Exhibit "C"

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

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,

vs.

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.

Civil Action No. 2018-CP-10-02762

ORDER

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

Third-Party Plaintiffs,

vs.

Specialized Loan Servicing LLC a/k/a SLS,

Third-Party Defendant.

BEFORE THE COURT is a Motion for Summary Judgment filed by Third-Party Defendant Specialized Loan Servicing LLC a/k/a SLS ("SLS") as to the third-party claims asserted by Temisan Etikerentse a/k/a Temisan L. Etikerentse and Ijeoma Etikerentse a/k/a

Ijeoma Etkis ("Third-Party Plaintiffs") in the above-referenced matter. Hearings were held on July 13, 2020 and July 15, 2020, with Brian M. Knowles and Robert B. Varnado appearing for Third-Party Plaintiffs and Blake T. Williams appearing for SLS. After consideration of all arguments based on the pleadings, exhibits, the parties' written submissions, oral argument, and applicable authorities, the Court hereby **GRANTS** SLS's motion for summary judgment.[1]

PROCEDURAL BACKGROUND

1. On June 15, 2007, Temisan Etikerentse and Ijeoma Etikerentse executed a $1,402,500.00 adjustable rate note ("Note") in favor of Countrywide Home Loans, Inc. The Note was secured by a Mortgage (the "Mortgage") on real property located at 783 Navigators Run, Mount Pleasant, S.C. executed and delivered to Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Countrywide.

2. MERS assigned the mortgage to Citibank N.A., as Trustee on behalf of the Holders of Bear Stearns Alt-A Trust II, Mortgage Pass-Through Certificates, Series 2007-1 ("Citibank") via assignment dated August 31, 2009.

3. Citibank then assigned the mortgage to Wilmington Trust, National Association, as Successor Trustee of Structured Asset Mortgage Investments II Inc., Bear Stearns Alt-A Trust II, Mortgage Pass-Through Certificates Series 2007-1 ("Wilmington Trust") via assignment dated November 4, 2014.

4. SLS services Third-Party Plaintiffs' loan on behalf of Wilmington Trust.

5. On April 8, 2015, Wilmington Trust filed this foreclosure action alleging that Third-Party Plaintiffs have been in default since December 1, 2008.

[1] The Court entered a Form 4 Order granting SLS's motion on July 22, 2020, and invited SLS to submit this formal Order.

6. On November 17, 2016, Third-Party Plaintiffs filed their Answer, Counterclaims, and Third-Party Complaint. Third-Party Plaintiffs asserted counterclaims against Wilmington Trust and third party claims against SLS for: (1) breach of contract, (2) declaratory judgment, (3) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA") and (4) violation of 12 C.F.R. § 1024.41.

7. By Order dated July 14, 2017, the case was stricken from the active docket pursuant to Rule 40(j), SCRCP. The case was restored to the active docket with a new civil action number by Order dated June 1, 2018.

8. SLS initially moved for summary judgment on August 30, 2018 while discovery was ongoing, relying solely on an affidavit of an SLS representative and supporting exhibits.

9. The Court denied this motion without prejudice via Form 4 Order dated February 11, 2018, finding that summary judgment was not appropriate because further inquiry into the facts was desirable.

10. SLS then proceeded to conduct additional discovery by deposing Dr. Etikerentse.

11. After the conclusion of discovery, SLS moved for summary judgment on all of the claims asserted against it by Third-Party Plaintiffs. SLS filed its motion on October 17, 2019. A hearing was scheduled for July 13, 2020. Third-Party Plaintiffs filed a response in opposition to SLS's motion on July 10, 2020.

12. The Court held hearings on this motion on July 13, 2020 and July 15, 2020.

STANDARD OF REVIEW

A motion for summary judgment should be granted where the Court is satisfied 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." Rule 56(c), SCRCP. A party opposing a motion for summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial." *Hedgepath v. AT&T Co.*, 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001) (quoting *Baughman v. AT&T Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991)). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Id.* at 355, 559 S.E.2d at 336. Moreover, "[a] party cannot escape summary judgment on the mere hope that something may develop at trial." *Champion Int'l Corp. v. Eubanks*, 291 S.C. 395, 398, 353 S.E.2d 880, 882 (Ct. App. 1987).

UNDISPUTED FACTS IN RECORD

1. Third-Party Plaintiffs do not have a contract, either express or implied, with SLS and SLS is not a party to the Note or Mortgage.

2. Third-Party Plaintiffs were in default on the note as of December 1, 2008 and have remained in default through the present date.

3. Third-Party Plaintiffs submitted a loss mitigation application in 2014.

4. SLS evaluated the 2014 loss mitigation application for foreclosure intervention options.

5. Via letter dated December 12, 2014, SLS informed Third-Party Plaintiffs that they were approved for a standard loan modification.

6. SLS also evaluated Third-Party Plaintiffs for several other loss mitigation options, but Third-Party Plaintiffs were not approved for those options because the loan did not meet the necessary criteria.

7. Despite the approval for SLS's standard modification program, the loan was not modified because Third-Party Plaintiffs did not accept the terms proposed by SLS.

8. During the second half of 2016, SLS again reviewed Third-Party Plaintiffs for loss mitigation options.

9. Via letter dated December 27, 2016, SLS informed Third-Party Plaintiffs that they were approved for a standard loan modification.

10. SLS also evaluated Third-Party Plaintiffs for several other loss mitigation options, but Third-Party Plaintiffs were not approved for those options because the loan did not meet the necessary criteria.

11. Despite the approval for SLS's standard modification program, the loan was not modified because Third-Party Plaintiffs did not accept the terms proposed by SLS.

CONCLUSIONS OF LAW

After thorough review and careful consideration of the pleadings, briefing, supporting exhibits, and oral argument of counsel at the hearing, the Court finds that there are no genuine issues of material fact and that SLS is entitled to judgment as a matter of law on all of Third-Party Plaintiffs' claims. More specifically, the Court finds as follows:

1. **Breach of Contract.** In their response in opposition to SLS's Motion for Summary Judgment, Third-Party Plaintiffs acknowledged that they do not have contractual privity with SLS and that this "undermines" their direct cause of action against SLS for breach of contract. (Third-Party Pltf. Memo in Opp'n at 6.) Under South Carolina law, the existence of a contract is a necessary element for proving 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."). In light of Third-Party Plaintiffs' concession that they lack privity of contract with SLS, the Court finds that there are no genuine issues of material fact and SLS is entitled to summary judgment on this claim.[2]

2. **Declaratory Judgment**. Third-Party Plaintiffs' second cause of action purports to state a claim for declaratory judgment. The Court finds that the gravamen of this claim seeks a declaration that SLS had an obligation to comply with the Home Affordable Modification Program ("HAMP") and that SLS failed to do so for Third-Party Plaintiffs' loan. This claim fails as a matter of law because HAMP does not provide a private right of action. *See Carrington v. Mnuchin*, No. CIV.A. 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), *aff'd*, 612 F. App'x 190 (4th Cir. 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 Third-Party Plaintiffs have done in this case. *See,*

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[2] In their Memorandum in Opposition, Third-Party Plaintiffs requested leave to amend their complaint to assert a claim for tortious interference with a contract instead of breach of contract. This action was originally filed over five years ago, and Third-Party Plaintiffs did not seek leave to amend their pleading to assert this new claim until the eve of the hearing on SLS's motion. SLS moved for summary judgment on October 17, 2019, and one of the grounds asserted in the motion was that the breach of contract claim failed because Third-Party Plaintiffs lacked privity of contract with SLS. Despite being on notice of this argument for several months, Third-Party Plaintiffs waited until only three days before the hearing on SLS's motion for summary judgment to request leave to amend to assert this entirely new cause of action.

The Court finds that SLS would be prejudiced if it permitted Third-Party Plaintiffs to amend their pleading to assert this new claim in light of: (1) the length of time this case has been pending, (2) the extensive discovery previously undertaken by the parties, (3) the lack of any significant factual developments warranting the untimely amendment, and (4) the fact that permitting the amendment would require SLS to introduce additional and different evidence to prevail. *See Holland ex rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 236, 754 S.E.2d 714, 719 (Ct. App. 2014) (collecting cases). Therefore, leave to amend is **DENIED.**

e.g., *Steffens v. Am. Home Mortg. Sevicing, Inc.*, No. CIV.A. 6:10-1788-JMC, 2011 WL 901812, at *2 (D.S.C. Jan. 5, 2011), *report and recommendation adopted* 2011 WL 901179 (D.S.C. Mar. 15, 2011) (dismissing claims due to lack of private right of action under HAMP, explaining that "[d]espite the fact that [plaintiff] did not label her claims as 'HAMP violations,' the underlying factual and legal basis for each is squarely based on HAMP").

Additionally, the Court finds that even Third-Party Plaintiffs could premise their declaratory judgment claim on HAMP, the unrebutted evidence supports that Third-Party Plaintiffs' loan did not qualify for that program. SLS attached two decision letters to its motion which explained that Third-Party Plaintiffs' loan was not eligible for HAMP because the current unpaid principal balance on the loan was higher than the program limit as defined by the applicable guidelines. Third-Party Plaintiffs did not provide any evidence to rebut this fact and, therefore, there is no genuine issue of fact for trial.

3. **Violation of RESPA.** The Court also finds there is no genuine issue of material fact regarding Third-Party Plaintiffs' claim for violation of RESPA, 12 C.F.R. § 1024.41. The undisputed facts are that SLS reviewed Third-Party Plaintiffs' loss mitigation application in 2014, provided an explanation of its decision as to a number of foreclosure intervention options, and approved Third-Party Plaintiffs for a loan modification. Therefore, the Court finds that SLS satisfied its obligations under RESPA. *See generally* 12 C.F.R. § 1024.41.

Third-Party Plaintiffs' pleading and briefing focused largely on allegations about SLS's actions during a second loss mitigation evaluation in 2016. The Court notes that SLS was under no obligation to evaluate Third-Party Plaintiffs for loss mitigation options for a second time, yet nevertheless reviewed their loan again and offered a second loan modification. Because SLS already reviewed Third-Party Plaintiffs for loss mitigation options in 2014 and notified them of

its decision, SLS was entitled to proceed with filing this foreclosure action while continuing to engage in voluntary loss mitigation. Third-Party Plaintiffs cannot assert violations of the RESPA loss mitigation rules as to the 2016 review since they previously availed themselves of the loss mitigation process in 2014. 12 C.F.R. § 1024.41(i) (explaining 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 mortgage loan account"); *Mangum v. First Reliance Bank*, No. 4:16-CV-02214-RBH, 2017 WL 1062534, at *3 (D.S.C. Mar. 21, 2017) ("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.").

The Court also finds that Third-Party Plaintiffs have failed to establish any genuine issue of material fact because they have not provided any evidence of damages. 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) (noting that damages are an essential element of a RESPA claim and a plaintiff fails to prove actual damages where the failure to comply with RESPA did not cause the purported harm). The lack of even a scintilla of evidence supporting any damages to Third-Party Plaintiffs also warrants summary judgment.

In response to SLS's arguments, Third-Party Plaintiffs relied extensively on a recent consent order between SLS and the Consumer Financial Protection Bureau ("CFPB"). *See* Consent Order, *In re: Specialized Loan Servicing, LLC*, No. 2020-BCFP-0002, Doc. 1 (May 11, 2020), *available at* https://files.consumerfinance.gov/f/documents/cfpb_specialized-loan-servicing_consent-order_2020-05.pdf. The Court finds that this Consent Order has no bearing on this case. First, as the Court explained above, the unrebutted evidence shows that SLS complied with its obligations under RESPA for Third-Party Plaintiffs' loan. Therefore,

allegations of purported RESPA violations in unrelated matters are irrelevant to this case. Additionally, the Consent Order is not evidence of anything since it expressly provides that SLS consented to its terms "without admitting or denying any of the findings of facts or conclusions of law." *See id.* at ¶ 2.

The Court also finds that the Consent Order has no impact on its subject matter jurisdiction. The Court has carefully reviewed the language of the Consent Order and it does not deprive the Court of jurisdiction over this foreclosure action or Third-Party Plaintiffs' claims against SLS. The jurisdictional statute cited by Third-Party Plaintiffs is in the CFPB's enabling legislation and concerns the CFPB's own enforcement powers. *See generally* 12 U.S.C. § 5563. Subsection (d) 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* 12 U.S.C. § 5563(d). Third-Party Plaintiffs acknowledged at the hearing that they are not seeking to enforce the terms of the Consent Order, but instead were relying on it as support for SLS's alleged bad acts. Therefore, the jurisdictional provisions are not implicated here.

4. **Violation of SCUTPA**. The Court finds that there is no genuine issue of material fact as to Third-Party Plaintiffs' claim for violation of SCUTPA either. In their response to SLS's motion, Third-Party Plaintiffs acknowledged that the gravamen of this claim is also that SLS failed to adhere to its loss mitigation obligations under RESPA. (Third-Party Pltf. Memo in Opp'n at 4.) Because Third-Party Plaintiffs failed to establish any genuine issues of material fact as to any RESPA violation by SLS or related damages, this claim also necessarily fails as a matter of law.

The Court further holds that Third-Party Plaintiffs' SCUTPA claim fails as to each of the three essential elements. A SCUTPA claim requires that the Plaintiff show: "(1) that the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act." *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 815-16 (2013). Here, there is no evidence of any unfair or deceptive action by SLS since the unrebutted evidence supports that SLS complied with its obligations under RESPA. Additionally, Third-Party Plaintiffs cannot show an impact on the public interest. Third-Party Plaintiffs relied solely on the CFPB Consent Order to support this element. However, again, the Consent Order did not contain any admissions by SLS as to any of the findings of fact or conclusions of law. Finally, Third-Party Plaintiffs did not provide any evidence of damages. To establish a claim under SCUTPA, a claimant must allege and prove an "ascertainable loss of money or property" that is causally connected to purported unfair or deceptive act. *See* S.C. Code Ann. § 39-5-140(a); *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 57-58, 777 S.E.2d 176, 189 (2015). Third-Party Plaintiffs have not provided any evidence supporting an ascertainable loss of money or property. Therefore, summary judgment is proper on this claim.

5. **Rule 14, SCRCP**. Finally, the Court notes that in addition to failing on the merits, Third-Party Plaintiffs claims against SLS are improper under Rule 14(a), SCRCP. Therefore, summary judgment is also proper on this separate, alternative basis.

Pursuant to Rule 14(a) of the South Carolina Rules of Civil Procedure, "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. "Under 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).

The Court finds that Third-Party Plaintiffs' claims against SLS are not proper Rule 14(a) claims. This is a foreclosure action filed by Wilmington Trust against Third-Party Plaintiffs for their failure to satisfy their obligations under the Note and Mortgage. SLS is not a party to these instruments and cannot possibly be derivatively liable for Wilmington's foreclosure claim against Plaintiffs. *See Deutsche Bank National Trust Co. v. Stevenson*, No. 2:12-1854-CWH, 2013 WL 12241630, at *3 (D.S.C. Jan. 30, 2013) (explaining that third-party claims asserted against a loan servicer in a foreclosure action were improper because the "outcome of [plaintiff's] foreclosure claim would not impact the liability of [the servicer]"). The correct mechanism for asserting these claims would have been to either file a separate suit against SLS or join SLS as a defendant to the counterclaims. Summary judgment is also appropriate for this alternative basis.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that, viewing the evidence in a light most favorable to the non-moving party, there are no genuine issues as to any material fact and SLS is entitled to judgment as a matter of law on all of Third-Party Plaintiffs' claims. Accordingly, SLS's Motion is **GRANTED**.

IT IS SO ORDERED, this ____ day of _____, 2020.

_____
The Honorable Bentley D. Price
Ninth Judicial Circuit

Charleston Common Pleas

Case Caption:	Wilmington Trust National Association As Successor Trustee , plaintiff, et al VS Temisan Etikerentse , defendant, et al
Case Number:	2018CP1002762
Type:	Order/Summary Judgment

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766