first instance.

Second, after erroneously failing to address Ms. Smith's argument, the Superior Court erred by granting Wilmington summary judgment on its bona fide purchaser status. This too is an independent ground for reversal because the undisputed facts demonstrate that Wilmington's predecessor was not a bona fide lender without notice of the fraud against Ms. Smith. This Court should reverse and remand.

I. The Superior Court Erred by Granting Wilmington Summary Judgment Without First Ruling on Whether the Fraudulent Deed was Void or Voidable.

Unenforceable fraudulent conveyances are distinguished into two categories: void ab initio and voidable. A void transaction is a legal nullity, meaning even a bona fide purchaser without notice takes nothing. *Columbia Fed. Sav. & Loan Ass'n v. Jackson*, 131 A.2d 404, 408 (D.C. 1957). A voidable contract, on the other hand, is unenforceable as to the parties to the contract, but remains enforceable against those parties by a bona fide purchaser without notice of the fraud. *Chen v. Bell-Smith*, 768 F. Supp. 2d 121, 136 (D.D.C. 2011). Likewise, fraud falls into two categories: fraud in the inducement renders a transfer voidable, whereas fraud in the factum renders it void. Fraud in the inducement occurs when fraudulent representations cause the grantor "to execute the very contract intended to be executed." 17A C.J.S. CONTRACTS § 218. By contrast, fraud in the factum is that "sort of fraud that procures a party's signature to an instrument without

knowledge of its true nature or contents." *Moore v. Deutsche Bank Nat. Tr. Co.*, 124 A.3d 605, 609 (D.C. 2015) (quoting *Chen*, 768 F. Supp. 2d at 135). Thus, whether a transfer resulted from fraud in the factum or fraud in the inducement determines whether that transfer is void or merely voidable.

Here, the Superior Court found in 2020 (and the parties have not disputed) that Ms. Smith's quitclaim deed to SJ&F was fraudulent. App. 114–15. However, the parties sharply dispute the nature of the fraud—i.e., whether it rendered the deed void or voidable. Below, after belatedly entering the case months after judgment was entered, Wilmington moved for summary judgment on the grounds that the deed was voidable, and Ms. Smith opposed on the grounds that it was void ab initio. In advance of summary judgment briefing, the court told the parties: "We need to figure out whether that was fraud in the factum or fraud [sic] inducement"—i.e., whether the quitclaim deed was void or voidable. App. 160. It then granted Ms. Smith's motion to continue for discovery on both issues. App. 161. Accordingly, both parties' summary judgment briefs addressed the nature of the fraud.

But the Superior Court then failed to rule on this issue, mistakenly granting summary judgment to Wilmington without first ruling whether the fraudulent quitclaim deed was void or voidable. This failure is reversible error because Wilmington's notice was irrelevant if the deed was void. Had the Superior Court

reached the issue, Wilmington would not have been entitled to summary judgment because the undisputed facts in the light most favorable to Ms. Smith show that she had no knowledge of the deed's essential terms, rendering the deed void.

A. The Superior Court Never Ruled on Whether the Fraudulent Deed was Void or Voidable.

To grant Wilmington summary judgment on the bona fide lender issue, the Superior Court first needed to decide that the fraudulent quitclaim deed was voidable instead of void. (Had the Superior Court instead decided that the deed was void, Wilmington could have never acquired a valid property interest, regardless of its awareness of Ms. Smith's claims. *See supra*, at 24.) But the Superior Court skipped this inquiry entirely.

When a party "adequately present[s]" an argument for the superior court's consideration, it is error for the court to "simply fail[] to rule on it." *Greene v. United States*, 279 A.3d 363, 370 (D.C. 2022); *see also Dada v. Child.'s Nat. Med. Ctr.*, 715 A.2d 904, 907 (D.C. 1998) (where the court's ruling on a motion would have been dispositive of summary judgment, "the trial court erred by failing to rule on [that motion] before granting summary judgment"). That is what occurred here.

In February 2021, the Superior Court was presented with a difficult situation entirely of Wilmington's making. Wilmington had belatedly intervened in June 2020, by which time Ms. Smith had a judgment against SJ&F voiding the deed and restoring title. App. 120. Wilmington then bombarded the court with paper,

moving to reconsider the 2020 judgment and have summary judgment entered against Ms. Smith without a single discovery request.

At a hearing on these motions, the court struck a balance between Wilmington's due process right to be heard and Ms. Smith's interest in retaining her family home free and clear. The court denied Wilmington summary judgment, but promised to consider its putative property interest at a future hearing where Wilmington could participate. App. 160. To effectuate that balance, the court granted Wilmington reconsideration of the default judgment order from void to voidable, thus giving Wilmington a chance to argue that it was a bona fide purchaser. *Id.*

However, the court made clear that "granting the motion to reconsider and amend the judgment in the manner that is proposed does not mean that there will be a different result as far as Ms. Smith is concerned," because "[w]e need to figure out whether this was fraud in factum or fraud inducement [sic]" and have "additional information exchanged regarding the fraud here." App. 159–61. Based on this order, the parties conducted discovery and submitted summary judgment briefs on whether the deed was procured by fraud in the factum or fraud in the inducement.

At the 2022 summary judgment hearing, however, the Superior Court made an abrupt about-face. When Ms. Smith's pro bono trial counsel began her

presentation, the court instructed her not to proceed because, "let me just remind you, I ruled that the deed was voidable. . . . We're not going to relitigate that issue." App. 492. After a colloquy on inquiry notice, the court granted summary judgment to Wilmington in an oral ruling, making no mention of the fraud issue. App. 494–505.

This was error. The court did not previously rule that the deed was voidable; it granted the motion to reconsider for the express purpose of "figur[ing] out whether this was fraud in factum or fraud [in the] inducement." App. 160. It then granted Ms. Smith's motion to continue so the parties could conduct discovery on this point. App. 161. The parties heeded this instruction by briefing the issue post-discovery, but the Superior Court "simply failed to rule." *Greene*, 279 A.3d at 370. This Court should correct this error by reversing and remanding for the Superior Court to evaluate itself whether the deed was void or voidable.

B. Had the Superior Court Reached the Issue, Ms. Smith Would Have Prevailed Because the Undisputed Facts Show the Fraudulent Quitclaim Deed was Void.

The failure to rule on this issue prejudiced Ms. Smith because the Superior Court's bona fide purchaser analysis hinged on the deed being voidable, instead of void. Because a void deed conveys no property interest, no amount of bona fides permit Wilmington to keep an interest in Ms. Smith's family home if the fraudulent quitclaim deed was procured by fraud in the factum. The undisputed

material facts here show that it was.

Fraud in the factum is "the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents." *Moore*, 124 A.3d at 609 (quoting *Chen*, 768 F. Supp. 2d at 135). While this Court has not articulated its exact elements, there are traditionally three elements that must be proven to show fraud in the factum:

1. Misrepresentations caused the instrument's execution;
2. The defrauded party had no knowledge of the instrument's character or its essential terms; and
3. The defrauded party had no reasonable opportunity to learn the instrument's character or its essential terms.

17A C.J.S. CONTRACTS § 218; Uniform Commercial Code § 3-305(a)(1)(iii) & cmt. 1; *see* D.C. Code § 28:3-305(a)(1)(iii). This Court has described the third element not as part of the fraud claim itself, but as estoppel against a grantor who, "if as a literate and reasonably intelligent person[,] fails to read the instrument." *Columbia Fed. Sav. & Loan Ass'n*, 131 A.2d at 408.

Fraud in the factum is distinguishable from fraud in the inducement by the grantor's understanding of what she is signing. Fraud in the inducement occurs when fraudulent representations cause the grantor "to execute the very contract intended to be executed." 17A C.J.S. CONTRACTS § 218. Fraud in the factum, on the other hand, occurs when there is a "disparity between the contract executed and

the one intended to be executed." *Id.* Thus, the classic case of fraud in the factum is a celebrity who signs a contract believing it to be an autograph, *Resol. Tr. Corp. v. Kennelly*, 57 F.3d 819, 822 (9th Cir. 1995), but such fraud also extends to ordinary people without adequate understanding of complicated transactions who convey their homes without realizing they have done so. *See Archie v. U.S. Bank, N.A.*, 255 A.3d 1005, 1017–18 (D.C. 2021); *Holmes v. Jones*, 343 F.2d 301, 302 (D.C. Cir. 1965).

This court recently reversed summary judgment on fraud in the factum in *Archie*. 255 A.3d at 1010. In that case, a bank sought to foreclose against a homeowner after acquiring its interest from an entity that defrauded that homeowner. *Id.* at 1014. The homeowner alleged fraud in the factum as an affirmative defense when an equity-stripping fraud scheme promised her a job that would help her make loan payments and she "lacked understanding in financial matters." *Id.* at 1017–18. The Superior Court granted summary judgment to the bank, but this Court reversed, reasoning that the homeowner's lack of financial understanding "created a triable issue as to whether she was defrauded about the content and significance of the loan documents she signed." *Id.* at 1018.

Likewise, the D.C. Circuit has upheld a fraud in the factum defense where the homeowner did not understand the nature of the transaction. In *Holmes*, the purchaser of a note secured by a home in D.C. sought to enforce its deed of trust

against the homeowner. 343 F.2d at 302. The homeowner, an eighty-year-old woman of less than average business knowledge, had conveyed her home but "had not been properly informed and did not realize that the documents she signed were conveyances of her property." *Id.* The trial court found the conveyance void, and the D.C. Circuit affirmed, ruling that the homeowner's lack of knowledge voided the deed of trust securing the note, "[e]ven assuming [the buyer] took that deed as a bona fide purchaser without notice." *Id.*

In contrast, the United States District Court for the District of Columbia has rejected a fraud in the factum claim brought by college educated plaintiffs who were "both 'literate and reasonably intelligent' persons who simply failed to read the documents they were signing." *Chen*, 768 F.Supp.2d at 136 (quoting *Jackson*, 131 A.2d at 408). In *Chen*, two victims of a foreclosure rescue scheme sued the owners of their home after a stranger approached them and offered help avoiding foreclosure, ultimately only to transfer their home to a third party. *Id.* at 135–36. The victims, both master's degrees holders literate in economics and finance, signed this fraudulent deed without reading it. *Id.* at 136. The court, therefore, applied D.C. law to deny their fraud in the factum claim, reasoning that there was "no dispute that plaintiffs were fully capable of reading and understanding the deed of sale . . . [yet] chose to sign these documents without reading them." *Id.*

Here, the undisputed facts in the light most favorable to Ms. Smith

demonstrate she had no knowledge of the fraudulent quitclaim deed's true character, making this a case of fraud in the factum:

First, Jefferson's misrepresentations caused Ms. Smith to execute the quitclaim deed. App. 114, 429–30; *cf.* App. 210, 213 (Wilmington undisputed facts reciting Ms. Smith's allegations without providing evidence to the contrary).

Second, Ms. Smith believed the instrument she was signing had a completely different character than its real effect. According to Mr. Jefferson's false representations, Ms. Smith was an owner of SJ&F who would receive income and employment from that company as a result of the deed. App. 64–65. Moreover, at Ms. Smith's insistence, Mr. Jefferson wrote and signed an addendum to the deed stating that her family home "will always belong to LoLillian Smith who is a [sic] active member of SJ&F Builders LLC, in which *the Deed will reflect her ownership.*" App. 444 (emphasis added). Thus, Mr. Jefferson led Ms. Smith to believe that the transfer was only to help her with foreclosure and would have no effect on her home ownership, and he signed an instrument memorializing this understanding in writing.

Like in *Archie*, where this Court reversed summary judgment to a bank against a woman who "lacked understanding in financial matters" and whose defrauders "told her they were going to give her a high-paying job that would enable her to make the loan payments," Ms. Smith was "defrauded about the

content and significance of the . . . documents she signed." *See* 255 A.3d at 1018. Similarly, like in *Holmes*, where the D.C. Circuit affirmed a fraud in the factum defense for an 80-year-old woman who "had not been properly informed and did not realize that the documents she signed were conveyances of her property," Ms. Smith did not understand that the fraudulent deed would divest her of ownership. *See* 343 F.2d at 302. Ms. Smith's case is thus substantially similar to others where fraud in the factum allegations have been upheld or survived summary judgment.

It is not enough that Ms. Smith was "aware that [the deed] transferred the property from her to SJ&F." *See* Wilmington Motion for Summary Judgment, Feb. 10, 2022. The facts here are materially different from *Chen* and more like those in *Archie* and *Holmes*. In *Chen*, there were two plaintiffs who could rely upon each other, "both college-educated," "both hold[ing] master's degrees," and "fully capable of reading and understanding the deed . . . *if they had taken the time to do so*," but choosing to sign without reading based "solely on the representations of a woman whom they had never met." 768 F. Supp. 2d at 136 (quoting *Brown v. Carlson*, 2009 WL 2914191, at *6 (Mass. Super. Ct. Sept. 1, 2009)) (emphasis added). Thus, unlike the *Chen* plaintiffs, Ms. Smith did not ignore the documents presented to her. Rather, she was deceived about their very nature by a decades-long, trusted friend, and the conveyance of her family home was contrary to the

representations about SJ&F and the very written addendum that she understood was part of the transfer. Ms. Smith meets the second element.

Third, and finally, Ms. Smith will not be estopped on remand from raising her fraud in the factum claim. *See Jackson*, 131 A.2d at 408. Ms. Smith is literate, but not financially literate when it comes to real estate transactions,[12] and she suffers from mental illness that affects her mood and perception. Nonetheless, she demanded a written addendum to the quitclaim deed guaranteeing her understanding that she was transferring the home to herself as an owner of SJ&F, which Mr. Jefferson supplied. App. 444. Ms. Smith thus took reasonable steps to learn the true nature of the transaction, but was prevented from effectively doing so by Mr. Jefferson's fraud.

The undisputed facts thus demonstrate that the fraudulent quitclaim deed was executed by fraud in the factum, rendering the deed void. At minimum, given the importance of the grantor's understanding of the deed when characterizing a fraud's nature, there is a triable issue of fact on what Ms. Smith understood when she was signing the quitclaim deed and addendum. If at trial Ms. Smith could demonstrate that she was "defrauded about the content and significance of the . . .

[12] In fact, in response to Wilmington's argument below that Ms. Smith should have researched North Carolina corporate records to learn about SJ&F excluding her, the Superior Court stated that "frankly, putting the onus on her to do things like research North Carolina corporate records is simply not equitable." App. 142–43.

documents she signed," she would prevail, making summary judgment in favor of Wilmington "inappropriate." *Cf. Archie*, 255 A.3d at 1017–18.

C. Alternatively, the Superior Court Erred by Granting Wilmington's Motion to Reconsider.[13]

Finally, this Court must reverse even if it finds no error in the Superior Court's failure to rule on Ms. Smith's complete defense to summary judgment.

Assuming arguendo that the Superior Court reconsidered its judgment voiding the fraudulent quitclaim deed with no intention to permit further litigation on the issue (an argument belied by the record), that would itself be reversible error. As described above in Part II.B, the undisputed facts before the Court demonstrate that the quitclaim deed came about through fraudulent in the factum, and was thus void ab initio. Granting Wilmington's motion to reconsider was therefore predicated on a legal error and, as such, an abuse of discretion.

II. The Superior Court Erred By Ruling on Summary Judgment That Visio was a Bona Fide Purchaser.

If this Court declines to reverse based on the Superior Court's failure to rule on Ms. Smith's fraud argument, it should nonetheless reverse and remand based on the court's rulings on Visio's—and thus, Wilmington's—bona fide lender status. The Superior Court erred by (1) ruling on summary judgment that "the cumulative

[13] Motions to reconsider are reviewed for abuse of discretion, but a claimed legal error is generally reviewed de novo. *Callahan v. 4200 Cathedral Condo.*, 934 A.2d 348, 353 (D.C. 2007).

'red flag' factors alleged to put [Visio] on inquiry notice were not legally sufficient to do so, thus [Visio] was not disqualified from being a bona fide purchaser for value;" and (2) dismissing Count VII of Ms. Smith's Third-Party Complaint as to Wilmington. App. 512–13.

Assuming the fraud against Ms. Smith merely rendered the deed voidable, Visio could take a valid property interest only if it was a bona fide lender for value, meaning it had no actual, constructive, or "inquiry" notice of the fraud. The Superior Court failed to rule on Ms. Smith's argument concerning the threshold issue of when Visio's notice should have been tested. The undisputed facts reflect that Visio was on actual notice of the fraud before recording its deed of trust, and Ms. Smith argued below that the recordation date was the correct date on which to measure Visio's notice. This Court should clarify that Ms. Smith's argument on this point is correct, which makes this a straightforward case of actual notice.

Alternatively, Visio had ample inquiry notice here because several red flags created enough uncertainty about title that Visio—had it exercised "ordinary prudence"—would have conducted a reasonable inquiry into ownership before closing on the loan and disbursing the funds. Such an inquiry would have revealed the fraud, putting Visio on inquiry notice. To the extent any of these facts are insufficient for this Court to reverse on legal grounds, this Court should vacate and remand for trial because there are triable issues of material fact.

A. The Superior Court Committed Reversible Error by Failing to Rule on the Contested, Dispositive Issue of When Visio's Notice Must be Assessed.

Ms. Smith and Wilmington debated in their summary judgment briefs when notice must be assessed, and this issue is dispositive of Visio's bona fide lender status, given the undisputed fact that Visio was on actual notice of Ms. Smith's fraud claims between loan closing and when Visio's deed of trust was recorded. Wilmington argued the correct date was no later than Oct. 10, 2018, when Visio disbursed funds pursuant to the loan, which closed on Oct. 8, 2018. For her part, Ms. Smith argued it should be the date when Visio recorded its deed of trust securing a property interest in Ms. Smith's home.

But the Superior Court failed to address this contested and dispositive question of when to evaluate notice. This error prejudiced Ms. Smith because the undisputed facts show that Visio had actual notice of the fraud before it recorded its deed of trust, and its inquiry notice at the time of disbursement would have been irrelevant if measured on the recordation date. This too is reason enough for a narrow reversal and remand so the Superior Court can evaluate in the first instance when notice must be assessed. *See supra*, at 26.

B. The Undisputed Facts Show that Visio was on Actual Notice of Ms. Smith's Interest on the Day Visio's Deed of Trust was Recorded, Which is When Visio's Notice Must be Tested.

Visio was not a bona fide lender—and, thus, neither is Wilmington—because Visio's notice must be assessed on Dec. 13, 2018, when its deed of trust was recorded, and it is undisputed that Visio was on actual notice of Ms. Smith's claims before that date—no later than Oct. 17, 2018. To be a bona fide lender, Visio must have "*acquire[d] an interest in [Ms. Smith's home]* for a valuable consideration and without notice of *any outstanding claims* which are held against [her home] by third parties." *Clay Properties, Inc. v. Washington Post Co.*, 604 A.2d 890, 895 (D.C. 1992). Visio's property interest needed to be legally effective and binding as against those who have "outstanding claims," *id.*, in Ms. Smith's home, including Ms. Smith herself. And, as against "others interested in the property," such as Ms. Smith, Visio's deed of trust took effect only when it was recorded. *See* D.C. Code § 42-401. Thus, Visio did not acquire a property interest in Ms. Smith's home that was effective as against her until Visio's deed of trust was recorded, at which point Visio was already on actual notice of her claims of a foreclosure rescue scam.

The importance of looking to D.C.'s recording statutes to decide the date on which to assess notice is illustrated in *Wash. Mut. Bank v. Homan*, 186 Md. App. 372 (2009). In that case, to decide when a bank seeking bona fide lender status

had "acquired" an interest in certain property, the appellate court looked to Maryland recording statutes to determine when the bank's deed of trust became effective against competing investor interests. The bank's deed of trust was dated before—but recorded after—the investors' interest arose. For this reason, the trial court had ruled for the investors. The appellate court disagreed, reasoning that that once the bank's deed of trust was recorded, the deed's effective date became when the deed was granted—i.e., before the investors' interest arose—based on the particular language of Maryland's recording statutes (which differ materially from those of the District of Columbia).[14]

As applied here, *Homan* stands for the proposition that (1) the timing of when a would-be bona fide lender acquires a property interest turns on when its deed of trust becomes effective as against the parties with competing interests, and (2) determining the deed's effective date depends on applicable state recording statutes.[15] Thus, the date when Visio's notice should be assessed depends on the effective date of its deed of trust, which in turn depends on D.C. recording statutes.

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[14] The appellate court then remanded to address the parties' arguments about whether the bank was on notice of fraudulent activity at the time the bank's deed of trust was granted. *Homan*, 186 Md. App. at 402–03.

[15] This *Homan* dicta carries little weight here: "We are aware of no authority supporting the proposition that a deed holder's 'notice,' for purposes of resolving a dispute between two competing interests to the same property, is to be assessed at the time of the recording of the deed." *Id.* at 399. The *Homan* court did not address any D.C. cases or statutes, nor did it have reason to do so.

The relevant D.C. recording statute provides:

> Any deed conveying real property in the District, or interest therein, or declaring or limiting any use or trust thereof, executed and acknowledged and certified as [required], and delivered to the person in whose favor the same is executed shall be held to take effect from the date of the delivery; *except, that as to* creditors and subsequent bona fide purchasers and mortgagees without notice of said deed, and *others interested in the property*, *it shall only take effect from the time of its delivery to the Recorder of Deeds for record*.

D.C. Code § 42-401 (emphasis added). This language somewhat tracks—but differs importantly—from the state recording statutes relied upon in *Homan*—Maryland Real Property Article §§ 3-201 & 3-203. 186 Md. App. at 399–400. The first Maryland provision, Section 3-201 provides:

> The effective date of a deed is the date of delivery, and the date of delivery is presumed to be the date of the last acknowledgment, if any, or the date stated on the deed, whichever is later. Every deed, when recorded, takes effect from its effective date as against the grantor, his personal representatives, every purchaser with notice of the deed, and every creditor of the grantor with or without notice.

Section 3-203 of the Maryland Real Property Article further provides:

> Every recorded deed or other instrument takes effect from its effective date as against the grantee of any deed executed and delivered subsequent to the effective date, unless the grantee of the subsequent deed has:
>
> (1) Accepted delivery of the deed or other instrument:
>
> (i) In good faith;
> (ii) Without constructive notice under § 3-202; and
> (iii) For a good and valuable consideration; and
>
> (2) Recorded the deed first.

The District's provision differs meaningfully from Maryland's because D.C. requires that, as to "others interested in the property," a deed becomes effective on the day it is recorded. As applied here, Ms. Smith falls in this category of "others interested in the property," meaning that Visio's deed of trust was not effective as against her until the deed of trust was recorded on Dec. 13, 2018. Therefore, applying the *Homan* reasoning, Visio could not have been a bona fide lender before that date, and in fact, Visio was not a bona fide lender because it was on actual notice of Ms. Smith's interest in her home no later than Oct. 17, 2018.

Holding Visio—and Wilmington—accountable to D.C.'s recording statute further serves the principles underlying bona fide purchaser doctrine:

> The logical and rational basis for preferring the bona fide purchaser over the grantor of the record title holder is that as between two innocent parties, i.e., appellant and the bona fide lenders such as Perpetual and other trust holders, appellant must yield to those who in good faith relied on the state of the record which her negligence allowed to exist. It would *manifestly defeat the whole point of recording statutes* to permit Mrs. Osin to assert her admitted equities at the expense of those who relied in good faith on a state of the record title which her acts created.

Osin v. Johnson, 243 F.2d 653, 656–57 (D.C. Cir. 1957). Here, it would also manifestly defeat the District's recording statutes to allow Visio to ignore their requirement that Visio's deed of trust was not effective against "others interested in the property"—such as Ms. Smith—until the deed was recorded.

C. Alternatively, Before the Loan Closed, the Undisputed Facts Show Visio was on Inquiry Notice of Ms. Smith's Interest.

Even assuming that the Superior Court properly assessed Visio's notice on the date it disbursed the loan funds to the defrauders, however, this Court should reverse and remand because Visio was on inquiry notice even on that date.

If a purchaser or lender is "aware of circumstances which generate enough uncertainty about the state of title that a person of *ordinary prudence* would inquire further about those circumstances," then the purchaser is "on inquiry notice of all facts and outstanding interests which a reasonable inquiry would have revealed." *Clay Properties*, 604 A.2d at 894 (emphasis added). This standard requires evaluation of the totality of the circumstances. *See, e.g.*, *Kramer v. Emche*, 64 Md. App. 27, 44 (1985).

Other courts have ruled that lenders to foreclosure rescue defrauders were on inquiry notice of the scam.[16] While these cases do not always use the term "foreclosure rescue scam," they all involve a person fraudulently acquiring a home

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[16] *See Martinez v. Affordable Housing Network*, 123 P.3d 1201, 1206–09 (Colo. 2005) (en banc) (lender on inquiry notice due to combination of factors, including use of a quitclaim deed, lender's failure to satisfy prior mortgages, and homeowners' continued possession); *In re Harydzak*, 406 B.R. 499, 511–17 (Bankr. S.D. Tex. 2009) (lender on notice of homeowners' interest in property due to numerous red flags, including the homeowners' continued possession and discrepancies in the loan papers); *Collings v. City First Mortg. Servs., LLC*, 177 Wash. App. 908, 932–39 (2013) (lender on notice because reasonable inquiry would have revealed lease—part of defrauder's scheme—that would have raised red flag indicating possible possession by person with superior claim to property).

by promising to assist a homeowner facing (potential or actual) foreclosure. And although the analyses in these and other cases addressing inquiry notice is heavily fact-specific, some key patterns emerge and are present here. Inquiry notice can arise when a lender is aware of various types of facts taken together, including that the prior homeowner maintains possession,[17] the defrauders used a quitclaim deed,[18] discrepancies in the loan application and related materials, and the prior homeowner transferred the house for minimal consideration.[19]

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[17] Possession "inconsistent with the record title and under an apparent claim of ownership is notice to purchasers of whatever interest the person actually in possession has in the fee," except if the seller "remains for a time in possession after giving a fee-simple deed, *with covenants*, which he permits to be recorded." *Chen*, 768 F. Supp. 2d at 137 (emphasis added). This exception should not apply here because the defrauders used a quitclaim deed, which provides no covenants. In any event, the inquiry notice standard requires analyzing the totality of the circumstances, not each one discretely and separately. "While possession of a person not the record owner is often a source of inquiry notice, it is not the sole possible source." *Clay Properties*, 604 A.2d at 897.

[18] "[W]hile a conveyance by quitclaim should not automatically raise suspicion, it should not shield a transaction from scrutiny either. When a grantor chooses to convey property by quitclaim, an element of risk is imposed upon the buyer that would not otherwise be present if the conveyance were by warranty deed. Thus, although by no means dispositive, a conveyance by quitclaim is a significant factor to be considered when assessing inquiry notice." *Martinez*, 123 P.3d at 1207–08. Again, use of a quitclaim deed is only one piece of what can make overall conduct suspicious.

[19] "Grossly inadequate" consideration can give rise to constructive notice of an allegedly fraudulent conveyance. *See Chen v. Bell-Smith*, 768 F. Supp. 2d 121, 137 (D.D.C. 2011) (citing *Iseli v. Clapp*, 254 Md. 664, 255 A.2d 315, 319 (1969)); *see also Miebach v. Colasurdo*, 685 P.2d 1074, 1078–79 (Wash. 1984) (en banc).

Here, these types of circumstances and others—considered in their totality—were red flags that would have prompted Visio to inquire further had it applied "ordinary prudence."[20] Indeed, in considering whether the facts known to Visio warranted further inquiry, the Superior Court stated, "It might have been prudent." App. 505. If Visio had then conducted a "reasonable inquiry," it would have learned of Ms. Smith's "outstanding interest" in her home. Thus, Visio was on inquiry notice of her interest, meaning Visio was not a bona fide lender.

By early October, in the days before the closing, Visio knew the following:

- Two months after SJ&F was formed, it acquired Ms. Smith's home for free;
- SJ&F would net more than $100,000 in cash proceeds from Visio's loan;
- Ms. Smith was continuing to reside[21] in her home for several months[22] while

[20] If Visio was not a bona fide lender, then neither was Wilmington. *See Fox-Greenwald Sheet Metal Co. v. Markowitz Bros.*, 452 F.2d 1346, 1358 n.69 (D.C. Cir. 1971) ("an assignee stands in the shoes of his assignor, deriving the same but no greater rights and remedies than the assignor then possessed").

[21] Wilmington did not dispute that Visio knew Ms. Smith was continuing to reside in her house. In any event, Visio had "an affirmative obligation to make a physical inspection of" her house. 14 POWELL ON REAL PROPERTY § 82.02[1][d][iii][A] (2023). "Figuratively speaking, the land is an open book (much like the record books) for all to see, and the purchaser has an obligation to inspect it. Thus, even if the purchaser does not have actual notice of the possession by the adverse party, notice of it will be implied." *Id.*

[22] Several months passed between the transfer to SJ&F (February 2018) and when Visio closed the loan and recorded its deed of trust (October and December 2018, respectively). For this entire period, Ms. Smith continued living in her home. *Cf.* 14 POWELL ON REAL PROPERTY § 82.02[1][d][iii][A] (2023) ("[A] holdover grantor in possession is not considered to give a prospective purchaser notice of any rights such a grantor may possess.… *Objection to this rule seems appropriate when the*

a lease identified someone else – Moses Pernell – as the tenant;

- SJ&F had a lawyer, but SJ&F's members handled the paperwork without the aid of either a lawyer or a title company;
- Instead, SJ&F used a quitclaim deed filled in by hand;
- The deed incorrectly[23] identified the grantee;
- SJ&F lacked an owner's title policy, which Visio required of borrowers, and did not at first know what such a policy was;
- Months after Ms. Smith's defrauders acquired her home for free, none of her creditors knew about the transfer; and
- DCHA resisted providing a payoff and indicated to ServiceLink that the process constituted "abuse."

Even if Visio's employees had never heard of a foreclosure rescue scam or similar schemes, this combination of circumstances would have "generate[d] enough uncertainty" that Visio would have probed this situation further had it applied "ordinary prudence." *Clay Properties*, 604 A.2d at 894. Indeed, the Superior Court observed it would have been "prudent" to do so. App. 505. Visio's loan would have allowed SJ&F to make something out of nothing. Specifically, the loan would have allowed SJ&F to leverage a freely obtained property into more

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grantor holds possession for a long period of time after the conveyance.") (emphasis added).

[23] At closing, SJ&F used a deed granting Ms. Smith's home from "SJ & F Builders" to "SJ&F Builders LLC." App. 451. Ms. Smith's expert below argued that this procedure failed to transfer title to SJ&F, meaning that neither SJ&F nor Visio ever acquired valid title to Ms. Smith's home. App. 198–99.

than $100,000 in cash. Meanwhile, Ms. Smith had given away for free her long-time home in which she had more than $100,000 in equity, only to occupy the house and presumably become a rent-paying tenant, given that Visio only issued loans for rent-ready properties. Why would she do this? Also, why did a lease name someone else as the tenant? And was SJ&F a bona fide landlord, given that it was recently formed and its representatives used hand-written forms, miswrote the entity's name, and did not know what title insurance was? A person exercising ordinary prudence would have recognized and probed such questions, particularly given the array of other discrepancies and difficulties.

Moreover, as applied to Visio—a sophisticated lender in a world where foreclosure rescue scams have become common enough that numerous states have passed laws addressing them[24]—"ordinary prudence" should incorporate an awareness of the risk of such widespread frauds. *See Albice v. Premier Mortg. Servs. of Washington, Inc.*, 174 Wash. 2d 560, 573 (2012) (en banc) (when determining bona fide purchaser status, "we consider the purchaser's knowledge and experience with real estate"). In this light, the circumstances surrounding SJ&F's loan application should have raised the concern of a possible foreclosure rescue scam. Although these schemes can take myriad forms, SJ&F's actions were

[24] *See supra* note 3.

consistent with a scam to strip the equity out of Ms. Smith's house. For a sophisticated, experienced lender like Visio, "ordinary prudence" would have meant recognizing the signs of a fraudulent scheme and conducting a "reasonable inquiry" to determine Ms. Smith's view of SJ&F's actions.

Visio's "reasonable inquiry" could have taken many forms. Ms. Smith's expert report provided some examples of prudent steps Visio could have taken:

> 1) Ask SJ&F for supporting documentation of the transaction (i.e. the contract between it and the previous owner, Smith) and verif[y] that the consideration required in the agreement was paid. *Had ServiceLink performed this due diligence ServiceLink would have discovered that Smith was supposed to be a member of SJ&F.*
>
> 2) Contacted Smith and asked her to confirm in writing that she consented to the transaction. Given that a revised quitclaim deed was being required anyway, best practice would have been to require Smith to join in the quitclaim deed. *Had ServiceLink performed this due diligence, it is unlikely that Smith would have consented to the transaction and assuredly the instant dispute would not exist. Most likely ServiceLink would have learned of Smith's claims and the Visio loan would never have been closed. Most certainly, ServiceLink would have learned of the addendum to the quitclaim deed expressly stating that she was conveying title to SJ&F Builders, LLC, an entity that she owned, and that she continued to own the home following conveyance of title to SJ&F Builders, LLC. Another addendum to the quitclaim deed ServiceLink would have discovered lists the purchase price at $70,000, which, of course, runs contrary to the quitclaim deed itself stating that title was conveyed for nothing and the records show no money was exchanged for conveyance of title.*
>
> 3) Call Smith to confirm that she executed the previous deed, called the notary listed on the deed to verify that the notary notarized the document and called the secretary of state where the notary was located to confirm that the notary was properly licensed as a notary at the time of the notarization. Indeed, this verification process is

> standard title underwriting practice for notarizations outside the title company's control, expressly because fraud with third party notaries is one of the highest causes of title company payouts. *Had ServiceLink performed this due diligence it appears that ServiceLink would have directly learned of Smith's claims or alternatively directly learned that Smith was to be a party of SJ&F.*

App. 197–98. In terms of contacting Ms. Smith, Rushmore's counsel expressly asked Visio if it had her authorization. This was a clear opening for Visio to contact Ms. Smith even if Visio or ServiceLink had not previously considered doing so. Another simple step would have been to regularly monitor Ms. Smith's judicial foreclosure action.[25] After Aug. 24, 2018, text plainly visible on that action's docket showed that Ms. Smith was alleging a foreclosure rescue scam.

As Wilmington stated in its summary judgment brief: "if the facts in [Ms. Smith's] Third-Party Complaint are true, then [Visio] has also been scammed by the perpetrators of this alleged fraud who received $114,705.38 in cash from the proceeds of the mortgage loan assigned to [Visio]."[26] This is correct. The defrauders perpetrated a fraud on Ms. Smith to acquire her home for free, and then they perpetrated a second fraud on Visio to pocket more than $100,000 with no intention of ever paying it back.

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[25] The record indicates that Visio checked the foreclosure action docket, but it is not clear when or how often. *See supra*, at 14–15.

[26] Wilmington Memorandum on Summary Judgment, at 8, Feb. 10, 2022.

Visio was a sophisticated player in the real estate industry and, compared to Ms. Smith, far better positioned to spot a potential scam. It would have done so had it acted "prudently," as the Superior Court suggested. Therefore, Visio is far from an "innocent" lender deserving of bona fide lender status.[27] "Unfortunately for [Visio, its] own sloppiness and willingness to do business with scam artists leave [it] bearing the ultimate loss. It is the cost of doing business with unsavory individuals." *In re Harydzak*, 406 B.R. at 501.[28]

At a minimum, this Court should rule that there are triable issues of fact precluding summary judgment on Visio's status as a bona fide lender—e.g., whether Visio determined if Moses Pernell was a tenant at Ms. Smith's home, the extent of Visio's awareness of Ms. Smith's continued residence there, or the extent and timing of Visio's monitoring of her judicial foreclosure action. Issues like these are relevant to the nature and extent of suspicious circumstances that could give rise to Visio's inquiry notice, or further probing these issues could indicate that Visio had actual notice of Ms. Smith's claims even earlier than Oct. 17, 2018.

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[27] *See Scotch Bonnett Realty Corp. v. Matthews*, 417 Md. 570, 576 (2011) ("In a fraudulent deed an innocent purchaser is protected because the fraud practiced upon the signatory to such a deed is brought into play, at least in part, by some act or omission on the part of the person upon whom the fraud is perpetrated.") Here, as Wilmington suggested before the trial court, both Ms. Smith's quitclaim deed and Visio's deed of trust were obtained due to the defrauders' fraudulent conduct.

[28] Visio's failure to attain bona fide lender status means Wilmington also has no valid property interest in Ms. Smith's home.

CONCLUSION

The Superior Court's judgment in Wilmington's favor should be **REVERSED** and the case **REMANDED** for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief was sent via this Court's e-filing system, on December 22, 2023, to:

Nationstar Mortgage, LLC
D/B/A Mr. Cooper
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Wilmington Saving Fund Society, FSB
c/o Richard Lash
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and via certified mail, on December 22, 2023, to:

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Dec. 22, 2023

Respectfully submitted,

/s/ Thomas Landers

Pro bono counsel for Appellant Smith

* The two addresses for Mr. Fryar are based on the June 6, 2023 filing labeled "Returned Mail from USPS" in D.C. Superior Court, Case No. 2017-CA-007426-R(RP). This June 6th trial court filing indicates that Mr. Fryar has used both addresses and that he no longer uses the 12th St. address.

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

    - An individual's social-security number
    - Taxpayer-identification number
    - Driver's license or non-driver's' license identification card number
    - Birth date
    - The name of an individual known to be a minor
    - Financial account numbers, except that a party or nonparty making the filing may include the following:

      (1) the acronym "SS#" where the individual's social-security number would have been included;
      (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
      (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
      (4) the year of the individual's birth;
      (5) the minor's initials; and
      (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Thomas Landers
Signature

23-CV-0189
Case Number(s)

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