

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2009-CP-40-8302

Lisa Willett and Allan Willett

Bank of America Corporation et al.

PLAINTIFFS

DEFENDANTS

Submitted by: _____

Attorney for: Plaintiff Defendant or 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.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; 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: This appeal is dismissed because the appeal is moot.

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:

RECEIVED

MAY 29 2015

The Court heard Plaintiffs' Motion for Damages on January 15, 2015, during the Common Pleas Non-Jury term of court in Richland County. The Court took this matter under advisement. The Court hereby awards a total judgment of \$1,082,970.24 against Defendant Bank of America.

SC Court of Appeals

INFORMATION FOR THE PUBLIC 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
Lisa Willett and Alan Willett	Bank of America Corporation	\$ 1,082,970.24
		\$
		\$

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.

Circuit Court Judge WJB

Judge Code 2161

Date 5-1-15

For Clerk of Court Office Use Only

This judgment was entered on the 1 day of May, 20 15 and a copy mailed first class or placed in the appropriate attorney's box on this 7 day of May, 20 15 to attorneys of record or to parties (when appearing pro se) as follows:

Peter Protopapas and Brian Quincey Newman
ATTORNEY(S) FOR THE PLAINTIFF(S)

Robert Mukenfuss and Richmond McPherson
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter MaryAnn Nevers

Clerk of Court Jeanette W. McBride

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Lisa Willett and Alan Willett,)

Plaintiffs,)

-v-)

Bank of America Corporation, Your)
Best Rate Financial, LLC, Brant)
Gilmore, Action Appraisals and)
Robert Poiner,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2009-CP-40-8302

ORDER ON DAMAGES

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MAY 29 2015

SC Court of Appeals

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RICHLAND COUNTY
JUDICIAL CIRCUIT

This matter comes before the Court on January 15, 2015 at a hearing on Plaintiffs' Motion for Damages. Present at this hearing were Peter Protopapas, Esquire, and Brian Quincey Newman, Esquire, Counsel for the Plaintiffs, and also Robert Mukenfuss, Esquire, and Richmond McPherson, Esquire, Counsel for Defendant Bank of America. After considering the parties' filings, the arguments of counsel, the parties' post-hearing briefs, and applicable law, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Summons and Complaint were filed on November 23, 2009.
2. Service was made upon registered agent of Bank of America Corporation. Defendant Bank of America is in Default as shown by an Order of Default filed on June 16, 2011.
3. Your-Best-Rate Financial, LLC was an agent acting in both its own capacity and as an agent of Countrywide Home Loans, predecessor in interest to Bank of America, its agents and subsidiaries. For the purposes of this Order, the actions of Your-Best-Rate Financial LLC

and its agents, and Countrywide Loans and its agents, are imputed to Defendant Bank of America.

4. On or about September 15, 2005, Plaintiffs entered into a contract for construction and purchase of a home at 2964 Riverwood Drive, Mount Pleasant, SC 29466 with John Wieland Homes. At the time of the signing of the contract, they put down \$5,000.00 as a builder deposit and additional sums for deposits for upgrades on the house that was to be built. The contract purchase price was \$618,900.00 plus additional funds for upgraded features.
5. On or about October 9, 2006, Plaintiffs were contacted by John Wieland Homes. They were informed that the construction was nearing completion and they needed to secure financing for the completed house.
6. On or about October 17, 2006, Plaintiffs received an email from Steve Ruhl advertising the services of Your-Best-Rate Financial, LLC.
7. On or about October 24, 2006, Plaintiffs sent to Brant Gilmore a copy of a loan application they had submitted to Quicken Loans containing their financial information for Your-Best-Rate Financial, LLC and Brant Gilmore to use in creating a loan application with Your-Best-Rate Financial, LLC.
8. In an email dated October 24, 2006, Brant Gilmore acknowledged receipt of this email and the attached information.
9. The loan application was taken by Brant Gilmore over the phone. Plaintiffs provided Mr. Gilmore with documents, such as a W-2, pay stubs, bank statements, asset information and contracts to verify employment. The only copy of the loan application provided to Plaintiffs was at the closing. At the time they were not granted adequate opportunity to review the documents and to verify the statements contained therein. Additionally, they were trusting

that the mortgage broker would use the information provided to accurately reflect their financial situation.

10. On October 31, 2006, Plaintiffs signed a Borrower Application Disclosure with Your-Best-Rate Financial, LLC. They also received a Good Faith Estimate at this time.
11. From on or about November 2, 2006 until the date of the closing, there was communication between Plaintiffs and Your-Best-Rate Financial, LLC, Brant Gilmore and other employees regarding the information provided by Plaintiffs.
12. During this time, Brant Gilmore repeatedly assured Plaintiffs that he was examining the documents provided for the loan application closely.
13. On November 21, 2006, Plaintiffs received via email a copy of an appraisal on the property dated November 17, 2006, completed by Robert Poiner of Action Appraisals which reported a sales value on the property of \$820,000.00. In the days prior to receiving appraisal, Plaintiffs were considering not completing the purchase transaction. They were aware that they would forfeit the deposit, but were worried about losing even more money than that if they proceeded to the closing. When they were sent the appraisal by Brant Gilmore, they decided to proceed with the transaction. According to the appraisal, the property had sufficient equity in it to sell at a profit if necessary. Plaintiffs are informed and believe that the appraiser and appraisal company furnished to them a negligently, grossly negligent reckless, and/ or willfully inaccurate appraisal.
14. On or about November 22, 2006, Plaintiffs closed on a loan for the purchase of the house at 2984 Riverwood Drive, Mount Pleasant, SC 29466.
15. At the closing, Plaintiffs signed a note promising to repay Your-Best-Rate Financial, LLC a total amount of \$636,000.00.

16. At the closing, Plaintiffs signed a mortgage granting a security interest to Mortgage Electronic Registration Systems, Inc. as nominee for Your-Best-Rate-Financial, LLC.
17. The HUD-1 Settlement Statement for the loan in the 800 section indicated that Your-Best-Rate Financial, LLC received funds from a third-party that were not properly disclosed at the time of closing.
18. Lines 805, 806, and 807 of the HUD-1 were marked "POC: L" indicating they were paid outside of closing by the lender. On the first page, however, the lender is listed as Your-Best-Rate Financial, LLC.
19. The information on the HUD-1 was provided by Your-Best-Rate Financial, LLC to the closing agent.
20. Plaintiffs are informed and believe that Your-Best-Rate Financial, LLC was never the true lender and that the true lender was always Countrywide, Bank of America's predecessor in interest.
21. Plaintiffs are informed and believe that Your-Best-Rate Financial, LLC and Brant Gilmore were acting as agents and representatives of Countrywide Home Loans, and that Countrywide Home Loans is responsible for the actions of its agents.
22. Plaintiffs are informed and believe Countrywide Home Loans n/k/a Bank of America is liable for the actions of its agents, Your-Best-Rate Financial, LLC and Brant Gilmore.
23. The closing took place at The Brownyard Law Firm, at 1476 Ben Sawyer Blvd., Mt. Pleasant, SC 29466. This closing agent was designated by someone other than the Plaintiffs. At no time prior to the closing did Your-Best-Rate Financial, LLC, Brant Gilmore or Countrywide Home Loans n/k/a Bank of America attempt to determine what closing agent Plaintiffs wanted to use.

24. At the closing, Plaintiff Lisa Willett was directed to sign the closing documents for herself and as Plaintiff Alan Willett's Attorney in fact. This was the first time Plaintiffs had seen the loan application. They never assumed anything other than the correct information they provided would be utilized and therefore relied on and trusted Brant Gilmore and Your-Best-Rate Financial, LLC. Given the limited time for closing the transaction and that no assumption of misconduct occurred, Plaintiff Lisa Willett did not examine the loan documentation to the extent of recalculating financial information on the application.
25. Plaintiffs had provided to Your-Best-Rate Financial, LLC and Brant Gilmore complete and accurate information for the loan application and trusted Brant Gilmore to complete the loan application with the correct information provided by Plaintiffs.
26. Since the loan closing, Plaintiffs have had to rely on credit cards and family members to make their monthly mortgage payments each month. They have had to pay additional interest on these amounts and have endured a financial hardship as a result of Defendants' actions.
27. On or about April 1, 2009, Plaintiffs discovered that there were numerous errors in their loan application that include the following: an overstatement of income by \$85,000.00, an overstatement of their assets by \$46,000.00, a statement of rental income of \$ 2,931.00 a month from the rental of their current residence when the home was never on the market for rent and no intention of such was ever expressed, an understatement of expenses by \$35,172.00 a year, an overstatement of the value of an asset with Bank of America in the amount of \$23,273.40, the listing of an asset they did not own with General America Corp., an incorrect reporting of the source of down payment, and the listing of 0 (zero) as the number of dependents when the applicants had 1 (one).

28. The Lenders and Mortgage Brokers knowingly took advantage of Plaintiffs' inability to protect their interest by not supplying the application prior to the closing transaction and following through the process of collecting all actual and truthful financial documentation from the Plaintiffs therefore inducing them to believe this was the information utilized for the application.
29. Plaintiffs are informed and believe that Your-Best-Rate Financial, LLC and Brant Gilmore willfully, recklessly, and negligently falsified the loan application and made no attempt to ensure that this information was accurate.
30. Plaintiffs are informed and believe that these errors demonstrate Defendants and their predecessors in interest breached the duty of trust that is owed by mortgage brokers to their clients. Their actions are at best negligent, reckless, and willful.
31. On or about July 20, 2009, Plaintiffs' attorney sent a Qualified Written Request ("QWR") to Countrywide Home Loans seeking information about payment history and, among other things, Countrywide's relationship with Your-Best-Rate Financial LLC. This QWR was signed for by Nelson Hernandez on July 24, 2009.
32. On or about July 26, 2009, Bank of America as successor in interest to Countrywide Home Loans reported negative credit information against Plaintiffs.
33. Bank of America sent a letter dated July 27, 2009 to the attorney for Plaintiffs acknowledging receipt of the QWR, but stating that Bank of America needed authorization to release credit information to the attorney. The letter stated that authorization could be faxed to Bank of America.



34. Bank of America sent a letter dated August 1, 2009 to the attorney stating that they could not comply with the request because the signatures for the borrowers did not match the signatures on file.
35. No further correspondence has been received by the attorney as of the filing of the complaint, and the entry has not yet been corrected on the credit report.

CONCLUSIONS OF LAW

36. As to Plaintiffs' First Cause of Action, the Court finds that Defendant Bank of America breached its fiduciary duty to Plaintiffs. Defendant Bank of America's agents, Brant Gilmore and Your-Best-Rate Financial, LLC acted as mortgage brokers for Plaintiffs, and in that capacity, owed a duty of utmost care, honesty, loyalty, in the transactions pursuant to S.C. Code Ann. § 40-58-70. Brant Gilmore and Your-Best-Rate Financial, LLC have willfully, recklessly, and negligently caused damage to Plaintiffs through their breach of their fiduciary duty to Plaintiffs. Brant Gilmore and Your-Best-Rate Financial, LLC knowingly falsified documents and entered false information on Plaintiff's the loan application to procure a mortgage on Plaintiffs' home. Brant Gilmore and Your-Best-Rate Financial acted as agents for Plaintiffs in obtaining a mortgage with scheduled payments that they knew or should have known Plaintiffs could not afford. In a breach of fiduciary case, a plaintiff is entitled to all damages for harm caused by the breach of a fiduciary duty owed to him or her. *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E. 2d 467,473 (Ct. App. 2004). Damages in an action for breach of a fiduciary duty are those proximately resulting from the wrongful conduct of the defendant. *Id.* The Court heard testimony from Plaintiff Lisa Willett as to her and Alan Willett's actual damages. Plaintiff Lisa Willett testified that their actual damages

were at least \$225,000.00. The Court finds that as a direct and proximate result of Defendant Bank of America's breach of its fiduciary duty to Plaintiffs, Plaintiffs suffered actual damages in the amount of \$225,000.00.

37. Also, due the willful, wanton, reckless, grossly negligent conduct of Defendant Bank of America, the Court finds that Plaintiffs are entitled to punitive damages. Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition. *BMW of North America v. Gore*, 517 U.S. 559, 116 S.C. 1589 (1996). The state's interest in awarding punitive damages must remain consistent with the principle of penal theory that "the punishment should fit the crime." *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009) (citing *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004)). "Punitive damages serve at least three important purposes: punishment of the defendant's reckless, willful, wanton, or malicious conduct; deterrence of similar future conduct by the defendant or others; and compensation for the reckless or willful invasion of the plaintiff's private rights." *Clark v. Cantrell*, 339 S.C. 369, 379 S.E.2d 528, 533 (2000). The Court hereby finds that Plaintiffs are entitled to an award of \$675,000.00 in punitive damages.

38. South Carolina courts have consistently declined to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 586, 686 S.E.2d 176, 184 (2009). However, in *Gamble v. Stevenson*, the South Carolina Supreme Court identified eight considerations that trial courts should apply in conducting a post-judgment due process review of any punitive damages award. See *Gamble*, 305 S.C. 104, 110, 406 S.E.2d 350, 353-54 (1991). The *Gamble* factors are: (1) defendant's degree of culpability; (2) duration of the



conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. *Gamble*, 305 S.C. at 111-12, 406 S.E.2d at 354. The trial court is not required to make a finding of fact for each *Gamble* factor to uphold a punitive damages award. *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996). In addition to considering the *Gamble* factors when reviewing punitive damages, South Carolina courts are also required to consider three additional factors established by the United States Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 575, 116 S.Ct. 1589 (1996), which include: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between actual and potential harm suffered by plaintiff and the amount of the punitive damages; (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 585, 686 S.E.2d 176, 184 (2009). Among the *Gore* factors, the degree of reprehensibility of the defendant's conduct is the most important factor in analyzing the reasonableness of a punitive damages award, as some wrongs are more blameworthy than others. *See Mitchell*, 385 S.C. at 587, 691 S.E.2d at 185. In *Mitchell*, the South Carolina Supreme Court explained:

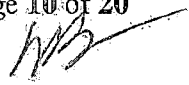
"[w]e have said in the past that trial courts must consider both the *Gamble* and the *Gore* factors. *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 195, 638 S.E.2d 667, 671 (2006) ("Although we find the punitive damages award was reasonable under the *Gamble* factors, we must also review the trial court's ruling on punitive damages under *Gore*"). However, considerations of judicial economy weigh in favor of a less burdensome and duplicative analysis. We now hold that *Gamble* remains relevant to the post-judgment due process analysis, but only insofar as it adds substance to the *Gore* guideposts."



Mitchell, 385 S.C. at 587, 691 S.E.2d at 185. Accordingly, the Court will focus on the three factors set forth in *Gore*, to determine whether \$675,000.00 is a reasonable amount to award the Plaintiffs in punitive damages.

39. In consideration of the first *Gore* factor, the degree of reprehensibility of the defendants' action, a court may consider a number of relevant factors: (i) whether the harm caused was physical as opposed to economic; (ii) whether the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) whether the target of the conduct had financial vulnerability; (iv) whether the conduct involved repeated actions or was an isolated incident; and (v) whether the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. *Mitchell*, 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009). The Court finds that the harm suffered by Plaintiffs was mostly economic. However, at the hearing, Plaintiffs testified that they not only suffered financial hardship as a result of Defendants' willful conduct, but they also suffered emotional harm. Furthermore, the Court finds that Defendants' reckless, willful and wanton conduct in forging documents evinced an indifference to Plaintiffs who were financially vulnerable. The conduct involved repeated intentional actions of dishonestly, trickery and deceit. Additionally, the Court finds that these actions were not mere accidents, but intentional actions that resulted in harm to the Plaintiffs. Therefore, the Court finds that this punitive award is appropriate in light of the degree of reprehensibility of Defendant Bank of America's actions.

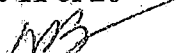
40. In consideration of the second *Gore* factor, the disparity between actual and potential harm suffered by plaintiff and the amount of the punitive damages, the Court finds that the punitive award is reasonable. In analyzing this factor, a court may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to



the harm likely to result from such conduct; and the defendant's ability to pay. *Mitchell*, at 588, 686 S.E.2d at 185. The Court finds that this punitive award is appropriate as it will serve to deter future like conduct, it is reasonably related to the particular harm likely result from their conduct, and Defendant Bank of America has the ability to pay this punitive award.

41. In consideration of the third *Gore* factor, the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases, the Court finds that this punitive award is reasonable. In *Freeman v. A. & M. Mobile Home Sales, Inc.*, where a buyer of mobile home brought suit against, inter alia, financial institution, for fraud, violation of Unfair Trade Practices Act, and violation of Consumer Protection Code, the Court of Appeals of South Carolina upheld a punitive damages award of \$40,000.00, when the actual damages were only \$1,1750.00. See *Freeman v. A. & M. Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532 (Ct. App. 1987). The *Freeman* court held that the punitive damages award was reasonable and not grossly excessive, even though that amount was more than twenty-two times the amount of actual damages. See *id.* Also, a South Carolina trial court upheld a jury award in actual damages of \$3,100,000 and punitive damages of \$5,000,000 for breach of contract breach of fiduciary duty, constructive fraud, negligent misrepresentation, and a violation of the South Carolina Unfair Trade Practices Act. *Maybank v. BB&T Corp.*, 2014 WL 7778749 (S.C.Com.Pl.). In *Maybank*, the punitive award was approximately 1.5 times the amount of actual damages awarded. See *id.* Furthermore, as the *Mitchell* Court noted:

“South Carolina courts have most often upheld verdicts on the low end of the single-digit spectrum, but have frequently deviated from this norm in cases involving particularly egregious conduct. See *James*, 371 S.C. at 196–97, 638 S.E.2d at 671–72 (upholding a 6.82 to 1 ratio); *Mackela v. Bentley*, 365 S.C. 44,



614 S.E.2d 648 (Ct.App.2005) (upholding a 3.75 to 1 ratio); *Austin v. Specialty Transp. Services, Inc.*, 358 S.C. 298, 594 S.E.2d 867 (Ct.App.2004) (upholding a 2.54 to 1 ratio); *Collins Entertainment Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 584 S.E.2d 120 (Ct.App.2003) (upholding a 9.96 to 1 ratio)..."

Mitchell, 385 S.C. at 593, 686 S.E.2d at 188 (footnote-omitted). Therefore, the Court finds that an award of three times the amount of actual damages is reasonable in light of other punitive awards in comparable cases.

42. Therefore, the Court finds that a punitive award of \$675,000.00 is reasonable and appropriate in this case. The Court also finds that this amount is appropriate in light of Defendant's culpability and that this amount is likely to deter Defendant Bank of America and other defendants from engaging in like conduct. Lastly, the Court finds that this punitive award is satisfies due process and that it is not excessive.

43. As the Plaintiffs' Second Cause of Action, the Court finds that Defendant failed to ascertain Plaintiff's attorney preference in violation of Section 37-10-102 of the Consumer Protection Code. Specifically, the Court finds at no time prior to the closing, did Your-Best-Rate-Financial, LLC, Brant Gilmore or Countrywide Home Loans n/k/a Bank of America attempt to determine what closing agent Plaintiffs wanted to use. Defendant's failure to adhere to the attorney preference statute permits Plaintiffs to recover damages pursuant to Section 37-10-105. Section 37-10-105 (A) provides, "[i]f a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars." Accordingly, the Court hereby awards actual damages to Plaintiffs and a total of \$7,500.00 in damages to both Plaintiff Lisa Willett and Alan Willett, individually, pursuant to Section 37-10-105. The



Court further finds that Plaintiffs are entitled to an award of costs of the action and reasonable attorney's fees, as addressed below.¹

44. As to Plaintiffs' Third Cause of Action, the Court finds Defendant engaged in unconscionable conduct in violation of Section 37-5-108. Section 37-5-108(b) provides that:

[i]n applying subsection (1), consideration may be given to the extension of credit to a consumer if, considering the consumer's current and expected income, current obligations, and employment status, the creditor knows or should know that the consumer is unable to make the scheduled payments on the obligation when due. Rental renewals necessary to acquire ownership in a consumer rental-purchase agreement are not obligations contemplated in this item (b).

Viewing the allegations of the complaint as true, the Court finds that the mortgage loan was unconscionable. Specifically, Defendant, without Plaintiffs' knowledge, increased their income by \$85,000.00 decreased expenses by \$35,172.00, so that the Plaintiffs could qualify for a mortgage loan in which the Plaintiffs ultimately could not afford. Section 37-10-105(c) provides that:

If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct, the court may, in an action other than a class action:

¹ Defendant Bank of America argues that Plaintiffs are precluded as a matter of law from recovering from this claim because Your-Best-Rate Financial, LLC was the creditor that violated the attorney preference statute, not Bank of America. Defendant Bank of America further argues that Plaintiffs cannot recover from it simply because of its status as an assignee as a matter of law. However, the South Carolina Supreme Court emphasizes in *Rosemond v. Campbell* that the Consumer Protection Act altered common-law assignment of debt rules with respect to consumer credit sales by prohibiting "waiver of defenses" clauses in consumer credit sales and loan agreements, and subjecting assignee of seller's rights to all claims and defenses of consumer against seller, even though assignee is holder in due course or consumer has purported to waive claims and defenses against assignee. *Rosemond v. Campbell*, 288 S.C. 516, 524, 343 S.E.2d 641, 645 (Ct. App. 1986). See also South Carolina Code Ann. Sections 37-2-404, 37-2-404(5), and 37-3-410(4). Therefore, the Court disagrees with Defendant Bank of America's contention, and finds that Plaintiffs are entitled to recovery from Bank of America on this claim.

- (1) refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made.

Due to the willful, grossly negligent, wanton, reckless conduct of the Defendants in violation of Plaintiff's rights, the Court finds that the most appropriate remedy is to order that all debt, past due amounts, accrued interest, finance charges, penalties, and other arrearages related to the mortgage loan as of July 1, 2015 shall be deemed forgiven. Plaintiffs will only be responsible for the principal amount remaining on the mortgage loan, starting from July 1, 2015, minus the amount already paid by Plaintiffs and the amount the Court orders to be deemed forgiven.

45. The Court finds that Plaintiffs' Fourth Cause of Action fails as a matter of law. The Court finds that the Mortgage Brokers Act does not apply to Defendant Bank of America because it is neither a mortgage broker nor a loan originator. See S.C. Code Ann. § 40-58-78. Furthermore, Defendant Bank of America falls under an express exemption within this statute. Section 40-58-20(16)(b) defines an exempt person as "a depository institution or a subsidiary that is wholly owned and controlled by the depository institution and regulated by a federal banking agency or an institution regulated by the Farm Credit Administration." As a depository institution, Defendant Bank of America falls under this exemption. Therefore, the Court finds that Plaintiffs are not entitled to recover any damages from Defendant Bank of America on this cause of action.

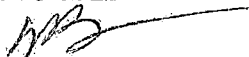
46. As to Plaintiffs' Fifth Cause of Action, the Court finds that Defendant Bank of America violated the Real Estate Settlement Procedures Act of 1974 (RESPA) found at 12 USC Section 2605. Specifically, the Court finds that Plaintiffs made a demand under RESPA and never received a response. A violation of RESPA results in damages under 12 USC § 2605(f), which provides that:

“[w]hoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in an amount equal to any actual damages to the borrower as a result of the failure and any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed \$2,000.”

Under RESPA, actual damages include emotional distress. *See Wright v. Litton Loan Servicing LP*, No. 05- 02611-JF, 2006 LEXIS 15691, at *9-10, 2006 WL 89130 (E.D. Pa. Apr. 4, 2006)(concluding that 'actual damages' includes damages for non- economic loss, such as pain , suffering, and emotional distress"); *Ploog v. HomeSide Lending, Inc.*, 209 F.Supp.2d 863, 870 (N.D. Ill. 2002); *Johnstone v. Bank of America, N.A.*, 173 F.Supp.2d 809, 814-16 (N.D. Ill. 2001); *Carter v. Countrywide Home Loans, Inc.*, No. CIV. 3:07-CV651, 2009 WL 1010851, at *3 (E.D. Va. Apr. 14, 2009). In regards to emotional damages, Plaintiffs testified to the significant impact of Defendant's conduct. Alan Willet testified that the Defendant's conduct caused a lot of stress and a strain on his marriage. *See Tr. (Alan Willet- Direct at p.13, lines, 1-4)*. Moreover, Alan testified:

"[a]nd for me the biggest thing is my son. As a parent you want to provide for your child. It costs us the ability to save for his future, put away money for college....It was a ---it was devastating."

Tr. (Alan Willet- Direct at p.13, lines 6-12). Lisa Willett testified to the stress of becoming so overwhelmed that she sought the services of a therapist and was worried about the effects of the stress on her pregnancy. She also testified to the impact on her time with her children, her work, her credit score dropped over 100 points and she was denied financing for a vehicle. She further testified that she had been reported late with credit bureaus fifty times since the QWR and twenty-one times since the original judgment was in place. *Tr. (Lisa Willet-Cross) at p. 87, lines 2-7*. Based on the foregoing, Plaintiff Lisa Willet is entitled to \$25,000.00 in emotional damages, and Plaintiff Alan Willett is entitled to \$15,000.00 in emotional damages.



Additionally, the Court finds that Plaintiffs have proven that Defendant Bank of America engaged in a practice and pattern of violating RESPA as evident by Plaintiff Lisa Willet's testimony that Defendant Bank America reported her late to the credit bureaus fifty times after refusing to fully respond to the QWR. Therefore, the Court finds that Plaintiffs are entitled to statutory damages of \$2,000.00 each, actual damages, and attorney's fees and costs.

47. As to Plaintiffs' Sixth Cause of Action, the Court finds that Defendant Bank of America violated the South Carolina Unfair Trade Practices Act. Under the South Carolina Unfair Trade Practices Act, any person who suffers an ascertainable loss of money or property as a result of the use or employment by another person of an unfair or deceptive method, act or practice may recover actual damages. S.C. Code Ann. § 35-5-140. To recover in an action under SCUTPA, the plaintiff must show that: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive acts. *Health Promotion Specialists, L.L.C. v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013). Under the South Carolina Unfair Trade Practices Act, unfair trade practices are practices which are offensive to public policy or which are immoral, unethical, or oppressive while a deceptive practice is one which has a tendency to deceive. *Id.* Also, the South Carolina Unfair Trade Practices Act (SCUTPA), a plaintiff may show that unfair or deceptive acts or practices have an impact upon the public interest by demonstrating a potential for repetition. *Bahringer v. ADT Sec. Services, Inc.*, 942 F.Supp.2d 585 (2013). Viewing the allegations of the complaint as true, the Court finds that Defendant Bank of America engaged in an unfair or deceptive act in the conduct of trade or commerce. The Court also finds that Plaintiffs presented evidence proving that the unfair



or deceptive acts of Defendant Bank of America affected the public interest. Here, Your-Best-Rate Financial, LLC and Brant Gilmore affected commerce in South Carolina by offering to act as a lender and/or mortgage broker to individuals in South Carolina. Your-Best-Rate Financial, LLC and Brant Gilmore engaged in unfair and deceptive trade practices by, among other things, falsifying Plaintiffs' the loan application, inducing them to enter into a loan agreement that could not afford or maintain are to payments on. The actions of Your-Best-Rate Financial, LLC and Brant Gilmore are not permitted under any federal or state law. The actions of Your-Best-Rate Financial, LLC and Brant Gilmore have a real and substantial potential for repetition and are a threat to the public interest. Thus, the Court finds that the Plaintiffs are entitled to recovery under the SCUTPA in amount of \$225,000.00 in actual damages. Moreover, Section 39-5-140(a) provides that:

“[i]f the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of § 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper. Upon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs.”

"Willful violation" is defined by statute as occurring when the party committing the violation knew or should have known that his conduct was a violation of the SCUTPA. Section 39-5-140(d). The Court of Appeals of South Carolina held that “[i]f, in the exercise of due diligence, a person of ordinary prudence engaged in trade or commerce could have ascertained that his conduct violates the Act, then such conduct is “willful” within the meaning of the statute.” *State ex rel. Medlock v. Nest Egg Soc. Today, Inc.*, 290 S.C. 124, 128, 348 S.E.2d 381, 384 (Ct. App. 1986). Here, the Court finds that Your-Best-Rate Financial, LLC and Brant Gilmore should have known or ascertained that their deceptive acts violated the SCUTPA. Therefore, the Court finds that the Defendant Bank of America willfully violated SCUTPA and the Plaintiffs are

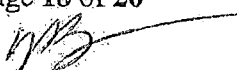


entitled to recover three times the amount of their actual damages in addition to reasonable attorneys' fees and costs.

48. The Court has reviewed Plaintiffs Counsel's Affidavit of Attorney's fees and hereby finds that an award of attorneys' fees in the amount of \$100,700.00 and costs of \$23,270.24 is fair and reasonable. See Exhibit A attached hereto.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED:

1. That Defendant Bank of America is to pay Plaintiff Lisa Willet a sum of **\$9,500.00** in statutory damages pursuant to the Attorney Preference Statute and the Real Estate Procedures Settlement Act.
2. That Defendant Bank of America is to pay Plaintiff Allan Willet a sum of **\$9,500.00** in statutory damages pursuant to the Attorney Preference Statute and the Real Estate Procedures Settlement Act.
3. That Defendant Bank of America is to pay Plaintiff Lisa Willet a sum of **\$25,000.00** in emotional damages pursuant to the Real Estate Settlement Procedures Act.
4. That Defendant Bank of America is to pay Plaintiff Alan Willet a sum of **\$15,000.00** in emotional damages pursuant to the Real Estate Settlement Procedures Act.
5. That Defendant Bank of America is to pay Plaintiffs Lisa Willet and Alan Willet a sum of **\$225,000.00** in actual damages.
6. That Defendant Bank of America is to pay Plaintiffs Lisa and Alan Willet and a sum of **\$675,000.00** in punitive damages, if the Plaintiffs so elect.
7. That Defendant Bank of America is to pay Plaintiffs Lisa and Alan Willet a sum of **\$675,000.00** in treble damages pursuant to the South Carolina Unfair Trade Practices Act, if Plaintiffs so elect.



8. Although the Court awards Plaintiffs punitive damages under Plaintiffs' First Cause of Action (Breach of Fiduciary), and treble damages under the Plaintiffs' Sixth Cause of Action (SCUTPA), the Court finds that Plaintiffs cannot recover both forms of exemplary remedies. Plaintiff must elect between the exemplary remedies of punitive damages and treble damages.
9. The Court further finds that Plaintiffs can only recover actual damages in the amount of **\$225,000.00** once and must elect which cause of action to obtain actual damages remedy.
10. That pursuant Section 37-10-105 (c), all debt, past due amounts, accrued interest, finance charges, penalties, and other arrearages related to the mortgage loan as of July 1, 2015 shall be deemed forgiven. Plaintiffs will only be responsible for the principal amount remaining on the mortgage loan starting from July 1, 2015, minus the amount already paid by Plaintiffs and the amount the Court orders to be deemed forgiven.
11. That Defendant Bank of America is to pay attorneys' fees in the amount of **\$100,700.00** and costs of **\$23,270.24**.
12. That Defendant Bank of America is to pay Plaintiffs a total amount of **\$1,082,970.24** in damages.
13. That this debt shall accrue interest at the judgment interest rate until paid in full.
14. That Defendant Bank of America, its subsidiaries and successors in interest shall have no current or future right to pursue collection of any debts it may claim against the Plaintiffs in relation to this transaction.

IT IS SO ORDERED.





The Honorable DeAndrea G. Benjamin
Presiding Judge, Fifth Judicial Circuit

May 1, 2015
Columbia, South Carolina