THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No.: 2010-CP-10-5775

CitiMortgage, Inc.,.....Respondent/[ ]Appellant,

v.

Brodie M. Trickey aka Brodie McCary Trickey and
Barberry Woods Property Owners Association.....Defendants,

Of whom Brodie M. Trickey is the.....Appellant[ ]Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

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C. BORROWER FAILED TO COMPLY WITH THE REQUIREMENTS SET FORTH IN THE PLAN

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STATEMENT OF THE CASE

Respondent is not dissatisfied with the Appellant's (hereinafter "Borrower") recitation of the Statement of the Case.

FACTS

This case involves the foreclosure of a mortgage involving real property located in Charleston County. Borrower entered into a debt with Respondent (hereinafter "Lender") in the amount of $255,575 on or about September 26, 2007, for the purpose of refinancing a pre-existing mortgage loan as well as paying off additional debt. [R. p. 296]. The debt was secured by both a Note and a Mortgage on residential real estate located at 1759 Hickory Knoll, Johns Island, SC 29455 (hereinafter "the Loan"). [R. p. 296, pp. 302-303]. The Mortgage was recorded with the Charleston County Clerk of Court on October 2, 2007 in Book G640 at Page 829. [R. p. 328].

Borrower testified that at the time he refinanced his previous loan with Lender, it was his intent to refinance the Loan once again in approximately six (6) months once his credit score improved. [R. p. 304-305]. However, Borrower conceded that at the time he entered into the Loan, he did not have any representations from Lender that it would either refinance the Loan or give Borrower a new loan at better terms at any time in the future. [R. pp. 304-305].

It is uncontested that by February 25, 2009, Borrower had defaulted on the terms and conditions of the Note and Mortgage by failing to make the required monthly payments to Lender. [R. p. 309]. In fact, the record reflects that Borrower first became delinquent on the account as of March 18, 2008. [R. pp. 223-253]. As

a result of the default, Borrower and Lender entered into an extension agreement dated February 25, 2009, whereby Borrower acknowledged that he was delinquent in payments to Lender for the Loan; that Borrower reaffirmed all of the terms and conditions of the Note and Mortgage for the Loan except as specifically provided for in the extension agreement; and Lender, subject to final approval, agreed to defer all unpaid interested accrued to-date on the Loan to be collected and paid at the time of payoff on the Loan. [R. p. 361]. The extension agreement was entered into prior to any proposed modification of the Loan. [R. p. 310].

In August 2009, Borrower provided to Lender financial information over the telephone in an attempt to seek a modification of the terms of the Loan. [R. pp. 223-253]. Borrower represented that his monthly income was $4,000.00 ($48,000 annual) and that his monthly expenses totaled $4,437.20. [Id.]. Borrower was informed that based upon the information provided, he would be eligible to participate in the Home Affordable Modification Program (hereinafter "HAMP") and that a loan modification package would be sent to him to complete. Borrower was informed that "all figures are estimates & not guaranteed, final numbers & approval may change." [Id.]. Borrower was further advised that he had thirty (30) days from the date the loan modification package was received to return the completed package, completed hardship affidavit, *income documentation* and any required disclosures or the *offer is void.* [Id.] (emphasis added).

In September 2009, Borrower contacted Lender via telephone and acknowledged receiving the loan modification package but informed Lender that he was "waiting on some information from his attorney . . . [and] may need an

extension on the package retu [sic] date." [Id., September 10, 2009]. On September 29, 2009, Borrower contacted Lender to inform Lender that he would be mailing the loan modification documents by October 6, 2009. [Id., September 29, 2009]. On October 19, 2009, Lender received signed documents, a hardship affidavit, a partially completed IRS Form 4506-T, Borrower's 2008 Federal Tax Return, proof of Homeowner's Insurance; a property tax statement and bank statements. [Id., September 19, 2009]. No income information was received.

The HAMP Trial Period Plan (hereinafter "the Plan") had an effective date of October 1, 2009, and was signed by Borrower on September 24, 2009. [R. p. 347. The Plan plainly set forth, "(Step One of Two-Step Documentation Process)". [R. p. 347] The Plan contained the following provisions:

> A. TIME IS OF THE ESSENCE under this Plan; . . .
>
> D. The Lender will hold payments received during the Trial Period in a non-interest bearing account until they total an amount that is enough to pay my oldest delinquent monthly payment on my loan in full. If there is any remaining money after such payment is applied, such remaining funds will be held by the Lender and not posted to my account until they total an amount that is enough to pay the next oldest delinquent monthly payment in full; . . .
>
> E. When the Lender accepts and posts a payment during the Trial Period it will be without prejudice to, and will not be deemed a waiver of, the acceleration of the loan or foreclosure action and related activities and shall not constitute a cure of my default under the Loan Documents unless such payments are sufficient to completely cure my entire default under the Loan Documents;
>
> F. If prior to the Modification Effective Date, (i) the Lender does not provide me a fully executed copy of this Plan and the Modification Agreement; (11) I have not made the Trial Period payments required under Section 2 of this Plan; or (iii) the Lender determines that my representations in Section 1 are no

longer true and correct, the Loan Documents will not be modified and this Plan will terminate. In this event, the Lender will have all of the rights and remedies provided by the Loan Documents, and any payment I make under this Plan shall be applied to amounts I owe under the Loan Documents and shall not be refunded to me; and

G. I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) I meet all of the conditions required for modification, (ii) I receive a fully executed copy of the Modification Agreement, and (iii) the Modification Effective Date has passed. I further understand and agree that the Lender will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Plan. . . .

(R. p. 347)

The Plan also contained a document titled **"INTERIM FORBEARANCE AGREEMENT"** which stated in part the following:

The Mortgage and Note together, as they may previously have been amended, are referred to as the "Loan Documents." . . .

This interim Forbearance Agreement is granted to Borrower during the review by Lender of Borrower's eligibility for a Trial Period Plan (the "Trial Plan") under the Federal Government's Home Affordable Modification Program. The Trial Plan is a preliminary step to entering into a modification agreement under such Program.

Lender agrees to suspend all collection activity, including any scheduled foreclosure sale of the Property, for seventy-five (75) days from the Effective Date or the execution of the Trial Plan, whichever is sooner, subject to the following conditions:

i) Borrower provides the documents and satisfies all other obligations in connection with processing a Trial Plan; . . .

This Interim Forbearance Agreement shall immediately terminate and be of no further force or effect on the earlier of seventy-five (75) days from the Effective Date or if and when Lender and Borrower execute a Trial Plan, which Trial Plan upon

being effective shall in all respects replace this Interim Forbearance Agreement.

(R. p. 347).

On November 2, 2009, after a review of the documents received by Borrower, Lender identified that the loan modification package was incomplete and that borrower would need to submit the following information: IRS Form 1099, profit and loss statement, 2007 income taxes, signed and dated schedules for his 2008 Federal Income taxes and a running bank statement for thirty (30) consecutive days showing the borrower's name and financial institution's name as well as all pages of the statement even if blank. A text message and HAMP additional documentation letter were sent to Borrower on November 11, 2009. [R. pp. 225-253].

On November 14, 2009, Borrower contacted Lender to check on his file status at which time he was informed of the additional documents needed to complete the HAMP application. Borrower indicated that he would provide signed 2008 tax information, that he *was not* self-employed[1] but a 1099 employee, and that he would "*get an earnings statement.*" [Id.].

On December 28, 2009, Borrower was contacted by Lender regarding the missing documents and advised "he will fax additional docs today 12-28-09." [Id.]. On January 14, 2010, Borrower was contacted by Lender regarding the missing documents and advised to fax to Borrower. [Id.].

[1] Presumably Borrower informed Lender that he was not self-employed in order to avoid having to produce a profit and loss statement which is required of self-employed borrowers.

On February 1, 2010, Lender again mailed a HAMP additional documentation required letter to Borrower. E-mails and text messages were also sent to Borrower regarding missing/incomplete documentation. At this time, so documentation regarding income verification had been received and no counter-signed Plan was entered into. Accordingly, by the terms of the Plan and Interim Forbearance Agreement, more than 75 days had passed since the October 1, 2009 effective date and, the Plan automatically terminated. [Id.; R. p. 347].

On February 25, 2010, Borrower contacted Lender to check the status of the modification. Lender acknowledged receiving additional documents on February 25, 2010, and forwarded the documents for review. [Id.]. On March 31, 2010, Borrower was contacted concerning the handwritten profit and loss statement provided (even though Borrower claimed to be a 1099 employee) and handwritten pay stubs which did not show year-to-date earnings and deductions. [Id.].

On April 1, 2010, Borrower determined that the Loan failed to meet HAMP requirements for not receiving documents. Borrower was then evaluated for a First Lien Supplemental Modification offer. [Id.].

On April 6 and 9, 2010, Borrower was contacted by Lender regarding missing income documentation. [Id.]. On April 19, 2010, Borrower informed Lender that he "is going to draw up a P&L [profit & loss statement] and fax it to [Lender] tomorrow." [Id.]. On May 3, 2010, Borrower contact Lender to inform Lender that "his accountant is finishing up the P&L" and would be faxing it to Lender in the next day. [Id.].

On May 10, 2010, Lender determined that Borrower was not eligible for the First Lien Supplemental Modification as the accrued amount past due exceeded the program forbearance amount. [Id.]. On May 17, 2010, Borrower was advised about a traditional modification in which he would have to make regular payments during the traditional modification review. Borrower advised Lender that "he cannot make his payments at all." [Id.].

On May 25, 2010, Borrower contacted Lender and was advised that he was denied for both HAMP and supplemental modification. Borrower informed lender that his "briefcase was stolen" with all of the copies of what was sent in. [Id.].

The record before the lower court reflects that the only documentation of verifiable income that the Borrower could produce relative to his 2009 application for a loan modification was a single 1099-MISC form from 2009 from the Fielding Group. The document reflects total non-employee compensation in the amount of $23,850. In fact, Borrower testified that the $25,000.00 evidence by his 1099-MISC was an accurate representation of his 2009 income and that Borrower did not think his "income was much more than that." [R. pp. 306-316; R. p. 324; R. 363]. This amount is less than half of the $48,000.00 in annual income that he informed Lender he earned in 2009 as part of his HAMP loan modification application discussed above.

Borrower maintains that he completed two (2) complete loan modification applications and sent all requested documents to Lender. [R. pp. 322-324]. Borrower further maintains that he does not have any copies of what was sent to Lender because his briefcase was stolen which contained his laptop. [R. pp. 322-

324]. Contrary to Borrower's claims that he could not reproduce documents sent to Lender, the Fielding Group is still in business and Borrower allegedly used an account to prepare "something." [R. pp. 319-320]. Moreover, as stated above, as of May 3, 2010, Borrower was informing Lender that "his accountant" was still finishing up the profit and loss statement.

In addition, Borrower testified that he has not filed income tax returns since 2009, which would have been reflective of his 2008 income. [R. p. 319]. Borrower further testified that he has not made a payment on the Loan since the inception of this lawsuit and that he only had at the time of his deposition on June 1, 2012, less than $1,000.00 in his account and $2,000.00 cash on hand. [R. pp. 320-321]. However, Borrower has used the opportunity to help his fiancé with "numerous things" and reduce "a lot of debt." [R. p. 321].

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." U.S. Bank Trust Nat'l Ass'n V. Bell, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct.App. 2009). "In an appeal from an action in equity, tried by a judge alone, [the appellate court] may find facts in accordance with [its] own view of the preponderance of the evidence." Id. Moreover, the appellate court "may correct errors of law in both legal and equitable actions[,]" with no particular deference to the trial court. Id.

Summary Judgment is warranted only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must

be viewed in the light most favorable to the non-moving party." Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. However, once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent must come forward with specific facts showing there is a genuine issue for trial." Garvin v. Bi-Lo, Inc., 337 S.C. 436, 523 S.E.2d 481 (Ct. App. 1999). The opponent cannot merely rely upon the pleadings, but must submit some additional evidence creating a genuine issue of material fact.

ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT AS TO THE COUNTERCLAIM FOR BREACH OF CONTRACT

A. BORROWER'S ARGUMENTS ARE BARRED BY THE PLEADINGS

Respondent moved in part for summary judgment as to Borrower's counterclaim for breach of contract. [R. pp. 93-222]. At the motion hearing, Lender argued that caselaw in South Carolina prohibits a private cause of action for any matter related to HAMP. [R. pp. 261-263]. In response and opposition to summary judgment, Borrower argued that the counterclaims were not an attempt to bring a private cause of action for HAMP decisions, but instead were state law claims. [R. p. 263].

Contrary to counsel's arguments at the motion hearing and the arguments currently before this Court [Appellant's Initial Brief, p. 11], the counterclaims are specific in their allegations:

FOR AND AS A [SIC] DEFENSE AND BY WAY OF COUNTERCLAIM (Breach of Contract and Breach of Covenant of Good Faith and Fair Dealing)

> . . .25. The contracts referenced in the complaint [Note and Mortgage Only] contain an implied covenant that the holder will act in good faith and deal fairly with Defendant in the performance of rights and obligations under the contract.
>
> 26. [Lender] received benefits from the United States Government and in return agreed to participate in a home modification program of which Defendant is a third-party beneficiary.
>
> 27. Each Contract requires [Lender] to act reasonably and in good faith in honoring the terms of the agreement which Plaintiff has breached the implied covenant through the acts alleged herein but not limited to, failing to property contact Defendant about the modification program, provide Defendant with information about the modification program, place Defendant into a modification program, properly apply the conditions of the modification program, make a good faith effort to place Defendant into a modification program, acting in a manner that jeopardizes Defendant's interest in her [sic] home/property, acting in its own self-interest and as a consequence of Plaintiff's breach of implied covenant, Defendant has sustained damages, in an amount to be proven at trial plus prejudgment interest.

(R. pp. 62-80). These three paragraphs are the *sole* allegations pleaded by the Borrower in support of the breach of contract claim.

> It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action.

Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992).

As set forth above, Borrower specifically pleaded that he is a "third-party beneficiary" with regard to Lender's participation in HAMP. Borrower's only reference to any "contract" is either to the Note, Mortgage, or the implication of the

contract between Lender and the U.S. Government regarding HAMP, to which Borrower alleges he is a third-party beneficiary. [R. pp. 62-80]. Therefore, Borrower is bound by those pleadings as none of the allegations were withdrawn, stricken or altered and there are no allegations of the existence of the Plan, the breach of any term of the Plan or any other breach of a contract other than the implied contract between Lender and the U.S. Government.

Accordingly, the lower court correctly found that all of the factual allegations set forth by Borrower in support of the counterclaims relate directly to the issue of whether or not borrower was entitled to a loan modification under HAMP. [R. p. 13]. Accordingly, the lower court correctly dismissed the counterclaim for breach of contract based upon the allegations and record before the court and the decision should be affirmed on appeal.

B. BORROWER'S CLAIM FAILS AS A MATTER OF LAW AS NO CONTRACT EXISTED UPON WHICH A BREACH COULD BE BASED

Even if this Court would find the pleadings encompassed Borrower's allegation that the Plan constituted a contract for the purposes of his alleged breach of contract claim, the evidence before this Court clearly shows no such contract existed and, therefore, the counterclaim fails as a matter of law and the lower court's decision should be affirmed.

Borrower contends that the Plan created a contact between the parties and the Lender's alleged failure to permanently modify the Plan resulted in a breach of the terms of the Plan. [Appellant's Brief, pp. 11-14]

The argument presented by Borrower has been addressed by the Court of Appeals for the Fifth Circuit. Pennington v. HSBC Bank USA, N.A., 493 F. App'x 548, 552 (5th Cir. 2012) cert. denied, 133 S. Ct. 1272, 185 L. Ed. 2d 185 (U.S. 2013). In Pennington, the plaintiffs' claimed the bank breached the HAMP Temporary Payment Plan (hereinafter "TPP") by failing to offer them the Step Two Permanent Loan Modification and not changing the terms of the loan. The court offered the following discussion which is appropriate to set forth here:

> Whether the TPP itself is a contract, and what obligations it imposes, are questions of first impression in this circuit. Courts have proposed a wide variety of answers to whether the TPP is a contract requiring the lender to provide a permanent modification under HAMP even to a borrower who complies with the TPP requirements. Some courts have used general reasoning to resolve the issue for all TPPs at once, attacking the plan for lack of consideration or definite terms or as being an attempted end-run around HAMP's lack of a private cause of action. Courts finding no consideration reason that all the terms are either required by the initial loan (i.e. regular payments) or are best understood as conditions of applying for the HAMP program. *E.g., Senter v. JPMorgan Chase Bank, N.A.,* 810 F.Supp.2d 1339, 1348–49 (S.D.Fla.2011).
>
> Other courts have decided that the additional terms in the TPP constitute consideration, namely opening new escrow accounts, undergoing credit counseling if asked, and proving financial information. *E.g., Wigod v. Wells Fargo Bank, N.A.,* 673 F.3d 547, 564 (7th Cir.2012). A few courts have declared that state breach-of-contract claims fail to state a cause of action independently of HAMP. *E.g., Bourdelais v. J.P. Morgan Chase,* No. 3:10–CV–670–HEH, 2011 WL 1306311, at *4 (E.D.Va. Apr. 1, 2011). Because HAMP affords no private right of action, *Miller v. Chase Home Fin., LLC,* 677 F.3d 1113, 1116 (11th Cir.2012), the *Bourdelais* court's reasoning means dismissal of a claim.
>
> Various courts have more narrowly addressed whether particular TPPs required lenders to offer a permanent modification, regardless of whether a TPP in general is a contract. Some of those courts have determined that the TPP does not require a lender to offer a permanent loan unless the plaintiff alleges that the lender

> determined that the plaintiff met the requirements of the TPP or provides evidence of a loan modification with a new monthly payment that both lender and borrower agreed to in executed loan documents. *E.g., Lonberg v. Freddie Mac,* 776 F.Supp.2d 1202, 1210 (D.Or.2011). Other courts have found that the TPP is not effective unless
>
> > after [the borrower] sign[s] and return[s] two copies of this Plan to the Lender, the Lender [sends] [the borrower] a signed copy of this Plan if [the borrower] qualif[ies] for the Offer or [sends] [the borrower] written notice that [the borrower] does not qualify for the Offer. This plan will not take effect unless and until both [the borrower] and the lender sign it and Lender provides [the borrower] with a copy of this Plan with the Lender's signature.
>
> *Soin v. Fed. Nat'l Mortg. Ass'n,* No. 2:12–634, 2012 WL 1232324, at *5 (E.D.Cal. Apr. 12, 2012) (analyzing contractual language that matches the TPP in the instant case).

Pennington, 493 F. App'x at 552-53.

The Pennington court found that it did not need to determine whether the TPP in general are contracts, because the plaintiffs did not meet the conditions set by the TPP and Modification agreement; mainly "***the bank never signed the TPP . . . or the Modification Agreement . . .,which is required for the provisions to take effect.*** Id.

Like the TPP in Pennington, the Plan in the present case also provides: "This Plan will not take effect unless and until *both* I and the Lender sign it and Lender provides me a copy of this Plan with the Lender's signature." [R. p. 347]. There is no evidence that Lender ever signed and returned a signed copy of the Plan to Borrower and, in fact, the only evidence before the Court is a Copy of the Plan which was *only* signed by Borrower. [R. p. 347]. Accordingly, the Plan provisions did not take effect. Pennington, 493 F. App'x at 552-53.

Borrower also relies heavily on the holding in Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547 (7th Cir.2012), allegedly "cited in over 100 cases" [Appellant's Brief, p. 12] for the proposition that Borrower can maintain a state law cause of action for breach of contract independent of HAMP. This argument has also recently been factually discussed but not decided in the Court of Appeals for the Fourth Circuit. Spaulding v. Wells Fargo Bank, N.A., 714 F.3d 769, 773 (4th Cir. 2013) (ruling on lender's motion to dismiss, the court found that absent a Trial Period Plan ("TPP") agreement, which creates privity of contract, "a suit that seeks the general enforcement of the HAMP guidelines must fail."). However, Borrower's interpretation of the holding in Wigod, which is not completely misplaced, can be distinguished for the facts in the present case. Wigod 673 F.3d at 558.

In Wigod, borrower provided all required financial documentation to lender prior to the issuance of a TPP. Lender then informed borrower she was eligible for HAMP and sent her a TPP Agreement. The TPP stated: "I understand that after I sign and return two copies of this Plan to the Lender, the Lender will send me a signed copy of this Plan if I qualify for the [permanent modification] Offer or will send me written notice that I do not qualify for the Offer." Id.

Borrower signed two copies of the TPP Agreement and returned them to lender. **Lender then executed the TPP Agreement and sent a copy to borrower**. Borrower timely made all four payments due under the trial plan but lender declined to offer Borrower a permanent HAMP modification. Id.

The Wigod court then analyzed whether the TPP itself constituted a contract under state law and determined that it did and, in so finding, determined that there was privity between the borrower and lender through the TPP and independent of HAMP and, therefore, borrower could maintain a state law cause of action. Specifically, the court found that the **lender's signing and returning the TPP already signed by the borrower** created a unilateral promise on behalf of the lender. This analysis and ruling is also consistent with the analysis and ruling in the Pennington case discussed above even though the Pennington court concluded that no contract existed because the bank did not sign and return the TPP to the borrower.

However, unlike the facts in Wigod, the Plan signed by the Borrower in this case was neither executed by Lender nor returned to Borrower and there is no evidence that the Plan was countersigned by Lender and, therefore, Wigod does not control and there was no contract. As there is no contract between the parties, there cannot be any breach. Armstrong v. Collins, 366 S.C. 204, 223, 621 S.E.2d 368, 377 (Ct. App. 2005) ("having a contract is a prerequisite to proving breach of contract"). As such, Borrower's counterclaim for breach of contract fails as a matter of law and the lower court's decision to dismiss the counterclaim should be affirmed.

C. BORROWER FAILED TO COMPLY WITH THE REQUIREMENTS SET FORTH IN THE PLAN

In addition, the lower court found that even assuming that a private cause of action for HAMP decisions could be maintained against a private servicer, the uncontested evidence before the Court is borrower had no verifiable income at all

times relevant to his request for an HAMP loan modification or this foreclosure action. [R. pp. 8-15].

Borrower argues there is no evidence to support the proposition that Borrower did not qualify for a loan modification for his failure to produce evidence of verifiable income. [Appellant's Brief, p. 10]. To the contrary, the record is replete with evidence of the attempts undertaken by Lender to secure evidence of verifiable income and Borrower's failure to provide said documentation.

Moreover, the purpose of the Two-Step Documentation Process is to verify the income reported to Lender. The Plan clearly states:

> **1. My Representations. I certify, present to Lender and agree:**
>
> . . .
>
> D. I am providing or already have provided documentation for **all** income that I receive (and I understand that I am not required to disclose any child support or alimony that I receive, unless I wish to have such income considered to qualify for the Offer); . . .

As stated above, Borrower represented to Lender that his income was $4,000 monthly or $48,000 annually. It was this representation to Lender which resulted in the HAMP application being sent to Borrower in the first place, as set forth above. However, Borrower's own testimony was that his income in 2009 was not much more than $25,000 as previously discussed, which would be $2,083.33 per month gross. Interestingly, Borrower further represented to Lender that his monthly expenses, including his mortgage payment in the amount of $2,621.20, totaled $4,437.20. [R. pp. 225-253]. Even reducing the mortgage payment to the Plan amount of $1,226.33 [R. p. 347], Borrower's monthly expenses would total

$3,042.33 while his *gross* monthly income would only be $2,083.33 leaving a monthly net loss of almost $1,000.00.

Borrower failed to produce documentation of all income he represented to Lender to have received and, as such, failed to satisfy the terms of the Plan. As such, Borrower is barred from alleging a breach of the contract and the lower court's decision should be affirmed.

D. AS THERE WAS NO CONTRACT TO BE BREACHED, THE TRIAL COURT CORRECTLY DISMISSED THE CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

This Court has concluded that the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract. RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004). Accordingly, it was proper for the lower court to dismiss that cause of action as it was subsumed by Borrower's breach of contract claim, which was also properly dismissed.

II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT AS TO THE COUNTERCLAIM FOR UNJUST ENRICHMENT

Borrower alleges that the lower court erred in summarily dismissing the counterclaim for unjust enrichment as there was no private cause of action for HAMP issues. [Appellant's Brief, p. 14]. Borrower again maintains that the unjust enrichment cause of action was not based on HAMP. Borrower alleges that he

made $12,000[2] in payments to Lender prior to being denied HAMP and, Lender was been unjustly enriched to Appellant's detriment. [Id., p. 15].

"Unjust enrichment is an equitable doctrine, which permits recovery of the amount that the defendant has been unjustly enriched at the expense of the plaintiff." Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 256-57, 715 S.E.2d 348, 356 (Ct. App. 2011)

To recover for unjust enrichment based on quantum meruit, quasi-contract, or implied by law contract, which are equivalent terms for equitable relief, one must show: "(1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value."

Aside from the facts set forth in support of the breach of contract cause of action discussed above, Borrower's only factual allegation contained in the cause of action for unjust enrichment is that "[Lender] has been unjustly enriched at the expense of and to the detriment of [Lenders] [sic] by failing to act in good faith and properly create, implement and administer a modification program." [R. pp. 62-80].

As set forth above, Borrower specifically pleads that he is a "third-party beneficiary" with regard to Lender's participation in HAMP. Borrower's only reference to any "contract," "quasi-contract" or "implied by law contract" is the Note, Mortgage, or the implication of the contract between Lender and the U.S.

[2] Borrower's counter-affidavit stated that he made payments in the amount of $1,400 from January 2009 through June 2009 which would total $8,400.00. The Plan provided for payments beginning October 2009 and concluding December 2009 in the amount of $1,226.33 each. [R. p. 347].

Government regarding HAMP, to which Borrower alleges he is a third-party beneficiary. [R. p. 62-80]. Borrower's allegation that Lender failed to act in good faith by creating, implementing and administering a "modification *program*," implies Lender is somehow not meeting its obligations as set forth by guidelines as a servicer participating in HAMP. Borrower is bound by those pleadings as none of the allegations were withdrawn, stricken or altered and there are no allegations of the existence of the Plan, the breach of any term of the Plan or any other breach of a contract other than the implied contract between Lender and the U.S. Government. Postal, 308 S.C. at 387, 418 S.E.2d at 323. As such, the factual allegations in support of the unjust enrichment cause of action is based on HAMP and the lower court correctly dismissed the cause of action as there is no private cause of action for HAMP.

As to the merits of Borrower's claim, as discussed it is uncontested that Borrower defaulted on the terms and conditions of the original Note and Mortgage by failing to make requirement payments. In support of the summary judgment motion, an affidavit was submitted which established that the debt total as of October 25, 2012 was $338,721.65. Assuming *arguendo* that Borrower did make payments in the total amount of $12,000.00 while the application was being reviewed, Lender has not been unjustly enriched, or enriched at all. Moreover, as discussed above, the Plan provided that payments made would be collected and applied to the principal balance when the collected amount reached the amount of the last payment due prior to the loan default. Accordingly, even though Borrower

defaulted on the loan in 2009, the "default" date was adjusted to March 2010 due to the application of payments per the Plan provision. [R. pp. 95-221].

As such, Lender has not been enriched by any payments and the lower court's ruling to dismiss the cause of action for unjust enrichment should be affirmed.

III. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT AS TO THE COUNTERCLAIM FOR NEGLIGENT MISREPRESENTATION

Borrower alleges the lower court erred in dismissing the cause of action for negligent representation. [Appellant's Brief, p. 15]. Borrower alleges that he provided evidence of instances of misrepresentations relative to the loss mitigation process.

> In a claim for negligent misrepresentation, a plaintiff must prove that:
>
> (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.

Robertson v. First Union Nat. Bank, 350 S.C. 339, 349, 565 S.E.2d 309, 314 (Ct. App. 2002).

In the Answer and Counterclaim, Borrower alleged that Lender made false and misleading representations regarding: (1) the actual terms of the loan; (2) the application of a modification program; (3) Lender's compliance with a federally required modification program; and (4) the availability of a loan modification.

Borrower further alleged Lender had a "pecuniary interest in making the statements and soliciting the consumer's business by making this loan." [R. pp. 62-80].

The evidence before the lower court conclusively established that Borrower took no issue with the terms and conditions of the Note and Mortgage. [R. pp. 299-301-303]. As discussed above, Borrower was not solicited by Lender to make the Loan, and Lender made no representations about the availability to refinance the terms of the loan or enter into a new loan with more favorable terms when Borrower entered into the Loan. Moreover, the availability of HAMP and the terms thereof were set forth in the Plan. See Midland Mortgage Corp. v. Wells Fargo Bank, N.A., 926 F. Supp. 2d 780, 792 (D.S.C. 2013) aff'd sub nom. Midland Mortgage Co. v. Wells Fargo Bank NA, 545 F. App'x 194 (4th Cir. 2013) ("In the banking context, South Carolina courts recognize that banks owe 'no special duty of care' to ordinary customers, and an individual is not ordinarily entitled to rely on a bank for financial guidance, information regarding potential liabilities flowing from contractual agreements"). Lender had no duty to discuss its compliance with HAMP with Borrower as discussed above. Accordingly, there is no evidence of any misrepresentations made to the Borrower regarding the allegations in the counter-claim and the lower court correctly dismissed the cause of action for negligent misrepresentation.

Borrower now alleges that misrepresentations were made regarding his ultimate qualification for a permanent loan modification under HAMP. Borrower is engaged in a classic bootstrapping argument. There was no requirement for Lender to evaluate Borrower for a loan modification except for its duty to do so as a non-

GSE loan servicer who voluntarily participates in HAMP. Borrower then sought to sue Lender for a private cause of action in tort against Lender for alleged misrepresentations it made during the HAMP evaluation process required by the federal government. As there is no private cause of action for HAMP as discussed above, the lower court correctly dismissed the cause of action for negligent misrepresentation.

Additionally, the only allegation that Lender had a pecuniary interest in making its alleged misrepresentations is Borrower's allegation that the loan was originated. As there is no evidence that Lender had a pecuniary interest in evaluating, making, or denying Borrower's application for a loan modification, the cause of action fails as a matter of law.

Finally, there is no evidence that Borrower suffered a pecuniary loss based upon the alleged misrepresentation. The evidence as discussed above is that Borrower defaulted on his payments *prior to* being evaluated for a loan modification under HAMP. All payments made during the evaluation have been applied to the loan which he was obligated to pay. Borrower has not set forth any evidence of a pecuniary loss as there remains a money debt owed to Lender as of October 25, 2012, in the amount of $338,721.65.

Based upon the lack of any evidence as to several elements of the cause of action, the lower court correctly dismissed the claim for negligent misrepresentation and its decision should be affirmed on appeal.

IV. BORROWER'S ARGUMENT THAT THE AFFIDAVIT IN SUPPORT OF SUMMARY JUDGMENT LACKED EVIDENTIARY SUFFICIENCY IS NOT PRESERVED FOR APPELLATE REVIEW

Borrower argues for the first time on appeal that the affidavit submitted in support of Lender's Motion for Summary Judgment was not in the proper form and, therefore, the only evidence before the lower court was Borrower's counter-affidavit and supporting documents. However, no objections to the affidavits, supporting documents, or deposition testimony submitted to the lower court were made at the time of submission or at either the summary judgment hearing or hearing on the motion to reconsider. As such, the evidence was properly taken under consideration and Borrower has failed to preserve the issue of appeal. Holroyd v. Requa, 361 S.C. 43, 60, 603 S.E.2d 417, 426 (Ct. App. 2004) (failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have the issue considered on appeal).

CONCLUSION

Respondent respectfully requests that this court find facts in accordance with its own view of the preponderance of the evidence and rule that Respondent met its burden of demonstrating an absence of issues of material fact as to all of the counterclaims and for an Order affirming the decision of the lower court.

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Columbia, South Carolina

August 18, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No.: 2010-CP-10-5775

CitiMortgage, Inc.,.....Respondent/Cross-Appellant,

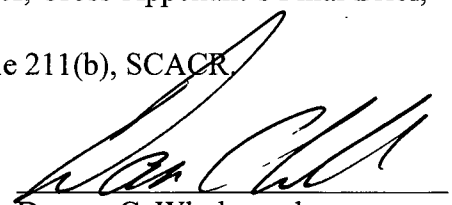
v.

Brodie M. Trickey aka Brodie McCary Trickey and
Barberry Woods Property Owners Association.....Defendants,

Of whom Brodie M. Trickey is the.....Appellant/Cross-Respondent.

CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent's Final Brief, Cross-Appellant's Final Brief, and Cross-Appellants Reply Brief comply with Rule 211(b), SCACR.



Damon C. Wlodarczyk
Attorney for Respondents/
Cross-Appellants

Columbia, SC
August 21, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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v.

Brodie M. Trickey aka Brodie McCary Trickey and
Barberry Woods Property Owners Association.....Defendants,

Of whom Brodie M. Trickey is the.....Appellant/Cross-Respondent.

CERTIFICATE OF SERVICE BY MAIL

I, the undersigned, hereby certify that on the date shown below, I served the **FINAL BRIEF OF RESPONDENT, FINAL BRIEF OF CROSS-APPELLANT, AND REPLY BRIEF OF CROSS-APPELLANT'S** on the parties listed below by depositing copies of same into the United States Mail, first class postage prepaid, addressed as shown.

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SIGNATURE BLOCK APPEARS ON FOLLOWING PAGE

RILEY, POPE & LANEY, LLC

Damon C. Wlodarczyk

Columbia, South Carolina

August 22, 2014