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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

Case No. 2013-CP-32-01349

JPMorgan Chase Bank, National Association,

Plaintiff,

vs.

Michael Hill aka Michael W. Hill, Holly Hill aka Holly H. Hill, Carolina National Bank and Trust Company, and First National Bank of the South,

Defendants,

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND FOR AN ORDER OF REFERENCE AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on the motion of Plaintiff JPMorgan Chase Bank, National Association ("Chase") for summary judgment on counterclaims and affirmative defenses asserted against it and on the amount owing on the loan that is the subject of this action and for an order referring the case to the Master in Equity ("Chase's Motion"). This matter also comes before the Court on the motion of Defendants Michael Hill and Holly Hill ("Defendants") for summary judgment on Chase's foreclosure action based upon the acceleration provisions of the subject mortgage ("Defendants' Motion").

A hearing on Chase's Motion and Defendants' Motion was held on Monday, October 6, 2014. After reviewing the memoranda and affidavits submitted by the parties, and after considering the arguments made at the hearing, the Court finds that Chase's Motion should be GRANTED and Defendants' Motion should be DENIED.

FILED AFFIDAVITS AND MEMORANDA

At the outset, the Court notes that the majority of Defendants' arguments submitted in opposition to Chase's Motion address Chase's standing to bring the foreclosure action. However, standing is not an issue before the Court at this time because Chase's Motion does not ask the Court to enter judgment for foreclosure. Additionally, Defendants' Amended Answer makes no argument about standing as a basis for their counterclaims nor asserts it as an affirmative defense. In fact, Defendants' counsel conceded at the hearing that, if Chase was not seeking summary judgment on foreclosure, then Defendants' entire argument concerning Mortgage Electronic Registration Systems, Inc. (i.e. standing) was withdrawn. This essentially eliminates the relevancy for consideration of the motions before the Court of pages 2 through 17 of Defendants' 22-page memorandum in opposition to Chase's Motion, the affidavit of Richard Kahn, and the 330-page deposition transcript from 2012 in a case that was pending in Florida.

The Court also rejects Defendants' argument that Chase's affidavits submitted in support of its motion, *i.e.* the Affidavit of Sumer J. Murton and the Affidavit of Indebtedness, are inadmissible. The affidavits are made by employees of Chase that attest to the statements in the respective affidavits based upon their personal review and familiarity of Chase's business records. Chase's affidavits comply with both South Carolina Rules of Civil Procedure and the South Carolina Rules of Evidence, and the Court rejects Defendants' attempts to have the Court disregard their admissibility.[1]

[1] Because Defendants' standing arguments are irrelevant for Chase's Motion and the Chase affidavits are admissible, the Court notes that only the Affidavit of Michael Hill filed October 2, 2014, in opposition to Chase's motion and pages 1-2 and 19-22 of Defendants' memorandum actually address Chase's Motion.

FINDINGS OF FACT

This is a foreclosure action of a mortgage loan (the "Loan") that has been in default since September 2008. On February 23, 2001, Michael Hill ("Mr. Hill") executed and delivered a promissory note to Aegis Mortgage Corporation d/b/a New America Financial, for $89,200 (the "Note"), to purchase property located at 102 Rama Court, Lexington, South Carolina 29072 (the "Property"). The Note is secured by a mortgage dated February 23, 2001 (the "Mortgage") from Mr. Hill and his wife, Holly Hill ("Mrs. Hill"), which was recorded on March 1, 2001, in Book R6216, Page 206. Chase is the current holder of the Note, the mortgagee of record, and the servicer of the Loan.

Mr. Hill fell behind on paying his monthly mortgage payments, and in or around August 2008, Washington Mutual Bank, the loan servicer at the time, prepared a letter to Mr. Hill, dated September 18, 2008, that notified him of his default in compliance with paragraph 22 of the Mortgage ("Notice of Default"). Defendants did not cure their default, and on April 2, 2009, Chase, the subsequent and current servicer of the Loan, commenced a foreclosure action against Mrs. Hill, who was the owner of the Property at the time, in the Lexington County Court of Common Pleas, Case No. 2009-CP-32-01542 ("2009 Foreclosure").

Mrs. Hill never filed an appearance or answer in the 2009 Foreclosure, and an order of foreclosure was entered on September 1, 2009 ("2009 Foreclosure Order"), finding the Loan in default and setting the Property for sale. The Property was sold to a third party bidder on October 30, 2009.

After the foreclosure sale, in November 2009, Chase Home Finance LLC[2] sent Mr. Hill a

[2] On May 1, 2011, Chase Home Finance LLC was merged with and into JPMorgan Chase Bank, National Association. The Court references Chase Home Finance LLC and its surviving entity, JPMorgan Chase Bank, N.A., collectively in this Order as "Chase."

letter offering him a Home Affordable Modification Trial Period Plan ("Trial Plan") and informing him that he might qualify for a loan modification. Mr. Hill signed the Trial Plan and returned it to Chase. Because the Property had already been sold when the Trial Plan was offered, Chase requested that the court set aside the 2009 Foreclosure Order and sale of the Property to give Defendants an opportunity to apply for a loan modification and keep the Property. A Consent Order Setting Aside Sale, Cancelling Master's Deed, Cancelling Satisfaction of Mortgage, and Dismissing Case was filed in the 2009 Foreclosure on November 20, 2009.

The Trial Plan specifically provided that it was "Step One of Two-Step Documentation Process" and memorialized an understanding between Mr. Hill and Chase that Mr. Hill would only be offered a permanent modification *if* certain conditions were met. In relevant part, the Trial Plan provided:

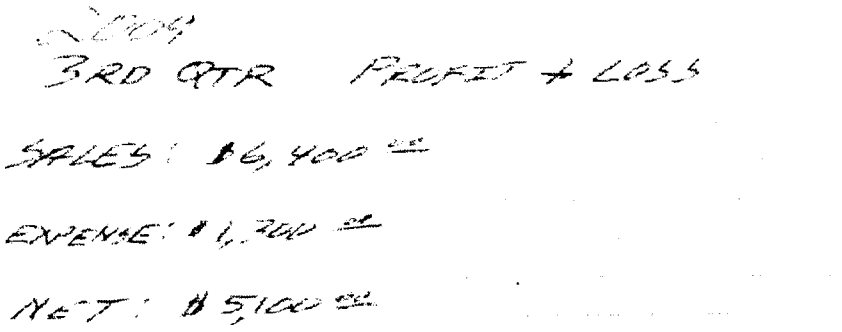
> E. When the Lender accepts and posts a payment during the Trial Period it will be without prejudice to, and will not be deemed a waiver of, the acceleration of the loan or foreclosure action and related activities and **shall not constitute a cure of my default under the Loan Documents unless such 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; . . . or (iv) I do not provide all information and documentation required by Lender, 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 . . . .
>
> G. **I understand that this 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 the Lender determines that I do not qualify or if I fail to meet any one of the requirements under this Plan.

(Trial Plan at § 2, emphasis added.)

Mr. Hill testified at his deposition that he understood the Trial Plan was not an agreement to permanently modify the Loan unless certain conditions were met. He failed to meet those conditions by not providing all information and documentation Chase required to process and approve the Loan for a permanent loan modification.

Specifically, Mr. Hill never provided proof of income to Chase with an audited profit and loss statement for his business and copies of bank statements. A detailed letter accompanied the Trial Plan notifying Mr. Hill of the conditions precedent to any permanent modification of the Loan, including a requirement that Mr. Hill provide proof of income. At the time Mr. Hill was self-employed, and the only documents he had to prove income were a profit and loss statement and company and personal bank statements.

The only profit and loss statement Mr. Hill submitted to Chase was the following handwritten document:


2009
3RD QTR PROFIT + LOSS
SALES: $6,400 ea
EXPENSE: $1,300 ea
NET: $5100 ea

Although Chase received this information, it obviously was not adequate to prove income. Chase sent many written communications to Mr. Hill explaining that a complete, audited profit and loss statement was required and providing a website from which forms could be downloaded to complete, but Mr. Hill never sent anything other than the handwritten note above.

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Mr. Hill never sent Chase any bank statements either. On several occasions, Chase requested copies of the "Four (4) most recent bank account statements" from Mr. Hill as proof of income, but Mr. Hill never sent them.

During this time, from December 2009 to February 2010, Chase also sent Mr. Hill letters notifying him, in bold, all capital letters, "YOUR MODIFICATION IS AT RISK – URGENT RESPONSE NEEDED!" The letters notified Mr. Hill that Chase still had not received a proper profit and loss statement or bank account statements as proof of income.

Because Mr. Hill failed to provide a proper profit and loss statement and bank statements, his request for a loan modification was ultimately denied. Chase sent Mr. Hill letters dated May 19, 2010, and May 21, 2010, informing him that "We are unable to offer you a Home Affordable Modification because you did not provide us with the documents we requested." Having failed to qualify for a permanent loan modification, Chase filed the instant foreclosure action based upon the September 2008 default.

CONCLUSIONS OF LAW

I. CHASE FULLY COMPLIED WITH THE ACCELERATION PROVISIONS OF THE MORTGAGE AND A SECOND NOTICE OF DEFAULT WAS UNNECESSARY TO PROCEED WITH THIS FORECLSOURE.

Because the 2009 Foreclosure was dismissed to give Mr. Hill the opportunity to apply for a permanent modification of the Loan, Defendants' Motion argues that the debt was "decelerated" and that Chase had to send a second notice of default and intent to accelerate the debt before filing the instant foreclosure action. However, Defendants' Motion, memorandum in support, and arguments at the hearing do not mention a single case that supports this theory of "deceleration." They have also failed to provide any proof of their ability to pay the amount

necessary to cure their admitted default and thus this appears to merely be another attempt to delay foreclosure.

Defendants do not dispute that the Loan was properly accelerated prior to the 2009 Foreclosure, and they do not dispute that they never reinstated the Loan thereafter. Instead, they argue that making three trial plan payments pursuant to the Trial Plan and the dismissal of the prior 2009 Foreclosure somehow "decelerated" the debt and required Chase to send another Notice of Debt before filing the instant action. However, the Mortgage's provisions have no such requirement.

The relevant provisions of the Mortgage are paragraphs 19 and 22. Paragraph 22 sets forth the requirements of the lender to give notice to the borrower before accelerating the debt. It provides the following:

> **Acceleration; Remedies.** Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument **without further demand** and may foreclosure this Security Instrument by judicial proceeding. . . .

(emphasis added.) Paragraph 19 of the Mortgage provides the right to reinstate the Loan after acceleration, and it states, in relevant part:

> **Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have the enforcement of this Security Instrument discontinued . . . . Those conditions are that Borrower (a) pays Lender all sums which then would be due under this Security Instrument and the Note as

> if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument . . . ; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by the Security Instrument, shall continue unchanged.

It is undisputed that the instant foreclosure action is based upon the September 2008 default, which is the same event of default that the 2009 Foreclosure Action was based upon, and that Mr. Hill has never exercised his right to reinstate the Loan after acceleration and has never met any of the requirements of paragraph 19 of the Mortgage. Thus, the entire Loan balance has been and continues to be due and owing to Chase.

"It has long been the law of this State that when a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties used, to be taken and used in their plain, ordinary sense." *U.S. f/u/b/a Williams Electric Co. Inc. v. Metric Constructors , Inc.*, 325 S.C. 129, 136, 480 S.E.2d 449, 450 (1997). "If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument's force and effect." *Ecclesiastes Prod. Ministries v. Outparcel Assocs. LLC*, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007) (citations omitted).

There is no ambiguity about the relevant provisions of the Mortgage. The acceleration provision of the Mortgage requires only that the lender send notice of default prior to accelerating the debt. Thereafter, if the default "is not cured," then the lender may require immediate payment and may foreclose on the mortgage "without further demand." After acceleration, the borrower may only reinstate the Loan after acceleration if he meets certain conditions set forth in paragraph 19 of the Mortgage.

Defendants argue there is ambiguity in the contract by referencing and explaining the case of *S. Atl. Fin. Servs. Inc. v. Middleton*, 356 S.C. 444, 590 S.E.2d 27 (2003). However,

Middleton dealt with entirely different language in a mortgage note concerning whether a notice of debt prior to acceleration even had to be issued. In fact, the principles cited in *Middleton* only further support that Chase complied with the provisions of the Mortgage in this case.

Furthermore, accepting "trial" payments from Mr. Hill in connection with his application for a loan modification did not reinstate the Loan or otherwise cure his default. A lender's "legal right to declare the entire balance due and right to commence a foreclosure action [can] not be taken away or nullified by a partial tender." *U.S. Bank Trust Nat'l Assoc. v. Bell*, 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009) (citing numerous cases); *see also Caulder v. Lewis*, 287 S.C. 372, 338 S.E.2d 837 (1986) (holding that mortgagee, by accepting one or two late payments after notifying mortgagors that she would foreclose if future payments were in default, did not waive her right to enforce the acceleration clause and foreclose).

Moreover, the Trial Plan expressly states the following:

> 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**.

(Trial Plan at § 2(E).)

The Court finds the cases cited in Defendants' Memorandum in support of their motion to be entirely unpersuasive and distinguishable. *See Rakestraw v. Dozier Assocs., Inc.*, 285 S.C. 358, 329 S.E.2d 437 (1985); *Cisson Constr., Inc. v. Reynolds & Assocs.*, 311 S.C. 499, 429 S.E.2d 847 (Ct. App. 1993). A quick review of the cases show that they do not support Defendants' arguments at all. *Rakestraw* concerned default based upon a due on sale clause where the court affirmed the lender had waived its right to accelerate the debt based upon this default after it accepted 17 more payments after the sale. *Cisson* concerned a guarantor's appeal

of a deficiency judgment and whether the lender owed him a duty to mitigate damages to accept late payments. Neither case supports a ruling that Chase had to send a second notice of default letter in this case.

It is undisputable that Mr. Hill was in default in September 2008 when the Notice of Debt was sent, and it is undisputable that he has not reinstated the Loan since then. Therefore, the Mortgage does not require that Chase send a second notice of debt letter as a prerequisite to filing the instant foreclosure action, which is based upon the same event of default as the 2009 Foreclosure Action. Defendants' Motion is therefore DENIED.

II. DEFENDANTS' COUNTERCLAIMS ARE BARRED BY STATUTES OF LIMITATIONS.

Defendants' counterclaims for breach of contract and unfair trade practices are based on the allegation that Chase breached the terms of the Trial Plan because Chase did not offer Mr. Hill a permanent modification agreement.[3] However, the Trial Plan provided that, if Chase were going to offer a permanent modification, then it would do so no later than the Modification Effective Date, defined as "the first day of the month following the month in which the last trial plan payment was due." The last payment on the Trial Plan was due on February 1, 2009, so the Modification Effective Date was March 1, 2010.

Mr. Hill admits that he did not receive any permanent modification agreement from Chase as of March 1, 2010, so he was on notice as of that date that Chase did not intend to offer him a permanent modification agreement. At the hearing, Mr. Hill argued that he believed he was receiving a permanent modification because of a letter dated January 20, 2010, that he received, congratulating him on a permanent modification. He also argued that he did not know

[3] Defendants have stipulated that Holly Hill, who is not a party to the Note, does not have standing to bring a breach of contract claim against Chase for its alleged failure to modify the Note, and therefore, the breach of contract claim is asserted by Michael Hill only.

until he received denial letters from Chase in May 2010 that his request for a modification had been denied. However, Mr. Hill has admitted that, even after receiving the January 20, 2010, letter, he continued to receive letters from Chase informing him that additional income information was needed to complete his modification request. He also acknowledged that he never received a final modification offer from Chase as mentioned in the letter and knew it was a mistake. Thus, the Court finds that there is no reliable evidence that Mr. Hill relied on the January 20, 2010, letter stating that he would receive a modification.

Instead, Mr. Hill did not file any claim against Chase until May 19, 2013, which was over three years later after the modification would have become permanent has he qualified for one. Thus, Mr. Hill's counterclaims are barred by the three year statute of limitations applicable to his claims. *See* S.C. Code Ann. § 15-3-530(1) (three year statute of limitations applies to "an action upon a contract, obligation, or liability, express or implied); *Id.* § 39-5-150 (claims under the South Carolina Unfair Trade Practices Act must be brought within three years).

III. CHASE NEVER OFFERED A PERMANENT LOAN MODIFICATION, SO DEFENDANTS HAVE NO BREACH OF CONTRACT CLAIM.

Even if Mr. Hill's counterclaim for breach of contract is not barred by the three year statute of limitations, Chase is entitled to summary judgment on the counterclaim because it is indisputable that Chase never agreed to a permanent modification of the Loan.

First, there is no written loan modification agreement between Mr. Hill and Chase that could have been breached. Mr. Hill alleges that Chase breached the Trial Plan by failing to offer a permanent loan modification. However, the Trial Plan expressly states that it was not a modification of the Loan, and that the Loan will not be modified until the borrower "receive[s] a fully executed copy of a Modification Agreement." Mr. Hill has acknowledged that he never

received a copy of any final modification agreement and does not know what the terms of any final modification agreement would be.

Second, the Trial Plan states that the Loan would not be modified if the borrower did not "provide all information and documentation required by the Lender." Mr. Hill never provided proof of his income that Chase required, despite repeated requests from Chase. It is clear Chase did not breach any of the Trial Plan provisions, thus Mr. Hill's counterclaim for breach of contract fails, and Chase is entitled to summary judgment.

Furthermore, Mr. Hill had no right to rely upon the January 2010 letter "congratulating" him on qualifying for a permanent loan modification. This letter was sent in error, particularly because Mr. Hill had not sent in all the requested income documentation and had not made his final trial payment. The letter did not promise or offer any modification terms or include a contract upon which Mr. Hill can base a breach of contract claim.

IV. DEFENDANTS HAVE PLEAD NO FACTS THAT SUPPORT A CLAIM FOR UNFAIR TRADE PRACTICES.

Defendants allege that Chase committed unfair trade practices in violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, et seq. (the "UTPA") because of the manner in which Chase handled Defendants' loan modification application.

None of Defendants' allegations, even if true, support a claim for a violation of the UTPA because the activity alleged was not unfair or deceptive. "A trade practice is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive; a practice is 'deceptive' when it has a tendency to deceive." *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 325, 396 S.E.2d 105, 108 (Ct. App. 1989), *rev'd. in part, on other grounds*, 422 S.E.2d 103 (S.C. 1992); *see also Brown v. Wachovia Bank*, Case No. 8:10-cv-1816, 2011 U.S. Dist. LEXIS 123880, at *5 (D.S.C. Sept. 30, 2011) ("To establish the defendant committed an unfair

or deceptive trade practice, the plaintiff must allege facts that demonstrate the defendant's conduct went beyond mere negligence or a breach of contract."). A party has no obligation to modify a written contract, so it cannot be deemed "unfair" or "deceptive" not to have offered one to Mr. Hill.

In their depositions, each of the Defendants testified that the only act they thought was deceptive was that Chase refused to modify the Loan, which they believed Chase promised to do under the Trial Plan. However, Chase's obligations under the Trial Plan are controlled by that agreement, and the UTPA does not apply when a claim is essentially a claim for breach of contract. *See S.C. Nat'l Bank v. Silks*, 295 S.C. 107, 111, 367 S.E.2d 421, 423 (Ct. App. 1988) ("A mere breach of contract does not constitute a violation of the UTPA."); *Key Co., Inc. v. Fameco Distrib., Inc.*, 292 S.C. 524, 528, 357 S.E.2d 476, 478 (Ct. App. 1987) ("[The plaintiff's] cause of action, as alleged and as tried, involved nothing more than a breach of contract that affected no one but the parties to the contract. An intentional breach of a valid contract is not, without more, a violation of the UTPA.").

Additionally, Defendants have no evidence that Chase's actions towards them affected the public interest. The UTPA is not available to address a private wrong where the public interest is unaffected. *Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1987); *see also Daisy Outdoor Adver. Co., Inc. v. Abbott*, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996) ("Since 1986, South Carolina courts have required that a plaintiff bringing a private cause of action under UTPA allege and prove the defendant's actions adversely affected the public interest."). As the Fourth Circuit has noted:

> While every private dispute doubtless has remote public ramifications, these cannot be held to satisfy the element of injury to the public interest which is a prerequisite to any recovery under the UTPA. Were the rule otherwise, every

> ordinary commercial dispute would become a candidate for the extraordinary remedies provided by the Act.

Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc., 974 F.2d 502, 507-08 (4th Cir. 1992).

Allegations of a claim under the UTPA must be bolstered by specific factual evidence to survive summary judgment: "To sustain a cause of action under the [ ]UTPA, the plaintiffs must establish, by specific facts, that members of the public were adversely affected . . . ." *Bessinger v. Food Lion, Inc.*, 305 F. Supp. 2d 574, 584 (D.S.C. 2003). "Without proof of specific **facts** disclosing that . . . members of the public were adversely affected by the [unfair conduct] or that they were likely to be, all we are left with is a speculative claim of adverse public impact and that will not suffice for recovery under the UTPA." *Jeffries v. Phillips*, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994) (rejecting a UTPA claim where the plaintiff did not introduce any evidence of specific facts to show any member of the public was adversely affected by his transaction) (internal citations omitted) (emphasis added).

In support of their UTPA claim, Defendants reference and quote from a 2012 settlement agreement (the "Settlement Agreement") between states and the federal government and five banks and mortgage servicers, including Chase. The Settlement Agreement became effective April 5, 2012, and was not in existence at the time of any of the facts relevant to this lawsuit. Defendants allege that the Settlement Agreement "highlights the offending actions and practices of Plaintiff," even though the Settlement Agreement provides that it was reached "**without trial or adjudication of issue of fact or law**" and "**without this Consent Judgment constituting evidence against Defendant**." (Settlement Agreement at 2 (emphasis added).) Thus, Defendants cite only to allegations asserted against Chase and the other mortgage servicers in the Settlement Agreement.

Defendants cannot merely rely on references to the Settlement Agreement to support their UTPA claim against Chase in this case. *See Jeffries*, 316 S.C. at 527-29, 451 S.E.2d at 23-24 (holding that plaintiff failed to allege specific facts showing the public was adversely affected by the specific transaction at issue and, therefore, failed to show that such conduct was within the scope of the UTPA); *see also Beattie v. Nations Credit Fin. Servs. Corp.*, 69 Fed. App'x. 585, 590 (4th Cir. 2003) (granting summary judgment for the defendant and holding that references to "bare allegations" contained in a separate complaint in which the defendant was a party, without further factual support, did not establish an adverse impact on the public interest); *Ethox Chemical, LLC v. Coca-Cola, Co.*, 2013 WL 41001, at *3 (D.S.C. Jan. 3, 2013) (finding the allegation that "Coca–Cola has been accused of engaging in unfair methods of competition and deceptive business practices" in the past and that "there is a legitimate threat that Coca–Cola will continue to engage in unfair practices and repeat its deceptive business practices, and, as a result, Coca–Cola's actions adversely affect the public interest" insufficient to establish adverse effects on public interest) (emphasis added); *cf. Williams-Garrett v. Murphy*, 106 F. Supp. 2d 834, 845 (D.S.C. 2000) (explaining that a previous suit that resulted in default judgment against the defendant may be used to establish past practices that can serve as a predicate for violation of the UTPA).

Defendants' references to the Settlement Agreement are not findings of fact, admissions of liability, or any other admissible proof that may be used to show that Chase's actions in this case affected the public interest or have the potential for repetition. On the contrary, in this case, Chase gave Defendants every opportunity to modify their loan, including overturning a foreclosure sale to open that possibility to them, but Defendants continuously failed to provide

the documents required to do so. There is nothing inherently "unfair" or "deceptive" in Chase's handling of Mr. Hill's application to modify the Loan.

V. DEFENDANTS' AFFIRMATIVE DEFENSES HAVE NO MERIT.

Defendants allege several defenses to Chase's foreclosure action, including unclean hands, failure to mitigate damages, and breach of the duty of good faith and fair dealing, which are all based on the allegation that Chase should have modified the Loan. Defendants have no evidence to support any of their defenses, and Chase is entitled to summary judgment on each defense.

A. Chase did not have unclean hands or fail to mitigate its damages by denying Mr. Hill for a loan modification.

Defendants allege that Chase has unclean hands and failed to mitigate its damages because it failed to offer Mr. Hill a loan modification. However, Chase was under no obligation under state or federal law, or under the Trial Plan, to offer Mr. Hill a modification of the Loan, and thus did not act unfairly in electing to proceed under the terms of the Loan with Mr. Hill. Because Chase's actions were not unfair and were expressly allowed by contract, they do not support a defense of unclean hands or failure to mitigate damages.

B. Chase did not breach the duty of good faith and fair dealing by denying Mr. Hill for a loan modification.

Defendants allege that Chase breached the duty of good faith and fair dealing in the Note and Mortgage by failing to modify the Loan. However, Chase has no contractual duty, express or implied, to modify or change the terms of the Loan, and there is no requirement under state or federal law that Chase offer Mr. Hill a modification of the Loan. Under South Carolina law, there is no breach of the implied covenant of good faith by conduct that the law permits. *See Adams v. G.J. Creel and Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (finding that a contracting party's failure to sell a product at the lowest price possible, rather than at the contract

price, did not breach the covenant of good faith and fair dealing because "there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do"); *accord Volvo Constr. Equip. N. Am., Inc., v. CLM Equip. Co., Inc.*, 386 F.3d 581, 599 (4th Cir. 2004) (finding no breach of the implied duty of good faith and fair dealing when one party terminated the agreement as provided by the agreement's terms) (citing *Adams, supra*)); *Johnson v. Bank of America, N.A.*, C/A No. 3:09-1600, 2010 WL 1542560, at *3-4 (D.S.C. April 16, 2010) (rejecting a debtor's claim for breach of contract, finding that the creditor did exactly what the agreement expressly gave it the right to do).

A contracting party does not breach his implied duty of good faith and fair dealing by refusing to change the terms of a contract. *Adams* at 277, 465 S.E.2d at 85; *see also Cosmopolitan Imports, LLC v. Pacific Funds, LLC*, 145 Wash. App. 1047 (Wash. Ct. App. July 21, 2008) (a contracting party does not breach the contract by failing to agree to materially different terms). "An implied duty of good faith cannot be used to override or modify explicit contractual terms." *Riggs Nat'l Bank of Washington D.C. v. Linch*, 36 F.3d 370, 373 (4th Cir. 1994); *see also Dearaujo v. PNC Bank, N.A.*, Case No. 2:12-cv-00981, 2012 U.S. Dist. LEXIS 164043 (D. Nev. November 15, 2012) (finding there was no breach of the implied covenant of good faith and fair dealing when a bank failed to modify a loan because "(1) there was no enforceable contract between the parties requiring Defendant to modify the loan, (2) there was no duty to modify under the operative Loan Agreement, and (3) Plaintiff has failed to plead any plausible facts that Defendants breached the intention and spirit of the Loan Agreement. Plaintiff has not pled facts showing that Defendants were under any obligation to grant a loan modification.").

The explicit terms of the Note and Mortgage control the duties between Chase and Defendants, and there is no term in either instrument that requires Chase to modify the Loan. Thus, Chase is entitled to summary judgment on Defendants' defense of the breach of the duty of good faith and fair dealing.

C. Chase's foreclosure action is not barred by the statute of limitations or the doctrine of laches.

Defendants allege that Chase's foreclosure claim is barred by the statute of limitation or the doctrine of laches. However, a mortgage is enforceable 20 years from the date of its maturity. S.C. Code Ann. § 29-1-10. This action was commenced on April 17, 2013, to enforce a Mortgage dated February 23, 2001, that has not yet matured. Thus, Chase's foreclosure claim is not barred by the statute of limitations.

Similarly, Chase's foreclosure action is not barred by the doctrine of laches. "Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Richey v. Dickinson*, 359 S.C. 609, 612, 598 S.E.2d 307, 309 (Ct. App. 2004) (quoting *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct. App. 1999)). "The party asserting laches has the burden of showing negligence, the opportunity to act sooner, and material prejudice." *Id.* (citing *Muir* at 297, 519 S.E.2d at 599).

Any delay in bringing the present foreclosure action only served to benefit Defendants who have been given every opportunity to try and qualify for a permanent loan modification while living in the property without making any mortgage payments or paying for taxes and insurance for another three and a half years. Thus, Defendants cannot show any prejudice to them that would justify barring this foreclosure action under the doctrine of laches.

VI. CHASE IS ENTITLED TO JUDGMENT AGAINST MR. HILL FOR THE AMOUNTS DUE AND OWING ON THE LOAN.

The Affidavits submitted in support of Chase's Motion demonstrate that Chase is the real party in interest to sue under the Note; that there is a total of $111,951.41 due on the Note as of July 7, 2014; and that Defendants are in default as of September 2008. Defendants have not submitted any affidavits to contradict or otherwise oppose these facts. Critically, Defendants do not contest that amount owing on the Note in the Affidavit of Indebtedness, that they are in default as of September 2008, and that Chase is in possession of the Note and is the servicer of the Loan.

Regardless of Defendants' contentions about endorsements on the original Note, Chase has standing to bring the foreclosure action in its capacity solely as the servicer of the Loan. *Bank of America, N.A. v. Draper*, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013) (holding that a servicer of a loan is the real party in interest and able to initiate a foreclosure action). Chase is also in possession of the original note, and has the right to enforce it. *See* In re *Neals*, 459 B.R. 612 (D.S.C. Bankr. 2011) (reviewing controlling authority from South Carolina's version of Article III of the Uniform Commercial Code to explain loan servicer has right to collect Note, as non-holder in possession of instrument who has the rights of holder). Thus, there is no issue of material fact that Chase is the real party in interest to bring a suit on the Note.

Claims for debts owed on promissory notes are subject to only limited defenses and are thus frequently resolved by summary judgment. The Supreme Court of South Carolina has affirmed the granting of summary judgment on promissory notes and guaranties of notes in a number of cases. *See Hansen v. DHL Labs., Inc.*, 319 S.C. 79, 459 S.E.2d 850 (1995); *First Savings Bank, FSB v. Capital Investors*, 318 S.C. 555, 459 S.E.2d 307 (1995); *Goodson v. Carolina Container Corp.*, 283 S.C. 575, 324 S.E.2d 67 (1984); *Turner Coleman, Inc. v. Ohio*

Construction & Eng'g, Inc., 272 S.C. 289, 251 S.E.2d 738 (1979); *Bankers Trust of S.C. v. Benson*, 267 S.C. 152, 226 S.E.2d 703 (1976); *Conran v. Yager*, 263 S.C. 417, 211 S.E.2d 228 (1975).

Because there is no dispute that Mr. Hill signed the Note and is obligated to repay Chase for the amounts provided by the terms of the Note, Chase is entitled to summary judgment as to the amount of principal, interest, and other amounts due on the Loan. *Blackmon v. Patel*, 302 S.C. 361, 396 S.E.2d 128 (1990) (holding that summary judgment was properly granted on a promissory note when the makers admitted that they executed the note for valuable consideration, that the note was in default, and that the amount claimed was due on the note).

VII. THIS CASE SHALL BE REFERRED TO A MASTER IN EQUITY.

Rule 53(b), SCRCP, provides that in an action for foreclosure, "some or all of the causes of action . . . may be referred to a master or special referee by order of a circuit court judge or the clerk of court." Because Defendants' legal counterclaims lack merit, the only remaining action is Plaintiff's action of foreclosure. This case therefore shall be referred to a Master in Equity for a final foreclosure hearing so that Plaintiffs may seek an Order for Foreclosure and Sale of the property and to supplement the amounts owing on the Note, as needed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that

1) Chase's Motion for summary judgment on Defendants' counterclaims is GRANTED;

2) Chase's Motion for summary judgment on Defendants' affirmative defenses is GRANTED;

3) Chase's Motion for summary judgment on the amounts due and owing on the Note is GRANTED;

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ORIGINAL JM

4) Defendants' Motion for summary judgment on the foreclosure action based upon the acceleration provision of the Mortgage is DENIED.

IT IS FURTHER ORDERED, ADJUSTED AND DECREED that this action is hereby referred to the Honorable James O. Spence, Master in Equity for Lexington County, with finality and with authority to make appropriate findings of facts and conclusions of law and to enter a final judgment in this case.

The Honorable G. Thomas Cooper, Jr.
Circuit Court Judge

Dated: October 23, 2014

FILED
2014 OCT 23 P 2:18
BETH A. CARRIG
CLERK OF COURT
LEXINGTON

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP3201349

PLAINTIFF(S)	DEFENDANT(S)	
JPMorgan Chase Bank National Association	Michael Hill	Michael W Hill
	Holly Hill	Holly H Hill
	Carolina National Bank and Trust Company	First National Bank of the South

Submitted by: Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

10/31/2014

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on **10-31-2014**, and a copy mailed first class or placed in the appropriate attorney's box on **10-31-2014**, to attorneys of record or to parties (when appearing pro se) as follows:

Mary McFarland Caskey
PO Box 11889 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

William H. Sloan Jr. PO Box 85 Summerville, SC 29484
Benjamin E. Grimsley PO Box 11682 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/mh

Court Reporter

Beth A. Carrigg - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
		Case No. 2013-CP-32-01349
JPMorgan Chase Bank, National Association,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION**
	)	
Michael Hill aka W. Hill, Holly Hill aka Holly H. Hill, Carolina National Bank and Trust Company, and First National Bank of the South,	)	
	)	
Defendants.	)	
	)	

This matter comes before the Court by way of Defendants' Motion to Reconsider pursuant to Rule 59(e), SCRCP. Specifically, Defendants ask this Court to reconsider its Order Granting Judgment for Plaintiff filed October 23, 2014.

After careful consideration of the record in this case and the submissions of the parties, including the parties' memoranda on the issue of reconsideration, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Defendants' Motion under Rule 59(e), SCRCP to Reconsider this Court's Order filed October 23, 2014. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

IT IS SO ORDERED.

Columbia, South Carolina
December 19, 2014

G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP3201349

PLAINTIFF(S)	DEFENDANT(S)
JPMorgan Chase Bank National Association	Michael Hill Michael W Hill Holly Hill Holly H Hill Carolina National Bank and Trust Company First National Bank of the South

Submitted by: | Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

12/22/2014

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on **22nd of December 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **22nd of December 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

Mary McFarland Caskey
PO Box 11889 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

William H. Sloan Jr. PO Box 85 Summerville, SC 29484
Benjamin E. Grimsley PO Box 11682 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/mh

Court Reporter

Beth A. Carrigg - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

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