THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price
South Carolina Circuit Court Judge

Unpublished Opinion No. 2023-UP-346
Filed October 25, 2023
Petition for Rehearing Denied February 23, 2024

Appellate Case No. 2020-001204

Wilmington Trust, National Association, as Successor Trustee to Citibank, N.A., as Trustee of Structures Asset Mortgage Investments II, Inc., Bear Stearns ALTA-A Trust II, Mortgage Passthrough Certificates Series, 2007-A, ... Plaintiff,

v.

Temisan Etikerentse a/k/a Temisan L. Etikerentse, Ijeoma Etikerentse a/k/a Ijeoma Etkis, Suntrust Mortgage, Inc., Capital Bank Corporation, Bank of America, N.A.; Keybank National Association and Olde Parke Homeowners' Association, Inc., ... Defendants.

AND

Temisan Etikerentse a/k/a Temisan L. Etikerentse, Ijeoma Etikerentse a/k/a Ijeoma Etkis ..... Appellants,

v.

Specialized Loan Servicing, LLC a/k/a SLS ..... Respondent.

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Temisan Etikerentse and Ijoema Etikerentse v. Specialized Loan Servicing, Inc.
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TEMISAN ETIKERENTSE and IJOEMA ETIKERENTSE .....Appellants,

v.

SPECIALIZED LOAN SERVICING, LLC .. .. Respondent.

APPELLANTS' FINAL BRIEF

Robert B. Varnado (S.C. Bar # 007085)
VARNADO LAW FIRM, LLC
36 Broad Street, Suite 200
Charleston, South Carolina 29401
(843) 737-7301
Attorneys for Appellants

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Charleston, South Carolina

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INTRODUCTION

In 2008, a South Carolina District Bankruptcy Court recognized that: "[u]nder South Carolina law one finds the general proposition that '[t]he plaintiff in a foreclosure suit should be the real, beneficial owner of the mortgage debt.' 27 S.C. Juris. Mortgages § 107." *In re Woodberry,* 383 B.R. 373, 379 (Bankr. Ct. D.S.C. 2008). "Despite the statement of the general proposition," the *Woodberry* Court found that "it appears that foreclosures and motions for relief from the stay are frequently brought by parties other than the beneficial owner...by virtue of its *pecuniary interest* in collecting payments under the terms of the note and mortgage." *Id.*

That is exactly what has occurred here.

In fact, the record establishes the existence of an un-appealed *Order Granting Motion For Relief From Stay Filed By Creditor Specialized Loan Servicing LLC*, ("SLS" or "Respondent"). Testimony also exists from the attorney for the purported foreclosing party (Wilmington Trust) that *Respondent SLS* (1) retained the law firm of Riley Pope & Laney, LLC ("RPL Firm"), and (2) directed him "to file a foreclosure action naming Wilmington Trust as the Plaintiff." [R. p. 187-189]. These acts certainly establish the basis that SLS is responsible for the entirety of Plaintiff Wilmington Trust's ("Wilmington") foreclosure action against the client. In fact, SLS Assistant Vice President Mark McCloskey has **importantly** conceded that their actions are derivative of its servicing agreement with Wilmington by testifying that, "at all times, SLS has acted only as servicer of the note and mortgage on behalf of the holder [sic] of the same, which is Wilmington." [R. p. 234-236].

STATEMENT OF THE CASE

On June 15, 2007, through his attorney in fact [his wife, Ijeoma Etikerentse], Temisan Etikerentse issued a $1,402,500.00 *Interest Only Adjustable Rate Note* ("Note") to Countrywide Home Loans, Inc. ("CHL" or "Originator"). Repayment of the Note was secured by a Mortgage (the "Mortgage") on the real property located at 783 Navigators Run, Mount Pleasant, S.C., in the name of Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for CHL.

On or before August 1, 2007, CHL negotiated, via blank endorsement, the Note to EMC Mortgage Corporation ("Sponsor") as the Seller/Sponsor of a separate pool of 3,186 notes and mortgages.

EMC then sold and transferred the pool to the depositor, *Structured Asset Mortgage Investment II, Inc.*, ("SAMI II") who in turn sold and transferred it to REMIC Trust, *Bear Stearns ALT-A Trust II, 2007-1*, ("BALTA II") under EIN 30-0183252. [R. pp. 342-343].

This REMIC Trust was created and was governed by a Pooling and Servicing Agreement ("PSA"), which designated Citibank, N.A. as the Indentured Trustee to hold the qualified mortgages for the exclusive benefit of the holder of the certificates that represent interest in the Trust ("Certificateholders 2007-1"). [PSA II § 2.02.]

Also, pursuant to the PSA, CHL retained mortgage servicing rights for the mortgage loans it originated absent any equitable title. *See also* 11 U.S.C. § 541(d). [PSA II § 2.02.]

For reasons not ultimately clear, on November 16, 2008, CHL accelerated the Note. [R. p. 235].

[redacted]

Thereafter, on March 16, 2015, SLS *again* wrote to Etikerentse and again disclosed that "THIS IS FOR INFORMATIONAL PURPOSES ONLY, THIS COMMUNICATION IS FROM A DEBT COLLECTOR." This letter, however, stated that the December 2014 Modification has been denied because "you have failed to comply with the terms of the offer by not returning the fully executed modification documents" that were never provided. [R. pp. 249-252].

Once again, SLS disclosed that "[t]he requirements for this evaluation were set forth and performed in accordance with the Pooling and Servicing Agreement between Specialized Loan Servicing, LLC and WILMINGTON TRUST, NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE TO CITIBANK, N.A. AS TRUSTEE OF

In the spring of 2016, SLS retained the RPL Firm in Columbia, and directed that attorney Damon C. Wlodarczyk ("Wlodarczyk") "to file a foreclosure action naming Wilmington Trust as the Plaintiff." [R. p. 187-189, at ¶ 2].

On April 8, 2016, a foreclosure complaint naming *Wilmington Trust as Successor Trustee to Citibank as Trustee on behalf of the Holders of Bear Stearns Alt-A Trust II, Mortgage Pass Through Certificates, Series 2007-1* was filed in Charleston County. [Case number 2016-CP-10-1987]. Specifically, its cause of action was based on non-payment of a discharged debt by Bankruptcy Court David Duncan on December 12, 2014!

Out of an abundance of caution, Appellants filed their full Motion to Reconsider on July 29, 2020; Judge Price denied this motion by Form 4 Order of August 5, 2020 without necessity of a hearing.

On August 6, 2020 SLS submitted a proposed formal order; on August 14, 2020, SLS filed a Motion to Alter or Amend to include findings of fact and conclusions of law. Judge Price entered the formal order prepared by counsel for the Respondent on August 17, 2020.

The instant appeal was then filed by Appellants nine (9) days later on August 26, 2020 and filed with the Charleston County Clerk of Court on August 27, 2020.

STANDARD OF REVIEW

The Court of Appeals reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Lemmons v. Macedonia Waterworks, Inc.*, 431 S.C. 182, 191, 841 S.E.2d 471, 474 (Ct. App. 2020). Rule 56(c), SCRCP, provides that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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." Further, when a circuit court grants summary judgment on a question of law, such as statutory interpretation, the appellate court must review the ruling de novo. *Wright v. PRG Real Estate Mgmt., Inc.*, 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019).

Because Appellant raises pre-emption of a South Carolina's regulatory or adjudicatory powers, "[s]uch a determination of congressional intent and of the boundaries and character of a pre-empting congressional enactment is one of federal law. Pre-emption,

LEGAL ARGUMENT

A. Rule 14 Argument.

SLS's primary ground for summary judgment under Rule 14(a), SCRCP, is predicated on the assertion by its Affiant Mark McCloskey that it "is not and has never been a party to the note or mortgage at issue in this action, or a successor thereto." [R. pp. 234-236]. SLS argues therefore "it cannot possibly be liable, in whole or in part, for Wilmington's foreclosure claim against the Plaintiffs."

Under Rule 14, the third-party plaintiff [Etikerentse] must have a substantive claim against the third- party defendant founded upon derivative liability. *Smith v. Tiffany*, 419 S.C. 548, 560, 799 S.E.2d 479, 486 (2017). Both the term "servicer" and "servicing" are defined by federal regulations promulgated under 12 U.S.C. § 2601, *et seq.*, known as the "Real Estate Settlement Procedures Act of 1974" ("RESPA[1]"). *See* 12 C.F.R. § 1024.2(b). "Servicer means a person responsible for the servicing of a federally related mortgage loan." *Id.* Fatal to Respondent's position is its concession that "at all times, SLS has acted only as servicer of the note and mortgage on behalf of the holder [sic] of the same, which is [Wilmington Trust as Trustee]." [R. pp. 234-236]. Based on McCloskey's affidavit testimony SLS cannot pass the definition of a servicer who is also "the person who makes or holds such loan." *Id.*

It is therefore axiomatic that SLS's ability to receive "any scheduled periodic payments from a borrower pursuant to the terms of any federally related mortgage loan, including amounts for escrow accounts under section 10 of RESPA (12 U.S.C. § 2609),

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[1] RESPA is a remedial consumer protection statute, and it imposes obligations upon servicers of federally related mortgage loans. [*See* HAMP/SCUTPA/RESPA argument, p. 14, infra].

without jurisdiction over the foreclosure action filed April 2016. *Kalb v. Feuerstein*, 308, U.S. 433, 439 (1940) ("The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, state or federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law."); *Ritzen Group Inc. v. Jackson Masonry, LLC,* 140 S.Ct. 582, 585 (2020) (Under the Bankruptcy Code, Appellant's filing a Chapter 7 petition for bankruptcy automatically "'operates as a stay' of creditors' debt-collection efforts outside the umbrella of the bankruptcy case. 11 U.S.C. § 362(a)."; *see also Id.* at 590 (elucidating that a bankruptcy court's "[r]uling on a motion for stay relief, it is true, will determine where the adjudication of an adversary claim will take place—in the bankruptcy forum or state court.").

In a similar vein, had SLS not relied on *Bank of America v. Draper,* 405 S.C. 214, 222, 746 S.E.2d 478, 482 (Ct. App. 2013), where the S.C. Court of Appeals ignored its Constitutional duty to be bound by decisions of the U.S and S.C. Supreme Courts, and agreed with the "general view, which has been accepted in this jurisdiction and others, that a loan servicer is a 'party in interest' and has standing by virtue of its pecuniary interest in collecting payments under the terms of the note and mortgage" then *no* foreclosure action would have been filed at all. Testimony exists from the attorney for the purported foreclosing party that SLS *alone*: (1) retained and paid the RPL Firm and (2) directed him "to file a foreclosure action naming Wilmington Trust as the Plaintiff."

Consequently, a non-party is subject to impleader only if there is a basis to assert that he is liable to the named defendant(s) for all or part of the plaintiff's claim. *Smith v. Tiffany*, 419 S.C. at 560, 799 S.E.2d at 486 (2017). The outcome of the principal claim

court's jurisdiction cannot be questioned. 140 S.Ct. at 585. SLS therefore cannot now assert it alone has not caused Appellant to face the very real danger of foreclosure.

Here, there is more than enough basis to assert the claim against SLS, because: (1) there is not a lawyer truly representing Wilmington, nor is Wilmington really involved; (2) SLS is paying and directing both sets of lawyers; (3) there are no Wilmington documents supporting the foreclosure, but in fact all of the relevant documents produced in the case are from SLS; (4) even the lawyer for "Wilmington" is also asking for summary judgment based on SLS's affidavit; and (5) controlling the foreclosure process by hiring the RPL Firm (purported counsel for Wilmington Trust). Thus, SLS cannot prevail on its Rule 14 and the circuit court should be reversed in its grant of summary judgment to SLS.

B. HAMP/SCUTPA/RESPA Argument.

The Appellant also alleges that the foreclosure action would have never occurred if Respondent had properly fulfilled its disclosure requirements pertaining to loss mitigation options under 12 C.F.R.§ 1024.41. This is a question of federal law and some background is necessary:

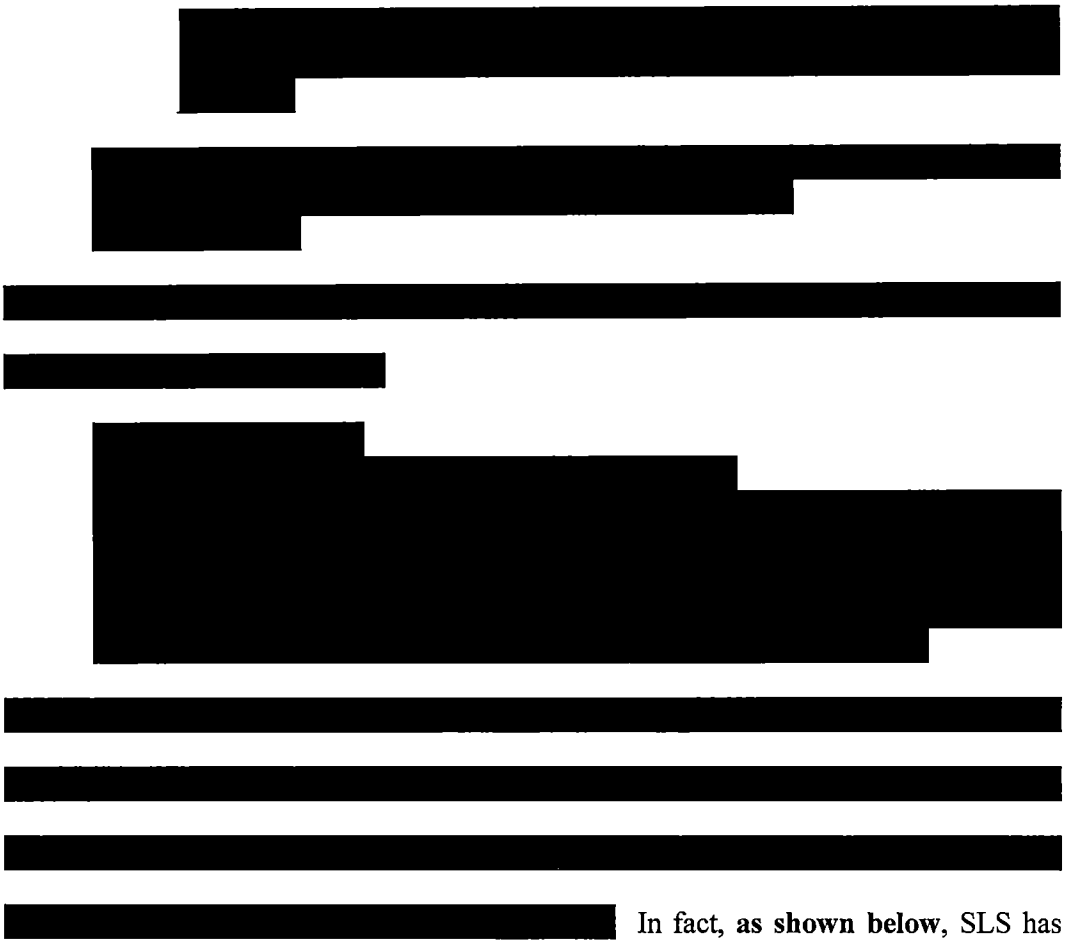
In the wake of the 2008 financial crisis, Congress established the Consumer Financial Protection Bureau ("CFPB"), an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 124 Stat. 1376.

In addition, Congress enacted a new prohibition on "any unfair, deceptive, or abusive act or practice" by certain participants in the consumer-finance sector, 12 U.S.C. § 5536(a)(1)(B), as well as transferred the administration of 18 existing federal statutes to

TO CITIBANK, N.A. AS TRUSTEE OF STRUCTURED ASSETS MORTGAGE INVESTMENT II INC., BEAR STEARNS ALT-A TRUST II, MORTGAGE PASS-THROUGH CERTIFICATES 2007-1." [R. pp. 295-300]. No request for documentation was attached therein because no modification was offered. The notice itself discloses "THIS IS FOR INFORMATIONAL PURPOSES ONLY, THIS COMMUNICATION IS FROM A DEBT COLLECTOR" because ***"approval of any offer must be submitted to the bankruptcy court."*** [R. p. 295].

Section 524 of the Bankruptcy Code sets forth the effects of a discharge. Pursuant to § 524(c), reaffirmation agreements made after the granting of a discharge under § 727 are unenforceable without bankruptcy court notice and approval. [redacted].

On March 16, 2015, SLS again wrote Etikerentse and again disclosed that "THIS IS FOR INFORMATIONAL PURPOSES ONLY, THIS COMMUNICATION IS FROM A DEBT COLLECTOR." The letter misleads Appellant by stating that the December 2014 Modification has been denied because "you have failed to comply with the terms of the offer by not returning the fully executed modification documents" that were never provided. Again, SLS disclose that *HAMP was not the program* for which Appellant could obtain a modification: "[t]he requirements for this evaluation were set forth and performed in accordance with the Pooling and Servicing Agreement between Specialized Loan Servicing, LLC and WILMINGTON TRUST, NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE TO CITIBANK, N.A. AS TRUSTEE OF STRUCTURED



In fact, **as shown below**, SLS has conceded that it failed to maintain **these records!**

Under RESPA, "the [Consumer Financial Protection] Bureau did not intend to create a private right of action for borrowers to enforce, in private litigation, any requirements that are imposed by owners or assignees of mortgage loans (including investors or guarantors) on servicers to mitigate losses for such parties." 78 F.R. 10822. That is not what is happening here.

"Rather, the Bureau intended that borrowers could enforce the loss mitigation procedures against servicers to ensure that servicers complied with the appropriate procedural steps before commencing or completing the

SLS has admitted "the following law violations: (1) Respondent violated the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 *et seq.*, its implementing regulation, Regulation X, 12 C.F.R. part 1024, and the Consumer Financial Protection Act of 2010 (CFPA) by taking prohibited foreclosure actions against certain borrowers, in violation of 12 C.F.R. § 1024.41(f)(2) and (g); and (2) Respondent violated RESPA, Regulation X, and the CFPA by failing to send or timely send evaluation notices to certain borrowers, in violation of 12 C.F.R. § 1024.41(c)(1)." *Id.* ¶. 1.

Moreover, pursuant to Section VII of the Consent Order, SLS has been ordered to engage in a comprehensive plan to *identify* and compensate those harmed and in the interim, "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order or to review, modify, suspend, terminate, or set aside any such notice or order." 12 U.S.C. § 5563(d)(4). Simply put, SLS agreed, in consideration for a smaller fine, that it was liable because it failed to maintain records to support any assertion that it had complied with 12 C.F.R. § 1024.41. SLS cannot now ask the Circuit Court to find such compliance ***now*** when it already admitted to its regulator that it did not comply, just last year! SLS's own discovery states that what it asserts to be a modification approval was in fact, sent for "informational purposes only."

Additionally, both because the RPL Firm and Nelson Mullins have "actual notice" of the Consent Order, they must engage in certain "affirmative actions" prior to proceeding with motions for summary judgement on behalf of their client, SLS.

Clearly, if Nelson Mullins, as argued in SLS' Motion, is not aware that 12 C.F.R. § 1024.41 is a regulation promulgated under RESPA, then no such affirmative review has

5-20 may bring an action individually, but not in a representative capacity, to recover actual damages." *See Freemantle v. Preston*, 398 S.C. 186, 194-95, 728 S.E.2d 40, 44 (2012) (holding that where the appellant asserted he was a citizen of South Carolina, then "[n]othing more" was required under statute).

The terms "unfair" and "deceptive" are not defined in SCUTPA; rather, in section 39-5-20(b) of the Act, the General Assembly **directs that in construing those terms, the courts of our state "will be guided by" decisions from the federal courts, the Federal Trade Commission Act (FTCA), and interpretations given by the Federal Trade Commission (FTC).**

That reason is simple – Congress has authorized the FTC, not state courts, to decide what constitutes unfair, deceptive and abusive practices as they relate to interstate commerce. Equally clear is that violations of the procedures, as alleged by the Appellant, are indeed considered unfair and deceptive by the FTC and made enforceable under 12 U.S.C. § 2605(f). *See* 12 C.F.R. § 1024.41(a).

Thus, SLS's Consent Order "shall be prima facie evidence in an action brought under Section 39-5-140 that the respondent used or employed a method, act or practice declared unlawful by Section 39-5-20." S.C. Code Ann. § 39-5-140(c).

CONCLUSION

The federal government regulates the interaction of a servicer (like SLS), with consumers – *not* the several states. In addition to state law, there exist 18 federal statutes that prohibit "any unfair, deceptive, or abusive act or practice" by certain participants in the consumer-finance sector. *See* 12 U.S.C. §§ 5512(a), 5481(12), (14).12 U.S.C. § 5536(a)(1)(B).

Respectfully submitted,

/s Robert B. Varnado

Robert B. Varnado (S.C. Bar # 007085)
VARNADO LAW FIRM, LLC
36 Broad Street, Suite 200
Charleston, South Carolina 29401
(843) 737-7301
and
Brian M. Knowles (S.C. Bar # 073108)
KNOWLES LAW FIRM, PC
768 St. Andrews Blvd.,
Charleston, South Carolina 29407
(843) 810-7596
Email: brian@knowlesinternational.com
Attorneys for Appellants

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that their ***Appellants' Final Brief*** in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on this day to the following:

Blake T. Williams, Esquire
Nelson Mullins Riley & Scarborough, LLP
BNC Bank Corporate Center, Suite 300
3751 Robert M. Grissom Parkway
Myrtle Beach, SC 29577
Attorneys for Respondent

/s Robert B. Varnado

Robert B. Varnado (S.C. Bar # 007085)
VARNADO LAW FIRM, LLC
36 Broad Street, Suite 200
Charleston, South Carolina 29401
(843) 737-7301
Attorneys for Appellants

August 25, 2021
Charleston, South Carolina

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COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Did the lower court correctly grant summary judgment in SLS's favor where Appellants failed to present even a scintilla of evidence supporting their claims?

2. Did the lower court properly find that it had jurisdiction to consider Appellants' claims and rule on SLS's motion for summary judgment where the jurisdictional provisions cited by Appellants do not apply to this case?

3. Did Appellants fail to preserve their argument that SLS violated the Real Estate Settlement Procedures Act in 2014 where Appellants failed to raise this argument to the lower court and it is unsupported by any record evidence?

4. Did the lower court appropriately find that an alternative ground for granting summary judgment was that Appellants' claims were improperly asserted as Rule 14, SCRCP third party claims?

(*See* Compl. Ex. B – 11/4/2014 Assignment; R. 76-77.) As a result of these valid assignments, Wilmington Trust is the holder-in-due-course of the Mortgage Loan.

Respondent Specialized Loan Servicing, LLC ("SLS") services Appellants' loan on behalf of Wilmington Trust.[2] (*See* SLS Mot. for Summ. J., Ex. A – Affidavit of Mark McCloskey ("McCloskey Aff.") at ¶ 8; R. 235.) SLS's agreement is with the trust. SLS is not, and has never been, a party to the Note or Mortgage and it does not have a contractual relationship with Appellants.

II. Appellants' default and SLS's loss mitigation efforts.

Appellants defaulted on the note on December 1, 2008 and have remained in default through the present date. (*See* Compl. at ¶ 15; Aff. at ¶ 9; R. 49, 236.)

The events forming the basis of Appellants' claims began when they submitted a loss mitigation application to SLS in 2014. In accordance with the Real Estate Settlement Procedures Act ("RESPA"), SLS evaluated the 2014 loss mitigation application for foreclosure intervention options and informed Appellants of its decision. (*See* McCloskey Aff. at ¶¶ 10-11; R. 236.) Via letter dated December 12, 2014, SLS explained that Appellants had been approved for a standard loan modification. (McCloskey Aff., Ex. 2 – Decision Letter dated 12/12/2014; R. 241-47.) SLS evaluated Appellants for several other loss mitigation options, but Appellants were not approved for those because the loan did not meet the necessary criteria. (*See id.*)

Despite SLS's approval of Appellants' loan for a standard modification, the loan was not modified because Appellants did not accept the terms by returning the necessary documents. (*See* McCloskey Aff. at ¶ 11; McCloskey Aff., Ex. 3 – Letter dated 3/16/2015; R. 236, 248-52.)

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[2] Mortgage servicing is "[t]he administration of a mortgage loan, including the collection of payments, release of liens, and payment of property insurance and taxes." *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 221, 746 S.E.2d 478, 481 (Ct. App. 2013) (quoting Black's Law Dictionary 1105 (9th ed. 2009)).

On October 17, 2019, after discovery closed, SLS filed a renewed motion for summary judgment. SLS premised its motion on two key arguments. First, SLS contended that Appellants' claims were improperly styled as "third-party" claims asserted pursuant to Rule 14 of the South Carolina Rules of Civil Procedure because they did not assert derivative liability. (*See* SLS's Mot. for Summ. J. at 4-5; R. 220-21.) Second, SLS argued that Appellants failed to produce evidence demonstrating any genuine issues of material fact for trial on any of their claims. Specifically, SLS asserted that each of Appellants' claims failed on the merits because: (1) there was no privity of contract between SLS and Appellants, (2) the declaratory judgment claim was an improper attempt to assert a claim pursuant to the Home Affordable Modification Program ("HAMP"), which lacks a private right of action, (3) there was no evidence of any unfair or deceptive act by SLS, impact on the public interest, or damages, and (4) there was no evidence supporting that SLS violated RESPA or that Appellants suffered any damages as a direct result of any alleged violation. (*See id.* at 6-14; R. 222-30.) Lastly, SLS asserted that to the extent Appellant Temisan Etikerentse sought to assert claims that accrued prior to his bankruptcy, they were barred because they were not disclosed and expressly abandoned by the Bankruptcy Trustee.[3] (*See id.* at 14-15; R. 230-31.)

The lower court scheduled a hearing on SLS's motion for July 13, 2020. Appellants e-filed their response brief on July 10, 2020 and also emailed supporting exhibits to the judge the morning of the hearing.[4] In their response, Appellants contended that confusion at the outset of

[3] Appellant Temisan Etikerentse filed a voluntary bankruptcy petition pursuant to Chapter 7 of the Bankruptcy Code on August 7, 2014. The Bankruptcy Court entered its Order discharging Etikerentse on November 12, 2014.

[4] The exhibits were: (1) the pooling and servicing agreement for their mortgage, (2) a copy of the affidavit submitted by SLS in support of its motion for summary judgment, (3) an affidavit previously submitted by Attorney Damon Wlodarcyzk (counsel for Wilmington Trust) in support

Appellants proceeded to file a motion to reconsider on July 29, 2020 (prior to the entry of the formal order). (*See* Mot. to Reconsider; R. 354-65.) That motion reiterated the same general arguments that Appellants raised in their response brief and at the hearings. The court denied that motion via Form 4 Order dated August 5, 2020. (*See* Form 4 Order dated 8/5/2020; R. 29-31.)

The lower court then entered the formal order granting summary judgment in SLS's favor on August 17, 2020. (*See* Order dated 8/17/2020; R. 32-43.) The Order held that there were no genuine issues of material fact on the merits of Appellants' claims. The Order also found that, in the alternative, Appellants' claims were not proper Rule 14 third-party claims. This appeal followed.

Standard of Review

This Court applies the same standard as the trial court when reviewing a grant of summary judgment. *Woodson v. DLI Props., LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *King v. Am. Gen. Fin., Inc.*, 386 S.C. 82, 92, 687 S.E.2d 321, 326 (2009) (quoting *Cafe Assoc., Ltd. v. Gerngross*, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991)). "When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). However, summary judgment is inappropriate where further inquiry into the facts is necessary to "clarify the application of the law." *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995).

In any event, Appellants conceded in their response to SLS's motion for summary judgment that they do not have contractual privity with SLS. (Memo in Opp'n at 6-7; R. 346-47.) This is fatal to their claim since the existence of a contract is, of course, a necessary element of a breach of contract claim. *See Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009) ("The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach."). The lower court properly granted summary judgment in SLS's favor on this cause of action and this Court should affirm.[5]

B. Appellants' declaratory judgment claim improperly sought to assert a claim for violation of HAMP.

Appellants' second cause of action purported to state a claim for declaratory judgment. As the lower court found, however, the gravamen of the declaratory relief sought was a declaration that SLS had an obligation to comply with the Home Affordable Modification Program ("HAMP") and failed to do so for Appellants' loan. The lower court properly found that this claim failed as a matter of law because HAMP does not provide a private right of action. *See Carrington v. Mnuchin*, No. 5:13-03422-JM, 2014 WL 4249876, at *10 (D.S.C. Aug. 27, 2014); *see also, e.g., Grenadier v. BWW Law Grp.*, No. 1:14CV827 LMB/TCB, 2015 WL 417839, at *5 (E.D. Va. Jan. 30, 2015) ("Although participating loan servicers are obligated to comply with HAMP guidelines in order to receive servicer benefits, 'HAMP does not create a private right of action for borrowers against lenders and servicers.'"). Litigants cannot evade the lack of a private right of action under HAMP by recharacterizing the claim by another name as Appellants attempted to do here. *See, e.g., Steffens v. Am. Home Mortg. Servicing, Inc.*, No.

[5] In their memorandum in opposition to SLS's motion, Appellants requested leave to amend their complaint to assert tortious interference with a contract instead of breach of contract. The lower court rejected this request as untimely. Appellants did not take issue with this finding in their motion to reconsider or in their opening brief to this Court. Therefore, this argument is also abandoned.

The lower court properly determined that there were no genuine issues of material fact for trial on Appellants' declaratory judgment claim. This Court should affirm.

C. The evidence before the lower court demonstrated that SLS complied with its obligations under RESPA and Appellants suffered no damages.

The lower court also appropriately granted summary judgment on Appellants' claim for violation of RESPA, 12 C.F.R. § 1024.41. This federal regulation requires a loan servicer to ***review*** a borrower's loan for loss mitigation options if the borrower has properly submitted a complete application for loss mitigation review and complied with the requirements of § 1024.41. *See id.* RESPA, however, does not require a servicer to ***offer*** a borrower a loan modification or any other loss mitigation option, let alone on the terms their choosing. *See* 12 C.F.R. § 1024.41(a) ("Nothing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option."). Here, the lower court properly found that SLS complied with RESPA.

1. There was no evidence SLS violated RESPA.

The only evidence before the lower court supported that SLS conducted a loss mitigation review of Appellants' loan in 2014 and offered a standard loan modification. (*See* McCloskey Aff., Ex. 2 – Decision Letter dated 12/12/2014; R. 241-46.) This satisfied SLS's obligations under RESPA. Appellants did not submit ***any*** evidence directly rebutting these facts. Rather, Appellants based their argument on the CFPB's administrative Consent Order. As detailed below, however, that Consent Order did not have any findings that involved the facts of ***this*** case and was, therefore, irrelevant—particularly in the face of SLS's evidence directly supporting compliance in this matter.

Section 1024.41(i) explains that "[a] servicer is only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower's

Modification Documents; R. 303-37.) But because SLS already complied with the loss mitigation regulations in 2014, SLS was entitled to proceed with filing this foreclosure action while continuing to engage in voluntary loss mitigation. *See* 12 C.F.R. § 1024.41(i); *Mangum*, 2017 WL 1062534, at *3 ("In other words, a borrower may not bring an action for violation of the loss mitigation rule if that borrower has previously availed herself of the loss mitigation process."). Appellants arguments about SLS's purported noncompliance with RESPA during the 2016 review are simply not actionable claims. Therefore, the lower court properly granted summary judgment.

2. Appellants also failed to submit evidence supporting any damages suffered as a result of the purported RESPA violations.

To establish a claim for violation of RESPA, a claimant must show damages ***as a result of the violation***. *See Wirtz v. Specialized Loan Servicing, LLC*, 886 F.3d 713, 719 (8th Cir. 2018) (explaining that damages are an essential element and a plaintiff fails to prove actual damages where the failure to comply with RESPA did not cause the purported harm); *see also Mrla v. Fed. Nat'l Mortg. Ass'n*, No. 15-CV-13370, 2016 WL 3924112, at *3 (E.D. Mich. July 21, 2016) (explaining that a RESPA complaint "must allege facts showing that damages occurred as a result of the alleged violations" and "[n]aked claims of damages, unconnected to such facts, are not enough to state a claim").

Here, Appellants did not submit even a scintilla of evidence supporting any damages. In his deposition, Temisan Etikerentse could not explain the substance of his RESPA claim. (*See* Etikerentse Dep. at 52:23-53:12; R. 288-89.) Moreover, he could not identify any injury Appellants suffered as a direct result of any RESPA violation. The only concrete issues he described were credit problems and the uncertainty of the foreclosure. (*See id.* at 47:20-48:21; 50:20-51:18; R. 283-84, 286-87.) However, the undisputed record evidence supported that

1. SLS did not commit any unfair or deceptive acts.

As the lower court correctly found, Appellants submitted no evidence of any unfair or deceptive action by SLS in its dealings with Appellants. An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive." *Gentry v. Yonce*, 337 S.C. 1, 12, 522 S.E.2d 137, 143 (1999). "An act is 'deceptive' when it has a tendency to deceive." *Id.* Here, the unrebutted evidence established that SLS complied with its obligations under RESPA. Since that formed the gravamen of Appellants' UTPA claim, summary judgment was also appropriate on this cause of action.

2. There is no evidence of impact on the public interest.

Appellants also failed to establish any genuine issue of material fact on this element. "To be actionable, under [SC]UTPA, the unfair or deceptive act or practice ***must*** have an impact upon the public interest." *Crary v. Djebelli*, 329 S.C. 385, 387, 496 S.E.2d 21, 22-23 (1998) (emphasis added). "Unfair or deceptive acts or practices have an impact upon the public interest if the acts or practices have the potential for repetition." *Id.* Generally, to establish the potential for repetition requirement, the claimant must make a "(1) showing the same kind of actions occurred in the past, thus making it likely they will occur absent deterrence, or (2) . . . showing the company's procedures create a potential for repetition of the unfair and deceptive acts." *Daisy Outdoor Adver. Co. v. Abbott*, 322 S.C. 489, 496, 473 S.E.2d 47, 51 (1996).

Again, the unrebutted evidence supported that SLS complied with its obligations under RESPA. However, even if Appellants produced evidence that SLS violated RESPA, they failed to establish an impact on the public interest. Appellants did not identify any procedures of SLS which could lead to repetition. Moreover, in his deposition Temisan Etikerentse was unable to articulate how SLS's actions went beyond the present matter. He acknowledged he does not

identify any ascertainable loss or pecuniary harm. When asked if he was seeking money from SLS, he responded that "[m]y main goal is [keeping] the house." (*See* Etikerentse Dep. at 48:1-11; R. 284.) Appellants did not submit any affidavits, testimony, or other evidence supporting their claimed damages to the lower court. Therefore, the court properly found that there were no genuine issues of material fact on this element as well.

For all these reasons, the Court should affirm the lower court's grant of summary judgment on Appellants' RESPA claim.

E. The administrative proceeding Consent Order between SLS and the CFPB does not constitute evidence supporting Appellants' claims.

Appellants' response to SLS's motion and their brief largely focused on the contents of a Consent Order from an administrative proceeding brought by the CFPB against SLS. The lower court properly rejected Appellants' reliance on the Consent Order as "evidence" supporting their claims.

Although Appellants contend that SLS "admitted" violations of RESPA in the Consent Order, they conveniently omit that the Consent Order expressly states that SLS has consented to its issuance "***without admitting or denying any of the findings of fact or conclusions of law.***" *See* Consent Order, 2020 WL 8182145. Therefore, Appellants are simply not correct that SLS "admitted" certain law violations in the Consent Order. Moreover, the lower court correctly found that the Consent Order had no relationship to the facts of this case. Here, the unrebutted evidence showed that SLS complied with its obligations under RESPA in servicing Appellants' loan. General allegations of purported RESPA violations in unrelated matters are entirely immaterial to this case. There is nothing in the Consent Order tying its contents to the facts of ***this*** case.

limine prohibiting plaintiff from introducing any evidence regarding a consent order between the defendant and the CFPB entered in a separate matter).

Therefore, the lower court correctly found that the Consent Order was not admissible evidence supporting any wrongful act committed by SLS.[9] Regardless, even if the Consent Order could be considered evidence of generalized wrongful acts committed by SLS, Appellants still did not submit any evidence of any impropriety by SLS ***in this case***—nor could they since SLS in fact complied with its obligations under RESPA.[10] The lower court properly granted summary judgment and this Court should affirm.

F. Appellants' brief fails to confront that their claims failed on the merits due to a dearth of supporting evidence.

The arguments Appellants raise to this court are largely procedural issues that either were not raised to the lower court or were tangential and properly rejected by the court. SLS addresses those arguments in turn below. However, the overarching reason for affirming the lower court is Appellants' failure to submit even a scintilla of any ***evidence*** to the lower court in support of their claims.

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[9] Appellants' brief asserts that the Consent Order caused a "shifting of the burden" requiring ***SLS*** to determine the damages it caused to ***Appellants***. This argument was not raised to the lower court and is unpreserved. Moreover, Appellants offer no support for this proposition and, in practice, it would lead to an absurd result. Appellants are, in essence, saying that it is incumbent on SLS to provide evidence supporting their claims despite being unable to produce any themselves. The Supreme Court case Appellants cite does not support their position. *See generally Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 38 (1991).

[10] Appellants' brief also asserts that the CFPB Consent Order constitutes "prima facie" evidence of a UTPA claim pursuant to S.C. Code Ann. § 39-5-140(c). This argument is also unpreserved and without merit. The portion of § 39-5-140(c) quoted by Appellants provides that injunctions, judgments, or court orders made pursuant S.C. Code Ann. § 39-5-50 shall constitute prima facie evidence that the respondent employed an unlawful method. *See* S.C. Code Ann. § 39-5-140(c). However, § 39-5-50 solely relates to ***actions brought by the Attorney General of South Carolina*** for an injunction against violation of the UTPA. *See* S.C. Code Ann. § 39-5-50(a). Thus, that provision has no applicability here.

As the court explained, "private persons may not bring actions to enforce violations of consent decrees to which they are not a party." *Id.* Only Congress may craft a private right of action, and this limitation applies to regulatory rulings like CFPB consent orders. *See id.* Where the consent order at issue specifies that the CFPB is the enforcer, it does not invoke a private right of action. *See id.*

The Third Circuit rejected a similar argument in *Conway v. U.S. Bank Nat'l Ass'n as trustee for structured asset securities corporation, structured asset investment loan trust, mortgage pass-through certificates, series 2005-2*, 804 F. App'x 120, 122-23 (3d Cir. 2020). The plaintiff in *Conway* argued that the defendant violated a consent judgment with the CFPB and that it related to his state law claims. The court, however, rejected this argument and explained that the plaintiff "has neither argued nor shown that the consent judgment created rights that could be enforced by third parties." *Id.* This rule applies even where nonparties are intended beneficiaries of the consent order. *See id.*; *see also Benjamin v. Fremont Inv. & Loan*, No. 17-11727-PBS, 2018 WL 4017595, at *10 (D. Mass. Aug. 22, 2018) (explaining that a plaintiff who was not a party to a consent judgment "has no standing to enforce ***any obligation*** imposed on the parties to the consent judgment").

By asserting that SLS was required to undertake certain affirmative acts pursuant to the Consent Order before the court could proceed with considering its motion for summary judgment, Appellants indirectly sought enforcement of the Consent Order's terms. The lower court correctly determined that Appellants lacked standing to assert any such claims.

& Pardon Servs., 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007). In other words, it involves the court's "power to hear and determine cases of the general class to which the proceedings in question belong.'" *Id.* (quoting *State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005)). Here, Appellants have not argued that the lower court lacked the ***power*** to hear this general class of case. This case began with Wilmington Trust asserting the foreclosure claim against Appellants in 2016. Appellants asserted counterclaims against Wilmington Trust and then willingly opted to assert "third-party" claims in this forum against SLS for issues related to SLS's servicing of their loan. Appellants have not contended that the court of common pleas lacked the ability to hear the types of claims they asserted against SLS. Therefore, their "subject matter" jurisdiction argument is without merit.

Appellants only complained of the court's "jurisdiction" to proceed on the eve of the summary judgment hearing after they failed to come forward with any specific evidence supporting that SLS acted improperly. Appellants' position is more appropriately characterized as an assertion that SLS failed to comply with administrative conditions precedent (which, as detailed above, they have no authority to enforce) rather than a "subject matter jurisdiction" argument. The lower court properly rejected Appellants' argument that § 5563(d)(2) deprived it of subject matter jurisdiction. This Court should affirm.

III. Appellants' argument that SLS failed to comply with RESPA during its 2014 loss mitigation review is not preserved and is without merit.

As detailed above, Appellants' claims each related to SLS's purported violation of RESPA's loss mitigation procedures. Appellants' pleading and arguments to the lower court largely centered on SLS's actions in connection with the 2016 loss mitigation review. For the first time on appeal, however, Appellants argue that certain filings and communications by SLS during Temisan Etikerente's bankruptcy support that SLS violated RESPA in connection with its

(2011). "The requirement also . . . prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Because the lower court never had an opportunity to consider or rule on the argument raised on pages 17 through 20 of Appellants' brief, it should not be considered by this Court. Moreover, even if the Court could consider this argument, the only evidence presented to the lower court established that SLS conducted a loss mitigation review of Appellants' loan in 2014 and offered a standard loan modification. SLS submitted sworn affidavit testimony and supporting exhibits establishing this fact. (McCloskey Aff. at ¶ 10 & Ex. 2 – Approval Decision Letter dated 12/12/2014; R. 236, 241-47.) Appellants did not submit an affidavit, deposition testimony, or any other supporting evidence rebutting this evidence to the lower court. Therefore, this argument is without merit.

IV. Appellants' Rule 14 argument is based on a fundamentally flawed understanding of the Rule and the proper basis for "third-party" claims.

SLS's Rule 14 argument represented an additional, alternative ground for granting summary judgment. As detailed above, the primary basis for the lower court's ruling was the lack of any evidence presented by Appellant contradicting SLS's arguments. However, as the lower court's order explained, summary judgment was also appropriate because Appellants' claims were improperly pled as "third-party" claims against SLS.

Pursuant to Rule 14(a), "a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action ***who is or may be liable to him for all or part of the plaintiff's claim against him.***" Rule 14(a), SCRCP (emphasis added). Thus, "[u]nder Rule 14, the third-party plaintiff must have a substantive claim against

federal Rule 14(a). In *Stevenson*, the defendant asserted third-party claims against its loan servicer for violation of the UTPA and breach of the duty of good faith premised on the servicer's failure to meaningfully engage in loss mitigation. *See id.* The District Court agreed with the servicer that "[t]he outcome of [plaintiff's] foreclosure claim would not impact the liability of [the servicer]." *Id.* Thus, the third-party complaint was not valid as it "seeks no indemnification, and there is no relationship to the plaintiff's claim against the third-party plaintiff." *Id.* The same is true here—Wilmington Trust's foreclosure claim would not impact SLS's liability to Appellants' for their claims based on SLS's servicing off their loan.

Appellants' argument misconstrues the purpose of Rule 14 and SLS's position. Appellants have consistently mischaracterized SLS's argument as asserting that SLS cannot be sued ***at all*** for the alleged improprieties in servicing their loan.[13] SLS has never made that assertion. Rather, SLS's argument has consistently been that the claims were not asserted through the correct procedural vehicle as they were not third-party claims. Appellants should have either joined SLS as a counterclaim defendant under Rule 13(h) ***or*** brought a separate suit against SLS. *See U.S. Bank Nat'l Ass'n v. Kahn Prop. Owner, LLC*, 64 Misc. 3d 1236(A), 118 N.Y.S.3d 369 (N.Y. Sup. Ct. 2019). A number of courts have recognized the interplay between Rule 13(h) and Rule 14. *See, e.g., Bank of New York Mellon Tr. Co. v. Prefco Nineteen Ltd.*

[13] Appellants have implied on several occasions that SLS is attempting to escape liability in this matter through obfuscation about its role in the case. SLS has never disputed that it is an agent of Wilmington Trust (the mortgage trust that holds Appellants' loan), and services Appellants' loan on its behalf. In that capacity, SLS retained counsel to file a foreclosure suit on behalf of the trust due to Appellants' default. Wilmington Trust was the named plaintiff since it holds the note and mortgage. Confusion arose when Appellants asserted both counterclaims against Wilmington Trust and "third-party" claims against SLS. SLS retained additional counsel to defend those claims and there was a miscommunication between counsel about who would handle which portion of the case. This misunderstanding was not an effort to avoid liability. SLS has never asserted that it cannot be sued as Appellants seem to suggest—SLS simply argued that Appellants did not sue SLS the correct way.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Blake T. Williams

Blake T. Williams
SC Bar No. 100794
E-Mail: blake.williams@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorney for Specialized Loan Servicing LLC a/k/a SLS

Columbia, South Carolina

July 28, 2021

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Blake T. Williams

Blake T. Williams
SC Bar No. 100794
E-Mail: blake.williams@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorney for Specialized Loan Servicing LLC a/k/a SLS

Columbia, South Carolina

July 28, 2021

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AFFIRMED

Robert Bratton Varnado, of Brown & Varnado, LLC, and Brian Morris Knowles, of Knowles Law Firm, PC, both of Charleston, for Appellants.

Blake Terence Williams, of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Respondent.

PER CURIAM: In this appeal from an action for foreclosure, Temisan Etikerentse and Ijeoma Etikerentse (collectively, Appellants) appeal the circuit court's grant of summary judgment in favor of third-party defendant Specialized Loan Servicing, LLC (SLS) as to Appellants' claims for breach of contract, a declaratory judgment that SLS violated the Home Affordable Modification Program (HAMP), violation of the South Carolina Unfair Trade Practices Act (SCUTPA)[1], and violation of 12 C.F.R. § 1024.41, also known as the Real Estate Settlement Procedures Act (RESPA). We affirm.

1. As to Issues I and II, alleging the circuit court lacked jurisdiction to issue the relevant order, we deem these issues abandoned. *See State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); *State v. Jones*, 344 S.C. 48, 58-59, 543 S.E.2d 541, 546 (2001) (stating an argument is deemed abandoned on appeal when conclusory and without supporting authority).

2. As to Issue III, alleging genuine issues of material fact existed as to Appellants' claims for breach of contract and violations of HAMP, SCUTPA, and RESPA, we conclude SLS was entitled to summary judgment on each claim. Additionally, we affirm the circuit court's finding that Appellants' claims were improperly brought pursuant to Rule 14, SCRCP. *See Coker v. Cummings*, 381 S.C. 45, 51, 671 S.E.2d

[1] S.C. Code Ann. §§ 39-5-10 to -180 (2023).

THOMAS, KONDUROS, and GEATHERS, JJ., concur.

Pursuant to Rules 221 and 240 of the South Carolina Rules of Appellate Procedure, the Appellants Temisan Etikerentse and Ijoema Etikrentse ("Etikenrentses") moves the Court of Appeals for rehearing on its unpublished per curiam opinion, filed October 25, 2023, affirming the decision of the Honorable Bentley Price.

The Court of Appeals found Issues I and II were abandoned. They were not. Because Appellants raised pre-emption of South Carolina's regulatory or adjudicatory powers, "[s]uch a determination of congressional intent and of the boundaries and character of a pre-empting congressional enactment is one of federal law. Pre-emption, the practical manifestation of the Supremacy Clause, is always a federal question." *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 388 (1986). Accordingly, Respondent's motion to strike portions of Appellant's designation of matter and of its argument, was misplaced. Appellant raised federal pre-emption, and pre-empted matters trump state rules of issue preservation and preclusion. In order for a South Carolina court to overcome deciding the **federal** question of jurisdiction, any "asserted non-federal ground must independently and adequately support the judgment." *Abie State Bank v. Bryan,* 282 U.S. 765, 773 (1931). To constitute an "independent" state bar, the state law basis for the decision must not be interwoven with federal law and rest purely on state law grounds. *Michigan v. Long,* 463 U.S. 1032, 1040-41 (1983); *Harris v. Reed,* 489 U.S. 255, 265 (1989). A state law or procedural rule is "adequate" if it is "firmly established" and "regularly followed." *Beard v. Kindler,* 558 U.S. 53, 60 (2009) (quoting *Lee v. Kemna,* 534 U.S. 362, 375 (2002)). Because "[t]he Supremacy Clause supplies a rule of priority," *Virginia Uranium, Inc. v. Warren,* 139 S.Ct. 1894, 1901 (2019), the court must first address the Appellant's question as to whether the Circuit Court has appellate jurisdiction over: (1) a final unappealed order of a federal bankruptcy court and (2) over a federal agency's findings in a Consent Order. *Ake v. Oklahoma,*

decisions stress that a state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'"). Assuming, *arguendo*, that subject matter jurisdiction could be waived – which the South Carolina courts deny – Respondent failed to provide any "strictly or regularly followed" rule requiring a court to strike exhibits based solely on a party's assertion that "these documents and their descriptions are insufficient to identify them with sufficient specificity." [Resp. Mot., at 3]. The proper relief appears to be that Appellant should supplement the record. *See* SOUTH CAROLINA APPELLATE PRACTICE 3D., at 406 ("Failing to be clear is a common cause of the need to supplement the record"). Respondent nor the Court of Appeals cannot cite state court rules of issue preservation to overcome an argument for lack of subject-matter jurisdiction – much less federal subject-matter jurisdiction.

Appellant's *Initial Brief* itself refutes Respondent's claim of lack of specificity for the designated materials. First, the "Chapter 7 Bankruptcy Petition" is referred to in its plain language with bankruptcy case (14-04497-dd) identified, as is the Discharge Order [ECF No. 24-2] and notification of the same sent to SLS and BANA [ECF No. 24-1]. SLS specifically pointed to this order in its two letters purported to have offered Appellant a modification. These items are "Undisputed Facts in Record" in the Circuit Court's Order. Similarly, the June 22, 2015 *Notice of Appearance and Request for Notice with Certificate of Service* was filed by attorney Lawrence Wilbur Johnson Jr., Esquire on behalf of *Specialized Loan Servicing LLC* as the "**creditor**," is identified as "[ECF No. 36]." So was the "Certification of Facts" attached thereto that specifically verifies under penalty of perjury that "movant" "has possession of the Note" and is "the assignee of the Mortgage," as "[ECF No. 37]." Both of these filings by SLS identified bankruptcy case 14-04497-dd in their headings, for which SLS was a party. Furthermore, "Administrative Proceeding File No. 2020-BCFP-0002, In the Matter of Specialized Loan Servicing, Consent Order dated May

federal regulations promulgated under 12 U.S.C. § 2601, *et seq.*, known as the "Real Estate Settlement Procedures Act of 1974" ("RESPA[1]"). *See* 12 C.F.R. § 1024.2(b). "Servicer means a person responsible for the servicing of a federally related mortgage loan." *Id.* Fatal to Respondent's position is its concession that "at all times, SLS has acted only as servicer of the note and mortgage on behalf of the holder [sic] of the same, which is [Wilmington Trust as Trustee]." [R. pp. 234-236]. Based on McCloskey's affidavit testimony SLS cannot pass the definition of a servicer who is also "the person who makes or holds such loan." *Id.*

It is therefore axiomatic that SLS's ability to receive "any scheduled periodic payments from a borrower pursuant to the terms of any federally related mortgage loan, including amounts for escrow accounts under section 10 of RESPA (12 U.S.C. § 2609), and making the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the...servicing contract," 12 C.F.R. § 1024.2(b)[2], are derivative of "the person who makes or holds such loan." *Id.*

What really matters was SLS' reliance upon its pecuniary interest as a servicer to both retain and direct Attorney Johnson to file bankruptcy court matters, as well as hire and direct attorney Wlodarczyk "to file a foreclosure action naming Wilmington Trust as the Plaintiff." *Companion Property Casualty Insurance Company v. U.S. Bank, National Association,* 2016 WL

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[1] RESPA is a remedial consumer protection statute, and it imposes obligations upon servicers of federally related mortgage loans. [*See* HAMP/SCUTPA/RESPA argument , p. 14, infra].

[2] 12 C.F.R. 1024.2(b) allows a servicer to "receive" payments and in no way authorizes a servicer (who is not the owner or holder of the loan) to enforce the Note and Mortgage. *See Butner* v. *United States,* 440 U. S. 48, 54-55 (1979), "[p]roperty interests are created and defined by state law. The justifications for application of state law are not limited to ownership interests, but apply with equal force to security interests, including the interest of a mortgagee." *Butner; supra,* at 55.

terms of the note and mortgage" then *no* foreclosure action would have been filed at all. Testimony exists from the attorney for the purported foreclosing party that SLS *alone*: (1) retained and paid the RPL Firm and (2) directed him "to file a foreclosure action naming Wilmington Trust as the Plaintiff."

Consequently, a non-party is subject to impleader only if there is a basis to assert that he is liable to the named defendant(s) for all or part of the plaintiff's claim. *Smith v. Tiffany*, 419 S.C. at 560, 799 S.E.2d at 486 (2017). The outcome of the principal claim must impact the third-party defendant's liability. *First Gen. Serv. of Charleston v. Miller*, 314 S.C. 349, 341-342, 445 S.E. 2d 446, 447 (1994). A foreclosure action presents just such an imminent loss to the mortgagor.

The only question before this Court is whether the United States Bankruptcy Court had jurisdiction to issue the Order. *See Williamson v. Berry*, 49 U.S. 495, 543 (1850), ("[w]henever the right to property is claimed to have been changed under a judgment or decree by a court, and it is set up as a defense in another court, the jurisdiction of the former may be inquired into."). Clearly, because a bankruptcy court's order resolving a creditor's motion for relief from the automatic stay constitutes a final order, then under the United States Supreme Court's decision *Ritzen Group,* the bankruptcy court's jurisdiction cannot be questioned. 140 S.Ct. at 585. SLS therefore cannot now assert it alone has not caused Appellant to face the very real danger of foreclosure. Here, there is more than enough basis to assert the claim against SLS, because: (1) there is not a lawyer truly representing Wilmington, nor is Wilmington really involved; (2) SLS is paying and directing both sets of lawyers; (3) there are no Wilmington documents supporting the foreclosure, but in fact all of the relevant documents produced in the case are from SLS; (4) even the lawyer for "Wilmington" is also asking for summary judgment based on SLS's affidavit; and (5) controlling the foreclosure process by hiring the RPL Firm (purported counsel for

The record reveals that on December 12, 2014, SLS notified Etikerentse that he had been approved for a "Standard Modification Program," not HAMP. Section 524 of the Bankruptcy Code sets forth the effects of a discharge. Pursuant to § 524(c), reaffirmation agreements made after the granting of a discharge under § 727 are unenforceable without bankruptcy court notice and approval. The bankruptcy court was not notified of the attempted re-affirmation. No record of the modification offer appears anywhere on the bankruptcy record.

On March 16, 2015, SLS again wrote Etikerentse. Thereafter, on June 22, 2015 a Notice of Appearance and Request for Notice with Certificate of Service Filed by Lawrence Wilbur Johnson Jr. on behalf of Specialized Loan Servicing LLC as the "creditor." [ECF No. 36]. On the same date Johnson filed a Motion for Relief from Stay pursuant to 11 U.S.C. § 362, "[f]or cause, lack of adequate protection 362(d)(1); lack of equity, lack of necessity to reorganization, Section 362(d)(2); lack of adequate protection, Section 363(c)" on behalf of Specialized Loan Servicing LLC, as servicing agent for Wilmington Trust, National Association, as Trustee to Citibank, N.A., as Trustee for Bear Stearns Asset Backed Securities Trust 2007-2, Asset Back Certificates, Series 2007-2. Johnson identifies SLS as the "creditor," "movant" and "a party in interest." [ECF No. 37]. Moreover, Johnson is aware of the fact that neither the bankruptcy court nor Appellant has received any paperwork in December 2014 to complete the modification process.

Missing from the record was any evidence that the modification documents were in fact overnighted to Appellant or his attorney. Moreover, Administrative Proceeding File No. 2020-BCFP-0002 establishes that Aldridge lacked any reasonable basis to assert "these are stall tactics." In fact, as shown below, SLS has conceded that it failed to maintain these records.

Under RESPA, "the [Consumer Financial Protection] Bureau did not intend to create a private right of action for borrowers to enforce, in private litigation, any requirements that are

SLS has admitted "the following law violations: (1) Respondent violated the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 *et seq.*, its implementing regulation, Regulation X, 12 C.F.R. part 1024, and the Consumer Financial Protection Act of 2010 (CFPA) by taking prohibited foreclosure actions against certain borrowers, in violation of 12 C.F.R. § 1024.41(f)(2) and (g); and (2) Respondent violated RESPA, Regulation X, and the CFPA by failing to send or timely send evaluation notices to certain borrowers, in violation of 12 C.F.R. § 1024.41(c)(1)." *Id.* ¶. 1. Moreover, pursuant to Section VII of the Consent Order, SLS has been ordered to engage in a comprehensive plan to *identify* and compensate those harmed and in the interim, "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order or to review, modify, suspend, terminate, or set aside any such notice or order." 12 U.S.C. § 5563(d)(4). Simply put, SLS agreed, in consideration for a smaller fine, that it was liable because it failed to maintain records to support any assertion that it had complied with 12 C.F.R. § 1024.41. SLS cannot now ask the Circuit Court to find such compliance ***now*** when it already admitted to its regulator that it did not comply, just last year. SLS's own discovery states that what it asserts to be a modification approval was in fact, sent for "informational purposes only."

Additionally, both because the RPL Firm and Nelson Mullins had "actual notice" of the Consent Order, they must engage in certain "affirmative actions" prior to proceeding with motions for summary judgement on behalf of their client, SLS. Clearly, if Nelson Mullins, as argued in SLS' Motion, is not aware that 12 C.F.R. § 1024.41 is a regulation promulgated under RESPA, then no such affirmative review occurred. Thus, SLS cannot proceed, nor its lawyers can proceed on behalf of their client, in the instant motions.

"[n]othing more" was required under statute). The terms "unfair" and "deceptive" are not defined in SCUTPA; rather, in section 39-5-20(b) of the Act, the General Assembly directs that in construing those terms, the courts of our state "will be guided by" decisions from the federal courts, the Federal Trade Commission Act (FTCA), and interpretations given by the Federal Trade Commission (FTC). That reason is simple – Congress has authorized the FTC, not state courts, to decide what constitutes unfair, deceptive and abusive practices as they relate to interstate commerce. Equally clear is that violations of the procedures, as alleged by the Appellant, are indeed considered unfair and deceptive by the FTC and made enforceable under 12 U.S.C. § 2605(f). *See* 12 C.F.R. § 1024.41(a). Thus, SLS's Consent Order "shall be prima facie evidence in an action brought under Section 39-5-140 that the respondent used or employed a method, act or practice declared unlawful by Section 39-5-20." S.C. Code Ann. § 39-5-140(c).

CONCLUSION

For the foregoing reasons, the South Carolina Court of Appeals should reverse its Opinion of August 16, 2023.

Respectfully submitted,

Robert B. Varnado (S.C. Bar # 0007850)
VARNADO LAW FIRM, LLC
25 Cumberland Street, Suite 200 (29401)
P.O. Box 387
Charleston, South Carolina 29402
(843) 737-7301
Attorneys for Appellants

November 10, 2023
Charleston, South Carolina

/s Robert B. Varnado

Robert B. Varnado (S.C. Bar # 0007850)
VARNADO LAW FIRM, LLC
25 Cumberland Street, Suite 200 (29401)
P.O. Box 387
Charleston, South Carolina 29402
(843) 737-7301
Attorneys for Appellants

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I. The Court properly affirmed the lower court.

This is an appeal from the lower court's grant of summary judgment in favor of SLS on third party claims asserted by Appellants against SLS complaining of issues associated with SLS's servicing of their loan.[2] Appellants' third-party claims sought monetary damages from SLS for alleged regulatory and statutory violations. The foreclosure claim brought by the Plaintiff mortgage holder (Wilmington Trust) against Appellants associated with their 2008 default on their obligations under their mortgage, as well as Appellants' counterclaims and affirmative defenses, remain pending before the lower court and awaiting adjudication. The lower court properly determined that Appellants' claims against SLS were not proper "third party" claims and, in any event, Appellants failed to present even a scintilla of evidence which would demonstrate a genuine issue of material fact for trial. This Court correctly affirmed.

Appellants' Petition for Rehearing should be denied. Much of the Petition rehashes the same difficult to follow, legally incorrect arguments that the Court has already considered and rejected. The remainder of the grounds are based on materials that were properly stricken from the record on appeal because they were never presented to the lower court.[3] Because Appellants fail to identify any issues that the Court overlooked or misapprehended as required by Rule 221(a), the Petition should be denied.

Appellants did not serve and file their Petition for Rehearing until November 10, 2023 and have not moved this court for leave to submit the Petition out of time.

[2] Mortgage servicing is "[t]he administration of a mortgage loan, including the collection of payments, release of liens, and payment of property insurance and taxes." *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 221, 746 S.E.2d 478, 481 (Ct. App. 2013) (quoting Black's Law Dictionary 1105 (9th ed. 2009)).

[3] The Court's Order struck the following: (1) 2009 Foreclosure Complaint; (2) Chapter 7 Bankruptcy Petition; (3) Bankruptcy ECF No. 24-1; (4) Bankruptcy ECF No. 24-2; (5) Copy of Bankruptcy ECF Records (List); (6) Bankruptcy ECF No. 36; (7) Bankruptcy ECF No. 37; and (8) LPS 7907-7954. It is undisputed that these materials were never submitted to the lower court.

evidence while glossing over the fact that they never submitted any *contra* affidavits, deposition testimony, or other supporting evidence. At the end of the day, Appellants bore the burden of proving their claims and the Court correctly affirmed the lower court's finding that they failed to show any genuine issues of material fact.

B. Appellants' claims were improperly pled as "third party" claims.

The lower court also correctly determined that Appellants' claims were not proper "third-party" claims against SLS, and this Court appropriately affirmed on this alternative basis. As the Court noted, either the lack of evidence **or** the improper nature of the claims would have independently been sufficient to affirm the lower court.

Pursuant to Rule 14(a), "a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action ***who is or may be liable to him for all or part of the plaintiff's claim against him.***" Rule 14(a), SCRCP (emphasis added). Thus, "[u]nder Rule 14, the third-party plaintiff must have a substantive claim against the third-party defendant founded upon ***derivative*** liability," meaning the "outcome of the princi[pal] claim must impact the third-party defendant's liability." *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994) (emphasis added). In other words, the key question is would the claim of the third-party plaintiff "impose liability upon [the third-party defendant] for all or part of [the plaintiff's] claim." *Id.*

In interpreting the analogous federal rule, the District of South Carolina has explained that a "third party" claim is "viable only where a proposed third party plaintiff says, in effect, 'If I am liable to plaintiff, then my liability is only technical or secondary or partial, and the third party defendant is derivatively liable and must reimburse me for all or part . . . of anything I must pay plaintiff.'" *Michelin N. Am., Inc. v. Klinger Ents., Inc.*, No. CV 6:18-518-HMH, 2018 WL

As SLS has maintained, Appellants' claims were not asserted through the correct procedural vehicle. Appellants should have either joined SLS as a counterclaim defendant under Rule 13(h) ***or*** brought a separate suit against SLS. *See U.S. Bank Nat'l Ass'n v. Kahn Prop. Owner, LLC*, 64 Misc. 3d 1236(A), 118 N.Y.S.3d 369 (N.Y. Sup. Ct. 2019). Appellants were masters of their pleading, however, and willfully chose to improperly state their claims without ever seeking to correct that error.

Therefore, for all these reasons, this Court properly affirmed the lower court's grant of summary judgment on this basis.

II. The arguments raised in Appellants' Petition for Rehearing are without merit.

Faced with the clear deficiencies with their claims, Appellants resorted to contending that the lower court lacked the power to rule on SLS's motion. The Court correctly found that these arguments were without merit.

A. Appellants' petition asserts vague, illogical arguments that are unsupported by any applicable law.

Appellants' Petition begins by discussing preemption, contending that unspecified federal matters preempted South Carolina's "regulatory or adjudicatory powers" over the claims they chose to assert in the circuit courts of this State. (Pet. at 2.) Preemption was not discussed in any detail in Appellants' merits brief. Moreover, Appellants did not argue preemption to the lower court aside from a passing reference in their motion to reconsider contending that the Home Ownership Lending Act preempts South Carolina law defining "default." (Mot. to Reconsider at 5; R. 358.) Preemption is a distinct doctrine from subject matter jurisdiction and must be raised to and ruled upon to be preserved. *See Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 645 (2011) (holding that the issue preservation principles applied to Appellant's preemption argument and finding the issue unpreserved). And, of course, "[a] party

expressly stated that it was not making any rulings regarding issue preservation. The Court's order merely struck materials from Appellants' designation of matter that were never presented to the lower court and prevented reference to those stricken materials in accordance with the well-established rules. Much of Appellants' petition is an effort to raise improper arguments based on these excluded materials and are not a proper basis for establishing any issues that the Court may have "overlooked or misapprehended" under Rule 221(a). Thus, they should be rejected.

C. Appellants' arguments about Temisan Etikerentse's bankruptcy proceedings are improper and without merit.

Appellants' Petition for Rehearing then raises several points relying on the materials excluded from the Record on Appeal from Temisan Etikerentse's bankruptcy. These arguments should be disregarded on this basis alone. However, they should also be rejected because they lack merit.

Appellants appear to contend that the bankruptcy court is the only court that has jurisdiction to adjudicate the issues raised by the claims that ***they chose*** to bring in circuit court. They assert that they have raised a question as to whether the circuit court "has appellate jurisdiction" over "a final unappealed order of the bankruptcy court." (Pet. at 2.) SLS remains unable to decipher precisely what Appellants are trying to argue about Temisan Etikerentse's bankruptcy or how this supposedly impacted the lower court's power to hear their claims but will briefly address this issue out of an abundance of caution.

Appellant Temisan Etikerentse filed a voluntary bankruptcy petition pursuant to Chapter 7 of the Bankruptcy Code on August 7, 2014. The Bankruptcy Court entered its Order discharging Etikerentse on November 12, 2014. The mortgage held by Wilmington Trust was not discharged through the bankruptcy, which Appellants' counsel acknowledged at the hearing

S.C. 93, 100, 610 S.E.2d 494, 498 (2005)). Appellants only complained of the court's "jurisdiction" to proceed on the eve of the summary judgment hearing after they failed to come forward with any specific evidence supporting that SLS acted improperly. Again, this is a bizarre scenario where a claimant appears to be contending that the claims they asserted are improper in the forum where they chose to litigate.

Regardless, however, as noted above, the Consent Order did not deprive the lower court of jurisdiction. The CFPB issued the subject Consent Order under 12 U.S.C. § 5563(d)(2). *See* Consent Order, *In re: Specialized Loan Servicing, LLC*, No. 2020-BCFP-0002, 2020 WL 8182145 (May 11, 2020). 12 U.S.C. § 5563 details the enforcement powers of the CFPB and its hearing and adjudication process. *See id.* The subsection cited by Appellants, (d)(2), details special rules for the enforcement of CFPB orders ***by the CFPB*** and notes that except as otherwise provided "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order or to review, modify, suspend, terminate, or set aside any such notice or order" issued pursuant to this statute. *Id.*

The lower court correctly found that this statute had no impact on its ability to hear and rule on SLS's motion or the merits of Appellants' claims. As the lower court explained, § 5563(d)(2) is in the CFPB's enabling legislation and concerns the CFPB's own enforcement powers. *See generally* 12 U.S.C. § 5563. Subsection (d) simply gives the ***CFPB*** the power to seek enforcement of its orders through the court system but provides that otherwise no court has jurisdiction to affect the issuance or enforcement of the Consent Order or alter its terms. *See id.* Thus, the lower court properly rejected Appellants' argument that § 5563(d)(2) deprived it of subject matter jurisdiction and this Court correctly concluded the same.

matter was not evidence supporting the plaintiff's claim. *See id.* at 1293 (explaining that the defendant having "entered into a settlement agreement in another case in which it was also accused of committing alleged errors in the servicing of mortgage loans is not evidence that it committed errors with respect to the Plaintiff's Loan in this case"); *see also, e.g.*, *Faiella v. Fed. Nat'l Mortg. Ass'n*, No. 16-CV-088-JD, 2017 WL 6375600, at *7 (D.N.H. Dec. 13, 2017), *aff'd*, 928 F.3d 141 (1st Cir. 2019) (finding that a consent decree between the defendant and the CFPB should not be credited as any evidence of wrongdoing on the part of the defendant who neither admitted nor denied the allegations therein); *Castellanos v. Portfolio Recovery Assocs., LLC*, No. 1:17-CV-20593-UU, 2017 WL 7796303, at *3 (S.D. Fla. Oct. 31, 2017) (granting a motion in limine prohibiting plaintiff from introducing any evidence regarding a consent order between the defendant and the CFPB entered in a separate matter).

Therefore, the lower court correctly found that the Consent Order was not admissible evidence supporting any wrongful act committed by SLS.[7] Regardless, even if the Consent Order could be considered evidence of generalized wrongful acts committed by SLS, Appellants still did not submit any evidence of any impropriety by SLS ***in this case***—nor could they since the unrebutted evidence supported that SLS complied with all regulatory obligations. Again, the lower court properly granted summary judgment and this Court did not overlook or misapprehend any argument in affirming that order.

[7] Appellants' repeat their contention that the Consent Order caused a "shifting of the burden" requiring ***SLS*** to determine the damages it caused to ***Appellants***. As SLS noted, this was not raised to the lower court and is unpreserved. Moreover, it would lead to an absurd result if this was correct. Appellants are, in essence, saying that it is incumbent on SLS to provide evidence supporting their claims despite being unable to produce any themselves. The Supreme Court case Appellants cite does not support their position. *See generally Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 38 (1991).

RECEIVED
Dec 08 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Bentley D. Price, Circuit Court Judge

Appellate Case No. 2020-001204
Case No. 2018-CP-10-02762

Wilmington Trust National Association as Successor Trustee to Citibank N.A. as Trustee of Structured Asset Mortgage Investments II Inc., Bear Stearns ALT-A Trust II Mortgage Pass-Through Certificates Series 2007-1, ... Plaintiff,

v.

Temisan Etikerentse a/k/a Temisan L. Etikerentse, Ijeoma Etikerentse a/k/a Ijeoma Etkis, Suntrust Mortgage Inc., Capital Bank Corporation, Bank of America NA,Keybank National Association, and Olde Park Homeowners' Association Inc., ... Defendants.

AND

Temisan Etikerentse a/k/a Temisan L. Etikerentse, Ijeoma Etikerentse a/k/a Ijeoma Etiks ..... Appellants,

v.

Specialized Loan Servicing LLC a/k/a SLS, ... Respondent.

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough, LLP, do hereby certify I have served all counsel in this action with a copy of the pleading(s) hereinbelow in accordance with the Supreme Court Order 2022-05-06-04, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

Documents Served: **Return to Petition for Rehearing**

Eileen Hindman

From: Eileen Hindman
Sent: Friday, December 8, 2023 3:23 PM
To: rob@varnado-law.com; brian@knowlesinternational.com; Blake Williams
Subject: Temisan Etikerentse v. Specialized Loan Servicing, LLC - Appellate Case No. 2020-001204
Attachments: 2023.12.08 Return to Petition for Rehearing (Etikerentse).pdf; 2023.12.08 Proof of Service (Etikerentse).pdf

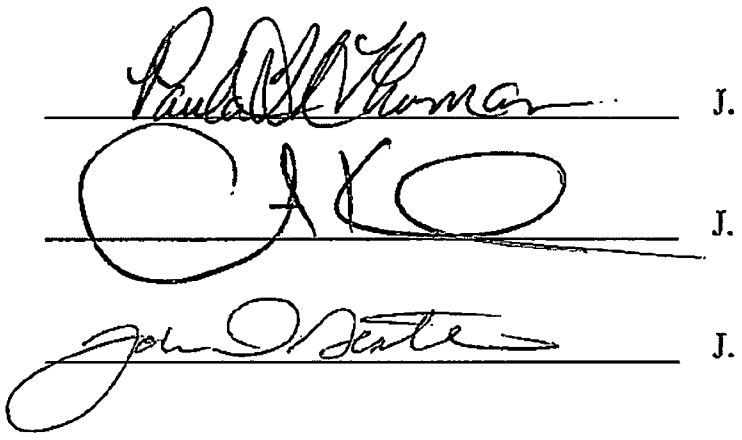
Good afternoon,

Attached for service upon you in the above matter is the Return to Petition for Rehearing and Proof of Service.

Thank you,

NELSON MULLINS

EILEEN HINDMAN SENIOR ADMINISTRATIVE ASSISTANT
eileen.hindman@nelsonmullins.com
MERIDIAN | 17TH FLOOR
1320 MAIN STREET | COLUMBIA, SC 29201
T 803.255.9204 F 803.256.7500
NELSONMULLINS.COM



J.

J.

J.

Columbia, South Carolina

cc:
Brian Morris Knowles, Esquire
Robert Bratton Varnado, Esquire
Blake Terence Williams, Esquire
The Honorable Bentley Price

FILED
Feb 23 2024

s/ Brian M. Knowles
Brian M. Knowles, Esquire
Knowles Law Firm, PC
1212 Wappoo Road
Charleston, SC 29407
Telephone: (843) 810-7596
brian@knowlesinternational.com
and
Robert B. Varnado SC Bar # 07858
Varnado Law Firm, LLC
Post Office Box 387
Charleston, SC 29402
Telephone: (843) 737-7301
rob@varnado-law.com

Attorneys for Appellant