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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF CHARLESTON | ) | NINTH JUDICIAL DISTRICT |
| Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2,<br>Plaintiff,<br>v.<br>Ashley Johnson Beshera as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd day of March 2010; Shoreline Farms Community Association, Inc.; Wells Fargo Bank, N.A.; Cadle Rock Joint Venture, L.P. an Ohio Limited Partnership, Curtis Rogers and Julie Rogers<br>Defendants,<br>Ashley Johnson Beshera as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd day of March 2010,<br>Third-Party Plaintiff,<br>v.<br>Nationstar Mortgage LLC,<br>Third-Party Defendant. | ) | Civil Action No. 2019-CP-10-04503<br><br>**ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, GRANTING PLAINTIFF AND THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING, IN PART, AND DENYING, IN PART, DEFENDANTS' MOTION TO COMPEL** |

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SC Court of Appeals

THIS MATTER came before the Court on February 10, 2023, for hearing on Defendants Curt and Julie Rogers' Motion for Summary Judgment and Motion to Compel and Plaintiff Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2 and Third-Party Defendant Nationstar Mortgage LLC's Motion

for Summary Judgment as to the Borrower-Defendants' counterclaims, cross-claims and third-party claims. Having reviewed the submissions and arguments of the counsel and having determined the issues raised in Plaintiff's Memorandum in Support filed February 1, 2023, the Court rules that the decision is affirmed and granted for the reasons set forth in the Motion for Summary Judgment and its Memorandum in Support.

## STATEMENT OF UNDISPUTED FACTS

*Loan Origination*

This is case represents a second attempt to foreclose a first-priority mortgage encumbering real property at 2235 Shoreline Drive, Johns Island, South Carolina 29455 ("Property"). The first-priority mortgage being foreclosed in this current action was originated when Curt Rogers executed and delivered a promissory note ("Note") in the amount of $1,500,000.00 in favor of Homecomings Financial, LLC—f/k/a Homecomings Financial Network, Inc.—("Lender") on January 12, 2007. (Compl. ¶ 6.) To secure payment on the note, the Rogers signed a mortgage ("Mortgage" and together with the Note, the "Mortgage Loan") that encumbers the Property. (*Id.* ¶ 7.) The Mortgage was recorded with the Charleston County Register of Deeds Office ("ROD Office") in Book B613 at Page 844 on January 24, 2007. (*Id.* ¶ 8).

*Procedural History for the Prior Foreclosure Action*

On September 8, 2009, Mortgage Electronic Registration Systems, Inc., as nominee for Lender, assigned the Mortgage to Aurora Loan Servicing LLC ("Aurora") pursuant to an assignment of mortgage that was recorded with the ROD Office in Book 0081 at Page 058 on September 15, 2009. (Blunt Aff., ⁋ 8.)

To collect amounts due under the Mortgage Loan, Aurora filed a foreclosure action ("Foreclosure Action") against the Rogers with the Court of Common Pleas for Charleston, South



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Carolina under civil action no. 2009-CP-10-05840 on September 15, 2009 ("Action 1"). The Rogers filed an answer without counterclaims in response to Aurora's complaint on October 21, 2009. Ultimately, the foreclosure action was removed from the court's active trial roster for loss mitigation with leave for Aurora or Intervenors to restore pursuant to Rule 40(j) Order entered on March 9, 2010. The Foreclosure Action was reinstated to the court's active trial roster under case no. 2011-CP-10-01805 pursuant to an order entered on March 10, 2011 ("Action 2").

After a series of conveyances of the Property and pursuant to a deed recorded with the ROD Office on August 9, 2010, in Book 0137 at Page 344, the Property was conveyed to Ashley Beshera, as Trustee.

On February 2, 2012, the Rogers filed an amended answer and counterclaims to allege counterclaims against Aurora for the following:

- breach of contract and good faith and fair dealing for an alleged breach of a purported work-out agreement;
- declaratory judgment to address alleged unconscionable loan terms;
- unjust enrichment;
- negligent misrepresentation regarding loss mitigation negotiations and purported workout agreements;
- demand for accounting;
- promissory estoppel;
- violations of the South Carolina Unfair Trade Practices Act; and
- violation of the Truth in Lending Act.

Aurora served a timely reply to the counterclaims, and the Court entered an order substituting Nationstar for Aurora as the plaintiff in the Foreclosure Action on June 14, 2013. For a second time, the Foreclosure Action was removed from the court's active trial roster pursuant to a consent Rule 40(j) order entered by the court on June 24, 2014.

Pursuant to a reinstatement order entered on April 7, 2015, this Court returned the Foreclosure Action to active trial roster under case no. 2015-CP-10-01971 ("Action 3"). By



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consent of the Rogers and Nationstar, the Foreclosure Action was again stricken from the docket pursuant to a Rule 40(j) order entered on May 16, 2016.

*Deutsche Bank's Foreclosure*

Neither the Rogers nor Nationstar reinstated the Foreclosure Action to the Court's active trial roster. Deutsche Bank filed this current foreclosure action against Beshera as the current owner. In response to Deutsche Bank's foreclosure complaint, Beshera filed a motion to dismiss to argue that the prior entry of three 40(j) Orders in the Foreclosure Action precluded Deutsche Bank's current action under Rule 41, SCRCP and the doctrine of collateral estoppel. Beshera further argued that Deutsche Bank's action should also be dismissed because the Rogers were not joined as necessary parties to the action in Deutsche Bank's foreclosure complaint. The court considered these arguments and denied Beshera's motion to dismiss by a Form 4 Order entered on June 23, 2020.

*Counterclaims, Cross-Claims, and Third-Party Complaint*

On July 28, 2020, the Rogers received leave to intervene as defendants. Beshera and the Rogers filed and served answers that included counterclaims against Deutsche Bank and cross-claims and third-party claims against Nationstar. Through their counterclaims, cross-claims, and third-party complaint, Beshera and the Rogers allege the following six claims against Deutsche Bank and Nationstar:

- Demand for Accounting;
- Negligent Misrepresentation;
- Abuse of Process;
- Malicious Prosecution;
- Violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"); and
- Declaratory Judgment.

The demand for accounting claim, SCUTPA claim, negligent misrepresentation claim, and declaratory judgment claim alleged in this action mirror the counterclaims that the Rogers raised in the amended answer that they served in Action 2 on February 2, 2012.

**STANDARD OF REVIEW**

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56, SCRCP. In considering a summary judgment motion, the Court must view the facts in the light most favorable to the non-moving party. *Koester v. Carolina Rental Ctr. Inc*. 313 S.C. 490, 493, 443 S.E.2d 392, 294 (1994); *Baughman v. Carolina Rental Ctr. Inc*. 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001). The party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545. Once the moving party meets the initial burden of showing an absence of evidentiary support for the opponent's case, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. *SSI Med. Servs., Inc. v. Cox* 301 S.C. 493, 392 S.E.2d 789 (1990).

Notably, "[s]tatutes of limitation were developed to prevent injustices, not to further them." *Moriarty v. Garden Sanctuary Church of God*, 334 S.C. 150, 163, 511 S.E.2d 699 (Ct. App. 1999), *aff'd*, 341 S.C. 320, 534 S.E.2d 672, 706 (2000). "Statutes of limitation evolved over time with definite purposes in mind. They protect people from being forced to defend themselves against stale claims." *Id.* "'One purpose of a statute of limitations is to relieve the courts of the burden of



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trying stale claims when a [claimant] has slept on his rights.'" *Logan*, 389 S.C. at 618, 698 S.E.2d at 883 (quoting *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996)). "'Another purpose of the statute of limitations is to protect potential defendants from protracted fear of litigation.'" *Id.*

**THE ROGERS' MOTION FOR SUMMARY JUDGMENT**

The Rogers' Motion for Summary Judgment raises the same arguments raised in Beshera's Motion to Dismiss. The Rogers assert that the prior entry of three 40(j) Orders in the Foreclosure Action precludes Deutsche Bank's current action under Rule 41, SCRCP, and the doctrine of collateral estoppel. This Court disagrees.

Dismissal of an action under Rule 40(j) does not trigger the two-dismissal rule under Rule 41, SCRCP. The language of Rule 41(a)(1) simply does not address multiple dismissals of a prior action with leave to reinstate under Rule 40(j):

> Subject to the provisions of Rule 23(c), of Rule 66(a), and of any statute, an action may be dismissed by the plaintiff without order of court (A) by filing and serving a notice of dismissal at any time before service by the adverse party of an answer or motion for summary judgment, whichever first occurs, or (B) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

Rule 41(a)(1), SCRCP.

Moreover, the contention that multiple dismissals pursuant to Rule 40(j) operates as a decision on the merits, conflicts with the text of Rule 40(j) itself. Rule 40(j) refers to a "Case Stricken From Docket by Agreement." Rule 40(j), SCRCP. This "Case" can then be restored on a motion by any party, which conflicts with the contention that the case is decided on the merits upon being struck a second time.



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Additionally, a *notice* of dismissal under Rule 41 that follows a prior dismissal by the Plaintiff can operate as a decision on the merits. *Id.* However, numerous cases interpreting Rule 41 of the Federal Rules of Civil Procedure and similar state court iterations of Rule 41, SCRCP have recognized that subsequent dismissal of a previously dismissed action by anything other than a *notice* of dismissal does not constitute a merits determination. *Manning v. S.C. Dept. of Highway and Public Transp.*, 914 F.2d 44, 47 n.3 (4th Cir. 1990) (recognizing that two dismissals of an action involving the same claims stated in a previously dismissed action only happens when the second dismissal is by notice, but not when the defendant is dismissed by motion or by stipulation); 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2368, (4th Ed. Oct. 2020 Update) ("By its own clear terms, the 'two dismissal' rule applies only when the second dismissal is by notice under Rule 41(a)(1)(A)(i). It does not apply to a dismissal by stipulation, nor to an involuntary dismissal, nor to a dismissal by a court order under Rule 41(a)(2). The rule does not apply if the second dismissal is in some way irregular."); *see also Estate of Livesay ex rel., Morley v. Livesay,* 723 S.E.2d 772, 776-77 (N.C. App. 2012) (holding that the two dismissal rule did not apply because the two prior dismissals of action were involuntary and by our order); *Crawford v. Kingston*, 728 S.E.2d 904, 906 (Ga. Ct. App. 2012) (recognizing that under Georgia law, only voluntary dismissals filed by a plaintiff are to be counted for purposes of Georgia's version of Rule 41).

Unlike Rule 41(a)(1), which permits the unilateral filing and service of a notice of dismissal before an adversary responds in an action, Rule 40(j) requires an adversary's consent for entry of a Rule 40(j) order striking it from the court's docket. *See* Rule 40(j), SCRCP. This may be done once as a matter of right, but subsequent requests to strike require court approval, as occurred here.



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Thus, Rule 40(j) does not contain language on preclusion, a case struck under Rule 40(j) is not terminated insofar as any party can move to restore it; it is not a unilateral act by the Plaintiff as contemplated in Rule 41's notice of dismissal provision. This Court holds successive Rule 40(j) Orders do not operate as a decision on the merits and denies the Rogers' Motion for Summary Judgment.

## DEUTSCHE BANK'S AND NATIONSTAR'S MOTION FOR SUMMARY JUDGMENT

### 1. Beshera's and the Rogers' Claims are Time-Barred.

The claims alleged in the Beshera's Amended Answer, Counterclaims and Third-Party Complaint are time barred pursuant to applicable statutes of limitations. *See* S.C. Code Ann. §§ 15-3-530(1), (5) & (7) (setting three-year statute of limitation for actions concerning "injury to the person or rights of another not arising in contract and not enumerated by law" and "relief on ground of fraud"); S.C. Code Ann. § 15-3-535(5); S.C. Code Ann. § 39-5-150(5) ("No action may be brought under this article more than three years after discovery of the unlawful conduct which is the subject of the suit."). A counterclaim must be asserted within the limitations period at the time it is first alleged, or it is untimely. *See Whitfield Const. Co. v. Bank of Tokyo Tr. Co.*, 338 S.C. 207, 225, 525 S.E.2d 888, 898 (Ct. App. 1999).

Beshera's and Rogers' claims arise largely from events that transpired in the litigation of this matter between 2009 and 2016, including from either origination of the mortgage loan in 2007 or, loss mitigation events occurring between 2010 and 2012. Indeed, these claims were previously alleged by the Rogers in 2012.

Beshera filed her Answer and Counterclaim on July 8, 2020 and her Amended Answer, Counterclaim and Third-Party Complaint and Summons on July 15, 2020. The Rogers filed their Answer, Counterclaim and Crosscla im on August 13, 2020.



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Therefore, Beshera's and Rogers' claims for declaratory judgment, negligent misrepresentation, abuse of process, malicious prosecution, and violation of the SCUPTA are all based on facts and circumstances that arose more than three years before they filed their claims and are time barred. Although this conclusion disposes of all claims, the Court will address the merits of each below.

**2. Beshera Lacks Standing to Challenge the Terms of the Mortgage Loan or the Transfer of the Mortgage Loan.**

Beshera lacks legal standing to challenge the terms of the mortgage loan and cannot assert any claims based on any endorsements on the note or transfers or assignments of the mortgage being foreclosed. Beshera is not a party to the mortgage loan or an intended beneficiary of any assignments or agreements to transfer the note and mortgage that the Rogers signed. *See Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 445, 494 S.E. 2d 827, 833 (Ct. App. 1997) ("Generally, a third person not in privity of contract with the contracting parties has no right to enforce a contract. However, when the contract is made for the benefit of the third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person"); *see, e.g., Doherty v. PNC Mortg.*, C/A No. 0:14-cv-4013-TLW-SVH, 2015 WL 5012781, at *3 (D.S.C. July 16, 2015) *adopted in-part by* 2015 WL 5012823, at *1 (D.S.C. August 21, 2015) (holding that devisee of real property lacked standing to challenge assignment of note and mortgage because she was not party to the agreement transferring the note and mortgage or a party to either the note or mortgage); *Reese v. U.S. Bank Ass'n*, C/A No. 3:11-cv-2990-CMC-SVH, 2012 WL 1952819, at *3 (D.S.C. Apr. 30, 2012) ("Plaintiff lacks standing to contest the Assignment of Mortgage. Plaintiff is only a party to the Mortgage and, because the Assignment is a separate contract to which Plaintiff is not a party, she cannot question its validity.").



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### 3. Beshera's and the Rogers' Negligent Misrepresentation Claims Fails to Show any Element of the Cause of Action Under South Carolina law.

"[T]he plaintiff must allege and prove the following essential elements to establish liability for negligent misrepresentation: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation." *Wells Fargo Bank, N.A. v. Pappas*, No. 2016-UP-263, 2016 WL 3200188, at *1 (Ct. App. June 8, 2016).

Neither Beshera nor the Rogers have identified an actual false representation made to them by Deutsche Bank or Nationstar. As a preliminary matter, Beshera alleged that "Plaintiff, Nationstar, and/or its alleged predecessors in interest made false and misleading statements to Defendant Curt and Julie Rogers and/or the Court." Beshera Answer ⁋ 79. Naturally, the first element of misrepresentation is a representation "to the Plaintiff." Beshera cannot base her claim on representations made to the Rogers or the Court.

Further, neither Beshera nor Julie Rogers had any direct communication with Plaintiff, Nationstar, or their alleged predecessors. (Plaintiff's Exhibit A, J. Rogers Depo., p 13, lns 3-22; Exhibit C, Beshera Depo., p 14, ln 20 – p 15, ln 4). Mr. Rogers also acknowledged he has had no interaction with Plaintiff. (Plaintiff's Exhibit B, C. Rogers Depo., p 25, lns. 17-24). He testified, however, that he considered the loan terms themselves to be a misrepresentation. *Id.* p 23 ln 14 – p 24 ln 5. Finally, all claimants also identified what appear to be Nationstar's allegations made during the course of litigation that it was authorized to foreclose as a false representation. (Plaintiff's Exhibit B, C. Rogers Depo., p 25, lns. 2-14).

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Loan terms are not "representations" and are neither true nor false. *See Beneficial Fin. I, Inc. v. Windham*, 431 S.C. 256, 271, 847 S.E.2d 793, 802 (Ct. App. 2020) ("[T]o be actionable, a statement must relate to a present or pre-existing fact…). Neither Plaintiff, Nationstar, nor any other loan servicer is responsible for Mr. Rogers' understanding of the loan terms. Rather, South Carolina has long recognized the "basic premise that it is a duty owed by every contracting party to the other party and to the public to learn and know the contents of a written contract before he signs and delivers it." *J.B. Colt Co. v. Britt*, 129 S.C. 226, 123 S.E. 845, 847 (1924). Moreover, no one owed a duty to explain the loan to the Rogers. *See Regions Bank v. Schmauch*, 354 S.C. at 670, 582 S.E.2d at 444 (recognizing that bank owed no duty in tort to notify obligor of obligations or loan renewals related to guaranty agreement).

Moreover, even if false, which the Court does not decide here, allegations in pleadings and testimony cannot be asserted as a basis for misrepresentation. Litigation is an adversarial process. Litigants are compelled to engage in the process and to admit or deny allegations, as Beshera and Rogers have done. Courts have long recognized there is no civil remedy for litigation-related misconduct because "perjurious testimony constitutes a fraud or deceit on the finders of fact and on the judicial system as a whole, and not on an individual litigant." *See Patel v. OMH Med. Ctr., Inc.*, 987 P.2d 1185, 1202, 1999 OK 33 (Okla. 1999). In limited situations, judgments obtained based on the basis of fraud can be set aside under Rule 60(b), but there is no cognizable basis for one litigant to sue another under a theory of misrepresentation.

For the same reason, Beshera and the Rogers cannot demonstrate any reliance on any purported representations. Beshera and the Rogers deny all allegations related to either Nationstar or Deustche Bank's standing to secure a foreclosure remedy in this action – as the litigation process compels them to do. (Beshera Answer, Countercl. & Third-Party Compl. at ¶¶ 3 & 16, Rogers

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Countercl., Crosscl. and Third-Party Compl.). They simply do not claim to have been deceived or to have changed their position as a result of any representation.[1]

### 4. Beshera and the Rogers Cannot Show a Genuine Issue of Material Fact Concerning any Element of Abuse of Process.

The essential elements of abuse of process are: (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding." *Johnson v. Painter*, 279 S.C. 390, 391, 307 S.E.2d 860, 860 (1983). Significantly, "the tort of abuse of process, as distinguished from that of malicious prosecution, involves the malicious misuse or perversion of the process, *after its issuance*, for an end not lawfully warranted by it. *Id.* (emphasis added).

Generally, Beshera and the Rogers complain that Plaintiff and Nationstar "improperly used the process of the legal system to attempt to foreclose on the Mortgage by filing Action 1, Action 2, Action 3, and Action 4 when Plaintiff and Nationstar, and/or their alleged predecessors" filed those actions without authority to foreclose. (*See* Rogers' Countercl. ⁋ 90.) They further raise a number of purported examples of abuse of process through failing to be ready for trial, dismissing actions, failing to name the Rogers in Action 4, and failing to obtain an order allowing foreclosure, all in "aimed at the illegitimate collateral objective of obtaining an order of foreclosure of the Mortgage . . . ."

These allegations misapprehend the tort of abuse of process. The improper filing of actions may constitute malicious prosecution, but it can never constitute abuse of process, which requires "malicious misuse or perversion of the process, *after its issuance*, for an end not lawfully warranted

[1] When asked about reliance, Mr. Rogers made no mention of the purported contentions concerning authority to foreclose. Plaintiff's Exhibit B, C. Rogers Depo., p 27 ln 24 – p 29 ln 7. Rather, he testified to not receiving a "clear representation as to where we stood at any point." That is not reliance. He also mentioned making a payment of $5,900 in connection with a workout agreement that is apparently unrelated to any representation or any allegation in the pleadings. *Id.*

by it." *Johnson*, 279 S.C. at 391, 307 S.E.2d at 860 (emphasis added). What is more, litigation of an action after it is commenced, including seeking continuances, seeking relief from the Court, or otherwise availing oneself of the procedures available to a litigant, cannot be logically characterized as "a willful act in the use of the process not proper in the regular conduct of the proceeding." *Id*. Furthermore, use of the "the process of the legal system to attempt to foreclose" is unquestionably an "end" permitted by a *lawsuit to foreclose*. Beshera's and the Rogers' attempt to define the stated objective of the lawsuit as "collateral" to the lawsuit is unpersuasive.

Beshera and the Rogers have conceded they have no evidence of an "ulterior purpose." Mr. Rogers was asked:

> 1 Are you aware of any evidence that plaintiff,
> 2 Nationstar, or its predecessor was attempting to
> 3 accomplish anything other than foreclosure of the
> 4 property through the prior litigation?
> 5 MS. ARNOLD: Objection as to form.
> 6 THE WITNESS: I'm not sure what you're
> 7 talking about. But I guess no.

Plaintiff's Exhibit B, C. Rogers Depo., p 30, lns 1-8. In response to the same question, Mrs. Rogers stated "Nothing specific." Exhibit A, J. Rogers Depo., p 17, ln 3. Ms. Beshera testified "I don't know." Plaintiff's Exhibit C, Beshera Depo., p 25, ln 26. This testimony does not create a genuine issue of fact concerning an ulterior purpose. *See, e.g., Food Lion, Inc. v. United Food Commercial Works Intern. Union*, 351 S.C. 65, 567 S.E.2d 251 (Ct. App. 2002) (affirming dismissal of abuse of process claim where plaintiff failed to allege how use of court process was designed to achieve improper collateral purposes that legal process was not designed to achieve).



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Additionally, Beshera was not a party to Actions 1, 2 and 3, and, therefore, could not possibly show abuse of process was used against her in those actions. Conversely, the Rogers were not named in the instant action (Action 4). Thus, even if a claim for abuse of process could lie for the commencement of these actions, which they cannot, no such action would lie against anyone by Beshera for the prior litigation or by the Rogers for the instant case.

Finally, as discussed above, contrary to Beshera's and Rogers' contentions, multiple entries of Rule 40(j) Orders in the prior foreclosure actions concerning the mortgage loan identified in Deutsche Bank's complaint do not preclude this current action. To the extent the abuse of process claims depend on this assertion, the claims lack merit.

**5. Beshera's and the Rogers' Malicious Prosecution Claims are not Cognizable under South Carolina Law.**

"[T]o maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in [the] plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006) (first alteration in original) (citations omitted). "An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence, including malice and lack of probable cause." *Id.*

As the court of appeals recently noted, "the element of favorable termination of proceedings to mean a termination reflective of the merits." *Gecy v. Somerset Point at Lady's Island Homeowners Ass'n, Inc.*, 426 S.C. 540, 553, 828 S.E.2d 73, 80 (Ct. App. 2019). This "means a termination consistent with a finding for the defendant on substantive grounds and not based



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solely on technical or procedural considerations." *Id.* "For example, a case's dismissal based on the statute of limitations would not be a favorable termination because a decision on the statute of limitations does not reflect the merits of the action." *Id.*

"Malice is defined as 'the deliberate[,] intentional doing of an act without just cause or excuse.'" *Id.* at 437, 629 S.E.2d at 649 (quoting *Eaves v. Broad River Elec. Coop., Inc.*, 277 S.C. 475, 479, 289 S.E.2d 414, 416 (1982)). "Malice does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition, although such an attitude certainly may indicate malice." *Id.* Where a plaintiff bases the claim on an opponent's institution of civil causes of action, probable cause exists if the facts and circumstances would lead a person of ordinary intelligence to believe that the plaintiff committed one or more of the acts alleged in the opponent's complaint. *Broyhill v. Resolution Mgmt. Consultants, Inc.,* 401 S.C. 466, 475, 736 S.E.2d 867, 871–72 (Ct. App. 2012). The issue is not what the actual facts were, but what the prosecuting party honestly believed them to be. *Eaves*, 277 S.C. at 478, 289 S.E.2d at 416 (citation omitted).

The claims for malicious prosecution are predicated on the contention that, because Actions 1 and 2 were dismissed pursuant to Rule 40(j), Nationstar lacked probable cause for instituting Action 3 and Plaintiff lacked probable cause for instituting Action 4. The Court disagrees.

First, the Court has already declined to adopt Beshera's and the Rogers' preclusion argument. This conclusion is sufficient for summary judgment here.

Additionally, Beshera was not a party to any of the prior foreclosure actions identified in her Counterclaims and Third-Party Complaint. Thus, there have been no prior prosecutions of her for this Court to even consider. Further, the instant action was not commenced against the Rogers who chose to intervene and has not been terminated, let alone terminated in favor of Beshera and the Rogers. Therefore, the commencement of Action 4 will never provide Rogers with a basis for



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a claim and cannot provide Beshera with any claim unless it is terminated in her favor and the remaining elements are alleged and proved. *See, e.g., Law v. South Carolina Dept. of Corrections,* 368 S.C. 424, 436-37, 629 S.E. 2d 642, 649 (2006) (affirming trial court's award of summary judgment to defendant where plaintiff failed to prove termination of prior litigation in plaintiff's favor, lack of probable cause for defendants' legal proceeding, and malice).

As discussed above, Beshera and the Intervenors cannot demonstrate termination of any prior litigation in their favor, lack of probable cause for instituting any alleged prior foreclosure action, malice, or any purported damages resulting therefrom.

**6. Beshera's and the Rogers' SCUTPA Claims Fail Lack a Genuine Issue of Fact as to any Element.**

The SCUTPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code Ann. § 39–5–20(a). In order to succeed on a SCUTPA claim, a plaintiff must show

> (1) that the defendant engaged in an unlawful trade practice, (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest.

*Noack Enterprises, Inc. v. Country Corner Interiors, Inc.*, 290 S.C. 475, 478-479, 351 S.E.2d 347, 349-350 (Ct. App. 1986).

Beshera and the Rogers attempt to bring a "kitchen sink" claim under SCUPTA alleging Plaintiff and Nationstar ran afoul of the statute

> by engaging in unfair and deceptive acts and practices including but not limited to: claiming as owed unconscionable interest amounts pursuant to unconscionable terms of the Note; seeking to enforce security for a note which contains unconscionable terms; making false and misleading representations to Defendant, Curt and Julie Rogers, and the court regarding the actual terms of the

> loan and Plaintiff, Nationstar and/or their predecessors in interest's right to enforce the note and mortgage, who the holder of the note and mortgage was at various time between now and 2009, assignments of the mortgage, endorsements of the note, that Plaintiff Nationstar, and/or its predecessor's interest were real parties in interest, and Plaintiff's general standing to bring this action, Action 1, Action 2, and Action 3 against Curt and Julie Rogers and Defendant; causing alleged endorsements of the note to be improperly executed and/or altered after execution; causing alleged assignments of the Mortgage to be improperly executed and/or filed without authority; initiating and maintaining Actions 3 and 4 when they were barred by Rule 41, res judicata and/or collateral estoppel; by continuing for 11 years to seek to prosecute the foreclosure of the Mortgage when Plaintiff Nationstar, and/or its alleged predecessors already failed to prosecute the foreclosure of the Mortgage in a timely and judicious manner for more than a decade; by misrepresenting that Plaintiff, Nationstar and/or their alleged predecessors in interest had the authority to agree to a short sale the Subject property and would do if Curt and Julie Rogers brought them a reasonable sale contract; by mispresenting that Plaintiff, Nationstar and/or their alleged predecessors in interest had the authority to agree to enter into a Workout and/or forbearance agreement with Curt and Julie Rogers and if the Rogers complied with the terms of the Agreement then Plaintiff, Nationstar and/or their alleged predecessors in interest had the authority to agree and would agree to a modification of the Note.

(Beshera Countercl., ⁋ 112 & Rogers' Countercl. ⁋ 116).

Beshera cannot raise allegations of conduct directed at the Rogers. Moreover, an unfair trade practices claim may not be brought in a representative capacity such as a trustee or representative of an estate. S.C. Code Ann. § 39–5–140(a); *Wogan v. Kunze*, 366 S.C. 583, 609, 623 S.E.2d 107, 121 (Ct. App. 2005), *aff'd as modified*, 379 S.C. 581, 666 S.E.2d 901 (2008).

Additionally, the Rogers' SCUTPA claim cannot be based on the terms of the mortgage loan. Neither Deutsche Bank nor Nationstar originated the loan. As mere assignees of the mortgage loan, Deutsche Bank and Nationstar are not subject to any claims arising from origination of the loan. *See Rosemond v. Campbell*, 288 S.C. 516, 523, 343 S.E.2d 641, 645 (Ct. App. 1986) ("[A]bsent agreement to the contrary, the common law assignee takes only the benefits, not the burdens of the assigned obligation.").



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Additionally, the Rogers were unable to substantiate any allegations concerning unfair and deceptive acts regarding any attempt to reach mutual assent concerning a loan modification. At his deposition, Mr. Rogers could say only the following:

> 20 … are you aware of anything that the plaintiff
> 21 did that was unfair or deceptive? And that would a
> 22 big, long name. Let's see. Deutsche Bank Trust
> 23 Company Americas as trustee for residential Accredit Loans
> …
> A I mean, it states simply there what my
> 1 feeling is about it. I mean, the terms of the note. I
> 2 was given options that were just so far out. I believe
> 3 at one point I was given a loan modification offer that
> 4 if I could pay $16,000 a month, that, you know, they
> 5 would do a workout with me. I mean, I don't think any
> 6 of us in here are going to be paying $16,000 a month
> 7 for a mortgage.
> 8 Q And were you dealing with the plaintiff with
> 9 respect to that?
> 10 MS. ARNOLD: Objection as to the form.
> 11 THE WITNESS: I believe that was with
> 12 Nationstar.
> 13 BY MR. TAYLOR:
> 14 Q Okay. And is it your position that a loan
> 15 servicer like Nationstar engages in an unfair and
> 16 deceptive trade practice if they don't offer you a loan
> 17 modification that sort of is tailored to your needs?
> 18 MS. ARNOLD: Objection as to form.
> 19 THE WITNESS: I don't know how to answer that
> 20 question. You know, there should be a certain
> 21 understanding by Nationstar and any mortgage company
> 22 that, you know, when someone's seeking relief to try
> 23 and work something out, that they ought to give, you
> 24 know, some attainable ways to get that done and we have
> 25 never been offered that.

(Plaintiff's Exhibit B, C. Rogers Depo., p 39 ln 19 – p 40 ln 25).

Further, the SCUTPA claim cannot be based on the procedural history of the prior foreclosure action. Moreover, litigation is not an act in trade or commerce. "Trade" and "commerce" are defined to "include the advertising, offering for sale, sale or distribution of any

services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate." S.C. Code Ann. § 39-5-10. Filing a lawsuit to enforce a default on a mortgage and litigating that lawsuit is not any of those things.

Additionally, these SCUPTA claims are clearly private, having no effect on the public interest. A Plaintiff bringing a private cause of action under SCUTPA must allege and prove that the defendant's actions adversely affected the public interest. *Noack Enterprises, Inc. v. Country Corner Interiors, Inc.*, 290 S.C. 475, 478-479, 351 S.E.2d 347, 349-350 (Ct. App. 1986) (citing *Zeeman v. Black*, 156 Ga. App. 82, 85, 273 S.E.2d 910, 915 (Ga. Ct. App. 1980)). Conduct that only affects the parties to the transaction provides no basis for a SCUTPA claim. *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 350. 565 S.E.2d 309, 315 (2002) (citing *Jefferies v. Phillips*, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994)).

The Rogers and Beshera have not shown the accused conduct affects the public interest in any way.[2] "An impact on the public interest may be shown if the acts or practices have the potential for repetition." *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004). "The potential for repetition may be shown by proving that the same kind of actions occurred in the past or by showing that the procedures employed by the defendant create a potential for repetition of the deceptive practices." *Schnellmann v. Roettger*, 368 S.C. 17, 23, 627 S.E.2d 742,

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[2] Mr. Rogers testified as follows:

14 What similar acts or practices in the past

15 have plaintiff and Nationstar engaged in that are

16 similar?

17 A I don't know exactly. I'd have to go back

18 and look.

(Plaintiff's Exhibit B, C. Rogers Depo., p 43 lns 14-28.)



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746 (Ct. App. 2006). A claim under SCUTPA is inadequate where it "fails to allege any specific procedures or business practices that create the potential for repetition." *Ethox Chem., LLC v. Coca-Cola Co.*, 2013 U.S. Dist. LEXIS 870, at *3 (D.S.C. Jan. 3, 2013).

Finally, Beshera's and the Rogers' SCUTPA claim fails because they have failed to identify any pecuniary loss supporting a SCUTPA claim. The Rogers have made no payments since prior to the First Action and have contested the foreclosure of this Property throughout.

**7. Beshera's Demand for Account Claim is not Cognizable.**

An accounting between a debtor and creditor requires the creditor to establish the amount due, and then the debtor bears the burden of proving payments, discounts, and off-sets. *See Devereux v. McCrady*, 53 S.C. 387, 395 (1898). In South Carolina, however, an accounting is an equitable remedy, rather than an affirmative cause of action. *See Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 144 (1989) (citing *Cox v. Lunsford*, 272 S.C. 527 (1979)) (emphasis added). Thus, an accounting may be awarded as an equitable remedy to support a claim such as unjust enrichment or breach of a fiduciary duty. *Id.* (citing *Smith v. Union Central Life Ins. Co.*, 112 S.C. 356 (1919)). Likewise, an equitable accounting may be awarded in an action with affirmative claims "involving long and complicated accounts where it would not be practicable for a jury to comprehend the issues and correctly make adjustments . . . ." *Id.* (citing *Jefferies v. Harvey*, 206 S.C. 245 (1945)).

Here, Beshera cannot assert a claim for accounting and is not entitled to the equitable remedy of accounting under any other claim. Indeed, Beshera has not pled or established a fiduciary duty owed to her by Plaintiff of Third-Party Defendant or made a claim for unjust enrichment. Further, the accounting claim involves an individual, residential promissory note and mortgage. Accordingly, the loan involved is not so complicated that the trier of fact would not be

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able to comprehend the issues involved, and Beshera does not allege otherwise. Simply put, an accounting is not an affirmative cause of action.

### 8. Beshera's and the Rogers' Declaratory Judgment Claims are not Cognizable Under South Carolina law.

The Declaratory Judgment Act was created to allow courts to answer actual controversies over "rights or obligations under the law . . . ." *S.C. Lottery Comm'n v. Glassmeyer*, 433 S.C. 244, 250, 857 S.E.2d 889, 892 (2021). Beshera's and the Rogers' claims for declaratory judgment fail as a matter of law for the following reasons:

First, their request for a declaration that Plaintiff is "precluded from maintaining this action by Rule 41," collateral estoppel or any other defense to the action is improper. As already discussed, the assertion of the two-dismissal rule is contrary to South Carolina law. However, more broadly, defenses to civil actions are not "rights or obligations" and will already be decided in the Plaintiff's action. As Rule 12(b) instructs, "every defense . . . shall be asserted in the responsive pleading." A request for declaratory relief for any issue, including standing to foreclose or challenges to Plaintiff's authority to enforce the debt, will be decided in the Plaintiff's case and a competing action for declaratory relief is unnecessary and duplicative.

Further, under South Carolina law, Deutsche Bank's constructive possession[3] of the original note, with all proper endorsements, provide Deutsche Bank with standing to prosecute this current action. *See* S.C. Code Ann. § 36-3-301; *Bank of America, N.A. v. Draper*, 405 S.C. 214, 223-24, 746 S.E.2d 478, 483 (Ct. App. 2013) (recognizing the party in possession of promissory note for mortgage subject to foreclosure was the holder of the note with standing to foreclose); *see also MidFirst Bank, SSB v. C.W. Haynes & Co., Inc.*, 893 F. Supp. 1304, 1314 (D.S.C. 1994)

[3] The original note and mortgage are currently in the physical possession of Deutsche Bank's foreclosure counsel, The Finkel Law Firm.

(“[T]he possession required by the [Commercial] Code to constitute a person a ‘holder’ may be constructive possession by delivery to one on his behalf. Thus a person is a ‘holder’ of commercial paper when it is in the physical possession of his agent.”). Indeed, even if the note at issue in this foreclosure action was not in Deustche Bank’s constructive possession, it may still be authorized to foreclose. *Koola v. Ditech Financial LLC*, 611 B.R. 251, 258-60 (D.S.C. 2019) (holding that a servicer of mortgage loan could enforce instrument, even though the note was lost and holding that transferee of lost instrument also had standing to enforce mortgage loan). In any event, these issues will already be decided in the pending foreclosure action and duplication of adjudication of these issues does not assist the Court.

Finally, the Rogers also assert the fact that they were offered multiple payment options, including the option to make a low minimum payment of less than the full monthly interest due, which the Rogers characterize as negative amortization, was unconscionable. (Plaintiff’s Exhibit B, p 41 lns 9-11.) A lower payment option is merely an option and cannot be oppressive. Nothing prevented the Rogers from making a fully amortized or a 15-year amortized payment. The Rogers were also allowed to repay the entire loan with no penalty. (Blunt Aff., Note, Secs. 4-5). The fact that the Rogers may have opted to make the lowest payment does not make the loan unconscionable.

**NOW, THEREFORE IT IS ORDERED**, for the foregoing reasons, the Rogers’ Motion for Summary Judgment is **DENIED**. The arguments raised therein were previously addressed and denied in the court’s order of June 23, 2020. Defendants consented to the prior cases being stricken under Rule 40(j), and that the dismissal under 40(j) is a dismissal without prejudice. If restored within one year, the statute of limitations is tolled. If the statute of limitations has not tolled, the case may be restored or a new lawsuit may be commenced.



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**IT IS FURTHER ORDERED** that Plaintiff/Third Party Defendant's Motion for Summary Judgment as to the Defendants' counterclaims, cross-claims and third-party claims for accounting, negligent misrepresentation, abuse of process, malicious prosecution, declaratory judgment, and SCUTPA is GRANTED for the reasons set forth above.

**IT IS FURTHER ORDERED** that Nationstar Mortgage LLC is hereby **DISMISSED** from this action.

**IT IS FURTHER ORDERED** that the Rogers' Motion to Compel and for Sanctions is **GRANTED IN PART AND DENIED IN PART**. The motion was granted with respect to Plaintiff's objection to standard interrogatories and order Plaintiff to fully respond within 10 days. The motion is denied with respect to giving the name of any specific witness on the part of the bank. Defendants may of course take the Rule 30(b)(6) deposition of a bank official whose responses will bind the bank for any future use in litigation.

This the___ day of _____________, 2023.

_______________________________________
**KRISTI F. CURTIS**
Circuit Court Judge

Charleston Common Pleas

**Case Caption:** Deutsche Bank Trust Company Americas as Trustee , plaintiff, et al VS Ashley Johnson Beshara , defendant, et al

**Case Number:** 2019CP1004503

**Type:** Order/Summary Judgment

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762



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